THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 660 OF 2019

(Arising from Civil Suit No. 114 of 2019)

SHARON ASASIRA :: APPLICANT

VERSUS

HOUSING FINANCE BANK LIMITED :::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 36 Rule 11 and Order 52 Rules 1,2 & 3 of the Civil Procedure Rules for orders that:

a) The decree and default judgement of 10th July 2019 of the Deputy Registrar be set aside.

b) An order doth issue for enlargement /extension of time for the Applicant to file her application for leave to appear and defend Civil Suit No.114 of 2019.

c) Leave be granted to the Applicant to file her Written Statement of Defence in Civil Suit No.114 of 2019.

d) The costs of the application abide the final outcome of the main suit.

[2] The grounds of the application as summarized in the Notice of Motion are that the Respondent sued the Applicant in Civil Suit No.114 of 2019. The Applicant/Defendant was not heard as she was never served with court process. On 10th of July 2019, a default judgement was passed against the

Applicant for Great Britain Pounds 20,000, the equivalent of UGX 95,463,997/= plus interest at court rate from the date of judgement until payment in full. The Applicant is interested in defending herself in the suit and failure to file a defence within the stipulated time was occasioned by failure of the Respondent to serve the Applicant with summons. The Applicant has a viable defence as she is not aware of any indebtedness to the Respondent in the sum of GBP 20,000. The Applicant is bound to suffer gross injury and financial loss if the default judgement is not set aside. The Application is brought in good faith and without unreasonable delay and it is fair and in the interest of justice that the default judgement and decree in the suit be set aside and the applicant given leave to file a defence.

[3] The application is supported by an affidavit deposed by **Sharon Asasira**, the Applicant, in which she states that the default judgement and decree passed against her was based on misguidance and false hoods presented by the Respondent. She states that the Respondent did not serve her with the summons and plaint at the offices of Premier Diaries Limited as alleged since she had stopped working for the said company in 2018 and the Respondent was well aware of her physical home address but fabricated lies in order to serve by substituted service.

[4] The Applicant further states that Respondent's failure to effectively serve court process upon her amounts to sufficient cause warranting setting aside the default judgement and decree. She stated that at the time the substituted service was done on 28th June 2019, she was in the village for a month and did not get a chance to read the newspaper and hence the substituted service of summons in the newspapers was ineffective as it did not bring notice of the civil suit to her. She states that she has a plausible defence to the Respondent's claim with a high chance of success since, upon communication from the Respondent about a possible mistake of depositing the said funds into

her Barclays Bank UK account, she requested the Respondent's officials to facilitate her to go to UK and confirm the allegations since she could not access her account from Uganda but they refused and she had not had a reason to go to the UK on her own. She further averred that the application has been filed without inordinate delay and it is in the interest of justice and equity that the default judgement and decree in Civil Suit No.114 of 2020 is set aside, time is extended and leave is granted for the Applicant to file a defence.

[5] The Respondent opposed the application through an affidavit in reply deponed to by **Kenneth Ssebabi**, an advocate with M/s Nangwala, Rezida & Co. Advocates who represented the Respondent Bank, in which he stated that he had been personally involved in the prosecution of the matter before court and obtaining the default judgement and decree accordingly. He stated that the application is incompetent before the court since its service was effected out of the prescribed time without seeking extension of time. The deponent further stated that the Applicant was at all times served with the court pleadings in respect to the matter in issue as is indicated in the several affidavits of service on record. He also stated that the judgement and decree sought to be set aside was entered after the Deputy Registrar had made protracted effort to have the Applicant served many times. The deponent prayed that a security deposit of UGX 45,000,000/= be made by the Applicant in case the court is inclined to grant the Application. He concluded that the Applicant has not proved any sufficient cause to set aside the decree and judgement in default and neither has she shown that she has a plausible defence on merits of the claim against her.

[6] The Respondent filed a supplementary affidavit in reply deposed by one Kabiswa Issa Malende, a process server attached to M/s Nangwala Rezida & Co. Advocates. The Applicant filed an affidavit in rejoinder. I have taken the contents of both affidavits into consideration.

Representation and Hearing

[7] At the hearing, the Applicant was represented by **Ms. Enid Akampurira** of M/s Soita & Co. Advocates while the Respondent was represented by Mr. **Bwayo Richard** from Nangwala, Rezida & Co. Advocates. It was agreed that the matter proceeds by way of written submissions. However, only Counsel for the Applicant filed their submissions. I have reviewed the submissions and taken them into consideration in the course of determining this matter.

Preliminary Point of Law

[8] Counsel for the Respondent indicated in the affidavit in reply that the application was incompetent and ought to be dismissed for having been served outside the prescribed 21 days. The Applicant in paragraphs 4 – 8 of her affidavit in rejoinder stated that the delay was occasioned by the fact that the court file went missing and that the Respondent was served a day after the file was located. Counsel for the Applicant submitted that the delay was not a fault of the Applicant or her lawyers who made all efforts to locate the file with the help of Ms. Sauda, a court clerk. Counsel argued that since the Respondent was served the next day, no injustice was occasioned as the Respondent had a week before the hearing date and they duly filed their affidavit in reply and supplementary affidavit in time for the hearing.

[9] The provisions of Order 5 Rule 1 on time of service and the consequence of non-adherence to the timeline are mandatory and strict. The rule applies whether the summons is upon an ordinary plaint, a chamber summons, notice of motion or a hearing notice. See: ***Edison Kanyabwera vs Pastori Tumwebaze, SCCA No. 6 of 2004 [2005] UGSC 1 (21 February 2005)***. On the case before me, the Notice of Motion was sealed on 11th September 2019. There are, however, no records to indicate exactly when service of the Notice of Motion was effected. It is only conceded by the Applicant that service was

effected outside the prescribed period of time. The Applicant seeks to justify the late service by pointing out that the case file had been misplaced and when it was located, service was immediately effected.

[10] For purpose of setting right the position of the law, I need to point out that where timelines provided for under the law are mandatory and strict, it is not open to a party to effect late service whatever the justification. The rule is that the party must seek for extension of time; at which occasion they would then table such justification. For instance, in the present case, the claim that the case file was misplaced does not justify a party serving expired summons. It would only justify grant of leave by the court for enlargement of time within which to serve upon an application made by the party intending to serve such summons.

[11] In the circumstances, if there had been proper evidence of the manner in which service of the present application was effected, the fact of late service would have invalidated the process. In absence of such evidence and in the greater interest of justice, I will ignore the complaint and proceed to consider the application on its merits.

Issue for Determination by the Court

[12] Only one issue is up for determination by the Court, namely;

Whether the default Judgement and Decree in Civil Suit No. 114 of 2019 should be set aside and the applicant be granted leave to appear and defend the suit?

Submissions

[13] Counsel for the Applicant relied on Order 36 Rule 11 which provides that court can set aside a decree if its satisfied that service was not effective or any other good cause. Counsel relied on the cases of ***Geoffrey Gatete v William***

Kyobe SCCA No.7/2005 and Oburu & Anor v Equity Bank (U) Ltd MA.No.809/15 to the effect that effective service means having the desired effect of making the defendant aware of the summons and that due diligence has to be done before an application for substituted service is made. Counsel also cited the provisions of Order 5 rule 10 of the CPR and submitted that the best service of court documents is personal service and argued that substituted service should only be resorted to if all due diligence has been exercised and efforts remain in vain. Counsel further submitted that the Respondent's agents were aware of her Kampala home address at Bugolobi Flats Block 6 as seen in the Respondent's previous letters but chose not to take summons there. Counsel stated that the affidavit of service of Kabiswa Malende Isah was full of false hoods because no effort was made to serve the Applicant at her known home address and that the substituted service in the Daily Monitor Newspaper was ineffective as it did not bring notice of the summons to her at that time since she was in the village in Kiruhura District for a month and never got a chance to read the newspaper. Counsel argued that substituted service might be good service but was not effective and that the Applicant was prevented by sufficient cause to file an application for leave to file a defence.

[14] Regarding the issue of leave to appear and defend, Counsel submitted that the Applicant is ready and willing to defend the claim against her in the main suit. He relied on paragraphs 10-12 of the affidavit in support where the Applicant states that she has a good and plausible defence with high chances of success. Counsel cited the case of ***Maluku Interglobal Trade Agency v Bank of Uganda 1985 [HCB] 65*** to the effect that the applicant must prove that he/she has a bonafide triable issue of fact or law that she/he will advance in the defence before court can grant a defendant leave to appear and defend. Counsel submitted that the Applicant has demonstrated in the draft defence that is on court record that she has a plausible defence with triable issues and

the court ought to set aside the default judgement and decree and grant the Applicant leave to appear and defend the suit.

Determination by the Court

[15] Order 36 rule 11 of the CPR provides as follows;

> *"After the decree the court may, if satisfied that service of the summons was not effective, or for any 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".*

[16] In the present case, the Applicant states that service of summons upon her was not effective which entitles her to setting aside of the judgment and decree that was entered in the main suit and to being granted leave to appear and defend the suit. Order 5 of the CPR makes provision for the modes and manner of service of summons. For service of summons to be effective, it must comply with the relevant provisions of the law which must depend on the facts and circumstances of each particular case. Order 5 rule 10 of the CPR provides; *"Wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient"*. In this case, there was no disclosed agent that was empowered to receive service on behalf of the Applicant/ defendant. The Respondent/ plaintiff therefore attempted to effect personal service upon the Applicant. There is evidence that two attempts at personal service were made at the Applicant's place of work. The Applicant was not found at the said place on both occasions. The Applicant claims that she had left that place of work; although without evidence. I have also not found reason as to why the persons that the process servers interacted with at the said place of work did not disclose the fact that the Applicant had ceased working at the said place.

[17] Nevertheless, it was stated by the Applicant that the Respondent's agents knew the residence of the Applicant. There is no explanation by the Respondent as to why no effort was made towards service upon the Applicant at her place of residence. When two attempts were made at serving the Applicant from her place of the work and the same were found by the court to be ineffective, the Respondent sought leave of the court to effect service of the summons by substituted service. Order 5 rule 18 provides for substituted service. Under rule 18(1) and (2) thereof, it is provided that;

> *"(1) Where the court is satisfied that for any reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy of it in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.*
>
> *(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally."*

[18] It is clear from the above rule that for the court to issue an order for substituted service, it must be satisfied that for some reason the summons could not be served in the ordinary way. In the present case, there was no evidence that the Respondent had taken all necessary steps or attempts to have the Applicant served personally. The Respondent therefore resorted to the option of substituted service prematurely. Such occurrence affected the effectiveness of substituted service in the present case. Although substituted service is as effectual as personal service, before it is resorted to, there must be evidence that such was the only way the defendant could be reached in the circumstances of a particular case. In otherwise, any adopted mode of service of summons should be as effective.

[19] What amounts to effective service was held by the Supreme Court in the case of ***Geofrey Gatete v William Kyobe SCCA No.7/2005*** to mean service of summons that produces the desired or intended result of making the defendant aware of the suit brought against him or her so that he/she has an opportunity to respond to it either by defending the suit or admitting liability and submitting to judgement. The Supreme Court went ahead to state that although service on an agent or substituted service would be deemed good service on the defendant entitling the plaintiff to a decree under Order 36 rule 3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is not effective.

[20] In the instant case, the Applicant claims that she was unable to read the Monitor News Paper in which the summons were published because she was in the village for about a month around that time. The Applicant, however, led no evidence to prove that claim. Had the Respondent properly resorted to the option of substituted service, the effectiveness of this mode of service would not have been negated by the bare claim by the Applicant that she was in the village. The service would have been effectual as if she had been personally served. But in view of the fact that the Respondent resorted to the option of substituted service prematurely, such affected the effectiveness of the service of process and renders the service ineffectual. For that reason, I find that the Applicant has established that service of the summons upon her was ineffective and she is entitled to have the default judgment and decree set aside by the Court.

[21] Regarding the issue of being granted leave to appear and defend the suit, the position of the law is that in accordance with Order 36 rule 4 of the Civil Procedure Rules, unconditional leave to appear and defend a suit will 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 bona fide defence. The applicant should demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out. See ***M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc. Application No. 128 of 2012;*** and ***Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112).***

[22] In ***Maluku Interglobal Trade Agency v. Bank of Uganda [1985] HCB 65***, which was cited by the Applicant, 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*."

[23] It is a further requirement under the law that in an application for leave to appear and defend a summary suit, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Secondly, the defence so disclosed must be both bona fide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may grant conditional leave, say by ordering the defendant to deposit money in court before leave is granted. (See ***Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016).***

[24] In the present case, the Applicant in her affidavits herein and in the draft written statement of defence states that she was informed by the Respondent that the said sum of GBP 20,000 was credited on her account in the United Kingdom but she could not confirm that the alleged mistaken payment reached her account since she could not access her account from Uganda. She requested the Respondent's officials to facilitate her to go to the United Kingdom but they could not.

[25] Upon such facts and circumstances, I am unable to believe that in this day and age, and definitely by 2019, a person could not communicate to a bank anywhere in this world, more so in Europe, so as to establish whether any sum had been credited on their account. The moment the Applicant was informed that the said sum had been credited on her account, it was incumbent upon her to establish from her bank as to whether such was true. I do not believe that the Applicant had to travel to the UK to verify such information. Secondly, it is apparent that even after learning that the Respondent intended to sue or even after learning of the suit, the Applicant still did not bother to verify such information. In my view, such is not conduct of a bona fide defendant. The defendant is either hiding something or suffers from lack of diligence. In the circumstances, I am in doubt as to whether the defence proposed by the Applicant is being made in good faith. This, in my view, is such a case where the court should grant conditional leave. I will therefore grant the Applicant leave to appear and defend the suit conditionally by ordering her to deposit a certain sum of money in the court before she can file her defence in the suit.

[26] In the affidavit in reply, the Respondent proposed that the Applicant be ordered to deposit a sum of UGX 45,000,000/= which is approximately half of the claimed sum. I have found this a reasonable suggestion. I accordingly order the Applicant to deposit the said sum into the court as a condition to her being allowed to defend the suit. This is in line with the provision under Order 36

rule 11 which states that the court may set aside the decree on such terms as it thinks fit.

[27] In the premises, this application is allowed with the following orders:

(a) The default judgement and decree of 10th July 2019 by the Deputy Registrar is set aside.

(b) The Applicant is granted conditional leave to appear and defend the main suit vide Civil Suit No. 114 of 2019 upon deposit into the court the sum of UGX 45,000,000/= within sixty (60) days from the date of this Ruling.

(c) Upon satisfying the condition in (b) above, the Applicant shall file her Written Statement of Defence within 15 days from the date of deposit of the said sum.

(d) If upon expiry of the time set out in (b) above, the Applicant has not satisfied the said condition, the order setting aside the decree shall lapse and the Respondent shall be at liberty to take out execution process over the same.

(e) Where a defence is filed, the costs of the application shall abide the outcome of the main suit. Where no defence is filed, the costs shall be met by the Applicant.

It is so ordered.

Dated, signed and delivered by email this 6th day of January, 2023.

Boniface Wamala

JUDGE