IN THE HIGH COURT OF UGANDA
AT KAMPALA

CIVIL SUIT NO 687 OF 1971

D. MBONIGABA. ……..……RESPONDENT/PLAINTIFF

VERSUS

CH.NKINZEHIKI ……APPLICANT/DEFENDANT

11th April,1972

BEFORE: HIS LORDSHIP E.A. OTENG ESQ., - JUDGE.

RULING:

This is an application on behalf of Nkinzehiki, the Applicant/Defendant herein, to set aside a judgment of the Deputy Chief Registrar of the 11th October 1971 and the ex parte judgment and decree of this Court of the 29th January 1972, and all entered and passed in default of appearance and in the absence of a written statement of defense, and is made on the ground that Applicant/Defendant was never served with the summons: The application has been brought by Notice of Motion and is said to be made under Order 9, Rule 9 and 24 of the Rules of this Court. The application is opposed by Counsel for Mbonigaba, Respondent/Plaintiff, herein.

There was filed an affidavit of service which affidavit was dated 2nd October 1971. It is deponed by one AlIi K. Mubiru who described himself therein as a Clerk employed by M/S Patel and Patel Advocates, Kampala. In that affidavit of service the deponent swore in the only six paragraphs thereof as follows:

1) That I am a clerk employed by Messrs. Patel & Patel, of Kampala, Uganda.
2) That by the permission of this Honorable Court I received the summons issued by this Court for service upon the above-named defendant in the above suit from M/S Kayondo and Company, Advocates of Kampala, Uganda.

3) That on the 10th day of September, 1971 at about 1.30p.m. I met the defendant at Mulago Car Park, Kampala, Uganda.
4) That at the same aforesaid time and place I showed to the defendant the original summons and handed over to him the duplicate thereof with annextures thereto which he accepted.
5) That thereafter I requested the defendant to sign at the back of the original summons, which he refused in my presence and the said original summons, I now produce before this Honorable Court duly served as above.
6) That the statements made herein are true to the best of my knowledge and belief."

Apart from the formal matters usually met with in affidavits of this kind, the above was the entire contents of the affidavit of service. It can be seen that it mentions nothing of the Applicant/Defendant being known to the Depondent who had alleged to have served the summons on the Applicant/Defendant.

To that extent the affidavit of service is defective. Paragraph 3 of Form 9, Appendix A of the Rules of this Court, which is in respect as of the very kind of affidavit of service such as is under discussion, requires that the affidavit of service sworn by a Process Server, in this case, Mubiru should disclose whether or not at the time of service of the summons, the person on whom the summons was served was personally known to the Process Server. Yet Mubiru in his affidavit mentions nothing of this. This is a material and as events show, uncured defect.

Without the affidavit of service disclosing that information it may very well be that the Process Server, if he ever served anyone at all, possibly served a person he thought and was convinced was the Applicant/Defendant, although the same may be any person other than the Applicant/Defendant. As it is, it is not known whether or not the Applicant/Defendant was personally known to the Process Server.

On the other hand, if at the time the Applicant/Defendant was not personally known to Mubiru, then if Mubiru served him at all, he was pointed out either by somebody else or by the applicant/defendant himself. In either case Mubiru, in order to comply with Order 5, Rule 17 of the Rules of this Court ought to have stated the name and the address of the person so identifying the Applicant/Defendant. Also the identifying person would not only have to identify the

Applicant/Defendant, but would also have to witness the service on him, and this too would have to be disclosed in the affidavit of service on him, and this too would have to be disclosed in the affidavit of service filed under Order 5, Rule 17 of the Rules of this Court. Yet nothing of the kind is there so disclosed.

When Mulenga, Counsel for the Applicant/Defendant, therefore, points out that the Affidavit of service sworn by Mubiru on 2nd October, 1971 was defective in failing to disclose whether or not his Client had been at the time of the alleged service of summons personally known to Mubiru, he was very right. Mulenga also pointed out that to the affidavit in reply sworn by his client on 14th February 1972 to the effect that he was never served, there had been no reply.

The failure to reply to this affidavit tends to confirm the fear that Mubiru never served the summons on the Applicant/Defendant. It is to be noted that in his affidavit of 14th February 1972, the Applicant/Defendant agrees that he was twice served with Hearing Notices only for the hearing of the formal proofs. It is also clear from the record that on two occasions the Applicant/Defendant attended Court. Mulenga remarks that it would be unlikely that the applicant /defendant would accept service of Hearing Notices and in obedience of them willingly come to the Court, yet refusing earlier to accept service of the summons to enter appearance.

This is not a very valid argument, as the Applicant/Defendant, a layman, would nevertheless attend the Court being motivated only by a desire to hear if he would win the case although he had previously refused to accept service. Moreover, the affidavit of service sworn by Mubiru on 2nd October 1971 did not aver that the Applicant/Defendant had refused to accept service. In the most relevant paragraph 5 of his affidavit of service all that Mubiru says is that the Applicant/Defendant refused to sign at the back of the original summons. Now, service of a summons is not effected by agreeing to sign the back of the summons.

It is effected in, the 'words Order 5, Rule 9, "…by delivering or tendering a duplicate thereof…"
Therefore, this second ground of complaint advanced by Mulenga is not a valid one. Mulenga, however, is well covered and sufficiently protected in my opinion, by his first ground of complaint, namely, that what Mubiru swore as an affidavit of service and dated 2nd October, 1971 was defective for non-disclosure of material particulars regarding whether or not at the time of the service in question the Applicant/Defendant was known to him.

This defect alone suffices to invalidate the affidavit of service, if ever there was service. There was, therefore, no such affidavit of service as was required by Order 5, Rule 17 read together with Order 5, Rule 15 of the Rules of this Court. This kind of defect in the affidavit of service was the subject matter of consideration before Sir Udoma, former Chief Justice of this court in the almost similar case **of *M.B. Automobiles V. Kampala Bus Service [1966] E.A. 480.***In that case there had been an allegation that a Clerk had pointed out to the Process Server a Manager of the Defendant Company who having been shown the original summons had refused to endorse the back of the copy thereof. No such disclosure was made in the affidavit of service subsequently filed under Order 5, Rule 15 and Order 5, Rule 17 of the Rules of this Court.

The Manager was not known to the Process Server. The question before the Court was then whether such non-disclosure rendered service defective. The Applicant/Defendant in that application, as in the instant application, swore an affidavit stating, inter alia, that the summons in the suit had not been served on him. It was held that failure to disclose the name of an identifying person rendered the affidavit of service defective for non-compliance with the provisions of Order 5, Rule 17, and that it was wrong for the Registrar to have acted on such an affidavit of service.

The Court, giving its ruling, was satisfied that the summons was never served on the applicant/defendant in the application. Although that was a case where it had been definitely known that the applicant/defendant was personally net known to the Process Server, the position must be the same where he is not known to have been so known. The affidavit of service sworn by Mubiru on 2nd October, 1971 was defective for non-compliance with the provisions, in this case, of paragraph 3, Form 9 of Appendix A attached to the Rules of this Court and requiring that the affidavit should state whether or not a person on whom the summons is alleged to have been served was known personally to the Process Server.

This non-disclosure in the affidavit of service sworn by Mubiru on 2nd October 1971 renders that affidavit defective. The registrar ought, therefore, not to have entered judgment on 11th October, 1971 on the ground that the Statutory period in which the applicant/defendant ought to have entered an appearance had expired without his having entered that appearance since there was not a valid affidavit of service that the applicant/defendant had been served with summons. It follows from this that the judgment subsequent to the hearing of the formal proof passed by this Court on 29th January,

1972 stood on an invalid foundation laid by the Registrar on 11th October, 1971 when he purported to enter judgment against a defendant who had not in law been shown to have been served with summons in the case.

The judgment, therefore, of this Court which judgment was dated 29th January 1972 was also passed and based on an invalid foundation. Kayondo for the respondent /Plaintiff urged that the Applicant/Defendant had no good defense to the suit against him. With respect, agreeing with the submissions of Mulenga, Counsel for Applicant/Defendant the question of whether the Applicant/Defendant had a good defence or not, is quite immaterial in this consideration.

This application is to set aside judgment and decree is made under Order 9, Rule 24 of the Rules of this Court. It is, there provided in no uncertain terms that "if he (a Defendant against whom an ex parte decree has been passed) satisfies the Court that the summons was not duly served or that he 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…" It appears to me that the only two considerations when dealing with an application under this Rule are:

(1) Was the Applicant /Defendant duly served? Or

(2) Was he prevented by any sufficient cause from appearing when the suit was called?

If he satisfies the Court on any of those two points the hands of the Court are tied and the Court must make an order setting aside the decree against him.

The wording of this order does not give authority to a respondent, such as is here represented by Kayondo, to introduce an irrelevant consideration such as the merits of the defense of the applicant/defendant or any other consideration at all. The question of the merits of any defense by the applicant/Defendant is wholly irrelevant and does not come in at all.

Kayondo for the Respondent has submitted that if the application is granted it should be on condition that the Applicant/Defendant be required to pay a deposit of shs.20, 000. Mulenga, on the other hand, submits tat the applicant/Defendant if successful in this application should not be required to deposit such a large sum as that of shs. 20,000, but instead should execute a bond.

The plaint, dated 12th August, 1971, which led to this application and filed' in the suit on 16th August, 1971, claims among others special damages of shs.540/= No submission has been made to me let alone evidence adduced regarding the means of the Applicant/ Defendant. He might be a millionaire who can well afford to pay the deposit of shs. 20,000/= or more; or he might be a person of no means at all who can not afford to pay any substantial amount.

To require of him, therefore, a deposit of the magnitude asked by Kayondo would work hardship on him if he is a man of no means. If, on the other hand, he was a man of "substantial means" there would be no loss if he was required in the event of being successful in this application, to deposit nothing, for in that case the, respondent always recover from him anything he may have lost thereby.

For the reasons stated above, I allow this application with costs, set aside the invalid ex parte judgment of the Registrar dated 11th October 1971 and the *ex parte* judgment and decree of this Court dated 29th January 1972 and based there-on and I make no order as to deposit.

It is ordered that if the respondent/plaintiff wishes to further prosecute the suit, a copy of the summons with the plaint annexed be served within, seven days of this order on the applicant/defendant or his Advocate and there after, the applicant/defendant do file his written statement do file his in fifteen days of such service.

Order accordingly.