

5

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 1762 OF 2022
(ARISING FROM MISCELLANEOUS CAUSE No. 0026 of 2022)

10

BOSCO KANYONYI APPLICANT

VERSUS

EQUITY BANK UGANDA LIMITED RESPONDENT

15

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction

This application was brought by Notice of Motion under the provisions of section 98 of the Civil Procedure Act Cap 71, Order 36 Rules 3, 4 & 11, Order 51 Rule 6 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1, where the Applicant seeks the following reliefs:

1. That an order does issue setting aside the Order for vacant possession issued in Miscellaneous Cause No. 0026 of 2022.
2. That leave be granted to the Applicant to file an affidavit in reply to the Respondent's application for vacant possession.
3. Costs of this application be provided for.

Facts

This application is supported by an affidavit of Bosco Kanyonyi, the Applicant deposed in paragraphs 1-11, and summarized as follows: -

That the Respondent's Miscellaneous Cause is incompetent and bad in law.

5 That the Applicant is not indebted to the Respondent in the sum of Ugx 51,000,000 (Uganda Shillings Fifty-One Million only) as claimed by the Respondent.

That without prejudice to the foregoing, the Respondent never served the Applicant with the Court process and as such, the Applicant was not aware of any Court proceedings against him.

10 That the Applicant only learnt about the case when unknown persons dumped a Court Order for vacant possession at his house on 02.12.2022 at 4:00pm.

That upon an inquiry at the Court Registry in the High Court of Uganda at Kampala [Commercial Division], the Applicant's Advocates discovered that Miscellaneous Cause No. 0026 of 2022, had been filed by the Applicant against the Respondent.

15 That it is fair, just and equitable that an order does issue setting aside the order for vacant possession issued in Miscellaneous Cause No. 0026 of 2022, and leave be granted to the Applicant to file an affidavit in reply to the Respondent's application for vacant possession.

The Respondent opposed this application in an affidavit in reply deponed by
20 Martha Nimurungi Kamuhanda in paragraphs 1-12, the Legal officer of the Respondent, and summarized as follows: -

That she is advised by the Respondent's Advocates M/S Kagera Advocates, whose advice she verily believes to be true that the Applicant's application lacks merit, is brought in bad faith, incompetent, and ought to be dismissed with costs.

25 That the Respondent advanced the Applicant a credit facility of Ugx 30,000,000 (Uganda Shillings Thirty Million only) on the 15th day of February, 2018, and was repayable with interest at a rate of 24% per annum in Eighteen monthly installments with effect from 15th March, 2018.

30 That the said credit facility was secured by property situate at Buzzi LC1, Namulanda Parish, Ssisa sub county, and the Mortgage Deed (Annexure B to the application in Miscellaneous Cause No. 26 of 2022) was assented to by the Applicant's spouse.

35 That the Applicant defaulted on his loan repayment obligations of the credit facility to the Respondent, was issued with all requisite notices to no avail, and that the property was advertised, and eventually sold however, the Applicant refused to hand over vacant possession, which prompted the Respondent to file

5 Miscellaneous Cause No. 0026 of 2022 in this Court on the 19th day of May, 2022 seeking an order of vacant possession and costs.

That the application was heard, and the Ruling was delivered on the 17th day of October, 2022 in favor of the Respondent herein, and on the 8th day of December, 2022, a Bailiff from the Respondent Bank affixed copies of the Court Order, and a demand notice at the Applicant's house.

That she was informed by the Respondent's Lawyers, which information she verily believes to be true that the Applicant was duly served with the notice of motion and affidavit in Miscellaneous Cause No. 26 of 2022 on the 25th day of August, 2022 at his house, and through his local area leader; the same way he got to know about the Order that he is seeking to set aside in the instant application.

That the Applicant has no good and or plausible defence to the Miscellaneous Cause, and the attached draft affidavit in reply is a mere sham that discloses no serious triable issue.

That a proper analysis of evidence was done before Court arrived at the conclusion to grant an order of vacant possession in Miscellaneous Cause No. 0026 of 2022.

That it will be unfair and unjust if this application is granted, as it will further deprive the Respondent of his money, which has been the case for the past five years and yet it's a deposit taking, and money lending institution dealing with the Public's money.

The Applicant filed an affidavit in rejoinder deponed by the Applicant in paragraphs 1- 9, in which he reiterated his averments in the affidavit in support, and further contended that the Applicant's application has a high likelihood of success, discloses serious questions to be tried, and that the Applicant was never served with the Notice of Motion, and supporting affidavit in Miscellaneous Cause No. 0026 of 2022.

Representation

The Applicant was represented by Counsel Nathan Katumba jointly with Counsel Isiko Arthur of M/S Kian Associated Advocates while the Respondent was represented by Counsel Mercy Sabano Pabire of M/S Kagera Advocates. Counsel for the parties herein, filed written submissions as directed by this Court.

5 Issues for determination

Counsel for the Applicant framed the issue for Court's determination to read; Whether this application reveals sufficient grounds for setting aside the order in Miscellaneous Application No. 26 of 2022 however, in accordance with Rule 5(1) of Order 15 of the Civil Procedure Rules SI 71-1, this Court framed the issues for
10 determination as below;

1. Whether this application discloses sufficient grounds for setting aside the exparte order in Miscellaneous Cause No. 26 of 2022?
2. What remedies are available?

Decision

15 Issue No.1: Whether this application discloses sufficient grounds for setting aside the exparte order in Miscellaneous Cause No. 26 of 2022?

Order 9 Rule 27 of the Civil Procedure Rules, SI 71-1 provides that:

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
20 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
25 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.” [Emphasis is mine]

From the above provision, the Applicant is required to meet two conditions in an
30 application of this nature. Firstly, that summons was not duly served, and secondly that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing.

In the instant case, the Applicant contends in paragraphs 7- 8 of his affidavit in support, that the Notice of Motion and affidavit in support of the application was
35 never served on him or his Advocates, and that the delay and or failure to file an affidavit in reply was due to non-service of Court process on the Applicant by the Respondent.

5 The Respondent on its part under paragraph 6 of the affidavit in reply contends
that the Applicant was duly served with the Notice of Motion and affidavit in
Miscellaneous Cause No. 26 of 2022 on the 25th day of August, 2022 at his house,
and through his local area leader, the same way he got to know about the order
that he is seeking to set aside in the instant application, as seen in an affidavit of
10 service attached, and marked Annexure "B".

I have looked at the affidavit of service deponed by Mwanje Yoweri Peter on the
26th day of September, 2022, under paragraphs 1-11, and specifically paragraphs
2-9 of the said affidavit, in which he states as follows: -

15 *"That having received Court process and tried to reach the Applicant in vain, on
the 25th day of August, 2022, he got in touch with Ms. Lapula Faith, a recovery
agent of the Respondent herein, who led him to the Applicant's home in Buzzi
Cell, Namulanda Ward, Kajjansi Town Council, Wakiso district which was well
known to her. That they reached the Respondent's home (Applicant herein) at
about midday, and a young man welcomed them, identified himself as the
20 Respondent's son and informed them that the Respondent was not around. That
he introduced himself and the purpose of his visit and requested them to leave
the Court papers with him. That they further proceeded to the Chairperson LC1
Buzzi cell to whom he introduced himself, and the purpose of his visit and that he
left a copy with the LC1 for purposes of serving the Respondent who
25 acknowledged receipt."* (Emphasis is mine)

Order 5 Rule 13 of the Civil Procedure Rules SI 71-1 provides as follows: -

**13. Service on agent or member of defendant's family when defendant cannot
be found.**

30 *"Where in any suit the defendant cannot be found, service may be made on an
agent of the defendant empowered to accept service or an adult member of
the family of the Defendant who is residing with him or her"* (Emphasis is mine)

In this case, the process server averred that when he failed to get the Defendant
(Applicant herein) in person, he requested to leave copies of the Court papers
with the Applicant's son, and that he left a copy with the LC1 for purposes of
35 serving the Respondent, who acknowledged receipt.

The proposition of the law is that, whoever alleges a given fact, and desires the
Court to give judgment on any legal right or liability dependent on the existence
of any fact, has the burden to prove that fact unless, it is provided by law that the

5 proof of that fact shall lie on another person. **(See sections 101 and 103 of the Evidence Act, Cap 6, and Jovelyn Barugahare Vs Attorney General SC Civil Appeal No. 28 of 1993[1994] KALR 190)**

In the instant case, the onus of proof lies on the Defendant (Applicant herein), to prove to the satisfaction of Court that summons was not duly served.

10 From the above statement by the process server, there is nothing to show that the Applicant's son was neither an adult member of the family, nor did he receive the Court process.

It is therefore my understanding that the process server did not leave a copy of the Court process with the Applicant's son, who is also not known to be an adult
15 member of the Applicant's family. Service of summons upon the Defendant must be personal but where it is not possible to serve the Defendant in person, service can be done on his or her agent or adult member of the family. **(See Betty Owaraga Vs G.W Owaraga HCCA No. 60 of 1992, and Erukana Karumu Vs Metha 1960 EA 305, cited with approval in Wadamba David Vs Godfrey Mutasa & 2 others**
20 **HCCA No. 0032 of 2015, relied upon by Counsel for the Respondent in support of his submissions.**

I find therefore, that the Respondent's contention that the Applicant was served in the same way he got to know about the order that he is seeking to set aside in the instant application is untenable.

25 The Applicant did not plead the ground of sufficient cause. This Court finds it unnecessary to delve into the second criteria of sufficient cause, which was not pleaded by the Applicant.

For reasons stated above, this Court finds that the Applicant was not duly served with the Notice of Motion in Miscellaneous Cause No. 26 of 2022.

30 This issue is therefore answered in the affirmative.

Issue No.2: What remedies are available?

This Court having found issue (1) above in the affirmative, further finds that this is a proper case for the Court to exercise its inherent powers under section 98 of the Civil Procedure Act, Cap 71, to make such orders as may be necessary for the
35 ends of justice to the parties.

Accordingly, this Court finds that this application has merit.

- 5 This application is allowed, and Court makes the following Orders:
1. The Order for vacant possession issued in Miscellaneous Cause No. 0026 of 2022 is set aside.
 2. Leave is hereby granted to the Applicant to file an affidavit in reply within ten (10) days from the date of this ruling.
 - 10 3. Costs of this application shall be in the cause.

Dated, and delivered electronically this 12th day of September, 2023.



SUSAN ABINYO

JUDGE

12/09/2023

15