

UGANDA / JUDGMENT

Asiimwe v Moil (U) Limited (Miscellaneous Application 577 of 2024) [2025] UGCommC 32 (31 January 2025) [2025] UGCommC 32

COURT

Commercial Court of Uganda

BEFORE

Ocaya, J

CASE / FILE NUMBER

Miscellaneous Application 577 of 2024

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 577 OF 2024 [ARISING FROM CIVIL SUIT NO.
1239 OF 2023]

10 PETER ASIIMWE] APPLICANT

VERSUS

MOIL (U) LIMITED] RESPONDENT

Before: Hon. Justice Ocaya Thomas O. R

RULING

20 Background

The Applicant brought this application under the provisions of Order 36 Rules 4 and 8 and Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act for orders that:

- (a) The Default Judgment in HCCS 1239 of 2024 be set aside;
- (b) The Application for leave to appear and defend be validated and/or the time for filing 25 the said application be extended by this Honourable Court.
- (c) The Applicant be granted unconditional leave to appear and defend in Civil Suit No. 1239 of 2023;
- (d) Costs be provided for.

30 The Applicant herein is the defendant in Civil Suit 1239 of 2023 ["The Main Suit"] which he considers frivolous, vexatious, bad in law and brought in bad faith. He contends that he signed an agreement for the supply of petroleum products with the Respondent. One of the major terms of the agreement, to wit Clause 19 of the same, was that the agreement would remain in force for a period of two (2) years and the same was subject to renewal by the parties.

35 Additionally, Clause 20 of the same agreement provided that in the event of any dispute, claim, or controversy between the parties, the parties shall attempt to resolve the dispute

5 through negotiation and in the event of failure, mediation and then arbitration (this is what is called a "neg-med-arb" clause).

Once the dispute which is the subject of the main suit arose, the parties never met, appointed a neutral mediator to resolve the dispute or failed to agree on an arbitrator, yet there is need

- 10 to reconcile accounts. The Respondent has neither served the Appellant in person nor made any attempts to have the dispute resolved amicably as is required under the agreement. Accordingly, the Applicant contends that the main suit is brought in bad faith and utter abuse of court process.
- 15 The Applicant further contends that
- (a) There is still a subsisting agreement between the parties and the court is mandated to ensure the parties comply and abide by the terms of the agreements.
- (b) At all times, the Applicant was under the honest belief that all their disputes shall be resolved in accordance with Clause 20 of the agreement and was never aware of the 20 suit being filed.
- (c) The Applicant has a good defense to the whole claim to wit that it is not indebted to the Respondent among other defenses.
- (d) The Application raises serious questions of both fact and law that ought to be determined inter partes.
- 25

The Respondent opposes this application. The Respondent contends that;

- (a) The Applicant does not have locus standi to bring this application since the Defendant in the main suit is Peter Asiimwe t/a Petreli Construction Limited and yet the present application has been instituted by Peter Asiimwe a non-existent party to the main suit.
- 30 (b) The present application has been brought after undue delay.

- (c) The Applicant by his assertions is imputing fraud on this Honourable Court that issued the decree in HCCS 1239 of 2023 a "heavy implication that has not been specifically pleaded, particularized or proved by the Applicant" (sic).
- 5 (d) The Respondent and the Applicant executed a supply agreement on 10 July 2023 wherein the Applicant accepted a credit limit for supply of fuel from the Respondent to a tune of UGX 80,000,000.
- (e) The Respondent provided security in the form of an owner's duplicate certificate of title for Plot 157 Busiro block 461 Bunga Wakiso District measuring 0.1580 Hectares 10 and registered in the names of Matovu Lawrence who issued the Applicant with Powers of Attorney to use his land as security in favour of the Respondent which property's market value ("MV") is UGX 115,000,000 and its forced sale value is UGX 73,000,000 ["FSV"]
- (f) Clause 8 of the supply agreement between the parties provides that the Applicant's 15 credit limit was subject to increase once the Applicant provided additional security and to which the Applicant then provided an additional security in the form of a certificate of title for Plot 80845 Busiro Blalock 314 land at Buloba measuring approximately 0.0390 Hectares registered in the names of Rodha Nakato, Robert Mayanja and Catherine Mulengera Nantongo as administrators of the Estate of the late 20 Eriya Kafero with a corresponding power of attorney by the said administrators, the FSV of the land being UGX 85,000,000.
- (g) Consequent to the provision of these securities, the Applicant and Respondent executed an addendum in respect of which the Applicant's credit limit was extended to a tune of UGX 160,000,000.
- 25 (h) The Respondent supplied the Applicant with fuel amounting to UGX 157,700,287.
- (i) Clause 20 provided that either party had an opportunity to either proceed to arbitration or court.
- (j) On 20 September 2023 the respondent served on the Applicant via his known email address a demand payment for the outstanding sum in response to which the 30 Applicant requested for 30 more days to clear the said debt which was not done prompting the Respondent's country manager to inform him of the expiry of such period of time and instructed the Respondent's advocates to proceed with recovery. The said email correspondences amounted to negotiation by the parties.
- (k) The Applicant was served with the application by WhatsApp and his email address 35 and sat back on his rights and accordingly, there isn't sufficient cause to warrant the

- 5 grant of an order of leave to appear and defend under the law and that this application is aimed at wasting court's time.

- (l) The intended defence by the Applicant contains general and evasive denials contrary to the law.
- On 17th 10 June 2024 court granted a conditional stay of execution vide HCT-00-CC-MA-0692-2024 pending the determination of this application. The Applicant was directed to deposit into Court a sum of UGX 50,000,000 only within twenty-one days of the order.

I have perused the file on ECCMIS for HCT-00-CC-MA-0692-2024 and there is nothing to 15 indicate the Applicant having complied with the Orders of court.

Representation

The Applicant was represented by M/s Emoru & Co. Advocates while the Respondent was represented by M/s Oketcha Baranyaga & Co. Advocates.

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Evidence and Submissions

The Applicant led evidence by way of an affidavit in support deponed by him. The Respondent led evidence by way of an affidavit in reply deponed by Yassin Nasser, the Respondent's country manager. Both parties made submissions in support of their respective

25 cases which this court has had the opportunity to consider before arriving at its decision.

Decision

Order 36 Rule 11 of the CPR provides thus

"After the decree the court may, if satisfied that the service of the summons was not effective,

- 30 or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit."
- 35 It follows that there are two grounds which one can rely on in setting aside an default judgment under Section 36 namely;

- 5 (a) Service of summons was not effective
- (b) There is good cause to set aside the decree

Service

The Applicant contends that he was not served with summons in respect of the head suit.

For an application for setting aside under the provisions of **Order 36 Rule 11** to succeed on the ground of non-service, it must be demonstrated that service of summons was ineffective. See **RM Market Links & 3 Ors v Ugafin (U) Ltd HCMA 334 of 2019**, **Lydia Naiga v Ask Services Limited HCMA 482/2020**, **Attorney General v Wazuri Medicare Limited HCMA 15 283/2023**

As a principle of law, service of a suit is effective if it is demonstrated that the adverse party was made aware of the existence of a suit against them. See **Godfrey Gatete v William Kyobe SCCA 7/2005**, **Allan Makula v First Finance Bank HCMA 848/2022**

The Respondent adduced unchallenged evidence in its affidavit in reply, and particularly Annexures "M1"- "M3" and Annexure "N" which showed the Applicant was served by WhatsApp and email. The Applicant did not controvert this evidence or in any way lead evidence that indeed he was not the person behind or with access to those channels of

25 communication or that the documents attached as proof of service were not authentic.

This court notes that service by electronic means such as by email or via a messaging service/platform such as WhatsApp is one of the acceptable modes of service. See **The Constitution (Integration of ICT into the Adjudication Process for Courts of Judicature)**

30 (Practice)Directions,2019, **Ssalongo Kakumba Bonny v Nyombi Eric HCMA 761/2021**,

From the evidence on record, it appears that the Applicant was well and truly served with the summons in the main suit and chose not to file an application for leave to appear and defend. It follows that the Applicant has failed to establish that service on him was ineffective.

5 Other Good Cause

Good cause has been defined in **Pinnacle Projects v Business in Motion Consultants HCMA 362/2010** as "a legally sufficient reason". It has also been defined in **Dr. B. B Byamugisha v Alison Kantarama HCMA 229/2019** as "the legal burden place upon a litigant, usually by court, to show why a particular request should be granted or an action or

10 omission excused". The court noted that "good cause" was being used analogously with "sufficient cause".

Is good cause the same as sufficient cause? In Uganda, the expressions "Good Cause" and "Sufficient Cause" have been used interchangeably, and to mean the same thing.

15 In the Indian Case of **Parimal v Veema Civil Appeal No. 1467 of 2011**, the Indian Supreme Court defined "Sufficient Cause" this way;

""Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that

- 20 which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not
- 25 acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

In the case of **Arjun Singh v. Mohindra Kumar & Ors.**, AIR 1964 SC 993 the Indian 30 Supreme Court has this to say about "good cause" and "sufficient cause":

"The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause."

I note that the CPR uses "good cause" and "sufficient cause" in different instances. For 35 instance, "good cause" is used in **Order 1 Rule 15, Order 36 Rule 11 and Order 9 Rule 21.**

5 On the other hand, the CPR uses "sufficient cause" in **Order 9 Rule 18, Order 9 Rule 26, Order 43 Rule 16 and Order 43 Rule 18**, among other instances.

A review of these rules quickly shows that the expression "sufficient cause" is used where a litigant must explain their default, or failure to take a step as directed by the law or court.

In my view, "good cause" and "sufficient cause" are not the same. "Good Cause" requires a party to show a legally sufficient reason why court should exercise a discretion in their favour. Good cause may exist in spite of a party's own mistake; for instance, good cause may favour allowing a party amend a pleading to include a party who was mistakenly excluded 15 or to amend their trial bundle and include a document they mistakenly forgot to include.

"Sufficient Cause" implies a much higher standard, requiring a party to show that they are not guilty of a default, or that it cannot be attributable to them. For instance, where an unrepresented party is hospitalised on the day of court, and accordingly an ex parte decree

20 is entered against them, there is sufficient cause to set it aside, since their failure to attend court is not a fault of their own. I do not believe the rules committee were being colourful when they used "good cause" in one instance, and "sufficient cause" in another. They intended to apply two different standards.

See **Mount Meru Millers v Atlas Cargo Systems HCMA 806/2022, Green Meadow 25 Limited v Patrice Namisono HCMA 1368/2022, Gids Consults & Anor v Naren Metha HCMA 864/2022**

The Applicant has not advanced either explicitly or otherwise any reasons showing good cause to otherwise set aside the impugned order. The Applicant has not provided any reasons

30 for failure to apply for leave to appear and defend, insisting, and against the weight of evidence, untruthfully so, that he was not served. Whereas the Applicant makes assertions regarding the jurisdiction of the court regarding the main suit, in my considered view, the contentions ought to have been raised in the substantive application for leave to appear and defend, which the Applicant neglected to file.

5 In **Stanbic Bank Limited v Kesacon Services Limited HCMA 724/2023** I dealt with some of the policy considerations relating to how this Court considers applications/actions involving money or its recovery;

"The role of the Commercial Court in my view is to ensure that there is expeditious disposal of suits to avoid thrombosis in commerce occasioned by a backlog of an 10 unresolved commercial claims or disputes. This is more so where the claims are for money. It must be recalled that money is an asset and a lengthy period of its retention means credit will become more expensive as lenders are precluded from putting their monies to use and will shift to prefer institutional borrowers that are unlikely to default as opposed to other borrowers. This has the effect of raising the cost of money 15 and making it difficult, if not impossible, especially for domestic borrowers to access credit."

See Also **Aya Investments Limited v Industrial Development Corporation of South Africa HCMA 3036/2023**, **URA v Roche Transport Services HCMA 2926/2023** & **Kisam Investments Ltd v Attorney General HCMA 742/2023**.

This is more so in applications for leave to appear and defend. This is because the rationale for summary procedure as has been summarised in the long-standing decision of **Post Bank (U) Ltd v Abdul Ssozi SCCA 8/2015** is expediency in disposal of matters in which there is no triable defence. In that case the the Supreme Court held thus:

25 "Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings."

30 See also **Zola & Another v. Ralli Brothers Ltd. & Another [1969] EA 691, 694**.

Summary procedure presupposes that the defendant does not have a defence and that there is no matter to try. It follows that if the defendant shows that it has a defence or that there is a matter to try, summary procedure is untenable. See **Miao Huaxian v Kampala Associated**

35 **Advocates HCMA 2097/2024**

- 5 Owing to the special character of summary suits, a party seeking to set aside a default judgment arising therefrom on the ground of good cause ought to show a compelling reason for the same. There must be a real and serious issue to be addressed to justify the delay of the conclusion of such proceedings which an order of setting aside no doubt brings.

