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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application No. 206 of 2023

*(Arising from Civil Suit No. 04 of 2023)*

Aseu Samuel Brian ..... Applicant

10

Versus

Emitu Stephen Naigo ..... Respondent

Before: Hon Justice Dr Henry Peter Adonyo

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Ruling

1. Introduction:

This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act, Cap 13, and Order 9 Rule 12 of the Civil Procedure Rules, SI 71-1 for orders that;

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- a) The default/interlocutory judgment and/or orders and decree arising therefrom by this Honourable Court arising from Civil Suit No. 04 of 2023 be set aside.
- b) Leave be granted to the Applicant to file his Written Statement of Defense.
- c) Costs of this application be provided for.

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2. Grounds of the application:

The grounds anchoring the application are set out therein and expounded in the supporting affidavit deposed by the applicant, and they briefly are that;

- a) The respondent instituted Civil Suit No. 04 of 2023 against the applicant in this Honourable Court seeking, for *inter alia*; a declaration that the

- 5 contents of a letter dated 26/01/2023 authored and distributed by the applicant are defamatory of the respondent.
- b) The applicant was never served with the summons to file a Written Statement of Defense in the High Court Civil Suit No. 04 of 2023.
- c) High Court Civil Suit No. 04 of 2023 proceeded in default, and a default  
10 judgment was entered against the applicant on 13<sup>th</sup> March 2023.
- d) On 1st December 2023, the applicant was served with a copy of the bill of costs and a copy of the taxation hearing notice vide Taxation Application No. 057 of 2023. **(Photostat copies of the Taxation Hearing Notice and the Bill of Costs are annexed as 'A' and 'B', respectively.)**
- 15 e) The Taxation Hearing Notice was signed by the court on 29<sup>th</sup> November 2023 and directed the applicant to appear in court on the 4<sup>th</sup> December 2023.
- f) The applicant was given two days to appear and defend the bill of costs, which
- 20 g) days fell on a weekend.
- h) When the applicant appeared in court on 4 December 2023, he requested a copy of the Judgment and was provided with an uncertified photocopy dated 21 July 2023. **(A copy of the Judgment is annexed as 'C'.)**
- i) It was at this point that the applicant was surprised that there was ever a  
25 Civil Suit filed by the respondent against him in the High Court of Soroti Vide Civil Suit No. 04 of 2023.
- j) The court informed the applicant that he was served with a court summons on 2<sup>nd</sup> February 2023 and that there was an affidavit of service on the court record, but the applicant refused to file a written statement of defence.
- 30 k) Upon further inquiry about the contents of the affidavit of service, the applicant was informed that the court process server, on 2<sup>nd</sup> February

5           2023, went to serve the applicant at his office, but he did not find him there; he then proceeded to the applicant's home and served him through his daughter called Aseu Patience and that he also affixed the court summons on his door.

10           l) The applicant's daughter - Aseu Patience Amulo, is a child of 10 years old, and the applicant wondered how such a child could be entrusted with a court summons, if at all, and that the applicant has never seen any court summons affixed on his door.

15           m) The applicant's lawyers informed him that even when the court summons is to be served to the family member of the defendant, the family member should be an adult of sound mind.

            n) The applicant has never seen any copy of the court summons or Plaint regarding Civil Suit No. 04 of 2023 that was allegedly served on him.

20           o) The applicant's lawyers advised the applicant that the interlocutory/default Judgment that was entered against the applicant in Civil Suit No. 04 of 2023 entered on 13<sup>th</sup> March 2023 was passed in error as the applicant was never aware of the said proceedings on account of the respondent's failure to serve him with the summons to file a Written Statement of Defense.

25           p) The applicant's lawyers have advised him that the court process server did not take all reasonable steps to attempt to serve him personally before choosing to serve him through the applicant's minor daughter and purportedly affixing a copy of the summons on his door.

30           q) The applicant's lawyers informed him that the respondent did not seek leave from the court to serve him in any way other than by personal service.

- 5 r) The applicant's lawyers informed him that he was not effectively served with the court summons to enable him to file a Written Statement of Defense and participate in the proceedings in Civil Suit No. 04 of 2025.
- s) The applicant's lawyers informed him that Taxation Application No. 057 of 2023 was issued in error and is without any merit on account of non-  
10 service of summons on him.
- t) The application has been made without inordinate delay.
- u) The applicant's lawyers advised him that this honourable court has the power to set aside its Judgment in High Court Civil Suit No. 04 of 2023 and grant the applicant leave to file a written statement of Defense because he  
15 was not served with a court summons.
- v) The applicant has a right to a fair hearing.
- w) The applicant has a good defence to the claim of the Respondent.
- x) It is in the interests of justice that the Application be granted in the terms  
20 sought.

3. Grounds in opposition to the application:

The application was opposed by Emitu Stephen Naigo, – the respondent; in his affidavit in reply, he swore, he stated that;

- a) On 30<sup>th</sup> January 2023, the respondent, through his lawyers, filed Civil Suit  
25 No. 04 of 2023 at the High Court of Uganda against the applicant.
- b) The Court signed the summons on 2<sup>nd</sup> February 2023.
- c) The respondent's lawyer informed him that the applicant was rightly and properly served with the summons, plaint, and summary of evidence by the court process server, Okello Edward. **(A Photostat copy of the affidavit  
30 of service is annexed as "A.")**

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5 d) The respondent's lawyers have informed him that the applicant did not file a written statement of defence as required by the summons and that a default Judgment was entered against the applicant on 13<sup>th</sup> March 2023.

**(A photostat copy of the default judgment is annexed as "B.")**

10 e) Civil Suit No. 004 of 2023 was set down for formal proof in which the respondent testified, and the Court delivered the judgment on 21<sup>st</sup> July 2023. A photostat copy of the decree and certified judgment are annexed as "C" and "C1," respectively.

15 f) The respondent's lawyers have informed him that the bill of costs was filed and taxed by the Deputy Registrar. **(A photostat copy of the taxation certificate is annexed as "D.")**

g) An application for execution of the decree and certificate of taxation was filed before this application was filed. **(A photostat copy of the application for execution is annexed as 'E'.)**

20 h) This affidavit in reply is deponed, opposing the application filed by the applicant, for which the court is invited to dismiss the instant application with costs.

4. Representation:

M/s Natala & Company Advocates represented the applicant, while M/s Amodoi Associated Advocates represented the respondent.

25 The parties filed written submissions, which have been considered accordingly.

5. Issues:

In his submissions, the applicant's counsel formulated an issue that suffices to determine the contention, thus

30 a) Whether the applicant was served with the summons to file a defence in respect to Civil Suit No. 04 of 2023?

b) What are the remedies available to the parties?

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5        6. Resolution:

This application was brought under Section 98 of the Civil Procedure Act, Cap 71 (CPA), which inherently empowers this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The application was also brought under Section 33 of the Judicature Act, Cap 13,  
10        which empowers this court to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings  
15        concerning any of those matters avoided.

Likewise, the applicant brought the application under Order 9 Rule 12 of the Civil Procedure Rules, SI 71-1 which provides for setting aside *ex parte* judgment; it provides that;

**Where judgment has been passed pursuant to any of the preceding rules of this  
20        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.**

It is trite that the duty and burden of proof lies on the applicant because she is the one who seeks to get a decision of this court in her favour. (See Sections 101  
25        and 102 of the Evidence Act, Cap 6).

*a) Whether the applicant was served with the summons to file a defence with respect to Civil Suit No. 04 of 2023?*

The applicant, in his affidavit in support of his application, avers that he was never served with the summons to file a Written Statement of Defense in the High Court  
30        Civil Suit No. 04 of 2023 filed by the respondent against the applicant in this

5 Honourable Court in which a default judgment was entered against him on 13<sup>th</sup> March 2023 and subsequently judgment delivered on 21<sup>st</sup> July 2023.

The applicant's counsel submitted that the affidavit of service filed on 7<sup>th</sup> March 2023 deponed by Edward Okello, a court process server who narrates how he purportedly served the applicant through affixing the summons at the door of his  
10 home under Order 5 Rule 15 the Civil Procedure Rules, such service can only be after the process server took all reasonable efforts to serve the defendant personally.

Counsel referred this court to several cases, among which is ***Rwabuganda Godfrey Versus Bitamissi Namudu Civil Appeal No. 23 of 2009***, where the Court of Appeal  
15 stated that,

***"It is our humble view that courts must always insist upon personal service of summons before taking any other steps in order to avoid or at least limit abuse of court process and the resultant injustice."***

It is not disputed that the respondent filed a case against the applicant **vide** Civil  
20 Suit No. 04 of 2023 seeking, ***inter alia***, a declaration that the contents of a letter dated 26/01/2023 authored and distributed by the applicant were defamatory of the respondent.

This court issued summons to file a defence on 2<sup>nd</sup> February 2023 and on 13<sup>th</sup> March 2023, through the then Assistant Registrar, entered default judgment  
25 after being satisfied that the summons was served onto the defendant but did not enter an appearance or file his written statement of defence.

Subsequently, the suit was set down for formal proof, and subsequently, judgment was entered in favour of the plaintiff on 21<sup>st</sup> July 2023.

The main contention of the applicant is that the interlocutory/default Judgment  
30 that was entered against him in Civil Suit No. 04 of 2023 on 13<sup>th</sup> March 2023 was passed in error as the applicant was never aware of the said proceedings on

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5 account of the respondent's failure to serve him with the summons to file a  
Written Statement of Defence.

The applicant avers that when he appeared in court on 4<sup>th</sup> December 2023 in  
answer to the Taxation Hearing Notice, he requested a copy of the judgment and  
was provided with an uncertified photocopy dated 21<sup>st</sup> July 2023, which he  
10 annexed as 'C' to the affidavit, in support of this application.

The applicant contends in this application and its supporting affidavit that his  
lawyers informed him that service the alleged service on him was irregular as it  
ought to be personal with any failure of which meaning that he was not  
effectively served with the court summons to enable him to file a Written  
15 Statement of Defense and participate in the proceedings in Civil Suit No. 04 of  
2025.

Further that even the respondent did not seek leave from the court to serve him  
in any way other than by personal service.

For the reason of non-service, the applicant avers that he has never seen any  
20 copy of the court summons or plaint regarding Civil Suit No. 04 of 2023 that was  
allegedly served on him and as such he prayed that this application be allowed.

It is trite law, and several cases have held that wherever it is practicable, service  
shall be made on a defendant in person as provided under Order 5 Rule 10 of the  
Civil Procedure Rules.

25 The perusal of the record show that the respondent, in a letter to court dated  
10/03/2023 which was through his lawyers, it is averred that summons issued by  
the court on 2<sup>nd</sup> February 2023 had been served onto the defendant by one  
Okello Edward, a court process server on 12<sup>th</sup> February 2023 and an affidavit of  
service filed to that effect.



5 Through the said letter, the lawyers of the respondent requested for a default judgement to be entered since the 15 days which was required for a defendant to file a defence had passed without the applicant filing one.

The Assistant Registrar of then of the court proceeded to enter a default judgment against the defendant/applicant and set down the suit for formal proof  
10 ex parte on 13<sup>th</sup> March 2023.

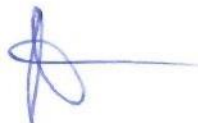
The perusal of the court record further show that an affidavit of service deposed by a one Okello Edward who is stated to be a court process server was filed in this court on the court record 7<sup>th</sup> March 2023 substantiating the service of court process onto the defendant/applicant which was by the affixing the summons  
15 onto the door of his home.

That affidavit of service was annexed to the respondent's affidavit in reply as "A" in support of the fact that it is not disputed that the service of the court process was not personal but was through affixing of the summons and plaint on the door of the applicant.

20 Order 5 Rule 15 of the Civil Procedure Rules provides the manner upon which a defendant may be served when such a defendant refuses to accept service or cannot be found.

It provides:

Where the serving officer, after using all due and reasonable diligence, cannot find  
25 the defendant or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued with a report endorsed on it or annexed to it stating that he or  
30 she has so affixed the copy, the circumstances in which he or she did so, and the



5 name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed. (Underlined for emphasis).

According to Order 5 rule 15 of the CPR, for service of process by affixing the summons on the door to be deemed effective as was in this case, the following ought must be satisfied:

- 10
- The serving officer must have used all due and reasonable diligence to find the defendant personally,
  - The serving officer must have affixed a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides,
  - 15 - The circumstances on which the process server did so, the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed.

It is imperative that all the above ingredients of the law are complied with so as the court to conclude that the serving officer used all due and reasonable  
20 diligence to find the defendant personally as affixing a copy of the summons is not effective service if diligence has not been shown in trying to find the defendant, and the mere fact that the defendant is not at home on one occasion is not enough. (See: *Nzioki s/o Mutweita v. Akamba Handicraft Industries Ltd. (1954) 27 K.L.R.*)

25 In this application, the applicant's counsel contends that the process server did not take all reasonable steps to serve the applicant personally because;

- 30
- i) After being told from the applicant's work place, that the applicant was having a wedding on Saturday, 4<sup>th</sup>, February, 2023, the process server should have inquired about the church/premises where the Applicant was going to wed from. This would have established a trail that the process server would use to find the Applicant personally and serve him

5 with the summons. Alternatively, the process server would have become patient to wait for the said wedding to end and then serve the Applicant.

10 ii) That instead, the process server allegedly rushed to the Applicant's home on the same day to purport to serve him as though the court summons were expiring on that date. That what was the rush and urgency when the summons was still valid for the next 20 days?

15 iii) That even after purportedly reaching the Applicant's home and finding a young girl called Aseu Patience, who informed him that the Applicant was not at home as he had just stepped out, the process server ought to have returned the next day to attempt service on the Applicant personally. The fact that the said Aseu Patience stated that the Applicant had just stepped out was an indicator that the Applicant stays in that home and could even be found the next day or any other date sooner. Diligence would also demand that he would have inquired from  
20 the said Aseu Patience when the Applicant would likely be home again so that the process server would return to serve the summons.

25 iv) That there was no need to affix summons on the door premises of the Applicant, after only one attempt of serving the Applicant personally. That as was held in the *Nzioki S/o Mutweita Versus Akamba Handicraft Industries Ltd (1954) 27 KLR*, the mere fact that the Defendant is not at home on one occasion is not enough. The court process server ought to have attempted to return the next date to try to serve the Defendant. Furthermore, since he alleges that he found at home a girl called Aseu Patience, diligence would have required that he inquiries  
30 from the said girl, of what time usually does the Applicant ordinarily be at home so that he can plan accordingly to attempt to serve him.

- 5 v) Or even where the Defendant appears to be difficult to serve, one attempt is not enough. A second attempt with more elaborate cautionary measures would suffice for instance using a court process server, going with a 3<sup>rd</sup> party who notes on the summons and confirms that process has been served in his presence etc.
- 10 vi) That there is no evidence, photographic or whatsoever, to confirm that, indeed, the process server even affixed summons on the doorway as alleged. In this digital era, the process server, if at all he indeed affixed the summons on the doorway of the Applicant, ought to have at least taken a photo of the house and also a photo of the summons affixed on
- 15 the doorway of the Applicant, but that was not done, and it becomes challenging to attempt to believe that indeed the summons were affixed on the doorway, especially when the Applicant herein is denying ever seeing any summons. It's the court process server's word against the Applicant's word.
- 20 vii) There is no name and address of the person, if any, by whom the house of the Applicant was identified and in whose presence the copy was affixed as required in Order 5 Rule 15 of the CPR. That whereas in the Affidavit of Service, the process server has averred that he went with a boda called Edmond to the home of the Applicant, he has not annexed
- 25 the address of the said Edmond. He also has not explained how the said Edmond knows the home of the Applicant, and worse, he has not explained whether or not the said Edmond was present and witnessed the affixing of the summons on the doorway of the Applicant. That the 3<sup>rd</sup> party ought to note the summons and confirm that the process has
- 30 been served in his presence. So, in this case, the said Edmond ought to have endorsed the return summons to confirm that he was indeed

5 present when the summons was affixed to the doorway of the Applicant. This was very relevant because the process server has no photographic evidence to confirm that he indeed affixed the summons to the Applicant's door.

10 On the other hand, the respondent's counsel contends that the defendant was served with court process to enable him or her to file a defence within a time specified in the summons, which was done according to paragraph 7 of the respondent's affidavit in reply and annexure A, and also in paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the supplementary affidavit deposed by the Court Process server Edward Okello where it is clear that the applicant was properly served and  
15 only stubbornly chose not to file a written statement of defence as required by the law.

Counsel for the respondent contended that the due diligence exhibited by the court process server is contained in the averments contained in the supplementary affidavit of the court process server which substantiates how the  
20 respondent was evasive despite several attempts by the Court process server to reach out to him through making numerous phone calls on his known cell No. 0771271525 registered in his name only to realise on subsequent attempts that the said telephone was off, and later the process server went to the applicant's known place of work in vain, further with the guidance of the former lover and in  
25 the company of the family *bodaboda* rider, he went to the applicant's known home of residence at Television along Mbale Road past Opuyo police station all in the attempts to find and serve the applicant but in vain and having exhausted with due diligence all possible ways of effecting personal service on the applicant, which yielded no fruits, the process server was left with only the option of affixing  
30 the summons and the plan on the main house door where the applicant resides, which the court process server did.

5 Counsel cited the case of *Bemanyisa v Bisere (Civil Appeal No. 22 of 2013) [2014] UGCommC 31 (3 April 2014)* which considered the question of what amounts to “due and reasonable diligence” in which the case of *Eliakanah Omuchi Vs Agub Machwa [1966] EA 229 (k)* was cited which in contextualizing “due and reasonable diligence” court quoted a paragraph from Mulla’s Code of Civil  
10 Procedure (12<sup>th</sup> Edn) at Page 566 where the author states:

To justify such service it must be shown that proper efforts were made to find the defendant e.g that the serving officer went to the place or places and at the times where and when it was reasonable to expect to find him. Thus if a serving officer goes to a defendants house but does not find him there and the defendant’s adult  
15 son who is in the house refuses to accept service on behalf of the father these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule, he must before effecting such service inquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant.

20 In the case of *Chakubhai V Patel (1948) 6 ULR 211*, where the court quoted with approval the case of *Cohen & An Vs Nursing Doss Audly Indian Decisions New Series (1914) Calcutta Vol.9 at page 579*, Sir W. Comer Petheram C.J had this to say: -

25 *“... It is true that you may go to a man’s house and not find him, but that is not attempting to find him. You should go to his house, make enquires and if necessary follow him. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not—to go to his house in a perfunctory way and because he has not been found*  
30 *there to affix a copy of the summons on the outer door of his house. I think this affidavit is insufficient and it is as well that persons should*

5                    *know that such service is not good service and that suits should not be  
tried as undefended suits on service such as has been relied on in this  
case.”*

In respect of the matter before me, the affidavit averment filed on 7<sup>th</sup> March 2023  
show how service was made on the applicant. That affidavit expounds on how  
10 the process server ended up serving the defendant personally shown by his  
averment which form part of this record wherein he states and I quote;

“

- 2) *That on the 01<sup>st</sup> day February 2023, I received summons to file defence and  
15                    complaint from this honorable Court in this case to be served upon the defendant.*
- 3) *That on the 2<sup>nd</sup> day of February 2023, I got the defendants contact from the  
counsel for the plaintiff phone number 0771271525 in names Aseu Samuel  
Brian who I contacted on his personal phone and introduced myself to asked  
to meet him and told me can't meet u am far and switch off his phone.*
- 4) *That I then moved to his work place San Laram Soroti office behind Soflife  
20                    hotel along Moroto road near Taj Mahal Guest House upon reaching there  
the front desk I met one of the officer who I introduced myself to and asked  
the station manager who I met in person also told me he is on leave and  
wedding on Saturday 4<sup>th</sup> February 2023.*
- 5) *That on the same 2<sup>nd</sup> day of February 2023 I proceeded to his home in  
25                    company of their family boda one Edmond who is at court gates stage given  
to me by his former wife, Kiyai Martha.*
- 6) *That we proceeded to Television along Mbale road off television center to  
your left passing by the Opuyo police station upon reaching there found wall  
fence and maroon iron sheet roof house painted grey and maroon on the  
30                    corners of the house and black gate.*

5           7) *That upon reaching there I knocked gate for about 10 minutes and one Aseu  
patience a girl tall light skin who was at home came open the gate and  
introduced myself to tendered the and asked where about of her father and  
told me he as just left home I then walked through the gate with paved walk  
10           way and tied the copies of the summon to file defence and plaint on the door  
way."*

The above averments, in my considered opinion, show a thorough exercise of due diligence.

The deponent did not only try to reach the applicant by way of a cell number 0771271525 which cell number was not denied by the applicant and through  
15       which the applicant evidently informed the deponent that he was very far away yet the process server had gone to his known place of work in vain forcing him to proceed to the home of the applicant where he was informed that the applicant had just left the place yet the applicant had told the process server on phone that he was far away.

20       Given the uncontroverted facts deposed by the court process server, I am satisfied that the process server used all available means in trying to serve the applicant who clearly in an attempt to dodge service upon himself gave false information of that he was not available yet the fact was that he was very much around and thus could have easily been served personally but peddled lies that  
25       he was not around and far away so as dodge service.

From the above non-controverted facts, I am inclined to believe that the process server exercised all due diligence in an effort to effect personal service on the applicant in vain and thus was forced subsequently to affix the summons and the plaint on the door where the applicant resides.



5 I am thus unable to agree with the applicant's counsel's assertions that the court process server did not exercise due diligence to serve the applicant personally for the following clear facts.

- The process server called the applicant on a telephone number, which he has not denied as being his,
- 10 - The process server went to the usual workplace that the applicant but did not find him and;
- Lastly the process server reached the applicant's home and was informed him that the applicant had just stepped out of the house.

That being the case, I find most of the hypotheses by the applicant's lawyers on  
15 what the process server should have done being mere opinions and conjectures without any legal backing as there is no legal requirement for the process server to take photographs of how he affixed the summons on a doorway. That is merely good practice but not the law and in law he who alleges must prove. This has not been done by the applicant.

20 But more importantly the rule of procedure provides that the person who has made such a service must attest to the circumstances of such service, provide his or her name and address and state how he came to be at the applicant's/defendant's place and nothing else, which the process server herein wholly complied with.

25 Consequently, I am inclined to find that the process server took reasonable steps to serve the applicant personally before choosing to serve him by affixing a copy of the summons and annexures thereto on his door and as such this aspect of the law that the serving officer must have used all due and reasonable diligence to find the defendant personally is answered in the positive.

30



5 b) What are the remedies available to the parties?

The second question for determination is whether the applicant has shown sufficient cause to warrant setting aside the default/interlocutory judgment and/or orders and decree arising therefrom by this Honourable Court arising from Civil Suit No. 04 of 2023 and also granting leave to the applicant to file his  
10 written statement of defence.

As I am persuaded that the applicant was duly served with the summons to file his defence but chose not to do so and as such he is thus not entitled to any of the prayers sought through this application which I see as merely being afterthoughts by a person who upon seeing that now execution process had  
15 begun against him runs to court to try to subvert the cause of justice by bringing this very unmerited application so as to buy time.

That mentality cannot be allowed in a court of law for as it has been stated, equity aids the vigilant and he/she who comes to equity must do so with clean hands. The applicant makes this application well knowing that his hands are dirty.  
20 He must meet the consequences of his ignoring court processes for court orders are never issued in vain.

7. Order:

The above conclusion being so, this unwarranted application is dismissed with costs awarded to the respondent.

25 I so order



.....  
Hon. Justice Dr Henry Peter Adonyo

Judge

9<sup>th</sup> April 2024