

UGANDA / JUDGMENT

Bugiri High School Ltd & 2 Ors v DFCU Bank Ltd (Miscellaneous Application No. 984 of 2015) [2017] UGCommC 144 (2 November 2017)
[2017] UGCommC 144

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 984 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

[COMMERCIAL DIVISION]

Miscellaneous Application No. 984 of 2015

(Arising out of civil suit No. 750 of 2014)

BUGIRI HIGH SCHOOL LTD

BASALIRWA MOSES :::::::::::::::::::: APPLICANTS

BASALIRWA EDITH

VERSUS

DFCU BANK LIMITED :::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

This is an application brought under O.9 rule 27, O. 52 rules 1 and 3 CPR and Section 98 of CPR seeking orders that the a default judgment in Civil Suit No. 750 of 2014 be set aside, un conditional leave to appear and defend the suit be granted and costs be provided for by the respondent.

The application is supported by grounds set out in the affidavit of the 2nd and 3rd applicant which briefly are;

1. That the failure to apply for leave to appear and defend was due to non-effective service of summons to file a defence on the 3rd applicant.

2. That the applicants had already repaid the loan amount of UGX 400,000,000/= (Four Hundred Million Shillings) together with all the accrued interest before Civil Suit No. 750 of 2014 was filed.
3. The judgment entered against the applicants is illegal as it will result into the respondents getting more UGX 108,730,894/- which amount the respondents has never advanced to the 1st applicant under the loan agreement in issue.
4. That it is in the interest of justice for an order for the default judgment to be set aside and the applicants be granted unconditional leave to appear and defend.

The plaintiff/ respondent filed an affidavit in reply deposed by Kansiime Timothy, which was dated the 21/10/2008. In the affidavit Mr. Kansiime Timothy stated that the applicants were duly served with summons and the plaint and they acknowledged receipt of the same on 27th day of October 2014 by affixing the 1st applicants stamp as well as 2nd applicant's signature on the said summons. That is was the premise on which the default judgment was entered against the applicants.

In the alternative, Mr. Kansiime prayed that should court be inclined to set aside the judgment and grant the leave to file a defence, such leave should be conditional and the applicant be ordered to deposit a sum of UGX 108,730,849/= in court on the basis that the respondent holds the judgment in its favour.

The brief facts of the case.

The respondent, a limited liability company operating as a financial institution sued the applicants for the recovery of UGX 108,730,848/= being an outstanding loan arrear.

A default exparte judgment was entered following the applicant's failure to furnish a defence in the time prescribed by the law. The applicants now seek that court sets aside the default judgment entered against them and they be allowed to appear and file a defence.

Ruling

I have carefully considered the application, the affidavit evidence for and in opposition to it, the written submissions of Counsel and the law. The application was brought under Order 9 rule 12 and 27 of the CPR. Later during submissions Counsel for the applicant prayed that court allows an amendment for the application to be brought under order 36 rule 11 of the CPR praying that the irregularity be ignored by court.

Counsel for the respondents in their submissions in reply argued that since the original suit was an ordinary plaint and not a summarily endorsed plaint, the proper law under which a default judgment can be set aside is order 9 rule 27 CPR.

The applicants in their submissions in rejoinder retracted their earlier submission and prayed to court to allow the suit to be brought under O.9r. 12. They relied on the case of ***Saggu Vs Roadmaster Cycles (U) Limited (2002) 1 E. AL. R 258*** where it was held that;

“Where an application omits to cite any law at all or cites the wrong law but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the correct law inserted”.

In the circumstances I will consider the application under O.9 r 27 CPR.

O 9 r 27 of CPR provides that;

*“*In any case in which a decree is passed ex parte against a defendant, he or**

she may apply to the court by which the decree was passed for an order to

set it aside; and if he or she satisfies the court that the summons was not

duly served, or that he or she 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 as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants* *also*”*

Based on the above, for this application to be granted, the applicants must show that they were not served with summons to file a defence and or that they were prevented by any sufficient cause from appearing when the suit was called for hearing. (See ***Mbogo & Anor Vs Shah [1968] E. A 93***)

The applicants allege that they were never served with summons to file a defence and only learnt of the suit when served with the notice to show cause why a warrant of arrest in execution should not be granted against the applicant.

The respondents contend that the applicants were duly served with summons to file a defence and a plaint and the 2nd applicant duly acknowledged receipt of the same on the 27th day of October 2014 by affixing the 1st applicant stamp as well as the 2nd applicant's signature on the said summons. They further contend that an affidavit of service sworn by Khainza Milly was filled on 30th October 2014 as proof of effective service of summons.

The 2nd and the 3rd applicants are husband and wife and in their capacity as directors of the company executed personal guarantees.

The appellant's case is that there was no effective service of summons on them. The 2nd applicant who it's claimed was served by the respondents is not an authorized agent to receive service on behalf of the 3rd applicant. The above is their basis to have the default judgment set aside.

The main issue here is whether the applicants were effectively served by summons to file a defence.

Order 29 rules 1 and 2 provide that;

1. ***Subscription and verification of pleadings;***

In a suit by or against a corporation any pleading may be signed on behalf

of the corporation by the secretary or by any director or other principal

officer of the corporation who is able to depose to the facts of the case.

2. Service on corporation.

Subject to any statutory provision regulating service of process, where the

suit is against a corporation, the summons may be served;

(a) on the secretary, or on any director or other principal officer of

the corporation; or

(b) by leaving it or sending it by post addressed to the corporation

at the registered office, or if there is no registered office, then at

the place where the corporation carries on business.

The process server in her affidavit of service stated that she went to Bugiri High School found in Bugiriri District and went to the administration block where she found the Deputy Head Teacher. The Deputy Head Teacher directed her to the office of the Director, Mr. Basasirwa Moses who offered her a seat. She handed him the two copies of the summons and he acknowledged receipt. The copy of the summons has a signature of Mr. Basasirwa Moses acknowledging receipt of the summons and also a stamp of the school.

The rules provide that summons can be served on the Secretary, any Director of the corporation, any other Principle Officer of the company.

The 2nd applicant is a Director of the company and by the rules; service on him is effective service. The applicants argued that because the 2nd respondent was a Director and married to the 3rd applicant at the time of the loan does not mean that the status is still pertaining. However, they did not tender an evidence to prove that the 2nd applicant had ceased from being a Director of the company or husband of the 3rd applicant. They did not challenge his directorship.

Further, even if he was not a director of the company, the rules provide that service on any principle officer of the company is effective service.

The process server states in her affidavit of service that she went to the Deputy Head Master's office who directed her to the Director's office. This shows that she actually served the summons to the Director of the school, Mr. Moses Basalirwa. Although proper effort must be made to effect person at service, if it is not possible service may be made on an agent e.g wife (read husband in this case) on an Advocate (see ***Kiguundu Vs Kasujja [1971] HCB 164***). Accordingly in my view there was effective service on the 3rd applicant as well.

Therefore, on the issue that there was no effective service of summons, I find that there indeed was effective service of summons and this ground fails.

The other ground under O.29 r.27 is that there is sufficient cause that stopped the defendant from appearing when the suit was called. Here court considers whether the applicant was prevented by any sufficient cause from appearing.

Counsel for the respondent submitted that the applicants have not demonstrated to court such circumstances that may be deemed to amount to sufficient cause. They relied on the case of ***Rosette Kizito Vs Administrator General and Others [Supreme Court Civil Application No. 9/86 reported in Kampala Law Report Volume 5 of 1993 at page 4]*** where it was held that sufficient reason must relate to the inability or failure to take the particular step in time. Further in ***Nicholas Roussos Vs Gulamhussein Habib Virani & Another*** Civil Appl No. 6 of 1995 the Supreme Court of Uganda held that some of the circumstances which may amount to sufficient cause include mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness by a party.

Counsel further submitted that the applicants have not demonstrated to court any such circumstances that may amount to sufficient cause. They have not pleaded illness, mistake of Counsel or ignorance of procedure.

I am inclined to agree with Counsel for the respondent. The applicants have not demonstrated that they were prevented by any sufficient cause from appearing to defend the suit.

Under the circumstances, based on the above analysis the application fails and it's dismissed with costs.

I so order

B. Kainamura

Judge

02.11.2017

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