

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 0301 OF 2015

ARISING OUT OF CIVIL SUIT NO. 0399 OF 2015

V:..... APPLICANT

VERSUS

alias SUSAN MIJJUMBI:..... RESPONDENT

FOR: HON. MR JUSTICE BASHAIJA K. ANDREW

RULING.

- (a) the ex parte judgment and decree in HCCS No. 054 of 2014 be set aside; and*
- (b) costs of this application be provided for.*

The Respondent opposed application. In the affidavit in reply sworn by Victo Kasimbi the holder of a Powers of Attorney of the Respondent, and in another affidavit of Wamani Robinson a court
25 Process Server, the Respondent contends that she filed *HCCS No. 054 of 2014* where upon the Applicant was duly served by Wamani Robinson. That the Applicant failed to comply with court summons and later substituted service was issued and the summons advertised in the *Daily Monitor* newspaper. That at the lapse of the period set in the summons the matter proceeded *ex parte* against the Applicant and judgment was entered in favor of the Respondent. That a decree
30 was extracted and execution commenced. Pursuant to the decree the Commissioner for Land Registration put notices in the Gazette for the issuance of a special certificate of title for the suit land which was later issued to the Respondent. That the Respondent has since sold the suit land to a third party and therefore has no interest in the land any more. That owing to these facts, the application is redundant and it should be dismissed with costs.

35 Counsel for the Applicant based on the Applicant's depositions and submitted that the Applicant was never served with summons and that the phone records that the Respondent presented to court to obtain the *ex parte* judgment were falsely stated or adduced in court. Further, that the Applicant managed to extract a phone record from MTN to prove that he has never received any phone call from the Respondent's Advocate's Law firm calling him for service. Counsel applied
40 in court to adduce the evidence of the phone record from MTN but this could not be granted as it was simply submission of the evidence from the bar. Counsel for the applicant maintained that the substituted service was not proper service as it was issued by court basing on falsehoods by the Respondent.

In reply counsel for the Respondent submitted that according to Wamani Robinson's affidavit, he
45 called the Applicant on his registered mobile phone number to effect service of summons on
him, and that the Applicant promised to respond but never did so. The application for substituted
service was filed for which an order was granted. The summons was advertised in the *Daily
Monitor* newspaper of 28/04/2014. Counsel cited Order 5 r.18 (2) CPR which provides that
substituted service shall be as effectual as if it had been made on the defendant personally.
50 Counsel submitted that when the days for filing a defence lapsed, the court entered a default
judgment and the Respondent proceeded *ex parte* and formally proved her case. Counsel further
noted that court confirmed that the Applicant was properly served with the summons and
proceeded to hear and determine the case and rendered its judgment.

Counsel for the Respondent also submitted that a decree was extracted and the Commissioner
55 Land Registration processed a special certificate of title which was granted to the Respondent in
execution of the decree in July, 2015. That the Respondent has since sold the suit land to a third
party before this application was brought to her attention. Counsel argued that the order sought
by the Applicant is merely redundant and moot since the land in issue has been sold. For this
proposition counsel relied on the case of ***Kampala Capital City Authority vs. Ddamulira Musa
60 & 6 Others HCCS No.568 of 2014.***,

In rejoinder counsel for the Applicant submitted that the application if granted would not be in
vain since the vendor of the suit land is resident in the USA and the Applicant is in possession of
the duplicate certificate of title. Further, that the falsehoods of the Respondent's agents should
not be allowed by this court to go unpunished.

65 ***Issues:***

1: Whether there was effective service of summons on the Applicant.

2. Whether the Applicant has shown sufficient cause to warrant setting aside of the ex parte judgment.

3. What are the remedies available to the parties?

70 **Resolution of the Issues:**

1: Whether there was effective service of summons on the Applicant.

Order 9 r. 12 CPR which provides for setting aside of *ex parte* judgments states as follows;

75 ***“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.”***

Further, rule 27 (supra) which provides for setting aside *ex parte* decrees against the defendants states as follows;

80 ***“In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the 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, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall***
85 ***appoint a day for proceeding with the suit; except that where the decree is of such a***

nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.”

The Respondent herein filed *HCCS No. 54 of 2014* against the Applicant. In the judgment delivered by court on 15/10/2014, at page 2, the court noted that;

90 ***“...The defendant was served with the summons to file a defence but he declined the service. This prompted the plaintiff to take out substituted service, and after the stipulated period of service had expired without the defendant filing his defence, court proceeded under Order 9 r. 10 CPR as if the defendant had filed a defence and the matter was then set down for hearing.”***

95 According to the affidavit of by Wamani Robinson the Process Server, he states that he obtained the summons from court and the Applicant’s mobile number from the Respondent. That he tried to get in touch with the Applicant through phone calls but in vain. Further, that he called the Applicant on 12/02/2014 and informed him of the court summons but that the Applicant told him he was in Jinja and promised to call back the following day to receive the summons. That on
100 13/02/2014 after the Applicant had failed to call him back, Wamani Robinson called him on his MTN mobile phone number but discovered that he was blocked because the calls were dropped. Robinson then used his AIRTEL mobile phone to call the Applicant who answered the call but eventually hang up after realizing it was the Process Server and then completely switched off the phone. The Respondent also adduced evidence of the orders for the call data information from
105 MTN and AIRTEL telephone operators.

In my considered view, the Respondent was sufficiently diligent in trying to find the Applicant. The Respondent has ably demonstrated through the evidence of Wamani Robinson that she tried

to get a hold of the Applicant in order to effect personal service upon him with the summons but all in vain. This evidence was not rebutted by the Applicant in his affidavit in rejoinder.

110 Therefore, the contention by counsel for the Applicant that the phone records that the Respondents presented to court to get the *ex parte* judgment were falsely stated was never supported by any evidence. It was merely evidence from the bar.

It is noted that despite counsel for the Applicant alleging that he had an extract of the phone record from MTN to prove that the Applicant has never received a phone call from the
115 Respondent's Advocate's Law Firm calling him for service of summons failed to properly adduce it in evidence. Therefore the substituted service issued by court was effective service under Order 5 r.18 (2) CPR. *Issue No.1* is answered in the affirmative.

Issue No. 2: Whether the Applicant has shown sufficient cause to warrant setting aside of the ex parte judgment.

120 In the case of *S. Kyobe Senyange vs. Naks Ltd (1980) HCB 31*, Odoki J (as he then was) held that;

“...before setting aside an ex parte judgment the court has to be satisfied that not only that the defendant had some reasonable excuse for failing to appear but also that there is merit in the defence case.”

125 As already found under *Issue No.1* above, the Applicant simply could not show cause as to why he never responded to the summons. He only tried to give unconvincing excuses of why he failed to appear. He miserably failed to show that he was not duly served.

On whether there is merit in the defence if filed, it is also important to note that the Respondent obtained a judgment and extracted a decree which was executed. Pursuant to the decree the
130 Commissioner Land Registration processed a special certificate of title that was granted to the Respondent. The Respondent sold the land the subject of the suit to one Ivan Kivumbi Basajjabalaba under sale agreement dated 20/07/2016. Although the application was filed on 26/03/2015, it was not brought to the attention of the Respondent until 11/10/2016 after she had disposed of the suit land. Therefore, even if the court were to set aside the *ex parte* judgment and
135 decree and allow the defendant to file his defence in the main suit, the defence would be rendered useless as the subject matter of the suit has been overtaken by events having been sold to a third party. In the event that an order is issued decreeing the suit land to the defendant, it would be incapable of being enforced without occasioning undue hardship to third parties.

In the case of ***Kampala Capital City Authority vs. Ddamulira Musa & 6 O'rs*** (supra) it was held,
140 inter alia, that a court will normally not issue orders where it appears to the court that it may not be able to effectively enforce those orders. Court will issue orders only where it is satisfied that the orders are capable of being complied with. The rationale was stated in the cases of ***Housing Finance Bank Ltd & Another vs. Edward Musisi, CACA No.158 of 2010***; and ***Wildlife Lodges Ltd vs. County Council of Narok & Another, [2005]2 EA 344 (HCK)***; that court orders are not;
145 and should not be issued in vain. *Issue No.2* is therefore answered in the negative.

Issue No.3: What remedies are available to the parties?

Having answered *Issue No.1* in the affirmative and *Issue No.2* in the negative, this application is misconceived and it is wholly dismissed with costs to the Respondent.

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BASHAIJA K, ANDREW

JUDGE

15/02/2017

Mr. Babu Rashid Counsel for the Respondent present.

Bakaluba Fred Counsel for the Applicant present.

155 Applicant present.

Mr. Godfrey Tumwikirize Court Clerk present.

Ruling read in open Court.

BASHAIJA K, ANDREW

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JUDGE

15/02/2017

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