

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION**

**Misc. APPLICATION NO. 759 OF 2021
(Arising from Civil Suit No.359 of 2010)**

WORLDWIDE LOGISTICS LIMITED.....APPLICANT

VERSUS

RAINBOW LOGISTICS LIMITED.....RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by way of Notice of Motion under section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act, Order 52 rule 1 and Order 36 rule 11 of the Civil Procedure Rules SI 71-1 ("CPR") for orders that:

- a) The exparte decree in Civil Suit No. 359 of 2010 be set aside.
- b) Stay of taxation and execution of the decree in Civil Suit No.359 of 2010
- c) Unconditional leave to appear and defend the main suit be granted to the Applicant
- d) Costs for this application be provided for.

Background

The Respondent instituted the main suit against the Applicants by way of summary suit on plaint on 8th October 2010 for recovery of USD 59,970 (Fifty-Nine Thousand Nine Hundred Seventy United States Dollars) and costs of the suit.

The core of the Respondent's claim against the Applicant is that on or about November 2007 the parties entered into a bilateral business transaction of supplying tents to Common Wealth Head of Government meeting (CHOGM); which transaction was successfully completed by the Applicants but upon payment of the USD 59,970, the Respondents did not receive the said amount.



The Respondent claims that summons in summary suit where duly served on the Applicant on the 11th day of October but the Applicant failed to apply for leave to appear and defend the suit within the ten (10) days from the date of service. Subsequently, the Respondent applied for and obtained a default judgement and a decree was extracted and endorsed on the 28th day of March 2011.

The Applicant now seeks to have the decree set aside and to be granted unconditional leave to appear and defend the main suit. The Applicant's application is supported by an Affidavit deponed by Mr. Kutosi Jimmy who is the managing director of the Applicant company. The applicant's deponent avers in paragraph 3 of his affidavit that the Applicant Company was never served with the summons and in paragraph 11 states that the service of summons was not effective. Further more in paragraph 5 of the affidavit, the deponent contends that court granted a default judgement while relying on a defective affidavit of service.

The deponent also asserts in paragraph 15 and 16 that the Applicant has a good defence to the main suit and was not given an opportunity to defend the suit. Mr. Jimmy Kutosi therefore, prayed that it is just, fair and equitable that the exparte decree be set aside.

Representation

At the hearing on 26th May 2022, the Applicant was represented by Nsubuga Sempebwa and Solomon Sebowa and the Respondent was represented by Philip Kasule and Frank Mpoza Kawooya for the Respondent.

The Respondent was directed to file and serve its Reply to the Application by 2nd June 2022 and the Applicant to file and serve its rejoinder by 8th June 2022. No Reply was filed by the Respondent and therefore there was no rejoinder by the Applicants. The Respondent's failure to file a reply to the application provides no evidence in response to the application and therefore only the parties' pleadings that have been filed will be relied on in determining this application.

The Parties were then directed to file submissions. The Applicant's submissions were duly filed.

Issues for Determination

The issues for determination herein are;



1. Whether there are sufficient grounds to set aside the decree.
2. Whether Applicant should be granted unconditional leave to appear and defend the main suit.

Resolution

Issue 1: Whether there are sufficient grounds to set aside the decree

Order 36 Rule 11 of the Civil Procedure Rules provides “After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit”

The above rule anticipates situations where service of summons may not be effective. Effective service was defined by **Mulenga JSC** in the case of **Geoffrey Gatete & Anor V William Kyobe SCCA No 7 of 2005** as “effective service of summons means service of summons that produces the desired or intended result. Conversely, non-effective service of summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in a civil suit is to make the defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment”

Order 29 Rule 2 CPR provides,

“Where the suit is against a corporation, the summons may be served—
(a) on the secretary, or on any director or other principal officer of the corporation; or (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carries on business.”

In the premise, paragraphs 3 and 7 of the Affidavit in support of the Application; deposed by the Managing director of the Applicant company re emphasizes that the Applicant company was never served with summons nor was it served in the alternative through its postal address or its registered address.

The affidavit of service deposed by Sentamu Abel; a process server and law clerk with the Respondent’s former lawyers to wit paragraph 3 avers that he together



with Lawyer Bbanga Semugabi Micheal served the Applicant's Managing Director on the 31st October 2010. However, in a letter dated 1st December 2010 addressed to the Registrar of High Court Commercial Division from the Respondent's former lawyers, Med Kaggwa & Company Advocates; states that the Applicant was served on 11th day of October 2010. The discrepancy in the dates of service puts the credibility of the affidavit of service into question.

There is no evidence on record that the Respondent applied any alternative means of serving the Applicant either through their postal address or their registered business address.

I therefore find that there was ineffective service of summons on the Applicant.

Section 2(c) of the Civil Procedure Act defines a decree; "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final.

Order 21 Rule 7(1) provides that a decree should bear the date on which judgement was delivered and rule 7(2) provides, inter alia, that the decree shall be sealed and signed. The decree on file offends both rules. There are two decrees on file; one bearing the date of 24th May 2021 with the sum of US 59,970 and the other bearing the date of 28th March 2011 with the sum of GB 59,970. It should be noted that both decrees are not sealed which raises questions as to their genuineness.

The discrepancy in the dates when the Applicant was supposedly served are a confirmation that there was no effective service and the affidavit of service was defective. Furthermore, the decrees on file lack credibility as to their genuineness. Therefore, I find these are sufficient grounds to set aside the decree in civil suit no 359 of 2010.

Issue 2: Whether the Applicant should be granted unconditional leave to appear and defend the main suit.

Under **Order 36** of the **Civil Procedure Rules SI 71-1**, leave to appear and defend a suit may be granted where the applicant shows that he or she has a good defence on the merits, or that a difficult point of law is involved, or that there is a dispute which ought to be tried or a real dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a bonafide defence.



Tumwesigye JSC in the case of **Post Bank (U) Ltd V Abdu Ssozi SCCA 08/2015** stated that Order 36 Rule 11 gives the court discretionary power to set aside its own decree and stay execution, or set it aside altogether and grant leave to the defendant to appear and defend the suit if the court is satisfied that the service of summons was not effective or for any other good cause. Good cause has been defined to be some evidence that the defendant has a triable issue.

In **Maluku Inter Global Trade Agency v Bank of Uganda [1985] HCB 65**, the court stated that:

“Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage.”

Paragraph 12 of the Affidavit in support of the application which is deponed by the Applicant company's Managing Director contends that the Applicant denies to have ever entered into a bilateral business transaction with the Respondent. Further more in paragraph 15 of the same affidavit states that the Applicant has a good defence to the main suit.

Paragraph 4(a) of the plaint states that the Plaintiff/Respondent and the Defendant company/Applicant entered into a bilateral business transaction however there is no evidence on file of the said business transaction in writing to show what kind of transaction was entered into between the two parties.

It is clear that there is contention when it comes to whether or not the two parties entered into a bilateral business transaction. This, in my opinion forms the very foundation on which the whole suit rests and falls under the ambit of a triable issue.

Therefore, I find that the Applicant has a triable issue that this court should further look into. The contention of whether or not there was a bilateral business transaction entered into by the Applicant and the Respondent is sufficient to grant the Applicant unconditional leave to appear and defend the main suit.

Orders



On these premises, the Applicant's application succeeds and I hereby order as follows;

1. The exparte decree granted in Civil Suit No.359 of 2010 is hereby set aside.
2. Taxation and execution of the decree in Civil Suit No. 359 of 2010 is hereby stayed.
3. The Applicant/ Defendant is granted unconditional leave to appear and defend Civil Suit No. 359 of 2010 and is required to file its defence within 15 days from delivery of this Ruling.
4. The costs of this application shall abide by the outcome of the main suit.

It is so ordered.



Jeanne Rwakakooko
JUDGE
29/07/2022

This Ruling was delivered on the 29th day of July, 2022