

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1909 OF 2022

(Arising out of Civil Suit No.1101 of 2021)

SULADEV FINANCE SOLUTIONS LIMITED:::::::::::::::::::::::::APPLICANT

VERSUS

1. MUNANIRO MUHAMED

**2. NAKAWESA SAFINA *(Administrators of
the estate of the late ZAWEDDE***

***ZIKULA)*:::::::::::::::::::::::::RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicant by way of notice of motion brought this application under the provisions of **Section 98 of the Civil Procedure Act cap.71, and Order 9 rule 27, & Order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1** seeking orders that the *ex-parte* decree issued in **Civil Suit No.1101 of 2022** be set aside and that the execution of the court orders issued in the *ex-parte* judgment be stayed pending the hearing and determination of the main suit. It further seeks an order that the applicant be allowed to file her defence, and the matter be tried inter party on its merits, and that the costs of the application be provided for.

Grounds of the application

The grounds upon which the application is based are contained in the affidavit in support **Mr. Ssempijja Davis**, a director of the applicant company. He states that the applicant is the registered owner of land comprised in **Block**



60 plots 543 & 544 land at Nampunge and Kalwe having acquired the same from a one Kyeyune Gideon Lwanga.

That unknown to the applicant, the respondent filed **Civil Suit No. 1101 of 2021** against the applicant who was never served with court process, and that as a result of non-service of court process on the applicant, and her general lack of knowledge of the existence of the said suit, the applicant was unable to file her defence, or appear to defend the suit against her when it came up for hearing.

That the applicant only learnt of the *ex-parte* judgment and decree on 9th November 2022 from counsel Okecha of **m/s Okeche Baryanga & co. advocates** the lawyer representing **m/s Asia Construction**, a company that also claims an interest in the suit land, and that it is when the deponent went to counsel's office to find a way of sorting the issues out that he was informed of the existence of a judgement and decree in the suit.

Additionally, that upon conducting a search at the court registry, the deponent established that the main suit was filed and conducted *ex-parte* without effecting service on the applicant who has since discovered that instead of effecting service on the applicant in an ordinary way, the respondents instead chose to apply, and secure an order to effect service of on the applicant by way of substituted service by advertising the summons to file a defence in the newspaper.

Further, that the applicant never became aware of the summons despite the fact that the summons to file a defence were advertised in the newspaper since the applicant's officers never saw or learnt of the said advert, and that since none of the applicant's officers saw or learnt of the summons, that was advertised in the newspapers, the same was never effective in informing the applicant of the existence of the suit against her, she was condemned without being heard yet the suit involves ownership of land measuring approximately 20 acres which is registered in her name.

That even when the matter came up for hearing, the applicant was prevented by sufficient cause to appear and defend the suit since she was not aware of

the hearing date, and that there is a subsisting threat of execution if no order to stay the same is granted since the respondents have since extracted a decree and served the same on the office of land registration asking the Registrar of titles to effect changes on the register.

- 5 From the record, the respondent did not file an affidavit in reply to oppose this application and yet the affidavit in reply on record was sworn opposing **Miscellaneous Application No.1910 of 2022**, an application by the applicant seeking an interim stay of execution of the orders of this court, pending the determination of this application.
- 10 There is also no evidence to show that the applicant was ever served with the affidavit in reply opposing this application, within the timelines set by this court. Similarly, the affidavit in rejoinder filed by the applicant is in respect of **Miscellaneous Application No.1910 of 2022**.

In the circumstances, this court is inclined to determine this application without considering the affidavit in reply as well as the rejoinder on record.

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Representation:

The applicant was represented by **M/s Maven Advocates** while the respondents were represented by **M/s Nabukenya Mulalira & Co. Advocates**. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

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Consideration by court:

I have carefully read and considered the pleadings, evidence and submissions of both counsel, the details of which are on the court record and the details of which I have taken under consideration in determining whether or not the application discloses sufficient cause warranting the setting aside of the judgment of this court.

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The law:

Order 9 rule 27 of the Civil Procedure Rules SI 71-1 lays down the procedure for setting aside an ex parte judgment. It provides thus:

“...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 aside; and if he or she satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient means from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs

The nature of this application requires the applicant to demonstrate that he or she was not duly served with summons and/or to furnish sufficient cause to set aside the judgment of the court.

10 The duty of this court as rightly pointed out by counsel for the applicant in his written submissions is to therefore investigate and also make a finding as to whether the applicant was duly served.

In the instant case, the ground set forth by the applicant seeking to set aside the judgment of this court is that the applicant was never served with court process and therefore he was never made aware of the proceedings against it.

15 Counsel for the applicant in his submissions posed the question of whether there was due diligence done to serve court process in the ordinary way before the application for substituted service was made.

He argued that there was no failure to effect service of court process on the applicant as alleged in the affidavit in support of the application for substituted service deposed by **Mr. Ronald Muteesa** who alleged that on 30th November 2021, he went to the National theatre where he met a one Vicent Kabanda, one of the officials managing the National Theatre who told him that the applicant did not operate from there and that he did not know the directors of the applicant company.

25 That it has since been established that the said Vincent Kabanda has not worked with the National Theatre for over 5 years, there was no effort to serve the applicant as alleged in the affidavit and that the order for substituted service was secured out of deliberate falsehoods, deceit because there was no failure to effect service on the applicant in the ordinary way owing to the fact that no due diligence or effort was made to do so.



Secondly, counsel for the applicant further argued that the substituted service relied upon to allow the main suit was not effective in informing the applicant of the existence of the suit so as to enable her file her defence or enter appearance when the case was called for hearing.

- 5 Citing the celebrated authority of **Geoffrey Gateete vs William Kyobe Supreme Court Civil Appeal No. 07 of 2005** he argued that substituted service becomes effective when the other party does not become aware of the publication of the hearing notices or summons.

10 Counsel additionally submitted that according to the applicant's affidavit in support, the applicant became aware of the existence of the suit and only got to know of its existence on 9th November 2022 from Okecha Micheal, **M/s Africa Asia Construction Ltd's** lawyer.

15 It is settled law that substituted service is a recognized mode of service of process in accordance with **Order 5 rules 18(1) of the Civil Procedure Rules**. It is specifically provided in **sub rule (2) of rule 18** that substituted service under an order of court shall be effectual as if it had been made on the defendant personally. **See: Franco Mugumya Vs Total (U) Ltd Misc. Application No.28/ 13 (unreported)**

20 In light of the above authorities, it is the view of this court that substituted service is effectual contrary to counsel for the applicant's argument that the same is not. More pertinent however is the question whether or not due diligence was done before the application for substituted service was made.

25 In the case of **Rwabuganda Godfrey vs Bitamissi Namudu Court of Appeal Civil Appeal No.87 of 2010**, the Court of Appeal quoting the case of **Geoffrey Gateete (supra)** stated that a party to a suit cannot be denied his constitutional right to be heard only on account that summons was effected upon him by way of substituted service. Court further stated that this was the gist of the holding in that case.

30 In the present case, the applicant was served through substituted service after the respondents herein failed to effect service on him through the ordinary

way. The respondents then obtained an order of substituted service which was granted by this court.

According to the affidavit in support of **Miscellaneous Application No.2334 of 2021** (by which order for substituted service was granted) deponed by Mr.

5 Munaningo Muhammad clearly stated that he did not know Mr. Kyeyune Gideon Lwanga who is the director of the applicant company and that he did not even know his whereabouts, residence, place of work or the applicant's registered offices.

He also stated at *paragraph 9* that neither the said Kyeyune Gideon or any of
10 the agents of the applicant herein had ever gone to the suit land to either open boundaries of the suit land or even lay claim to it.

The respondents herein also filed an additional affidavit in support of the application for orders of substituted service deponed by **Mr. Ronald Muteesa** a court process server attached to **m/s Lubega Matovu & Co. Advocates** who
15 stated that he had conducted a search at the Uganda Registration Services Bureau from where he established the names of the applicant's directors to wit; Ssempiija Davis & Ssemakula Sulait. To this end, he attached a copy of form 20 showing the particulars of the directors marked **Annexure 'B'**.

He further averred in that application that upon failing to get information on
20 the people that executed the said document, he realized that he could not serve them in the ordinary way and that he reported to Mr. A. Lubega who advised him to go to National Theatre which were registered as the company offices so as to serve the company.

Upon reaching National Theatre was informed by a one Kabanda Vincent who
25 claimed to be in official management of the premises. He informed him that the company did not operate from the premises and that its directors were unknown to him.

Decision of court:

The order for substituted service was based on the claim that due diligence
30 had been done to locate the applicant company and its directors. **Mulenga**



JSC (RIP) in Geoffrey Gatete and Angela Maria Nakigonya Vs William Kyobe S.C. C.A No. 7 of 2005 stated that the words “effective service” means having the desired effect of making the defendant aware of the summons.

In this case the service was not effective since none of the applicant’s agents or directors were made aware of the proceedings against them. The respondents herein relied on misinformation and falsehoods which supported the order for substituted service.

This constitutes sufficient ground to set aside the *ex-parte* decree and judgment entered against the applicant company.

Administration of justice demands that the matters in dispute be heard *inter partes*. Equally important is the acknowledgment by this court of the fact that the right to be heard is guaranteed under the Constitution of Uganda.

Based on all the above considerations, this application is accordingly allowed.

Since however the land which is the subject of the main suit falls within the jurisdiction of the High Court of Luwero, the main suit is transferred to the High Court of Luwero. Accordingly, **MA No. 1910 of 2022** is overtaken by events.

No orders as to costs.

I so order.

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Alexandra Nkonge Rugadya

Judge

29th March, 2023.

Delivered by mail
Alexandra Nkonge Rugadya
29/3/2023