

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

MISC. CIVIL APPLICATION NO. 47 OF 2008

(From H.C.C.S NO. 94 of 2006)

ROSE TUMWIKIRIZE:::::::::::::::::::::::::::::::::APPLICANT/DEFENDANT

VERSUS

TUKWATANISE DEVELOPMENT

ASSOCIATION LTD:::::::::::::::::::::::::::::::::RESPONDENT/PLAINTIFF

BEFORE HON MR. JUSTICE J.W. KWESIGA

RULING

This application by Notice of Motion was brought under Orders 36 rule 11 and 52 rule 1 of Civil Procedure rules seeking;

- (a) Stay of execution and setting aside the decree entered against the Applicant in default of entering a defence in the main suit. The Application's grounds in the Notice of Motion and the supporting affidavit is that the Applicant/Defendant was never served with the summons requiring her to file a defence and that she was further never served with notice of Taxation hearing before the final decree was issued and she was eventually arrested as a Judgment debtor in execution of the decree.

The record shows this application was filed as far back as 19th August, 2008 at Mbarara High Court Registry and the Applicants' efforts to obtain a hearing date, for various reasons, did not materialise. The hearing commenced on 25th November, 2011 when this file was transferred to this New High Court Circuit of Kabale which covers Rukungiri where the cause of action arose.

The background of this case is that on 4th September, 2006 the plaintiff sued the Defendant/Applicant to recover Shs. 5,693,324/= plus interest under summary suit now governed by Order 36 of Civil Procedure Rules (amended).

The Process Server filed an affidavit of service indicating she/he served the Defendant and that the Defendant refused to acknowledge service. Judgment was entered for Sh. 5,693,324/=. The same Process Server swore another affidavit that the Defendant/Applicant refused to acknowledge service of Notice of Taxation hearing. The Defendant/Applicant denies ever receiving service of any of the alleged court processes. I have examined the affidavit of service, although the process server stated that the Defendant was well known to her, she/he does not state how she came to know her to rule out mistaken identity of the person served. It is good practice, especially in the rural set-up like what is involved in this case to seek presence of a local authority of the area like LC I official to avoid the denial of service. There is need for presence of a witness that would have corroborated evidence of service. This renders the affidavit of service that lack the above particulars un reliable.

I have considered the consent signed before the Registrar of the High Court after the Judgment in default had been partly executed. For the reasons that Judgment had been entered in default, the consent order can not stand. Secondly, the consent Judgment was entered under totally involuntary circumstances and the Applicant/Defendant was not allowed to obtain legal representation. The application raises triable issues between the parties and for the above reasons this application shall succeed with the following orders:-

- (a) The Judgment and decree in Civil Suit No. 94 of 2006 dated 28th December, 2006 is hereby set aside.

(b)The Applicant/Defendant is hereby granted leave to file the written statement of Defence within 14 days from the date of this Ruling.

(c) The claim in the suit falls within the monetary jurisdiction of the Chief Magistrate's Court and it is ordered that this file shall be transferred to The Chief Magistrate's Court at Rukungiri for hearing and further management.

(d)Costs in this application shall follow the results in the main suit .

Dated at Kabale this **22nd** day of **February, 2012**.

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J.W. KWESIGA

JUDGE

Mr. Murumba for Respondent

Mr. Ngaruye for Applicant.

Parties not present.