

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0022 OF 2017
(Arising from Civil Suit No. 0009 of 2017)

WEST NILE RURAL ELECTRIFICATION COMPANY APPLICANT

VERSUS

MARMA TECHNICAL SERVICES LIMITED RESPONDENT

Before: Hon Justice Stephen Mubiru

RULING

This is an application made under the provisions of section 98 of *The Civil Procedure Act*, section 33 of *The Judicature Act* and Order 36 rule 11 and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. It seeks orders setting an ex-parte judgment and decree entered in favour of the respondent against the applicant, setting aside the execution of the decree, and order of refund of funds recovered by the respondent in execution of the decree, an award of interest thereon, unconditional leave to file a written statement of defence and costs of the application.

The application is supported by the affidavit of the applicant's director in which he avers that the applicant was never served with summons and the specially endorsed plaint or any other court process relating to the suit and only learnt of the existence of the suit on 20th February 2017 upon receipt of a Garnishee order Nisi. As a result, the applicant was denied the opportunity to defend the suit which resulted in unfair execution of the resultant ex-parte judgment and decree. Upon perusal of the court record, it was discovered that a false affidavit of service had been filed indicating that the applicant had been served with summons and a specially endorsed plaint whereas not. The summons and garnishee order nisi attached to the affidavits of service bear a forged rubber stamp impression purported to be that of the applicant. Both were subjected to forensic examination and proved to be forgeries. The affidavits of service are defective in that the time, date, place of service and person served were never disclosed.

By an affidavit in reply sworn by the respondent's Managing Director, the application is opposed. The respondent contends that the applicant received on credit a supply of electrical material worth shs. 298,160,515/= under a contract with the respondent. The applicant subsequently made part payment leaving a balance of shs. 195,982,274/=. The respondent made several demands for the outstanding payment to no avail, hence the suit. The applicant was duly served with summons and the specially endorsed plaint but did not file an application for leave to appear and defend the suit. The respondent then filed an affidavit of service on the basis of which an ex-parte judgment and decree was entered against the applicant which was subsequently duly executed. The applicant has no plausible defence to the suit and the application ought to be dismissed as an afterthought and abuse of process.

Submitting in support of the application, Counsel for the first applicant Mr. David Ojiambo stated that the application is premised on grounds contained in the affidavit in support, sworn by the Director of the applicant company on 3rd March 2017. The main argument being that there was no service of summons on the applicant. This is supported by the contents of paragraphs 2, 3, 12, 13 and 15 of the affidavit in support. Paragraphs 2 and 3 state that it is on 20th February 2017 that the applicant learnt of the existence of the proceedings and a garnishee orders Nisi served on Barclays Bank. The law regarding service is under Order 5, rule 16 specifies details the serving officer should provide in all cases. To the contrary, the affidavit of service of Salim Maude in paragraphs 2 and 3 lacks the required details of service such as; time, date, place etc.

In addition, Order 29 rule 2 of the Civil Procedure Rules specifies officers of a company who are competent to receive service on its behalf. The officer of the company served in the instant case is not disclosed. He cited *Life Pharma Africa Ltd v. Matovu and another, H. C. Misc. Application No. 328 of 2016* for the proposition that service on a corporation is effective only when it is effected on a director or officer of the company. He also cited *Goodman Agencies Ltd and another v. Highland Agricultural Export Ltd, H. C. Misc. Application No. 364 of 2013* for the proposition that filing an affidavit of service is a mandatory requirement and the affidavit should comply with the requirements of Order 5 r 16 of the Civil Procedure Rules. He finally cited *Kibuuka Nelson and another v. Yusuf Ziiwa H. C. Misc. Application No. 0225 of 2008*, where it was held that a judgment based on an ineffectual service will be set aside by court. In

conclusion, he submitted that looking at the defects in the affidavit of service, there was no effectual service and therefore the judgment, decree and proceedings undertaken thereafter ought to be set aside.

When the application came up for hearing on 29th March 2017, counsel for the respondent was not in court whereupon court directed that he could file his written submissions at any time before delivery of the ruling. In his written submissions, he argued that before a defendant to a summary suit can be granted leave to appear and defend the suit, he must prove that there are bona fide triable issues of fact or law and that there is a statable defence to the suit. He cited *Makula Interglobal Trade Agency Ltd v. Bank of Uganda [1985] HCB 69*. In the instant application, the applicant does not disclose any. The claim that there was no service on the applicant is an afterthought. An affidavit of service was filed and the Assistant Registrar of this court was satisfied that service was effective on the applicant before he entered the default judgment and proceeded to tax the respondent's bill of costs. The applicant has not attached the proposed written statement of defence and therefore its averment that it has a plausible defence to the suit should be disregarded.

The key irregularity singled out by the applicant for seeking to set aside the default judgment and decree is that it was not served with summons and the specially endorsed plaint on basis of which a default judgment and decree were entered against it on 3rd February 2017. It is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties. It is for that reason that an ex-parte judgment will be set aside if there is no proper service (see *Okello v. Mudukanya [1993] I K.A.L.R. 110*). Under Order 36 rule 11 of *The Civil Procedure Rules*, the court may, if satisfied that the service of the summons was not effective, or for any other good cause, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

A court would be justified to enter a default judgment in the circumstances it did under Order 36 rule 3 (2) of *The Civil Procedure Rules* only after satisfying itself that the applicant had been

duly served and had failed to apply for leave to appear and defend the suit. An affidavit of service must be on record before such proceedings are allowed (see *Kitumba v. Kiryabwire [1981] H.C.B. 71*). Perusal of the record of the court discloses an affidavit of service affirmed by a one Salim Mawudhe on 23rd January 2017 and filed in court on 3rd February 2017, stating that service was effected upon the applicant on 23rd January 2017. The affidavit contains four operative paragraphs which I reproduce as follows;

1. That I am an adult male Ugandan of sound mind and a process server of the High Court and all courts subordinate thereto.
2. That on the 23rd day of January 2017 I received copies of the plaintiff's pleadings from this court for service upon the defendant which I effectively served on the defendants who acknowledged receipt of the same as attached hereto.
3. That I depone this affidavit to affirm that service of the specially endorsed plaint and summons from court was effected on West Nile Rural Electrification Company Limited.
4. That what I have stated herein is true and correct to the best of my knowledge.

The affidavit does not disclose important details regarding how the service was effected, i.e. the place at which it was effected, the time of service and the mode of service. Effective service of court process requires the person serving to provide the recipient a copy of the process and immediately thereafter to return to the issuing court the original process duly endorsed with what he or she has done concerning it. Such service is proved by an affidavit of the person effecting service in which he or she identifies himself or herself, states that he or she is authorised under the law to serve process or documents therein, and that the process or document in question has been served as required by the law, and sets forth particulars of the person served, the manner, time, place and the date of such service. The process server should disclose whether he or she knew the person served before and if not, the identity of the person who helped with the identification of the individual served. The procedures of service are so exacting to the extent that the requirement that a duplicate be delivered or tendered is mandatory and if not complied with, the service is bad (see *Erukana Kavuma v. Metha [1960] E.A. 305*).

Service on a person who is not a "recognized agent" of the person to be served is not effective service even though the court process actually reaches that person (see *Narbheram Chakubhai v. Patel (1946) 6 U.L.R 211*). It is worse if it is shown, like in this case, that the service did not lead

to the defendant becoming aware of the process. In such cases, the service is not effective (see *Geoffrey Gatete v. William Kyobe* [2007] 1 H.C.B. 54). According to Order 29 rule 2 (a) of *The Civil Procedure Rules*, where a suit is against a corporation, the summons may be served on the secretary, or on any director or other principal officer of the corporation. From the wording of this provision it is important that the personal identity and specification of the post held by such principal officer in the company must be disclosed in the affidavit of service. In other words if such officer is neither secretary nor director, his or her position in the company must be specified. It is not enough just to say that such a person is a principal officer (see *Kiganga and Associates Gold Mining Co Ltd v. Universal Gold NL* [2000] 1 EA 134 at 138). The rule is very strict on the issue of service upon a corporation and makes it clear that no service effected upon any person other than a principal officer of the company, will be recognised.

The rule though does not define who a “principal officer of the corporation” is. However, considering the mischief aimed at by the provision, it seems to me that the determination of who in the corporation qualifies as such must be determined on basis of the nature of the duties the person performs in the corporation. It is a functional determination considering the decision in *Remco Ltd. v. Mistry Jadva Parbat and Co. Ltd. and others* [2002] 1 EA 233, where service of summons intended for a corporation were served on the receptionist of the company. Regarding the issue whether such service was effective on the company, the court held that it was not in dispute that the receptionist was neither a director nor a secretary nor a principal officer of the Defendant Company. Thus although there was service on an employee, the receptionist, the court decided that such was not properly served on the Defendant corporation as contemplated by the rules. That being the case, the judgment obtained in default of appearance was an irregular judgment and had to be set aside *ex debito justitiae*.

This court in interpreting Order 29 rule 2 (a) of *The Civil Procedure Rules* on *eiusdem generis* basis, is of the view that it includes such persons in the corporation who are authorised to exercise substantial executive or managerial powers, such as signing contracts and making major business and administrative decisions as distinguished from regular employees. In the instant case, neither the identity of the person served was identified nor was his or her position in the applicant corporation disclosed in the affidavit of service. It was therefore not possible for the

Assistant Registrar, before entering a default judgment as he did, to determine that the person served held a position in the applicant corporation that involves exercise of substantial executive or managerial powers for that person to qualify as a “principal officer” of the applicant. In light of that omission in this case, I find that the purported service on the applicant was not effective. The result is that the court entered a default judgment without first satisfying itself that there had been proper and effective service of the summons and the specially endorsed plaint upon the applicant. Consequently, the default judgment should be treated as one entered against a party which was not served and which had no knowledge about the said proceedings. The resultant decree and the execution thereof are thus irregular and the court has no discretion in deciding whether or not to set aside such a judgment. Such Judgment should be and is hereby set aside *ex debito justitiae* along with the decree and subsequent execution.

I find it unnecessary, for purposes of this application, to consider the contention that the stamp impression affixed to copies of the court process filed in court as part of the return of service is a forgery. For that reason I have disregarded the contents of the forensic analysis report annexed to the affidavit in support of the application, more particularly because the report is not verified by an affidavit of its author.

Order 36 rule 11 of *The Civil Procedure Rules*, authorises the court, if satisfied that the service of the summons was not effective, after setting aside the decree and setting aside execution of the decree, to grant leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit. Unlike Order 36 rule 4 which upon a direct application for leave to appear and defend requires the defendant to state the intended defence with sufficient particularity so as to appear genuine such that general vague statement denying liability will not suffice, under the instant provision the court had a wide discretion to grant leave “if it seems reasonable to the court so to do.”

The discretion conferred upon court by this provision requires it only to conscientiously consider and determine, using ordinary care and prudence, whether as a result of setting aside the decree and execution, upon reasonable evaluation of the material before it, an apparent state of facts exist which would induce a reasonable, intelligent and prudent tribunal to believe that there are

triable issues of fact or law in the case that warrant granting the applicant a hearing. The court may also consider whether in the circumstances, it is still feasible to have the case tried as a summary suit, or any other similar reason. The court though will not grant the applicant leave to appear and defend based on capricious, whimsical, or arbitrary reasons.

Proceedings under Order 36 of *The Civil Procedure Rules* are of summary nature and do not envisage a defence except with the leave of court. In paragraph 17 of the affidavit in support of the application, the applicant states that it disputes the respondent's entire claim. The basis of this refutation is not disclosed and such a pleading would clearly be inadequate to support an application for leave to appear and defend under the provisions of Order 36 rule 4. I have nevertheless considered the fact that setting aside the judgment, decree and execution of the decree does not resolve the real issues in controversy between the parties. To direct the respondent to effect service on the applicant and require the applicant thereafter to file an application for leave to appear and defend the suit will only prolong the controversy between the parties yet the dispute is of a commercial nature involving financial resources that are vital for the commercial operations of both parties. On the other hand, its character as a summary suit has been substantially altered by the order setting aside the default judgment, decree and its execution. It is now necessary to expeditiously proceed with the suit as an ordinary suit and for that reason the applicant is granted leave to appear and defend the suit. The applicant is to file its written statement of defence and serve it upon the respondent within fifteen days from today. The suit shall thereafter be subjected to mediation by the Assistant Registrar of this court.

In the event that no compromise will have been arrived at by 16th August 2017, the respondent is to refund to the applicant all monies recovered in execution of the decree by 30th August 2017 whereupon the parties shall file a joint memorandum of scheduling and hearing of the suit shall proceed on a date mutually agreed upon between them during the month of September 2017. The costs of this application are awarded to the applicant.

Delivered at Arua this 15th day of June 2017.

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Stephen Mubiru
Judge
15th June 2017.