

UGANDA / JUDGMENT

CEDA Financial Services Ltd v Q-Services Ltd & 3 Ors (Miscellaneous Application No. 6 of 2015) [2016] UGCommC 86 (10 March 2016)

[2016] UGCommC 86**COURT**

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 6 of 2015

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****[COMMERCIAL DIVISION]****MISCELLANEOUS APPLICATION No. 06 OF 2015****[ARISING OUT OF CIVIL SUIT No. 449 OF 2014]****CEDA FINANCIAL SERVICES LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT****VERSUS**

1. **Q-SERVICES LTD**
2. **NGABIRANO BOSCO**
3. **MARTIN MUHWEZI**
4. **REHEMA BAGUMA KABITO ::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON JUSTICE B. KAINAMURA**RULING**

The applicant filed this application by Notice of Motion under the provisions of Order 36 rule 11, Order 52 rule 1 & 3 of the CPR and section 98 of the CPA. The applicant seeks orders that the default judgment entered in Civil Suit No. 449 of 2014, decree and proceedings be set aside and leave be granted to the applicant to file a defence and costs be provided for.

The application was supported by the affidavit of the Begumanya Cyprian Baguma the Managing Director of the applicant in which he deposed that;

On 8th July 2014 he was served with court documents which he forwarded to the Company lawyers on 10th July 2014.

Upon further scrutiny by the Company lawyers it was established that the suit was filed on 2nd July and served on 8th July which left the applicant with limited time to file an application for leave to appear and defend.

On 16th July 2014, during the court vacation the applicant's Lawyers filed Misc Appl. No. 603 of 2014 seeking leave to appear and defend the suit. The applicant was advised by the Lawyer that the application could only be fixed after court vacation.

Following the routine legal audits, they were shocked to find a default judgement already entered against the applicant on the 7th day of August 2014 despite the fact that there was an application for leave to appear and defend the suit on court record.

The impugned default judgement was based on an affidavit of the process server which was largely tainted with deliberate falsehoods and irregularities such as the date of service which was indicated as 4th July whereas not.

The default judgment was entered erroneously basing on the fact that the prescribed time to apply for leave after service of court process had not lapsed.

The company does not owe the respondents UGX 195,890,000/= as claimed and entered in the default judgment.

The respondents' suit is premature as it does not comply with the investment agreement signed between the parties in as far as the respondents did not refer any dispute for arbitration before filing this suit as required by the investment agreements attached to the plaint.

The respondents have gone ahead to tax their bill of costs, extracted a decree and threatening to execute the same unless stopped by this honourable court.

It is just and equitable that this honourable court sets aside the default judgment.

Mr. Ngabirano Bosco a Director of the 1st respondent company deponed the affidavit in reply stating that;

The default judgment was not marred by gross irregularities and was granted within the provisions of the law.

The applicant was first served on 2nd July 2014 but first declined to accept service and now seeks to alter the date of service to pervert the course of justice.

The applicant only made this application after execution proceedings were commenced.

The applicant in Begumisa's affidavit admitted its indebtedness to the respondents and as such has no plausible defence to Civil Suit No. 449 of 2014.

The taxation of the bill of costs was done within the law and rights of the respondents.

The applicant seeks to use the application to delay the applicants from recovering proceeds of their investments with the company.

It is in the interest of justice that the application be declined.

Counsel for the applicant submitted that this application is premised on three major grounds which are; the judgement was entered during court vacation without a certificate of urgency, the judgement was entered when the applicant had filed an application for leave to appear and defend, and the judgment was based on an affidavit bearing falsehoods about the date of service of endorsed plaint on the applicant.

Counsel cited the case of ***Britaitana Vs Kamoga [1977] HCB 34*** where court held that if an affidavit has obvious falsehoods, then the entire affidavit becomes suspect and an application supported by a falsehood is bound to fail. Counsel invited court to follow established positions on inconsistent and false affidavits and find that the applicant was never served the summons on the dates alleged.

Counsel further argued that the default judgement was entered in error since there was a pending application to be fixed and heard by court. Counsel cited the case of ***Uganda Telecom Limited Vs Airtel Uganda Limited Misc. Appl. No. 30 of 2011*** submitting that court has powers to make such orders as may be necessary for ends of justice to prevent abuse of court process.

Counsel for the applicant cited **rule 4 of the Court Vacation Rules SI 13-40** and submitted that the respondents ought to have obtained a certificate of urgency before their matter was entertained during court vacation. They didn't and accordingly it was irregular and the ensuing judgment and decisions are illegal. Counsel added that the law is couched in mandatory terms and civil business by court during court vacation are disallowed unless those of urgent nature. Counsel submitted further that once an illegality is brought to the attention of court it must not be condoned ***(Makula International Vs Cardinal Nsubuga Civil Appeal No. 4 of 1981)***.

Counsel for the applicant further submitted that there are triable issues and the defence is not a sham.

In conclusion, Counsel prayed that the application be allowed and the matter heard on its merit by allowing the applicant to file its written statement of defence to the claim.

In reply, Counsel for the respondent submitted that the applicant did not file an application for leave to file a defence in time. Counsel cited the decision in the case of ***Zamzam Noel & others Vs Post Bank Limited Misc Appl. No. 530 of 2008*** where court held that time is of the essence where a suit is filed under summary procedure. Counsel further argued that the mistaken belief by the applicant's former lawyers that the period when court was on vacation was excluded in computation of time for filing pleadings would not amount to good cause as provided for under rule 11. Counsel added that the default judgment was obtained on 7th August 2014 and the application for setting aside was only filed on January 6th 2015 which according to him amounted to inordinate delay.

Counsel further submitted that regarding the need for the certificate of urgency, in the case of ***Noor Mohammed Vs Jaffrey Wanami Civil Revision No.002 of 2007*** Court held that all that needs to be proved is that the matter is urgent but there is no specific requirement for an application for urgency. Counsel submitted that the applicant's contention in this regard must fail.

Counsel added that it is clear that **rule 4 of the court vacation rules** applies to Judges and not registrars.

Counsel also invited court to hold that the applicant has not demonstrated good cause for setting aside the default judgment and execution should therefore proceed. Relying on the case of ***Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65*** Counsel submitted that the applicant does not have a good defence on the merits of the suit.

Counsel submitted that the application offends Constitutional principles on administration of justice and prayed that the application be dismissed because it's intended to fetter the respondents from realizing their fruits yet court should protect the respondents' constitutional right to justice without delay.

In conclusion, Counsel prayed that the court should hold that;

The application does not hold merit in that it does not disclose good cause to necessitate the setting aside of the default judgment.

The application fails because the applicant has no good and plausible defence to the suit.

In the alternative the applicant be ordered to settle all the uncontested amounts and furnish security for due performance of the contested sums and payment of any costs of the suit.

Decision of Court

This application was brought by Notice of Motion under the provisions of ***Order 36 rule 11, Order 52 rule 1 & 3 of the CPR and Section 98 of the CPA***. The facts as earlier stated are that the respondents instituted a summary suit against the applicant and a default judgement was entered against the applicant for UGX 195,890,000/=. The applicant seeks to have the same set aside as well as the orders thereunder and also seeks leave to appear and defend the suit.

The grounds of the application are basically that; the judgement was entered during Court vacation without a certificate of urgency, the judgement was entered when the applicant had filed an application for leave to appear and defend, and the judgment was entered on the basis of an affidavit bearing falsehoods relating to the date of service of endorsed plaint on the applicant.

The application as stated earlier was made under **Order 36 rule 11 of the CPR** which is to the effect that;

"11. Setting aside decree

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

In the case of ***Kingstone Enterprises Ltd Vs Metropolitan Properties HCMA 341/12,*** court with regard to Order 36 rule 11 held that;

“Clearly under that rule, before this application can be allowed, this court must satisfy itself that either service of summons was not effective or the applicants must show any other good cause that prevented them from applying for leave to appear and defend the main suit.”*

Counsel for the applicant on the issue of service of summons argued that the affidavits are tainted with falsehoods especially in regard to the date of service of summons. I observe that in the affidavit in support of the application deposed by the Managing Director of the applicant, it was deposed that;

“.....we were advised which advise we verily believed to be true that since the suit was filed on 2nd July, and only served on 8th July 2014 we had limited time within which to file an application for leave to appear and defend.”*

Order 5 rule 1(a)* of the CPR provides for summons issued to the defendant ordering him or her to file a defence within the time specified in the summons.

The days start running from the date the defendant is served. I therefore do not find the argument that the applicant had limited time of any relevance to this matter.

I further took note of the discrepancy in various affidavits filed. The Managing Director of the applicant alleges to have received the summons on 8th July and given it to the company lawyers on 10th July 2014. Mr. Ngabirano Bosco a director in the 1st respondent company alleged that service was done on 2nd July 2014. The process server deposed that service was made on 4th July 2014. I will however rely on the affidavit of service deposed by Mr. John Kyeyune the process server which is on court record. He deposed that;

“THAT on 4th July 2014 I went to the defendant’s offices located on 1st Floor, Theatre House Rooms 2 & 3, Plot 5, Dewinton Road, Kampala. THAT on arrival at the said offices, I introduced myself.....thereafter she directed me to the Manager Mr Cyprian Baguma to whom I tendered the summons together with the plaint. He accepted the documents however declined to receive the summons”*

I observed also that the copy of the summons attached to the affidavit of service has no proof of acknowledgement of receipt on them contrary to ***Order 5 rule 14 of the CPR*** which requires the person served to sign acknowledgment. However taking into considering the circumstances of the case and the fact that the Managing Director of the applicant acknowledges he was served but that it was on 8th July, i am satisfied that summons was dully served.

As earlier indicated, i am of the view that the service was on 4th July as deponed by the process server. It is my finding therefore that service was effective. That said, the applicant had up to 14th July to move court under O 36 rs 3 and 4 to be granted leave to appear and defend the suit. Court record shows that Misc. Appl No. 603 of 2014 was filed in court on 16th July 2014 two clear days after it should have been filed. Indeed court record further indicates that by that date the respondent had already moved court to enter a default judgment. In the premise the applicant's assertion that the default judgment was entered in error is not sustained and fails.

I will now proceed to evaluate whether the applicant has shown any other good cause that prevented it from filing its application in time.

In the case of ***Kingstone Enterprises Ltd Vs Metropolitan Properties (supra)*** court held that;

“The phrase is not defined in the CPR but it is defined in* *Black’s Law Dictionary, Seventh Edition*, as;*** “A legally sufficient reason”***. The authors explained that good cause is often a burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.*

The phrase “*sufficient cause*” that is normally used interchangeable with the phrase* “good cause” *has been explained in a number of authorities. In the cases 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] *it was held that sufficient reason must relate to the inability or failure to take the particular step in time.*****

In* ***Nicholas Roussos v Gulamhussein Habib Virani & Another, Civil Appeal No.9 of 1993 (SC) *(unreported), the Supreme Court laid down some of the grounds or circumstances which may amount to sufficient cause. They include mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness by a party.”***

Counsel for the applicant submitted that the default judgement was entered by the Registrar during court vacation and invited court to find that that is good cause for court to set aside the judgment.

Rule 4 of the Judicature (Court vacation) rules S. I. 13 – 20 provides;

“In vacation the Court shall deal with criminal business but shall not sit for the discharge of civil business other than such civil business as shall, in the opinion of the presiding Judge, be of an urgent nature.”

I agree with Counsel for the respondents that a default judgment is not defective because it was entered during court vacation. I am buttressed in my view by the holding in the case of ***Nor muhammed Vs Jeffery Wanani Civil Revision No. 2 2007*** where the court had this to say:-

***“I perused the Judicature (Court Vacation) Rules (now SI 13-20). Save for a provision in rule 4 thereof that court shall not sit to discharge civil business other than such civil business that shall, in the opinion of the presiding judge, be of an urgent nature, I did not find any specific requirement for applications for certificates of urgency. Such applications are normally brought**

under the provisions of Order 52 rule 1 CPR. All that needs to be proved on such an application is that the matter is urgent. I am therefore of the opinion that if the trail magistrate thought the matter was urgent enough to be disposed of, then he had the discretion to so dispose of it, even without leave first being obtained to do so”.*

I am in agreement with the above position and accordingly the applicant’s contention in this regard must but fail.

Accordingly the applicant has failed to show sufficient reason why the default judgment should be set aside.

Accordingly this application is dismissed with costs.

B. Kainamura

Judge

10.03.2016

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