



### **Grounds of the Application:**

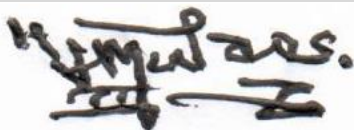
The Application was supported by the affidavits of the applicants which were to the same effect that:

1. That they were never served with Summons in Civil Suit No. 082 of 2022  
5 and only got to know of the suit when they were served with a notice to show cause why execution should not issue against them. That the affidavit of service attached is false and was intended to mislead court.
2. That the photo attached on the affidavit of service of Mr. Boneface Birungi  
10 in respect of the 1<sup>st</sup> applicant relates to a different matter (supply agreement) and was handled in the office of Mr. Musinguzi Davis a court bailiff based in Kasese and that is why it has only his picture and that of Mr. Musinguzi. That for the 2<sup>nd</sup> Applicant he has never seen a one Boneface Birungi and the photo attached of him was taken some time back.
3. That the Respondent is not a money lender and as such he cannot charge the  
15 exorbitant interest of 18% per month and as such the same is illegal. That the security mentioned in the agreement is family land and that the 1<sup>st</sup> Applicant has never borrowed any money from the Respondent.
4. That the Applicant shall suffer grave injustice if the application was denied.  
20 That they were denied the right to be heard and as such it is just and equitable that this application is allowed.

### **Reply of the Respondent:**

The Application was opposed by the Respondent through the affidavit in reply where he contended as follows:

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1. That the Applicants were served with Court Process per the affidavit of Service deponed by Mr. Bonefance Birungi, a court process server. That the affidavit details the manner of service and the photos of the Applicants when they were served with court process.
- 5 2. That the documents served were summons and not the agreement alluded to. That the Applicant's application therefore is premised on an affidavit which is false and thus the same should be disallowed.

**Representation and Hearing:**

10 *Mr. Mishelle Geofrey of M/s Bagyenda & Co. Advocates* represented the Applicants while *Mr. Timothy Atuheire of M/s Atuheire & Co. Advocates* represented the Respondents. A schedule to file submissions was issued by court and only the Applicants complied.

**Issues:**

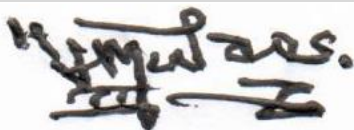
- 15 1. **Whether the Applicants were served with court process in Civil Suit No. 82 of 2021.**
2. **Whether or not the default judgment in Civil Suit No. 082 of 2022 should be set aside and leave granted to the Applicants to defend the suit.**

**CONSIDERATION OF THE APPLICATION:**

- 20 1. **Whether the Applicants were served with court process in Civil Suit No. 82 of 2021.**

Order 36 rule 3(1) and (2) of the Civil Procedure Rules S.I 71 provides that:

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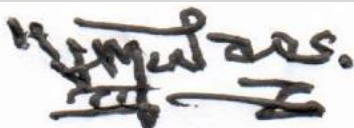


(1) Upon the filing of an endorsed plaint and an affidavit as is provided in rule 2 of this Order, the court shall cause to be served upon the defendant a summons in Form 4 of Appendix A of these Rules, or in such other form as may be prescribed, and the defendant shall not appear and defend the suit except upon applying for and obtaining leave from the court.

(2) In default of the application by the defendant or by any of the defendants (if more than one) within the period fixed by the summons served upon him or her, the plaintiff shall be entitled to a decree for an amount not exceeding the sum claimed in the plaint, together with interest, if any, or for the recovery of the land (with or without mesne profits), as the case may be, and costs against the defendant or such of the defendants as have failed to apply for leave to appear and defend the suit.

The manner of service of court summons is provided for under Order 5 of the Civil Procedure Rules. Rule 2 of order 5 is to the effect that every summons issued must be served within 21 days from the date of issue by court. Rule 4 provides that a defendant to whom a summons has been issued against, must be served in person or through a recognized agent or a duly recognized advocate. It is settled law that personal service is the most effective form of service. This is emphasized under Rule 10 which to the effect 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.”***

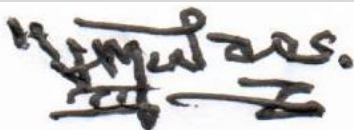
Evidence of service is by way of an affidavit of service. This is provided for under Rule 16 of Order 5 which provides that: ***The serving officer shall, in all cases in***



5 *which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons.*

10 In the present case, Mr. Boniface Birungi a court clerk attached to this court effected service of court summons upon the Applicants and filed an affidavit of service on 11<sup>th</sup> January 2023 stating that: *“That on the 28<sup>th</sup> day of December 2022, I proceeded to Kasese town, linked up with the plaintiff and the plaintiff contacted the 1<sup>st</sup> defendant on Tel Phone No. 0784782274 who arranged that we should meet at Musinguzi associates a baliff’s office in Kasese. That we eventually met with the 1<sup>st</sup> defendant at Musinguzi associates a bailiff’s office in Kasese, explained to him the reasons for meeting up with him which was service of summons in a suit for Civil Suit No. 82 of 2022 upon him. That while in office, I handed over the said documents to the 1<sup>st</sup> defendant, received but refused to acknowledge receipt by endorsing on my return copy. (Attached hereto is the photo while handling the summons attached with the plaint)”*

20 The 1<sup>st</sup> applicant denies receiving the summons and claimed that the photos related to a different occasion. The Process Server deponed that he took a picture while the 1<sup>st</sup> Applicant was looking at the pleadings served upon him. The colored picture attached to the affidavit of service clearly indicates that the documents the 1<sup>st</sup> applicant was reading were summons. I believe that the applicant was duly served with court process in Civil Suit No. 82 of 2022.



For service upon the 2<sup>nd</sup> Applicant, the process server stated thus: *“That upon service of the 1<sup>st</sup> Defendant I proceeded to the 2<sup>nd</sup> Defendant’s address in kidodo with the help of the plaintiff, who identified the 2<sup>nd</sup> defendant for me while at his home. That I explained to him the reason for my visit which was service of*  
5 *Summons in summary suit for Civil Suit No. 82 of 2022 upon him. That I handed over the said documents to him, received the same and he acknowledged receipt by endorsing on my return copy. (Attached hereto is the photo while signing the same and the copy he acknowledged receipt).”*

10 The above extract clearly shows the manner in which the 2<sup>nd</sup> Applicant was served. There is a colored photo attached to the affidavit of service which clearly shows that the documents the 2<sup>nd</sup> Applicant was signing were Court summons. I believe the evidence of the process server and find that the 2<sup>nd</sup> Applicant was duly served with Summons in Civil Suit No. 080 of 2022.

15 I reject the claims of the applicants in their affidavits that they were never served with Summons in Civil Suit No. 082 of 2022 as false and exclude and sever those claims from my consideration (**Rtd Col. Dr. Kiiza Besigye Vs. Electoral Commission and Yoweri Kaguta Museveni, Election Petition No. 1 of 2006**  
20 **[2007] UGSC 24 (30 January 2007); Baryaija Julius Vs Kikwisire Zaverio & Anor, Court of Appeal Civil Application No. 324 of 2016).**

25 **2. Whether or not the default judgment in Civil Suit No. 082 of 2022 should be set aside and leave granted to the Applicants to defend the suit.**

Order 36 rule 11 of the Civil Procedure Rules provides that:

**11. Setting aside decree.**

*After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, 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.*

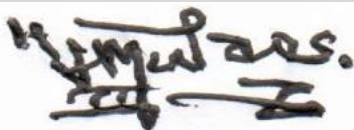
10 Mulenga JSC (as he was) in Geoffrey Gatete & Another vs. William Kyobe, SCCA No. 7 of 2005, stated that: “...*Apart from ineffective Service of summons, what the courts have consistently held to amount to good cause is evidence that the defendant has a triable defence to the suit*” The Judge further observed that: “*In either case, however, the court should grant leave only if it seems to it reasonable to do so. O.36 r. 11, gives the court very wide discretion to grant leave if is satisfied – (a) either that service of the summons was not effective; or that there is any other good cause.... I should stress that in an application for leave to appear and defend a summary suit, the court is not required to determine the merits of the suit. The purpose of the application is not to prove the applicant’s*

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20 *defence to the suit but to ask for opportunity to prove it through a trial. What the court has to determine is whether the defendant has shown good cause to be given leave to defend.*”

In this case the Respondent / plaintiff filed a suit for recovery of Ugx 240,000,000/= and costs of the suit. In the particulars of the claim, he averred that;

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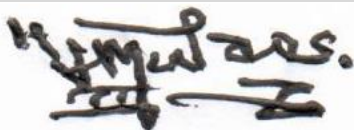


5 *“The defendant on the day of 31<sup>st</sup>/01/2022 entered into a loan agreement with the defendants for Ugx 86,920/= which has accumulated interest to the tune of Ugx 240,000,000/= it being subjected to an interest of 18% per month which was given to him on the execution of the agreement. (A copy of the loan agreement is hereto attached and marked annexure A). That the defendants have deliberately refused to pay the subject matter of the said loan without any justifiable reasons hence the suit.”*

10 The Applicants contended that the agreement relied upon by the Respondent as the basis of his claim was illegal. That it was not known to them. Secondly that it contained a clause on interest yet private individuals are not allowed to charge interest. Further, that even if they were the percentage was too high.

15 At this stage I cannot delve into the merits of the case. I believe the claims of each party require the court to subject the matter to trial on the merits. I believe there is justifiable cause to set aside the decree in Civil Suit No. 80 of 2022 and have the case heard on the merits inter-party. This application succeeds with the following orders:

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- 1. That the default judgment and Decree in Civil Suit No. 080 of 2022 is hereby set aside.**
  - 2. That the Applicants are hereby granted leave to appear and defend Civil Suit No. 082 of 2022.**
  - 3. That the Applicants shall file and serve their defense within 10 days**
- 25 **from the date of delivery of this ruling.**

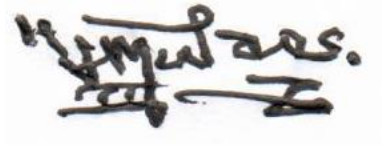




4. That a reply to the Written Statement of Defense shall be filed with 5 days after service.
5. The applicants shall pay the costs of this Application to the Respondent.
6. The case is accordingly fixed for mention on 28<sup>th</sup> August 2023.

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It is so ordered.



Vincent Wagona

**High Court Judge**

10 **FORT-PORTAL**

**DATE: 24/8/23**

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