THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO

MISCELLANEOUS APPLICATION NO. 180 OF 2022

(ARISING FROM CIVIL SUIT NO. 71 OF 2019)

LUTALO NSIRIDDE JORDAN :::::::: APPLICANT / JUDGMENT DEBTOR

VERSUS

1. **ALLAN NTANDA**
2. **MARCUS KWIKIRIZA**
3. **HUMPHREY KOBEL**
4. **AUGUSTINE KIVEBULAYA**
5. **OKWAKO DANIEL**
6. **DANIEL MUGENGA**
7. **ASIIMWE CHRISTINE**
8. **EVA KEMIGISHA**
9. **NAMUGERA RONALD**
10. **NAMUGERA GLORIA NAKIBUUKA**
11. **KAMULEGEYA RONALD**
12. **MUTYABA ROBERT:::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

RULING

1. This application was brought by Notice of Motion under Section 33 of the Judicature Act, Cap. 13, Order 9 rule 12 & Order 52 rules 1, 2 & 3 of the Civil Procedure Rules, S.I 71-1, seeking for orders that:

(a) execution of the decree in HCCS No. 71 of 2019 be stayed;
(b) the judgment and decree in HCCS No. 71 of 2019 be set aside;
(c) the Applicant be granted leave to file his written statement of defence out of time and the matter be determined on its merits; and
(d) costs of the application be provided for.

2. The grounds of the application as contained in the affidavit of Lutalo Nsiridde Jordan, the Applicant, are that:

(a) On the 21st day of April, 2022, the Applicant was contacted by his area L.C.1 Chairperson who informed him that there were men looking for him with a warrant of arrest;

(b) the Applicant then instructed his lawyers M/s Kyamanywa, Kasozi & Co. Advocates to go and investigate under which circumstances there comes to be a warrant for his arrest;

(c) on 21st April, 2022, the Applicant's lawyers wrote to court requesting for the pleadings so that they could advise him appropriately;

(d) the Applicant was informed by learned Counsel Kyamanywa Edward Cooper that the summons were advertised in the Newspapers before court granted a default judgment;

(e) had the Applicant known of the suit or had he been served with summons to file defence; he would have complied since he did not commit any civil wrong;

(f) in 2016, the Applicant had land comprised in Bugerere Block 75 Plots 9 and 11 at Bumala which he wished to sell off;

(g) the Applicant was connected to the 1st Respondent as a popular land broker with potential buyers and it was through the 1st Respondent that the Applicant got to know the 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th, and 12th Respondents;

(h) it was Henry Kiwanuka who linked the Applicant up with the 7th & 8th Respondents;

(i) to connect the Applicant to the buyers for all the land, the 1st Respondent demanded for 30 acres out of the land comprised in Bugerere Block 75 Plot 9 at Bumala, which the Applicant was okay with and the 1st Respondent chose the location when he was taken by the Applicant to see the land;

(j) after linking the Applicant up with the said Respondents and on advice of Counsel Angela Kobel the 1st Respondent's wife, they insisted that agreement be made in such a way that it looks as if the 1st Respondent has paid the Applicant money for the 30 acres whereas not and for as long as he secured for him good buyers, the Applicant had no problem with it;

(k) the Applicant has never received any money from the 1st Respondent and the agreement attached is not true;

(l) in the company of the 1st Respondent, the Applicant took the 2nd, 3rd, 4th, 5th,6th, 9th, 10th, 11th & 12th Respondents or their agents while the 7th & 8th Respondents were brought by Henry Kiwanuka to inspect and they liked the land which eventually led to the execution of the land sale agreements with the 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th & 12th Respondents;

(m) in the agreements executed with the Respondents particularly clause 4 (a) of the agreement, it was agreed that they would incur the costs of securing/processing titles for the demised portions of the land;

(n) the Respondents did not like the Applicant's surveyor and on the recommendation of Counsel Angela Kobel, they appointed Joseph Bakundukilize who was said to be a surveyor to open boundary and subdivide the land to enable each of the Respondents get the land paid for;

(o) the Applicant led the said Joseph Bakundukilize to the land and he believed he opened boundaries since he moved around the land with his equipment but the Applicant never received the surveyor's report after the Respondents hiring the services of the said Joseph Bakundukilize;

(p) under Clause 6 of the agreements, it was agreed that any dispute arising in connection to the agreements which cannot be resolved amicably by the parties be submitted by either party for

mediation in accordance with the Arbitration and Reconciliation Act, Cap. 4 before recourse can be made to the court of law;

(q) without giving any justifiable reason, the 2nd to 12th Respondents demanded refund of the money they had paid the Applicant and out of good will, he refunded UGX. 80,000,000/= after disposing off his other property;

(r) the 2nd to the 12th Respondents lodged a caveat on the land making it impossible to sell it to the 3rd parties to get money to refund to the 2nd to the 12th Respondents;

(s) it is the Respondents that breached the agreement when they failed to take the demised land without giving any justification and the Applicant has a good defence to the suit copy of the draft is attached to this application;

(t) Clause 6 forbid filing suit unless and until the clause was complied with which makes the suit untenable and premature; and

(u) the suit having been barred by Clause 6 of the agreement, default judgment was entered in error and it cannot stand.

3. The Respondents opposed the application by an affidavit in reply sworn by Ms. Masawi Dorah, an advocate employed by M/s Kiiza & Kwanza Advocates. The grounds were that:

(a) the application is clearly misconceived, frivolous, brought in bad faith and an abuse of court process and it is in the interest of justice that it is dismissed with costs;

(b) the Respondents intend to raise a preliminary objection to the effect that the application for stay of execution was brought under the wrong law;

(c) the Applicant entered into several agreements with the Respondents for the sale or purchase of land to be curved out of property comprised in Bugerere Block 75, Plots 9 and 11 land at Bumala;

(d) under Clause 3 (b) of the sale agreements, the Applicant undertook to indemnify the purchasers in the event that any claim or anything arose that would prevent the purchasers from acquiring good title by a refund of any monies received and spent in respect of the land sold;

(e) on the 2nd October, 2016, the Applicant accompanied the Respondents and the surveyor to the land for a 2nd visit for the purposes of identifying the mark stones but the Applicant frustrated the transaction when he led the Respondents to another plot of land, claiming that he was unable to locate the purchased plots of land hence occasioning a total failure of consideration;

(f) upon conducting due diligence on Bugerere Block 66, Plot 2, it was established that the property was registered in the names of

Spencon (U) Ltd and encumbered with a caveat lodged by a one Kimuli Steven rendering it unacceptable to the Respondents;

(g) on the 9th November, 2016, M/s Tibeingana & Co. Advocates on the instructions of the Respondents served the Applicant with a demand notice for refund of the money so far paid as consideration for the sale of the properties comprised in Bugerere Block 75, Plots 9 and 11 land at Bumala;

(h) on the 30th November, 2016, the Respondents' lawyers received a response to the demand from the Applicant's lawyer Kyamanywa Edward who was then attached to Rwakafuzi & Co. Advocates, wherein the Applicant pledged inter alia to refund a sum of UGX. 80,000,000/= as part payment of the monies due to the Respondents and requested for three months to enable him come up with a conclusive repayment plan;

(i) on the 6th December, 2016, one Edward Kyamanywa acting on behalf of the Applicant paid the sum of UGX. 80,000,000/= to Respondents' lawyers;

(j) on the 5th April, 2017, the Respondents' lawyers received a repayment schedule from the Applicant wherein he acknowledged the debt of UGX. 219,525,000/=;

(k) the Applicant proposed to pay UGX. 19,000,000/= by 12th April, 2017 and an interest of 24% per annum on the outstanding amount to be paid on a monthly basis starting from 30th May, 2017;

(l) from that time to-date, the Applicant has never made any payments to the Respondents and as a result, the Respondents filed HCCS No. 71 of 2019 on the 11th April, 2019 against the Applicant, wherein they sought for among others an order that the Applicant refunds to the Respondents the consideration of UGX. 156,048,052/= paid by them for the purchase of property comprised in Bugerere Block 75, Plots 9 and 11, land at Bumala;

(m) summons were issued by the court on the 16th April, 2019 to be served onto the Applicant and attempts to effect service on the Applicant at his residence in Segulu Katale Bunamwaya Road proved futile;

(n) the Applicant has continuously changed his telephone contact and currently has over 6 telephone contacts all registered in his names and they are usually switched off hence making it hard to get to him;

(o) upon failure to effect service personally on the Applicant, the application for substituted service was granted on the 27th August, 2019 and the summons were duly advertised in the Daily Monitor Newspaper;

(p) the Applicant did not file a defence as required by law despite having been effectively served with the summons, therefore the Respondents applied for a default judgment and the same was granted on the 13th January, 2020;

(q) the bill of costs was fixed for taxation and court ordered that the taxation hearing notices are advertised in the Daily Monitor and an affidavit of service sworn by a one Nakiguli Josephine was duly filed in court as proof of service on the Applicant;

(r) upon taxation of the matter, court ordered that notice to show cause why execution should not issue is advertised in Daily Monitor and Bukedde Newspapers and a copy is affixed on the notice board of the court and an affidavit of service sworn by a one Nalwoga Racheal was duly filed in court as proof of service on the Applicant;

(s) the 1st Respondent paid the Applicant a sum of UGX. 20,175,000/= as consideration for the purchase of 30 acres of land to be curved out of land comprised in Bugerere Block 75, Plot 9 and a land sale agreement was executed which was signed by the Applicant;

(t) whereas the Applicant availed the Respondents with a land agreement in his names as the purchaser and Spencon (U) Limited as the Vendor, the Respondents further conducted due diligence and established that the property was encumbered with a caveat lodged by a one Kimuli Steven, rendering it unacceptable to the Respondents;

(u) the Respondents lodged a caveat on the land in order to protect their interests in the land since the Applicant had not fully refunded the purchase price;

(v) the Applicant has not fulfilled the grounds that merit the grant of an application for stay of execution to wit, a deposit of security for the performance of the decree as may ultimately be binding upon him; and

(w) the Applicant does not in any way contest the debt outstanding, due and owing to the Respondents.

4. In rejoinder, the Applicant deposed that at the preliminary stage of the hearing, the Applicant's lawyers shall raise a point of law to the effect that the affidavit in reply is untenable and the same ought to be struck out and that HCCS No. 71 of 2019 was prematurely brought in violation of Clause 6 of the agreements. Further, that the Applicant has never been a resident of Seguku Katale Bunamwaya as alleged and that if that was his place of residence, the process server should have left the court papers at his residence or even used the local authorities to serve him.

5. The Applicant added in rejoinder that he does not keep changing his phone numbers and that he has been in touch with Angella Kobel the known lawyer for the Respondents and that he has on several occasions met her on the streets of Kampala. That the Respondents intentionally avoided to serve the Applicants to deprive him of his right to be heard so that they would arrest him. The Applicant stated that he did not see the summons or notices advertised in the newspapers nor see the publication on the court notice because he had no reason to pass by court to see the same and that no one informed him of any

notice about him being on the court public notice. That there is no valid judgment to warrant depositing security for stay as the suit was pre-mature and the judgment was entered in error.

6. During the hearing of this application, the Applicant was represented by Counsel Kyamanywa Edward Cooper from M/s Kyamanywa, Kasozi & Co. Advocates. The Respondents were represented by Counsel Asiimwe Rita from M/s Kiizza & Kwanza Advocates and Legal Consultants who held brief for Counsel Angela Kobel. Both parties filed their written submissions and the Applicant filed submissions in rejoinder.

7. That Applicant's counsel contended that the Applicant was not effectively served with summons to file defence and the judgment under execution is a nullity having been entered under a premature suit hence that the court erroneously entered judgment against the Applicant. That whereas the Respondents' counsel knew the phone contact of the Applicant, there was no effort to notify him of the suit. That the Applicant only came to know of the suit when the bailiffs went searching for him via the area L.C.1 Chairperson.

8. Counsel averred that even the affidavit of service of summons show that there was no effective service of court process upon the Applicant. That the return of service of summons deponed by Simon Bukenya filed in court on the 27th August, 2017 is full of falsehoods. That the process server deponed as to how he found a girl at the house to which he was led that is said to belong to the Applicant and this girl of about 15 years gave her the Applicant's phone number which he called in

vein. That the process server contradicted himself when he said that he was told that the Applicant had sold the house and relocated to an unknown place.

9. Counsel contended that how can a 15 years old girl who was a stranger to the Applicant come to have his phone number and that how comes the process server did not get the Applicant's phone number from Angela Kobel or Okun Charles who knew the Applicant well? That it is unbelievable that a 15 years old girl staying with the person who had purchased the Applicant's house could have the Applicant's phone number.

10. Furthermore, that the process server never approached the area L.C.1 authorities to trace the Applicant and that the land sale agreements all have the Applicant's phone number and yet the said Angela Kobel did not know the phone contacts of the Applicant which are in the agreement. The Applicant's counsel also submitted that it cannot be said that the Applicant was effectively served by substituted service because the Respondents irregularly obtained the orders of substituted service.

11. That from the affidavit of Bukenya Simon, it cannot be concluded that the Respondents exhausted the means of effecting direct service of summons upon the Applicant and therefore, the order for substituted service was irregularly obtained. That the Respondents could have attempted to serve the Applicant through their lawyers. And that the Respondents did not exhaust all possible means by which they should have effected service of summons to file defence upon the Applicant.

12. That secondly, even service of summons to file defence upon the Applicant by way of substituted service was not effective. That the Applicant did not have notice of HCCS No. 71 of 2019 and did not get the opportunity to see the advertised summons to file the defence which frustrated the intended purpose of the advert. Counsel cited the cases of **Bitamisi Namuddu v. Rwabuganda Godfrey, Supreme Court Civil Application No. 04 of 2015** and **Godfrey Gatete & Anor v. William Kyobe, SCCA No. 07 of 2005**).

13. It was thus asserted for the Applicant that the advertisement of the summons having not achieved the objective of notifying the Applicant of the suit, the substituted service did not achieve its objective and there was no effective service. The Applicant's counsel prayed that this honourable court be pleased to find that there was no effective service of the court process upon the Applicant which prevented him from filing his written statement of defence.

14. The Applicant's counsel contended that the judgment under execution is a nullity having been entered in a premature suit. Citing the case of **Steam Investments Ltd v. Isolux Ingenieria, HCCS No. 91 of 2021**. Counsel stated that parties to a contract are bound to its terms. That the Respondents' claim is premised on agreements executed between the parties and that there is a common clause in all the agreements that is, Clause 6 which is about dispute and the law to govern the dispute that may arise under the executed agreements. That the parties under this clause agreed that any dispute that arise

may be referred by any of them to a mediator in accordance with the Arbitration and Conciliation Act, Cap. 4.

15. That from the wording of the agreements, the parties chose not to institute any legal proceeding in any court of Judicature unless and until they have attempted mediation and that Clause 6 of the agreements makes the main suit premature and barred. That it was erroneous for this court to enter judgment when it was very clear in the agreements upon which the suits had been brought where the parties had clearly agreed not to institute any proceeding in court unless and until the dispute had first been handled by a mediator.

16. The Applicant's counsel submitted that section 9 of the Arbitration and Conciliation Act forbids courts from intervening in matters that are governed by the Act with a few exceptions. Counsel prayed that this court sets aside the ex-parte judgment entered in HCCS No. 71 of 2019 and dismisses the suit.

17. The Respondents on the other hand raised a preliminary objection to the effect that the application for stay of execution was brought under the wrong law that is, Order 9 rule 12 and Order 52 rules 1, 2 & 3 of the Civil Procedure Rules, S.I 71-1 instead of Order 22 rule 23 and Order 43 rule 4 of the Civil Procedure Rules.

18. That for an application for stay of execution to succeed, the case of **Kayizzi Godfrey v. Osman Tom, Misc. Applic. No. 1921 of 2016**, laid down the grounds that one must satisfy before the application is

granted which include that substantial loss may result unless the order of stay is made, that the application has been made without unreasonable delay and that the Applicant has given security for due performance of the decree or order. Counsel contended that the Applicant has not shown anywhere in his application that he will suffer any substantial loss if execution of the decree is carried out.

19. The Respondents' counsel argued that under Clause 3 (b) of the land sale agreements, the Applicant undertook to indemnify the purchasers in the event that any claim or anything arose that would prevent the purchasers from acquiring good title by a refund of any monies received and spent in respect of the land sold. That on the 2nd October, 2016, the Applicant accompanied the Respondents and the surveyor to the land for the 2nd visit for purposes of identifying the mark stones but the Applicant frustrated the transaction when he led the Respondents to another plot of land comprised in Bugerere Block 66 Plot 2, claiming that he was unable to locate the purchased plots of land comprised in Bugerere Block 75 Plots 9 and 11 land at Bumala.

20. That the Respondents through their lawyers served a demand notice onto the Applicant which was received by his lawyer Kyamanywa Edward who was then attached to Rwakafuzi & Co. Advocates. That the Applicant made repayment of UGX. 80,000,000/= and requested for 3 months to enable him come up with a conclusive repayment plan which he later availed to the Respondents' counsel.

21. The Respondents' counsel further argued that the default judgment was entered on the 13th January, 2020 and this application was lodged in court on the 10th May, 2022, after 2 years and 4 months. That the Applicant's counsel requested for a copy of the pleadings in HCCS No. 71 of 2019 on the 22nd April, 2022 and that over 8 months have elapsed without any proof that counsel followed up on his letter which delay cannot be explained and amounts to inordinate delay. Counsel prayed that if court decides to grant this application, the Applicant should be directed to pay security for costs. That the Applicant has benefited from the Respondents' money paid to him for over 5 years now and that it is just and equitable that he is ordered to deposit the security equivalent to the decretal sum should court decide to grant the application. Counsel averred that the Applicant has not satisfied any of the grounds for grant of an application for stay of execution. She prayed that the application is dismissed with costs to the Respondents.

22. As to the Applicant's prayer to set aside the default judgment the Respondents' counsel submitted that it was not possible to serve the Applicant as evidenced in the affidavit of service annexed to the Respondents' affidavit in reply. That Mr. Okun Charles who knew the Applicant very well and who directed Simon Bukenya to the Applicant's home must have known his home and could not have led the process server to a wrong place. That the Applicant confirmed that the home at Seguku Katale Bunamwaya was his home but he had sold it to another person who was staying with a 15 years old girl that the process server found home. That the process server called the Applicant's number

severally but his calls went unanswered and he had also sold his known home in Seguku Katale Bunamwaya thus unable to trace for him.

23. The Respondents' counsel submitted that the process server exhausted all the possible means that were available to serve the Applicant when he traced for his home only to find that it had been sold and also called his phone number severally only for his calls not to be answered. That when the process server approached Counsel Kyamanywa Edward Cooper who was by then attached to Rwakafuzi & Co. Advocates, he stated that he did not have instructions to represent the Applicant in the said suit hence the need to serve the Applicant personally.

24. Counsel argued for the Respondents that the Respondents adhered to Clause 6 when they filed the matter before a mediator under Mediation Case No. 79 of 2019, before they proceeded to court and that the same was frustrated by the non-appearance of the Applicant hence the need to proceed to court. That the suit is thus neither premature nor untenable as stated by the Applicant. Counsel prayed for the application to be dismissed with costs to the Respondents.

25. In rejoinder, the Applicant's counsel submitted that the preliminary objection raised by the Respondents is misconceived and ought to be rejected. That this court is vested with jurisdiction under section 33 of the Judicature Act to grant the remedies sought. That

besides, failure to cite the law cannot be the basis of court not granting a remedy within jurisdiction.

26. Counsel further rejoined that the argument that the mediation failed when the Applicant failed to submit to mediation hearing in Mediation Case No. 79 of 2019, is submission from the bar because the Respondents' affidavit in reply does not show anywhere evidence that the parties underwent mediation and it failed. That even if the Respondents filed the said mediation cause as alleged, there is no proof that notice of mediation was ever brought to the attention of the Applicant.

27. That this court could have not entered judgment in the main suit instead it could have directed the Respondents to commence proceedings to resolve the dispute in accordance with the Arbitration and Conciliation Act, Cap. 4, as chosen by the parties in their agreement. That with Clause 6 of the said agreements, court could not even invoke its inherent powers where the parties chose the preliminary mode of dispute resolution. Counsel prayed that the judgment be set aside and the matter abates.

Issues

(1) Whether the procedure used by the applicant was proper.

(2) Whether the Applicant has provided sufficient reasons warranting setting aside judgment and decree and granting him leave to file a written statement of defence out of time in Civil Suit No. 71 of 2019.

The Court's Consideration

28. The instant application is an omnibus one where the Applicant seeks for orders of setting aside default judgment and decree thereunder, stay of execution and leave to file a written statement of defence out of time in Civil Suit No. 71 of 2019. The Applicant alleges that he was not effectively served with summons to file a defence leading to his failure to file a written statement of defence.

29. The Respondents' counsel raised a preliminary objection that the procedure used by the Applicant was wrong. This application was brought under Section 33 of the Judicature Act, Cap. 13, Order 9 rule 12 & Order 52 rules 1, 2 & 3 of the Civil Procedure Rules, S.I 71-1, seeking for orders that execution of the decree in HCCS No. 71 of 2019 be stayed; the judgment and decree in HCCS No. 71 of 2019 be set aside; the Applicant be granted leave to file his written statement of defence out of time and the matter be determined on its merits; and costs of the application.

30. Order 9 rule 12 of the Civil Procedure Rules S.I 71-1 provides thus:

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

31. Section 33 of the Judicature Act, Cap 13 states thus:

"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, 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 concerning any of those matters avoided."

32. Both Order 22 rule 23 and Order 43 rule 4 of the Civil Procedure Rules provide for stay of execution. Once a court issues an order to set aside or vary an ex-parte judgment, then stay of execution is implied. There would be nothing to execute once an ex-parte judgment is set aside. The High Court can under the provisions of section 33 of the Judicature Act issue a stay of execution. The provision grants the High Court discretion to grant all remedies to avoid a multiplicity of legal proceedings and determine all matters in controversy. Therefore, the preliminary objection is hereby overruled. That resolves issue 1 in the Applicant's favour.

33. Service of summons is provided for under Order 5 rule 10 of the Civil Procedure Rules, S.I 71-1. It states that:

"Wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered

to accept service, in which case service on the agent shall be sufficient"

34. Order 5 rule 18 (1) and (2) of the Civil Procedure Rules empowers this court to issue an order for substituted service where it is convinced that service cannot be effected in an ordinary manner. In that regard the substituted service shall be effectual as if it has been effected personally on the defendant. Order 5 rule 18 of the Civil Procedure Rules provides as follows:

*"18. **Substituted service.***

(1) Where the court is satisfied that for any reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy of it in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally."

35. I have carefully perused the affidavit of service of Mr. Bukenya Simon, the application for substituted service and the supporting affidavit deponed by Mr. Okun Charles. It is important to note that the court record does not contain any affidavit of service sworn by Mr. Okun Charles and yet he deponed an affidavit in support of the

application for substituted service claiming to have attempted to serve the Applicant on several occasions in vain. The affidavit of service filed on court record and also attached to the Respondents' affidavit in reply as Annexure "F" was sworn by Mr. Bukenya Simon who deponed to have attempted to effect service of summons to file defence on the Applicant in person on 27th May, 2019, which service according to him proved to be futile.

36. Moreover, the application for substituted service and its supporting affidavit was filed on 23rd May, 2019, prior to the alleged date of service of the summons by the said Bukenya and also prior to the filing of the affidavit of service, which was filed on 27th August, 2019, about 3 months after filing of application for substituted service. Besides, Mr. Bukenya in his affidavit of service, claimed to have found a 15 years old girl who told him that the Applicant had gone for work and always comes back at around 6:00pm. He added that the said girl gave him the Applicant's mobile telephone number which he called in vain but he neither mentioned the girl's full names nor did he indicate what relationship the girl had with the Applicant. In my view, this was a serious gap that the trial Deputy Registrar could have noticed while considering whether or not to issue an order for substituted service.

37. Had the trial Deputy Registrar considered the discrepancies and untruthfulness in the affidavit in support of application for substituted service sworn by Mr. Okun Charles and the affidavit of service sworn by Mr. Bukenya Simon as well as the inconsistencies in the dates of filing the said application and that of attempting to personally serve the

Applicant with summons to file defence by Mr. Bukenya Simon, she would have reached a different conclusion. In my judgment, I find that the order for substituted service was issued in error.

38. As to the arbitration clause claimed by the Applicant, Civil Suit No. 71 of 2019, from which this application arises constituted a claim for recovery of UGX. 156,048,052/=, being parts of the purchase prices in respect of land sale agreements between the Applicant as the vendor on one hand and the Respondents as the purchasers on the other hand. The parties executed respective land sale agreements which all contain similar clauses with regards to dispute resolution mechanism. Clause 6 of the agreements provides thus:

> ***"Any disputes arising in connection with this agreement which cannot be resolved amicably by the PARTIES shall be submitted by either PARTY to mediation in accordance with The Arbitration and Conciliation Act, Cap. 4 before recourse can be made to the courts of law. This agreement shall be governed by the Laws of Uganda."***

39. It is trite law that where an arbitration agreement exists, the courts would not hear the case until the arbitration procedure has fully been exhausted. Section 5 (1) of the Arbitration and Conciliation Act, Cap. 4 states that:

> *"(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a*

hearing, refer the matter back to the arbitration unless he or she finds—

that the arbitration agreement is null and void, inoperative or incapable of being performed; or

that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

40. Therefore, parties with disputes are thus obliged to submit to the provisions under the Act on the basis of an arbitration clause in their agreement. Section 2 (1) (c) of the Arbitration and Conciliation Act, Cap. 4 provides for the meaning of "Arbitration Agreement". It states –

"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"

41. In my view, where a case has commenced in court and it is established that the matter was meant for arbitration under the Arbitration and Conciliation Act as in the instant case, the court has to respect the mandatory provision of the Act and should always make an order referring the matter to arbitration as provided for in section 5 of the Arbitration and Conciliation Act, Cap. 4.

42. In **Shell (U) v. AGIP (U) Supreme Court Civil Appeal No. 49 of 1995,** Justice Tsekooko stated thus:

"From the provisions it appears that the following are the necessary conditions which influence a court in its exercise

of discretion.

1. *There is a valid agreement to have the dispute concerned settled by arbitration.*
2. *Proceedings in Court have been commenced.*
3. *The proceedings have been commenced by a party to the agreement against another party to the agreement.*
4. *The proceedings are in respect of a dispute so agreed to be referred.*
5. *The application to stay is made by a party to the proceedings.*
6. *The application is made after appearance by that party, and before he has delivered any pleadings or taken any other step in the proceedings.*
7. *The party applying for stay was and is ready and willing to do all the things necessary to the proper conduct of the arbitration."*

43. The arbitration clause the Applicant referred to in his application were not disputed by the Respondents thus binding on all the parties and the 2nd, 3rd, 4th and 5th conditions stated above are not contested by either party. I have already held above that the order for substituted service issued by the trial Deputy Registrar was issued in error. This implies that there was no effective service of summons to file defence on the Applicant leading to his failure to file his written statement of defence or participating in the proceedings. Had the Applicant been given the opportunity to file his defence and participate in Civil Suit 71 of 2019, then the right step the Deputy Registrar should have taken

was to hear both parties before deciding whether to refer the matter back to arbitration.

44. Section 5 of the Arbitration and Conciliation Act provides that "*A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds — that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*"

45. In my judgment, the proper interpretation of the law is that the defendant should have filed a defence, a party raises the issue of the arbitration clause and the parties are given an opportunity to be heard before a judge or magistrate exercises his or her discretion to refer the case back to arbitration. In the instant case, the above procedure was not followed as there was no defence on record. This court has already held that there was no proper service on the Applicant. Therefore, the default judgment and decree were improperly obtained.

46. Pursuant to the foregoing, I find that the Applicant has adduced sufficient evidence to warrant setting aside the default judgment and decree. Therefore, the application is allowed and I order:

(a) that the default judgment and the decree entered in Civil Suit No. 71 of 2019 be hereby set aside;

(b) for stay of execution of the decree in Civil Suit No. 71 of 2019;

(c) the Applicant to file his written statement of defence in Civil Suit No. 71 of 2019 within 15 days from the date of this ruling;

(d) each party to bear their own costs of this application.

I so rule and order accordingly.

This ruling is delivered this ....24th.... day of ....July.... 2023 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Kyamanywa Edward Cooper from M/s Kyamanywa Kasozi & Co. Advocates, for the Applicant;

(2)Ms. Pauline Nakavuma, the Court Clerk.