THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-MA-0125-2013
(ARISING FROM HCT-04-CV-CS-0060-2010)

ASEKENYE CATHERINE…….……..APPLICANT
VERSUS
SAMSON PHILMON BARASA…….…….RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

Applicant brought this application by Notice of Motion under O.9 r. 12 and 27 and O.52 r.1 and 3 of the Civil Procedure Rules. The application was for orders that;

1. The exparte judgment/decree passed against the applicant in Civil Suit No. 0060/2010 be set aside.
2. The applicant/defendant be allowed to file a defence and matter heard interparties.
3. Costs be provided for.

a) The Honourable Court entered an exparte judgment against the applicant in CS.0060/2010 on an alleged default to file a defence.
b) That the applicant was not served with summons to file a defence in CS.0060 of 2010.
c) That the applicant has a residence both in Kampala and Busia and with a known place of work.

d) That applicant learnt of the entire suit on 18.06.2013 after judgment had been passed against her.
e) That the applicant has formidable and plausible defence to the respondent's suit.
f) That the execution of the decree in CS.0060/2010 will occasion irreparable loss to the applicant.
g) That it's in the interest of justice that the order sought be granted.

I have gone through the arguments and pleadings by both applicant and respondent.

O.9 r.12 of the Civil Procedure Rules, provides that;

> "*Where Judgment has been passed pursuant to any proceeding rules of this order, or where judgment has been entered by the Registrar in cases under order 50 of these rules the court may set aside or vary the judgment upon such terms as may be just*."

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

> "*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*."

In his application the applicant in her affidavit in support of the Notice of Motion paragraph 6 and 7 averred that she was not served with summons to file a defence to CS.0060/2010. She also averred that she had a plausible defence to respondent's claim. Respondent's affidavit in reply paragraphs 4, 5 and 6 averred

that applicant was served with the summons by substituted service but she neglected to file a plausible defence to the suit.

In his submissions Counsel for the applicant argued that applicant is an ex-wife of the respondent, with legal divorce documents and 5 children.

He 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.
He referred to *REMCO LTD. VRS. MIISTRAY JADBRA LTD (2002) (1) EA Page 233* that;

> "*If there is improper service of summons to enter appearance, the resultant exparte judgment is irregular and must be set aside by court*."

He also referred to the same decision to argue that applicant has a plausible defence as defined therein to mean, "*one which discloses bonafide triable issues*."

In response respondent's counsel opposed the application on grounds that paragraph 5 of the Respondent's affidavit in Reply mentions that the court ordered that applicant be served by substituted service. Under O.5 r.18 (2);

> "*Substituted service shall be as effectual as if it had been done on defendant personally*."

He argued that in light of O.15 r.18 (2) of the Civil Procedure Rules, it mattered less that the applicant had a plausible defence. He distinguished the authority of *REMCO LTD* (Supra) and argued that it was not concerned with O.15 r.18 (2).

Alternatively, referring to the case of *Little Sisters of St. Francis Madera Convent vs. No. 103690 Sgt Oling Nicholas HC. Msc. 58/2010*, he prayed for security for costs of 22 million as condition for sustaining the application.

In cross reply applicant insisted that the authority of REMCO is relevant since it addressed the matters to be deponed in an affidavit of service. He argued that the service was not proper and that security for costs is not a precondition for determining an application of this nature.

Having the above facts and the law, the issue is whether service was effective; and if so whether sufficient cause has been shown by applicant why they failed to appear and defend the suit.

What is effective service?

According to O.5 r. 18 (2)- substituted service is as good (effectual) as if it has been made on the defendant personally.

Substituted service under O.5 r.18 (1) of the Civil Procedure Rules is only resorted to where court is satisfied that; " *for any reason the summons cannot be served in the ordinary way…..*"

According to Respondent's affidavit of Service annexture B^2 annexed to affidavit in rejoinder in paragraph 3 and 4 it is deponed that he used postal address information utilized by the defendant on her title deed documents but failed to

trace her. Also attempts to track her in the last known place of work in Kampala failed since she could not be traced. The service was returned and according to paragraph 5 of his affidavit in reply court ordered that defendant be served by substituted service.

The Applicant's affidavit in reply under paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15 shows 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.*"

Under paragraph 9 of affidavit in support applicant shows that Respondent knew the address of her lawyers but ignored to serve her through them. She also shows in paragraph 6, 7 and 8, that she had a known phone number, and adult members of her family all who were well known to respondent and his counsel.

By virtue of the above facts which are not denied by respondents' it's my view that it has been demonstrated that proper effort was not made as per Katongole's case above.

It has also been held in *Bulenzi v. Wenderi (1990) KALR 108*, "If the defendant is out on regular business when the server comes, such server cannot say the defendant cannot be found."

Also it was observed in *Nzioki S/o Mutwata v. Akamba Handcraft Industries Ltd (1954) 27 KLR*, that;

> "*The affixing of a copy of summons is no 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*."

From the above and what is on the file on this application, I agree with applicants that service was not effective before resorting to substituted service. However the Respondents were properly granted an order for substituted service which they enforced under O. 5 r.18 (2) after the substituted service. The High Court went ahead and determined the suit exparte.

The applicant in this application has shown by affidavit and pleadings attached thereto that;

1) The service was not effectively done to warrant substituted service.
2) She has a plausible defence to the plaint.
3) She is a holder of a certificate of title which in law is proof of ownership till otherwise proved to the contrary – (see paragraph 10 of her affidavit).
4) She had no knowledge of the suit until 18.06.2013.
5) She acted immediately to file this application.

I am therefore of the opinion that sufficient cause has been shown. I will therefore hold that this is a proper suit for setting aside of the exparte order.

I will however agree with the proposition for security for costs as prayed by respondents on grounds that:

1. Respondent holds a judgment in his favour.

The second question for determination therefore is whether applicant has shown sufficient cause to warrant setting aside of the exparte judgment. I will refer to the Court of Appeal decision in *LEBEL (EA) LTD V. EF LUTWAMA (1986) HCB*, holding that;

> "*the purpose of a trial is to enable the parties to put their case properly and broadly so that court may hopefully come up with a fair decision on the crucial issues in the case*."

In *S. KYOBE SENYANGE VS. NAKS LTD (1980) HCB 31*, it was held by **Hon. J. Odoki** (as he then was) that before setting aside an exparte judgment the court has to be satisfied that not only has the defendant had some reasonable excuse for failing to appear but also that there is merit in the defence case.

The position was reaffirmed in *NICHOLAS ROUSSOS VS. GULAM H.H. VIRAN & 2 OTHERS S.C. Appeal No. 3 of 1993*, which discusses the principles upon which the discretion of the court to set aside exparte orders is discussed and therefore needs to be secured as per holding in *Little Sisters of St. Francis Madera Convent v. Oling Nicholas Misc. App. 58/2010*, which I find persuasive. I will grant the application subject to security for costs of shs. 15,000,000/= which were awarded as damages pegged to filing of the suit. I so order.

Henry I. Kawesa

JUDGE

13.03.2015