

Hategeka Humphrey Tuyiringire had seen a copy of Judgement Exparte against him in the hands of the clerk or agent of Phoenix Advocates and that he was on the run.

- c) That he was never served with summons to file a defence; and he has with guidance of his lawyer of M/S. Tuyiringire & Co Advocates read the affidavit of service in the matter and it is misleading.
- d) That the affidavit states that the process server went to M/S. Tuyiringire & Co. Advocates; and is informed by the Applicant's sister Katono Sarah that her lawyer Hategeka Humphrey Tuyiringire who is now her lawyer , had approached the said gentleman having recognized Magistrates Court Jinja.
- e) That upon receiving the information from his sister Katono Sarah and upon her advice, he came to Jinja on the 30th March 2023 to meet her lawyer whom I have since instructed in this matter.
- f) That with the help of the Applicant's counsel, he accessed the pleadings from court file in order to ascertain the matters in quo; and learnt that the Plaintiffs served the Applicant by substituted service.
- g) That with the guidance of his counsel, he perused the Chamber Summons upon which the grant of an order of substituted service was made; and he was informed by his lawyers that that the Application for substituted service was defective and misconceived as that the Chamber Summons were filed by one Gwasaze Adison not being a party to the suit.
- h) That the Applicant was advised by his lawyers whose advice he verily believes to be true that service ought to have been effected on him personally; and that the substituted service was defective and cannot be relied upon to prove service of summons.
- i) That the applicant has a good and valid defence to the suit and if the application is not granted, I shall be condemned unheard and attached Written Statement of defence and **"E"**.

The above stated grounds are reiterated in broader detail in the Affidavit supporting this Application deposed by the Applicant. Briefly he averred that :-

The Respondents filed **Civil Suit No.009 of 2022** against me and the same was determined by this honourable court. A copy of the plaint and Judgement attached as A and B.

- a) That on the 29th day of March ,2023, I received a phone call from his sister , Katono Sarah in which she informed me that her lawyers Mr.Hategeka Humphrey Tuyiringire had seen a copy of Judgement exparte against me

in the hands of the clerk or agent of Phoenix Advocates and that I was on the run.

- b) He was never served with summons to file a defence.
- c) With guidance of his lawyer of M/S. Tuyiringire & Co Advocates read the affidavit of service in the matter and it is misleading.
- d) The affidavit states that the process server went to M/s Tuyiringire & Co. Advocates.
- e) He is informed by the Applicant's sister Katono Sarah that her lawyer Hategeka Humphrey Tuyiringire who is now her lawyer, had approached the said gentleman having recognized Magistrates Court Jinja
- f) Upon receiving the information from my sister Katono Sarah and upon her advice, he came to Jinja on the 30th March 2023 to meet her lawyer whom he has since instructed in this matter.
- g) With the help of the Applicant's counsel, he accessed the pleadings from court file in order to ascertain the matters in quo.
- h) He learnt that the Plaintiffs served the Applicant by substituted service.
- i) With the guidance of his counsel, he perused the Chamber Summons upon which the grant of an order of substituted service was made.
- j) He was informed by his lawyers that that the Application for substituted service was defective and misconceived as that the chamber summons were filed by one Gwasaze Adison not being a party to the suit.
- k) The Applicant was advised by his lawyers whose advice he verily believes to be true that service ought to have been effected on him personally.
- l) He was advised by his advocates that the substituted service was defective and cannot be relied upon to prove service of summons.
- m) The applicant has a good and valid defence to the suit and if the application is not granted, he shall be condemned unheard and attached written statement of defence and "E".

In Reply, the 4th Respondent, Namulondo Jane respondent filed an affidavit opposing this Application and averred that:-

- 1. She was advised by her lawyers M/S Phoenix Advocates, whose advice he verily believed to be true that there are preliminary objections/points of law to be raised that can expunge the Applicant's affidavit on the court record:
 - a) The Applicant's supporting affidavit possesses an incurably defective Jurat in law.
 - b) The affidavit in support is tainted with grave hearsay and it is argumentative

- c) Tuyiringire & Co. Advocates, non-issuance of a notice of instructions before filing of the application.
2. That the contents of paragraphs 1, 2, 3 of the affidavit in support deponed by Mukembo Emmanuel are noted.
3. The contents of paragraph 4 of the affidavit in support deponed by Mukembo Emmanuel are denied in toto and the Applicant shall be put to strict proof thereof, and I reply that the Applicant was duly served by way of substituted service after attempts to serve him personally and or at any known address were fatal.
4. The contents of paragraph 5 of the affidavit in support deponed by Mukembo Emmanuel are denied in toto and the Applicant shall be put to strict proof thereof, and I reply that the Affidavit of substituted service of summons is rather in answer of the court order issued by court that directed the mode in which the Applicant be served as per copy of court order Annexed as 'A'.
5. The contents of paragraph 6 of the affidavit in support deponed by Mukembo Emmanuel are noted.
6. The contents of paragraph 5 of the affidavit in support deponed by Mukembo Emmanuel amount to hearsay and the court cannot rely on the same thus rendering the Affidavit incurably defective for which at the hearing the respondent shall seek to have it expunged from the record.
7. That in further reply to paragraph 7 the Applicant shall be put to strict proof thereof, and I state that if the affidavit falls short, how then did the non-instructed advocate of Tuyiringire & Co Advocates pick interest in the matter and was miraculously able to recognize the same being connected/linked to the applicant.
8. That in further reply. The contents of paragraph 7 of the affidavit in support deponed by Mukembo Emmanuel, I responded that the Applicant jointly with his lawyers are on a scheme to defeat the ends of justice as when the process server attempted to serve the advocates with summons to file a defence, they declined to having instructions or knowing the Applicant despite having enjoyed the benefit to peruse the pleadings , to which they rather opted in a bid to delay the ends of justice, waited until completion of the case and issuance of Judgment to claim to having been instructed recently relying to their acts of good Samaritans in contacting the siblings to the applicant ab act they omitted to do at the time of service of summons.
9. That in further reply to the contents of paragraph 7 and 8, although the Applicants lawyers claims to have received instructions from the Applicant after the issuance of the Judgment, there is no notice of instructions on

record to prove the same or distinguish this later claim, from the former, where he conveniently denies having received instructions to accept service of summons, on behalf of the applicant.

10. That the Judgment makes no mention of the names of the alleged clients of Tuyiringire & Co Advocates with reference to Annexure **A and B** as annexed on the affidavit in support in specific Balaba Silvester, Mubiru Simon, Katono Sarah and Byogero Eseza falls short of how the Hategeka Humphrey and advocate in previous suits unless having had the instructions prior could have been able to create a connection by merely approaching the agent as stated in paragraph 7 and 8.
11. That in further reply to the contents of paragraph 7 and 8, the Applicant denies the said lawyers /law firm of M/S Tuyiringire & Co Advocates of having ever had instructions referring to previous suits as annexed however the same makes no mention of how learned counsel got to know the applicant to the extent of picking interest in the case where he has never dealt or had instructions.
12. That in further reply to the contents of paragraph 7 and 8, at the hearing of the case, through my Learned counsel, I shall seek that the said counsel Humphrey Hategeka being the source of information be invited of cross-examination.
13. That the contents of paragraph 9 and 10 of the Affidavit in support are noted.
14. That in reply to paragraph 11, the contents therein are denied in toto and the Applicant shall be put to strict proof thereof, and I further state being advised by lawyers which advise I verily believe to be true that, substituted service is a recognized and acceptable mode of service for which indeed the Applicant was served with summons through the same.
15. That in further reply to the contents of paragraph 11, by the affidavit of the process server , attempts were made to serve the Applicant by accessing the advocates/law firm that is now representing the Applicant who declined then to having had instructions , or ever knowing the plaintiff , which justify the court's issuance of the orders for substituted service.
16. That not limited to the above, I further reply stating that attempts were made to serve the applicant at his local residence beside the address of his current advocates that were fatal as the local authorities who were conversant with the members of their community declined to know the Applicant's which in turn justifies the court's issuance of the orders of substitutes service.
17. That in reply to the contents of paragraph 12 of the affidavit in support deposed by Mukembo Emmanuel, the Applicant shall be put to

strict proof thereof, and am further advised by my lawyers that substituted service as made through the radio announcements was good service as the advert despite the Applicant being presumed to be illiterate were translated to Lusoga for ease of the listeners to understand the contents of the summons.

18. That in further reply to the contents of paragraph 12, the Applicant was served with two different modes which were radio announcements made 5 times a day for 4 days as having commenced on the 7/5/2022 on NBS radio which has a wide coverage in the Busoga area, and through the dailies of Bukedde and Monitor that were published on 10/5/2023 and 11/05/2023 respectively.
19. That in reply to the contents of paragraph 13, am advised by my lawyers of Phoenix Advocates that the same are defective in as far as the advice of counsel, as the law indicates that substituted service under an order of the court shall be effectual as if it had been made on the defendant personally.
20. That in reply to the contents of paragraph 14, am advised by my lawyers of Phoenix Advocates that the Applicant's allegations are premised on mere technicalities jointly with the entire affidavit in support of the Application from which by virtue of Article 126 (2) (e) of the Constitution courts are to administer substantive justice without undue regard to technicalities.
21. That in reply to the contents of paragraph 15 are denied in toto and the Applicant shall be put to strict proof thereof, and further state that:
 - a) The affidavit in support of this application possesses a certificate of translation and indication that as of 2023, the applicant has all along been illiterate whereas the petition declaration used to attain a grant for the letters of Administration lacked thus the declaration and petition in as far as illiterates Protection Act (Cap 78) and thus justified to be set aside for in as far as their illegality.
 - b) Further to the same the Applicant deposed in this affidavit in support of his application stating that he is a male adult and yet at the acquisition of the letters of administration he opted to claim to be a widow and thus female.
 - c) The Applicant did not deny that the subject matter in the estate exceeded the court that issued the letters of Administration pecuniary jurisdiction, indicating that while acquiring letters of administration, how undervalued the said estate, to fit the lower court.

- d) The Applicant in his draft defence indicated nowhere towards his acquisition of letters of Administration the involvement of either the Administrator General or the family members.
 - e) The Applicant is illegally and unlawfully misdirected in reference to the law of succession to presume that each property go the deceased is supposed to have its independent letters of administration rather than the entire estate.
 - f) The Applicant further admits to non-filing of an inventory which merits this case judgment to revoke the letters of administration.
 - g) The Applicant further lies in his pleadings having been made the executor of the Will of the late yet he is not, as a copy of the same and translation on the court record says otherwise.
 - h) The Applicant further lies to court to have distributed the estate of the deceased yet there is no inventory of the same.
22. That in further reply to the contents of paragraph 15, am advised by my lawyers of Phoenix Advocates whose advise I verily believe to be true that upon perusal of the defence as annexed on the Applicant's affidavit, it is undoubtedly clear that the Applicant's possess no defence rather he brings frivolous and vexatious application, well intended to waste court's time and annoy the beneficiaries of the Estate and risk further waste of the Estste.
23. That I am advised by my lawyers of Phoenix Advocates whose advise I verily believe to be true that whereas the matter proceeded ex-parte, the same was subject to formal proof which the court justifiably arrived to the conclusion it did with the support of the evidence.
24. That the head suit is premised on proper management of the estste of the deceased which the Applicant failed as proved by cases between siblings over the property of the deceased as Annexed in the pleadings marked A& B on the affidavit in support of the Application.
25. That further to the above, even in the intermediate time pending the execution of the Judgment, the beneficiaries are still being haunted by the selfish illegal acts of the Applicant in defending criminal sanctions opened up by third parties who dealt with Mukembo as evidenced in **CRB/104/26/04/2023** opened at Budondo sub-county police station Jinja City.
26. That I am advised by my lawyers of Phoenix Advocates whose advise I verily believe to be true that the main suit (HCT-03-LD-CS-009-2022), was filed in the interest of safeguarding the Estste from going to waste and yet the Applicant's Affidavit and a draft Written statement of defence

confirms his actions to further attribute the Estate to waste at the detriment of the beneficiaries.

27. That the orders as issued in the Judgment , set an injunctive remedy for the beneficiaries against the Applicant , for which the same if set aside would empower the Applicant to further put to waste the Estate of the deceased.
28. That I am advised by my lawyers , whose advise I verily believe to be true that at the hearing of the said application an interim injunctive remedy shall sought to halt the actions of the applicant and any of those claiming under him, to remedy the inconvenience being caused to the beneficiaries pending the disposal of the application.
29. That it is fair and just that this application be dismissed as the applicant if competent and fulfills the requirements under the law to award him letters of Administration could be voted by the family members back to administration and be issued a grant by a competent court following due process, which was never followed in the first place.
30. That the Applicant will not occasion any injustice when the application is dismissed against him as being an administrator of an estate is not for the personal interest of an individual but rather the beneficiaries who by indication find him incompetent.
31. That I am advised by my lawyers whose advise I verily believe to be true that the hearing of the application court shall be moved , for the applicant to pay security for costs in the main suit.
32. That in reply to paragraph 15, it is only fair, just and equitable that the application be dismissed with costs.

REPRESENTATION

When this Application came before me for hearing, the Applicant was represented by learned Senior Counsel Tuyiringire Onesmus of M/S. Tuyiringire & Co. Advocates for, while the Respondent was represented by.....of M/S Phoenix Advocates.

The parties were directed to file written submissions and both sides complied. I have had the benefit of reading and have considered in the determination of this Application.

THE LAW

O.9 r.27 of the Civil Procedure Rules provides that;

“For setting aside decree exparte against defendant upon satisfying 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.”

Section 98 of the Civil Procedure Act which reads that:-

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

This section empowers the court to grant orders in all cases in which it appears to the court to be just and convenient to do so to restrain any person from doing certain acts. The main principle in this section is whether the dictates of justice so demand.

And

Order 52 rule 1 and 3 of the Civil Procedure Rules provide for the procedure that an Application of this nature must take.

RESOLUTION OF THE APPLICATION

I have carefully analyzed this Application and the Orders sought. The following are the issues to be determined in this Application:-

1. Whether service was effective; and if so whether sufficient cause has been shown by applicant why they failed to appear and defend the suit?
2. Whether the Applicant has furnished sufficient grounds to fulfill the conditions for the grant of this Application?

It was submitted by Learned Counsel for the Applicant that the major ground the applicant advanced in the Application for failure to file a defence is that he was not served with summons. That the Applicant contends that he learnt of the exparte decree and Judgement through his sister's counsel, Mr. Hategeka Humphrey who saw the Judgement in the hands of the clerk of M/S Phoenix Advocates. That the said Mr. Hategeka had represented the Applicant's sister Katono Sarah in previous matters in the lower court vide **Civil Suit No.104 of 2022** among other matters where the Respondents herein has represented Katono Sarah in matters concerning the same Estate as per annexure **C** and **D** to the affidavit of the Applicant.

Further, that when the Applicant came to Jinja on 30th March.2023 is when he confirmed the suit had been heard and determined without his knowledge. That

the record reflects an order of substituted service emanating from the Application of Gwasaze Adeson that showed that the attempt to serve the Applicant personally was through M/S. Tuyiringire & Co. Advocates yet at the time the said law form was not known to the Applicant.

He further added, that it was important to note that there was no affidavit of service of the initial summons issued by the court in **Civil Suit No.009 of 2023** contrary to **Order 5 rule 16 of the Civil Procedure Rules, Cap 71** which requires an affidavit of service be placed /sworn by the serving officer. This is indeed because no service of summons was done and counsel invited the court to make this finding.

They went ahead to turn to the propriety of the Order of substituted service attached to the affidavit in reply of Namulondo Jane as **annexure “A”**; and invited court to note the following;

“It is an Application made by Gwasaze Adison (as applicant) against Emmanuel Mukembo. That Gwasaze Adison as the record reflects is a not a party to the suit, as he is a court process server of Phoenix Advocates. While he may swear an affidavit in support of the Chamber Summons, he cannot make the Application as is not a party to the suit. As such the orders and the application are incompetent and a nullity abinitio and they ought to be set aside.

Substituted service is provided for under Order 5 rule 18 of the Civil Procedure Rules and is only resorted to when it’s shown to the satisfaction of the court that the summons could not be served in the ordinary way.

In the absence of an affidavit of service on court record in respect to the initial summons and in view of the fact that the reply doesn’t make mention of the affidavit of service or even service of the initial Plaint and Summons; it is then right to conclude that the summons were not served and substituted service premature and misconceived.”

Finally, counsel submitted that the summons were never served onto the Applicant as provided for under **Order 5 r 1 CPR** and thus the Applicant didn’t know the proceedings against him and this violated his constitutional right to be heard.

In his application, the Applicant in his affidavit in support of the Notice of Motion paragraph 4 averred that he was not served with summons to file a defence to **Civil Suit No. 009/2022**. He also averred that he had a plausible defence to respondent’s claim. The 4th Respondent’s affidavit in reply paragraphs 6 averred that applicant was served with the summons by substituted service.

Learned Counsel for the Applicant argued that substituted service which is provided for in the Rules is not just one of the available modes of service, it's just a last resort after due diligence in affecting personal service has failed. He stated that it was deliberately done by Respondent not to serve applicant so that she is denied Justice.

Furthermore, that Gwasaze Adison as the record reflects is not a party to the suit, as he is a mere court process server of Phoenix Advocates. That while he may swear an affidavit in support of the Chamber Summons, he cannot make the Application as he is not a party to the suit. As such the orders and the application are incompetent and a nullity ab initio and they ought to be set aside. They relied on the case of **REMCO LTD. v. MIISTRAY JADBRA LTD (2002) (1) EA Page 233** that:-

“If there is improper service of summons to enter appearance, the resultant ex parte judgment is irregular and must be set aside by court.”

They went on to argue that the Applicant has a plausible defence which amounted to sufficient cause to set aside ex-parte Judgement and decree in **Civil Suit No.009 of 2022**.

In reply, learned counsel for the Respondent's opposed the Application on grounds that paragraph 6 of the Respondent's affidavit in Reply mentions that the court ordered that applicant be served by substituted service as per the court Order in **Miscellaneous Application No. 37 of 2022 arising from Civil Suit No.009 of 2022**, dated 25th April, 2022 which was done by the Respondents and the summons were published in print media and Electronic Media in Radio announcements.

They argued that it was not true that Mr. Hategeka Humphrey Tuyiringire could have seen a copy of the Judgement ex parte against the Applicant in the hands of the clerk or agent of Phoenix Advocates, and recognize them as being the name of the Applicant, a person he had never met until 30th March, 2023. That the implications of the statements in the Applicant's Affidavit in support is proof that the Applicant's lawyers had prior dealings with and known to the Applicant to be able to identify a document bearing the Applicant's name as belonging to the Applicant for him to inform the sister of the Applicant.

In order to determine the above stated issues, it is pertinent to ascertain what comprises effective service?

Further, according to **O.5 r. 18 (2) CPR**, substituted service is as good (effectual) as if it has been made on the defendant personally. It is however only resorted to where court is satisfied that; “*for any reason the summons cannot be served in the ordinary way....*”

According to Affidavit of Service **annexture ‘B’** annexed to Affidavit in Reply in paragraph 21, the Respondent deponed that she used two different modes to effect service upon the Applicant in this case. Radio announcements were made 5 times a day for 4 days as having commenced on the 7th day of May, 2022 on NBS radio which has a wide coverage in the Busoga area, and through the dailies of May 2023 respectively

Further, in paragraph 19 of the affidavit in reply attempts to track the Applicant at his local residence beside the address of his current advocates failed as the Local authorities who are conversant with the members of the community declined to knowledge of the Applicant which justified the court to issue orders for substituted service as sought by the Respondent.

Again, in the Respondents affidavit in reply under paragraphs 11, 18, 19 it clearly shows the circumstances under which the substituted service was obtained. According to the decision of **UTC V. Katongole & Anor. (1975) HCB 336**, it was held that;

“Proper effort must be made to effect personal service, but if it is not possible service may be on an agent.”

The Respondent averred in his affidavit in Reply that he knew the address of the Applicant’s lawyers and even attempted to serve them but they also ignored this service.

From the above averments which have not been rebutted or denied by Applicant, I’m convince that it has been demonstrated that proper effort was made. I have also had the benefit of examining the record of the main suit out of which this application arises. I have found that, I do not agree with applicants that service was not effective before resorting to substituted service.

It is therefore my finding and decision that the Respondents were properly granted an order for substituted service after all efforts to serve the Applicant proved futile and that they enforced under **O. 5 r.18 (2) CPR** after the substituted service.

After satisfying itself that the Order for substituted service was fulfilled as per the ..., this Honourable Court High Court went ahead and determined the suit exparte. Court ruled that:-

“The Applicant in this Application has shown by affidavit and pleadings attached thereto that;

- 1. The service was effectively done to warrant substituted service.*
- 2. He has no plausible defence to the plaint.*
- 3. He acted way out of time to file this application. Default Judgment was entered against the Applicant on 15th June 2022 and the Applicant brought this Application to court ten months after Judgement in default was issued on 12th April, 2023”.*

From the above, it is my finding and decision that service on the Applicant was effective; and he failed to appear and defend the suit.

The second question for determination therefore is whether applicant has shown sufficient cause to warrant setting aside of the Exparte Judgment. I have critically analyzed the Applicant’s averments and arguments of his counsel and I have not found them convincing that they heard the Judgement from a clerk in view of the confirmation I have made that the lawyers representing him in this Application were served with the summons but they refused to receive the same. I also find it self-defeating that they are the same lawyers now who filed this Application on behalf of the Applicants and are ready to defend the Applicant.

For all the reasons given in this Ruling, it is my finding and decision that I have not found any merit in this Application and it is FAILS.

1. The Judgment and Orders made by this Honourable Court in **Civil Suit No.104 of 2022** remain valid and stand.
2. The Costs of this Application are awarded to the Respondent.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
22/11/2023

This Ruling shall be delivered by the Magistrate Grade 1 attached to the chambers of the Resident Judge of the High Court Jinja who shall also explain the right to seek leave of appeal against this Ruling to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
22/11/2023