

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT KAMPALA
MISC. APPL. 131 OF 2003
(Arising Out of HCCS No. 982/2001)
GALIWANGO FRED
VS
ASUMAN KAVUMA

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

RULING.

This motion has been presented by the applicant under Order 9 rule 24 and Section 101 of the Civil Procedure Act. The applicant seeks orders:

- that execution of the decree issued in HCCS No. 982 of 2001 be stayed;
- that the ex parte judgment and decree issued in HCCS No. 982 of 2001 be set aside; and
- that costs of the application be provided for.

The background to the motion is that the respondent, on 18th November, 2001 filed civil suit No. 982 of 2001, against the applicant. The applicant did not file any defence within the time provided by the rules. Judgment was entered against the applicant on 26th February, 2002, under Order 9 rule 6 of the Civil Procedure Rules. Consequent to the court's assessment of damages, a decree was issued against the applicant. The decretal sum, including costs was Ugs 8,006,320/=. Execution issued and a warrant of attachment and sale of movable property was issued by the Deputy Registrar on 19th February, 2003.

In the motion and in the three affidavits in support of the motion, the applicant sets out two main grounds for this application:

- a) that summons were not duly served upon him; and

b) that he had compensated the respondent for the damages and injuries which he had caused to his house and two children.

As it was pointed out by the Supreme Court of Uganda in Nicholas Russos Vs. Glam Hussein Habib Virani & Nazurundin Habib Virenc SCC Appeal No. 9 of 1993, the discretion of this court under Order 9 rule 24 is limited unlike that exercisable under Order 9 rule 9, which is wider. This court, therefore, can exercise its discretion to set aside an exparte decree Under Order 9 rule 24, only upon being satisfied that the applicant:

- a) was not duly served with summons to enter a defence, or
- b) was prevented by sufficient cause from filing a defence.

I will start with whether the summons were served or not.

In deciding to enter an interlocutory judgment under Order 9 rule 6, of the Civil Procedure Rules, the court relied upon the affidavit of service which was deponed by a court processor server named Patrick Turyahirwa on 8th February, 2002. Mr. Hannan, who represents the applicant in this application ha submitted that the affidavit be rejected as containing falsehoods in its paragraphs 4, 5 and 6. Mr. Hannan also relies upon the provisions of Order 5 rule 15 and 17, of the Civil Procedure Rules, which require that the person to whom summons are served must endorse the duplicate and that the name and address of the person identifying the person being served or witnessing the tendering of the summons be disclosed in the affidavit. Mr. Hannan submits that owing to the fact that there was no compliance with those two provisions of Order 5, of the Civil Procedure Rules, this court concludes that there was no effective service. Mr. Hannan relies upon the decision in M.B.Automobilie Vs. Kampala Bus Service 119661 E.A. 480, in which this court held that the disclosure of the name and address of the person who identified and witnessed the delivery or the tendering of the summons to the defendant at the material time was a statutory duty; and that failure to disclose the name of such person in the affidavit sworn by the process server rendered the affidavit defective.

Furthermore, Mr. Hannan relied upon paragraph 4 of the affidavit in support, by Galiwango Fred, the applicant, to the effect that he and his wife Namazzi Dorothy were not at their home on 30th November 2001, when the summons are alleged to have been served. He invites this court to believe that averment in preference to that of the process server that he served the summons to the applicant in the applicant's compound on 30th November, 2001, or the following day.

Mr. Spencer, for the respondent, submitted that the affidavit of service by Patrick Turyahirwa was impeccable. He invited this court to uphold it and reject the affidavits in support of the motion which he referred to as having been sworn in mere desperation and contained no grain of truth.

I have examined the pleadings and the submissions made by both counsel. I have come to the conclusion that the affidavit deponed by Patrick Turyahirwa is not defective and must be upheld by this court. There is no falsehood contained in the affidavit of Turyahirwa. It appears to me that he states the truth when he depones that he found the applicant's wife at home on 30th November, 2001. In his affidavit, Turyahirwa states that the home of the applicant is at Najjanankumbi, Stella zone, and that the fact is not denied. How could Turyahirwa have known where the home was if he did not go to it as he says? I see no credible reason why Turyahirwa could go out of his way to lie in an affidavit and in a matter in which he had no personal interest as opposed to the applicant.

Secondly, the applicant and his wife claim that they were away from home from 7.30 a.m to 8.00 pm on 30th November 2001. They claim that that was their routine absence for work. But none of them disclosed where they worked or why they worked for such long and uniform hours all the days of the week.

The statement in paragraph 6 of Turyahirwa's affidavit that he read through carefully and asked me whereabouts of the plaintiff. I told him that I was with the Plaintiff the previous day and he is

the one who showed me your place” does not, in my view, constitute any major inconsistency in the affidavit that would reasonably lead to the conclusion that the affidavit contains a falsehood thus necessitating its rejection. In paragraph 3 of the affidavit, the deponent states that he went to the home of the applicant, with summons and in the company of the respondent who showed the home. The time was 4.00 am. by the wife of the respondent that the applicant was usually home after 4.00 p.m.

In paragraph 5, the deponent states that he returned to the home of the applicant. This time he arrived there at 4.30 pm and not in the company of the applicant as was the case previously. The deponent does not, in paragraph 5 specifically state that he visited the home of the applicant the second time on the same day (30th November 2001). It is in paragraph 6 where the respondent implies that the second visit was on the day following the first visit. In my humble view, I find no serious inconsistency. Which can reasonably lead to the conclusion that Patrick Turyahirwa might have lied in his affidavit. The averments are merely a little unclear upon the first glance. They are fully understandable after a more serious scrutiny.

Lastly, although I agree with learned counsel, Mr. Hannan, that the facts of this application are more or less similar to those in M.B. Automobiles Vs. Kampala Bus Service [19661 E.A 480, I, at the same time, find that case largely distinguishable from the instant application. The process server in M.B Automobiles vs. Kampala Bus Service (supra) did not, by any degree, mention the fact that a clerk of the applicant’s office had helped him to identify and witness the service of the summons. Nor did he mention the name of the clerk. In the instant application, the process server clearly names both the plaintiff and the wife of the applicant or at least the woman that he thought was the wife of the applicant albeit by description. These were not witnesses to the actual service which was executed in the compound of the applicant’s home and in the absence of the plaintiff. Both would not fall under the ambit of Order 5 rules 17, of the Civil Procedure Rules.

In any case the statutory requirement imposed upon a process server under Order 5 rule 17; appear to me to operate only in cases where the execution of service of summons has been witnessed by some person. where no person has witnessed the service as in this case, the requirement to name the witness does not apply. The words “the person if any” used in rule 17 of order 5 render credence to this interpretation.

For those reasons, therefore, the failure by Patrick Turyahirwa to name the person who witnessed the execution of the service of the summons together with address of such person cannot render his affidavit defective within the meaning of the rule laid down by Sir Udo Udoma, C.J., in MB. Automobiles Vs. Kampala Bus Service, (supra) since in the instant case no such person was in existence.

In view of what I have stated above, it is my finding that the applicant, in this case, has not duly discharged the onus which lies upon him to satisfy this court that summons were not served. Thus the first ground of the application fails.

The second ground of the application was that the applicant had paid some money before Civil Suit No. 982 was filed in this court and that the Civil Suit was filed in court in bad faith. Since I have found and believed the respondent’s evidence that due service of summons to file a defence was effected upon the applicant in Civil Suit No. 982, I can only state that if it were true that he had paid off his liability to the respondent that fact would have been the more compelling for him to file a defence and rely upon the fact of the settlement as his defence. In paragraph 6 of the affidavit of service, Patrick Turyahirwa avers that upon serving the applicant with the summons, the applicant asked him about the whereabouts of the respondent so that they work things out.

He also avers that the applicant refused to acknowledge service, by signing the duplicate copy, because he told the process server that he could not do so before consulting his lawyer. If the case had been already settled what was there to consult the lawyer about? If the case had been settled, the applicant would have had with him some documentary evidence pointing to that fact.

But he has none.

In me circumstances, the applicant's averments which are nakedly made without any independent supporting evidence, cannot be believed.

On account of those reasons, this court is not satisfied that the applicant was prevented by any sufficient cause, within the meaning of Order 9 rule 24, from filing a defence in Civil Suit No.892 of 2001.

The applicant has thus failed to discharge the onus upon him to prove to the satisfaction of this court that the ex parte decree in Civil Suit No. 892 of 2001 should be set aside.

The applicant has also sought an order staying execution of the decree mentioned above. The principle upon which a court can act to order stay of execution, is clearly that a court would only grant stay of execution if it is satisfied that there is good cause to do so and there are special circumstances to justify such course. KCC vs. National Pharmacy Ltd. (1979) HCB 216. In the instant case there is no good cause shown and there appears to me to be no special circumstances to justify an order staying execution.

The application is, therefore, dismissed with costs to the respondent.

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V.F.MUSOKE-KIBUUKA (JUDGE)

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ORDER.

The Deputy Registrar/Civil is requested to deliver this judgment on Friday 28th March, 2003, at 9.00 am, as I will be on leave.

V.F.MUSOKE-KIBUUKA (JUDGE)

24.3.2003.

