THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)

MISCELLEANOUS APPLICATION NO. 763 OF 2016

(ARISING FROM EMA NO. 235 OF 2016)
(ARISING FROM CIVIL SUIT NO. 999 OF 2015)

MUGISHA BONIFACE ……..…….… APPLICANT

VERSUS

HAMWE INVESTMENTS LTD ……RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application made under 0.22 rr 23 91) and 89 C.P.R and S.98 C.P.A, the Applicant sought orders of this court staying warrant of arrest issued in HCT EMA 235/2016, pending the determination of Miscellenous Application No. 273/16 of Mengo Court.

Costs of the application were also applied for.

The grounds for the application are that:-

1) On 15.04.16, the Applicant was arrested by warrant of arrest issued by this court in Civil Suit 999/2015.
2) The Applicant has since filed an application for setting aside the decree, applied for leave to file a defence and to have the matter heard on the ground that he was never served with court process.
3) The Applicant has a plausible defence to the claim and the application before the Trial Court has a high likelihood of success.
4) The application has been made without inordinate delay and if Applicant is arrested, the application before the trial court will be rendered nugatory.

The application is supported by the affidavit of the Applicant.

There is an affidavit in reply deponed by Irene Rebecca Nassuna, Advocate.

When the application was called for hearing on 22.06.16, Counsel for the Respondent raised a preliminary objection which court decided to make an issue within the application.

Counsel for the Applicant then went through the provisions under which this application is made and the grounds thereof emphasizing that the Applicant has applied to set aside judgment of the lower court as he was not served with the summons. Referred to paragraph 6 and 7 of the supporting affidavit disputing place of residence and signature acknowledging receipt.

Further that no moneys are owed to the Respondent who is a money lender and that the whole process was marred by irregularities and therefore Applicant deserves a chance to have the application before the trial court determined.

In response, Counsel for the Respondent submitted that, the applicant had no right to amend and there is no provision allowing him to amend summons. That if he proceeded under 0.6 r 9-21 C.P.R, the Applicant ought to have sought leave of court to amend under 0.6 r 20 C.P.R.

Further that the amendment ought to have been done within fourteen days of filing of affidavit in reply. The affidavit in reply was filed on 17.05.16 and the amended summons were filed on 08.06.16 that is twenty two days after.

The Applicant having been out of time ought to have sought court's leave to amend.

Since there is already an application pending before this court, Applicant was barred by S.6 C.P.R to file second application without leave of court.

The prayer by Counsel for the Applicant to construe the two as one and the same is in untenable in law. And if, Applicant amended application, then he is bound to follow the amended chamber summons.

It was then prayed that the amended chamber summons be struck out.

Thereafter, Counsel opposed the application referring to the affidavit in reply paragraph 5 where it is alleged that, the Applicant acknowledged receipt of the summons and was therefore aware of the matter.

Further that by failing to return to Court, the Applicant was in contempt of court orders.

There is no application attached to the Applicant's application and therefore the existence of an application at Mengo is doubtable.

Also that, the Applicant has no plausible defence since he committed to pay the amount indicated and the claim that he has paid is not true.

It was also the assertion of Counsel that, the application before Mengo Court has no chance of success as the alleged non-service of summons is disputed. It was insisted that the Applicant was served but did not respond.

Pointing out that, the Respondent obtained judgment following clear procedure of law and contending that the application is intended to delay the Respondent from realizing the fruits of its judgment.

It was submitted that, it is not in the interests of justice to grant this application.

It was prayed that the application be dismissed and the amended chamber summons struck off the record and the costs be met by the Applicant.

In rejoinder, Counsel for the Applicant pointed out that leave to amend was granted by court on 24.05.16, when the application was adjourned to 08.06.16.

On 08.06.16, the amended summons was filed in court and the date of 22.06.16 was fixed for hearing. Therefore, Counsel argued, the objection that there was no leave to amend was based on failure of the Respondents to upraise themselves of the court record.

Commenting about the affidavit in reply by one Issa Bukenya, it was argued that there is no one on court record bearing that name and there is no affidavit of service deponed by such a person. The affidavit of 07.04.16 on court record is deponed by Simon Bukenya. It refers to the Judgment Creditors Manager but does not say Manager and does not disclose the purported phone number.

It refers to a notice to show cause issued by the Deputy Registrar on 29.03.16 but the notice to show cause attached is dated 26.02.16 and the Defendant in the matter was Mugisha David. Counsel argued that the deponent could have been mistaken to refer to Mugisha David as Mugisha Boniface.

The affidavit of Ariko Daniel and Siman Bukenya refer to the Applicant refusing to acknowledge receipt. And court was referred to the record of 15.04.16 when the Applicant was arrested and maintained that he did not know of the court proceedings.

Counsel asserted that the affidavit in reply proves there was no service as it is alleged that the Applicant committed to pay on 19.09.15, however, the suit was filed on 20.08.15. That this raises issues as to whether there was commitment or consent.

Earlier prayers were maintained.

Counsel for the Respondent insisted that for leave to amend to be granted, it is very clear that under 0.6r31 CPR, the application has to be by summons in chambers. That there was no such application filed in the present case and none was never served on the Respondent and they are therefore not aware of any order granting leave to amend the summons.

He reiterated earlier prayers.

In determining this application, court will begin with the **issue of amendment raised by Counsel for the Respondent.**

The record indicates that a chamber summons was filed by the Applicant on 26.04.16. It was fixed for hearing on 24.05.16 at 9.am.

On that date, Counsel for the Applicant appeared, however, the parties and Counsel for the Respondent were absent.

Counsel for the Applicant then applied for adjournment for ten days to enable him amend the application to include stay of execution.

Court allowed the application and adjourned the matter to 08.06.16, with orders to the Applicant to serve the Respondent.

The amended chamber summons was filed on 08.06.16, was signed by the Registrar on 20.06.16 and affidavit in reply was filed on 24.06.16.

While there was no written application for amendment, this court finds that the Respondent, who was given a chance to respond, thereto could not have been prejudiced by the amendment. Further the amendment was allowed by court, although it was not specifically stated so.

By allowing the adjournment to enable Applicant file amendment and ordering service of the Respondent, the court had allowed the proposed amendment. – Refer to **S.33 of the Judicature Act**.

The section enjoins 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 of matter is entitled to…. 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."***

In allowing the amendment without any written application being made, court also took into account the principle established by decided cases that ***"rules of procedure were meant to be hand maidens of justice and not to defeat it."***

The application to amend was allowed by court. The amended chamber summons was served on the Respondent who was able to file a reply thereto.

The preliminary objection is accordingly overruled for those reasons.

Court now goes ahead to determine **whether stay of execution should be granted and the warrant of arrest recalled**.

The following conditions have to be satisfied for a party to obtain stay of execution.

1) Substantial loss may result unless the order of stay is made.

2) The application was made without unreasonable delay, and

3) Security for costs has been given by the Applicant.

Courts have established that ***"substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal."*** – See **Tropical Commodities Supplies Ltd and Others vs. International Credit Bank Ltd (in Liquidation) [2004] 2EA 331.**

In the present case, the case arises out of money that the Respondent alleges to have lent to the Applicant.

Judgment was entered against the Applicant on the ground that he had failed to file a defence although the Respondent contends that Applicant was served and he acknowledged receipt of summons.

The Applicant asserts on the other hand that he was never served, as the place mentioned is not his residence. Further that he has a plausible defence and the application before the trial court has a high likelihood of success.

Alleged lack of service and existence of an application to set aside exparte judgment would normally amount to sufficient cause for stay of execution. However, looking at the Miscellenous Application purportedly filed by the Applicant on 19.04.2016, when fees were seemingly paid, it does not have a court stamp acknowledging filing of the same. It has no date as to when it will be heard. It was also not dated by Counsel for the Applicant and has never been signed by the Magistrate. This raises doubt as to whether there is actually an application pending before the lower court.

The principle established by courts is that ***"for an application to be valid, it should be fixed, signed and sealed by the court."*** – Refer to the case of **Hussein Badda vs. Iganga District Land Board and Others Miscellenous Application 478/2011** arising from **Civil Suit 166/2011**. - Justice Zehurkize.

The record also indicates that on 15.04.16, when the Applicant was brought to court on warrant of arrest, he was released on the undertaking of his Counsel that, he would re-appear in court on 18.04.16 at 10am. But there is no record of what transpired on 18.04.16, an indication that the Applicant never returned to court as undertaken, instead the alleged application before Mengo Court was purportedly filed on 19.04.16 and the present application was filed on 26.04.16.

In the circumstances, this court finds that the applicant has not established sufficient cause for stay of execution.

Further, there is no indication that the refusal to grant a stay is likely to cause substantial and irreparable injury or loss to the Applicant or that the loss or injury if any cannot be atoned for by damages.

The Respondent is a Limited Liability Company and in the unlikely case of the Applicant overturning the decree, the Respondent will pay back the money.

The application is accordingly disallowed with costs to the Respondent.

FLAVIA SENOGA ANGLIN
JUDGE
14.03.16