

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**MISCELLANEOUS APPLICATION NO. 349 OF 2012**

***ARISING FROM CIVIL SUIT NO. 380 OF 2008***

**SAMUEL SERUNJOGI.....APPLICANT**

**VERSUS**

**EFULAIMU KASIWUKIRA.....RESPONDENT**

**RULING**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

This was an application by notice of motion under Order 9 rule 27 and Order 52 rules 2 & 3 of the Civil Procedure Rules (CPR), and section 98 of the Civil Procedure Act, for orders that the *ex parte* judgement and decree in civil suit no. 380 of 2008 be set aside; that the applicant be granted leave to file his written statement of defence out of time; and that costs of the application be provided for.

The grounds of the application are that the applicant is the lawful owner and lawfully registered proprietor of land comprised in Kyadondo Block 8 Plot 234 at Namirembe since 1987 to date and he has since enjoyed use of the same uninterrupted; that the applicant was never served with summons to file a defence in civil suit no. 380 of 2008; that the applicant was out of the country being in London at the time the summons in civil suit no. 380 of 2008 were issued by court; and that in spite of the applicant's

absence from the country the respondent did not use due and reasonable diligence, to serve Mr. Semakula the applicant's agent in charge/management of the suit land or on the address of the caveat lodged on behalf of the applicant or on an adult member of the applicant's family.

The application is supported by the affidavit of **Samuel Serunjogi** the applicant. It is opposed by the respondent **Efulaimu Kasiwukira** who filed an affidavit in reply. Counsel filed written submissions on the matter.

The background to the application is that the respondent filed civil suit no. 380 of 2008 against the applicant for orders directing the registrar of titles to cancel the applicant's registration in respect of land comprised in Kyadondo Block 8 Plot 234 at Namirembe, and a vesting order vesting the said land into the respondent's names. The applicant was served by substituted service on grounds forwarded by the respondent that he could not be traced. The registrar of this court eventually entered a default judgement and the matter was set down for formal proof. The court declined to grant the vesting order, but it entered an *ex parte* judgement against the applicant and ordered that the applicant's registration in respect of land comprised in Kyadondo Block 8 Plot 234 at Namirembe be cancelled and be substituted by the names of A. Mayanja as administrator of the estate under which the suit property falls. The applicant seeks to set aside the judgement and decree.

I will first address the matter raised by the respondent's Counsel in his submissions that the signature of the deponent and that of the notary public appearing on the affidavit in support have been scanned and or photocopied. It was the submission of Counsel that this creates a doubt as to whether the deponent actually appeared before a notary public who notarised the affidavit. He submitted that this contravenes section 5 of the Commissioner for Oaths (Advocates) Act. He submitted that since the affidavit bears scanned/photocopied signatures of the deponent and the notary public they should be struck out which would leave the application incompetent as it would not stand on its

own without the affidavit. He cited **Mohamed Majambere V Bhakresa Khalil ma 727/2011 arising from cs 133/2010** to support his position.

The allegation that the affidavit in support is photocopied or scanned was made by Counsel in his submissions apparently as a point of law. It did not feature in the affidavit evidence adduced by both parties. I have looked at the applicant's affidavit in support alleged to be a photocopy or a scanned copy. It bears a red/maroon seal of the notary public as well as the signatures of the deponent and the notary public before whom it is stated to be sworn. That is as far as I can go. On the face of it without adducing expert or other authentic evidence that this affidavit is scanned or photocopied I am not in a position to determine whether the affidavit is a photocopy or a scanned copy of the original. The respondent's Counsel could only have enabled the matter to be determined as a point of law if he had first sought court's leave to have the deponent of the affidavit cross examined on how his affidavit was commissioned and or whether it is a photocopy or a scan of the original which he would then use as a basis to challenge the affidavit. In the form in which it is, without the said evidence being adduced, I cannot determine whether it is a scan or a photocopy, or whether the deponent who signed it did so before the notary public who signed it.

I find the case of **Mohamed Majambere V Bhakresa Khalil** cited by Counsel not applicable in this situation. In that case, unlike in the instant case before me, the affidavit was found to be incurably defective after counsel for the appellant conceded to the objection that the affidavit in support of the application was just photocopied and that the appellant did not appear before the commissioner for oaths. In the given circumstances, where no such common ground was taken and where evidence would be required to substantiate the objection, I find the point of law not sustainable. I will therefore proceed to the merits of the application.

Order 9 rule 27 of the CPR provides that an *ex parte* judgement and decree against a defendant may be set aside by the court which passed it where the defendant satisfies

court upon formal application that he was prevented by sufficient cause from appearing or was not served with summons or hearing notice.

The applicant's affidavit evidence is that he was not duly served with summons to file his defence as he was out of the country, that is, in London at the time the summons were issued. He attached copies of the passport and the visa as **B**. The respondent in his affidavit in reply however averred that both the passport and the visa had expired even before the suit was lodged. In rejoinder the applicant averred by affidavit that his passport and visa expired in 2005 and 2007 respectively but he could not travel until 2008 when he was granted a British passport which he attached to the affidavit in rejoinder as **A**. He further averred that he has a British visa he acquired in 2000 with no time limit on the holder's stay in the United Kingdom. He attached a copy of the said visa as annexure **B**.

It was submitted for the applicant that substituted service could not be effective when the person to be served is out of jurisdiction, and that if the respondent's lawyers had done due diligence they would have served the applicant out of jurisdiction instead of by substituted service. The respondent's Counsel however submitted that the applicant had failed to show that he was out of Uganda in June 2008, and that he must therefore have been within jurisdiction when the summons was issued.

I have scrutinised the copies of the passports and visas annexed to the applicant's affidavits as annexures **A** and **B**. Annexure **B** to the applicant's supporting affidavit reveals that the applicant's Uganda passport number B220060 was issued on 5<sup>th</sup> July 2000 and it expired on 5<sup>th</sup> July 2005. Annexure **B** to the applicant's affidavit in rejoinder reveals that a visa to the United Kingdom was issued to the applicant and endorsed in his Ugandan passport on 20<sup>th</sup> July 2000, and there was no time limit on the holder's stay in the United Kingdom. The same document shows that the applicant entered Portsmouth on 19<sup>th</sup> September 2000 while a copy of a visa for Malta also annexed reveals that the applicant entered Malta on 18<sup>th</sup> September 2000. Annexure **A** to his affidavit in rejoinder shows that he was issued with a United Kingdom passport on 13<sup>th</sup> August 2008 which he used to enter Uganda on 3<sup>rd</sup> September 2010 and 1<sup>st</sup> June 2011. The court record indicates

that service of process in Civil Suit No. 380 of 2008 (formerly Civil Suit No. 1245 of 2008 Chief Magistrate's Court of Mengo) was effected by substituted service on 1<sup>st</sup> July 2008, as per the advertisement in the Monitor Newspaper of 1<sup>st</sup> July 2008.

There is nothing on the court record as analysed above to show that the applicant was in the country before 3<sup>rd</sup> September 2010 after he left Uganda in September 2000. In paragraph 4 of his affidavit in rejoinder he averred that he was in London by 2008 and he could not travel before that as his passport expired in 2005.

Having carefully analysed the affidavit evidence and the court record, the logical conclusion I can draw is that since the applicant's Uganda passport expired in 2005 and he was only issued with a United Kingdom passport in August 2008, he could not have been in the country by 1<sup>st</sup> July 2008 when service of process by substituted service was effected on him. Thus, since the applicant was not in Uganda, the substituted service on him could not have been effective. The appropriate service of court process on the applicant should have in the circumstances been through service out of jurisdiction under order 5 rules 22 and 26 of the Civil Procedure Rules, and not through advertising in a local newspaper. See **Muzito V Njuki [2005] 2 EA 232**. Alternatively, the applicant could have been served through his agent in Uganda who has been revealed in the adduced evidence to be a Mr. Semakula who has been collecting rent on behalf of the applicant since 1987.

In the given circumstances, I am satisfied that the applicant was not served with summons or hearing notice in civil suit no. 380 of 2008. The *ex parte* judgement and decree in civil suit no. 380 of 2008 is therefore set aside. The applicant is granted leave to file his written statement of defence out of time. The costs of the application will follow the event of the main suit.

**Dated at Kampala** this 6<sup>th</sup> day of December 2012.

Percy Night Tuhaise

**JUDGE.**