

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

MISCELLANEOUS APPLICATION NO. 0449 OF 2023

(ARISING FROM CIVIL SUIT NO. 412 OF 2020)

SMSONE LIMITED:.....APPLICANT

VERSUS

ZEENODE LIMITED :.....RESPONDENT

Before: Hon. Lady Justice Patricia Kahigi Asimwe

Ruling

Introduction:

1. The Applicant brought this Application by way of Notice of Motion under Order 9 Rules 12 & 27 of the Civil Procedure Rules; Section 96 & 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Order 52 Rules 2 and 3 of the Civil Procedure Rules S.I 71-1 seeking orders that:
 - a) The default judgment/ex-parte judgment entered by this Honourable Court in Civil Suit No. 412 of 2020 in favour of the Respondent be set aside and
 - b) That costs of this Application be in the cause.
2. The background to this case is that on 10th July 2020, the Respondent instituted Civil Suit No.412 of 2020 against the Applicant and Henry Tumusiime for breach of contract.
3. The grounds of the Application as stated in the affidavit in support sworn by Mr. David Mushabe the Managing Director of the Applicant company stated that:

- a) He became aware of the Civil Suit on 20th July 2020 when he received a call from the 2nd Defendant informing me of a suit against him and my company;
 - b) He instructed their lawyers to defend the suit and they duly filed a written statement of defence on 30th July 2020;
 - c) He was informed that during summons for directions, the Respondent's lawyers sought to strike out the Applicant's written statement of defence on the basis of a default judgement having been granted;
 - d) The averment in the affidavit of service deposed by Alex Igiraneza, that he directed that the plaint and summons to be served on Muwema & Co. Advocates is false as he has never received any such phone call.
 - e) No staff, director, or company secretary authorised to receive service on behalf of the company has ever received the court summons in Civil Suit No. 412 of 2020.
4. In an affidavit in reply Mr. Kenneth Agaba Mugira an advocate with Kyagaba & Otatiina Advocates a firm of lawyers representing the Respondents, stated that:
- a) On 15th July 2023 the respondent's advocates instructed Mr. Alex Igiraneza, a duly authorized process server to serve summons in HCCS No. 412 of 2020 upon the Applicant.
 - b) That Mr. Igiraneza's affidavit of service filed in this court on the 29th of July 2020, indicates that he duly served the process on the Applicant.
 - c) That the applicant has at all material times been aware of the default judgment of 3rd August 2020 and there is no excuse for the delay to file this application.
5. In rejoinder, Mr. David Mushabe the Managing Director of the Applicant company further stated as follows:

- a) That the company has never authorized the law firm of Muwema & Co Advocates to represent it or receive service on its behalf in this matter
- b) That he understands that the said law firm represents the 2nd defendant, and it is more than likely that the deponent is confusing service on the 2nd defendant with that on the Applicant
- c) That at the time of summons for directions there was no copy of the default judgment on the court file and as such the Respondent's information could not be verified.

Representation:

6. At the hearing of this application the applicant was represented by M/s ABNO Advocates, while the respondents were represented by Kyagaba & Otatiina Advocates.

Issue:

7. Whether there are sufficient grounds for setting aside the default judgement entered in Civil Suit No. 412 of 2020.

Resolution:

8. Counsel for the Applicant submitted that there was no service of summons on the Applicant as the affidavit of service on record indicates that no service was done at the company premises nor on any of the principal officers of the company.
9. Counsel for the Respondent on the other hand submitted that the Respondent was properly and effectively served as required by law and cited the case of **Geoffrey Gatete v William Kyobe, Civil Appeal No.7 of 2005**, for the definition of effective service as "...service of summons that produces the desired result." It was contended for the Respondent that if Muwema & Co & Solicitors were acting for just one of the defendants, they would have stated so when they acknowledged receipt of the summons.

10. I have considered the submission by both parties. Under *Order 9 Rule 12 of the Civil Procedure Rules* it is provides as follows:

“Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.”

11. Under *Order 9 Rule 27* setting aside decree *ex parte* against defendant.

“In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.”

12. Under the above provision one of the grounds for setting aside an *ex parte* judgment is that summons were not served. In the present case, the Applicant’s managing director stated that the summons was not served on the Applicant.

13. Service of summons on a company is provided for under *Order 29 (2) of the Civil Procedure Rules* which provides as follows:

Subject to any statutory provision regulating service of process, 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.*

14. In the affidavit of service, the process server states that he was advised to serve the summons on M/s Muwema & Co. Advocates who he was advised represented the company. While the Respondent contends that the Applicant was properly served there is no evidence adduced to prove that indeed Muwema & Co. Advocates represented the Applicant. It should be noted that Muwema & Co. Advocates did not file a defence on behalf of the Applicant. However, they went ahead and filed a defence for the 2nd Defendant. This in my opinion is proof that indeed they did not have instructions to receive the summons on behalf of the Applicant. I therefore find that the Applicant was not served.
15. The Applicant filed a written statement of defence on 30th July 2020 and was represented by a different law firm. On 3rd August 2020, the Respondent applied to court for judgement against the Applicant for failure to file a defence. On the same day, the judgement was entered against the Defendant. It should be noted that the service on Muwema & Co. Advocates was effected on 15th July 2020. The record shows that the Applicant filed a written statement of defence on 30th July 2020. Therefore, even if the service on Muwema & Co. Advocates was to be considered effective, the Applicant's written statement of defence was filed within the stipulated 15 days. There was therefore no basis for entering the default judgement.
16. I, therefore, find that the Registrar erred by entering judgment against the Defendant when a written statement of defence was on record.

17. Counsel for the Respondent submitted that there was an inordinate delay of more than two years after the default judgement was entered in filing the present application. Counsel cited Article 28 of the Constitution, read together with Article 126 (2) (b) that court trials shall be speedy, and justice shall not be delayed. Counsel also cited the case of *Connect Financial Services Limited V Middlenorth Co-operative Union Ltd, Misc. Civil Revision Cause No. 065 of 2017*, for the position “that unexplained delay in coming to Court is considered as a bar in obtaining relief in discretionary remedies.”

18. I agree with counsel for the Respondent that indeed there was a delay in filing this Application. In the case of **Anlaby v Praetorius (1888) 20 GBD 764** at 769, cited in the case of **National Enterprises Corporation vs. Mukisa Foods Limited CACA No. 42 of 1997** it was held as follows:

There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has discretion to impose terms as a condition for granting the defendant relief.

19. In the case of **National Enterprises Corporation vs. Mukisa Foods Limited (supra)** it was held that in an application to set aside a default judgement, “...The primary consideration is whether there is merit to which the court should pay heed; if merits are shown, the court will not prima facie desire to let judgment pass on which there has been no proper adjudication.”

20. In this case, having found that the default judgement was entered in error, this court does not have the discretion to refuse to set aside the default judgement. Therefore, whereas there was a delay in filing the present application, given the

circumstances of this case, an injustice would be occasioned if the default judgement is not set aside.

21. In conclusion, therefore, this application is allowed with the following orders:

- a) The judgment in default by the learned Registrar is hereby set aside;
- b) The costs of this application shall be in the cause.

Dated this 8th day of September 2023

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Patricia Kahigi Asimwe

Judge

Delivered on ECCMIS

