

UGANDA / JUDGMENT

Damani v Mbalirwa (Misc. Application No. 072 of 2002) [2014] UGHCCD 95 (16 July 2014)

[2014] UGHCCD 95

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Misc. Application No. 072 of 2002

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISC. APPLICATION NO. 072 OF 2002

HARSHAD DAMANI ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

FLORENCE JANE MBALIRWA ::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

RULING

This Application is brought under the provisions of Order 9 r.24 CPR (at that time) which is now Order 9 r.27, and the then Order 48 rr.1 & 3 (which is now Order 52 rr.1 & 3) seeking Orders that the Judgment and Decree in the above suit be set aside and the Applicant be allowed to defend and be heard in the case before it is finally determined.

The grounds are set out as follows:

1. Hearing Notice in the above suit was never served on the Applicant/Defendant on 02/04/2002.
2. The Applicant/Defendant on the said date was outside Uganda in Dubai and could not have been served with the Notice.
3. The Applicant has a complete defence to the suit.
4. That it is just and equitable to set aside the Judgment/Decree and allow the Applicant to be heard on the merits of the case.

The background to this application in brief is as follows:

The Respondent/Plaintiff filed the head suit against the Applicant/Defendant.

According to the record, the Applicant was served and duly filed a defence.

The matter was not heard the several times it was fixed for hearing and finally at the instance of Counsel for the Respondent, it was fixed for hearing on 29/04/2002.

On the day fixed for hearing, Counsel for the Defendant and his client were not in Court.

There was an affidavit on record that the Applicant had been served.

The Judge believed that the Applicant/Defendant was duly served on the strength of the signature of acknowledgment on the Hearing Notice and proceeded to hear the case exparte and delivered Judgment thereon.

The affidavit of service was deponed by one Paul Wamboka on 27/4/2002. Therein he had claimed he served the Applicant personally as he knew the said Applicant in person.

The said Applicant is said to have acknowledged service by signing on the copy of the Hearing Notice which was returned to Court as proof of the said service.

The Applicant filed an affidavit in support and later a supplementary thereto wherein he claims he only came to learn of the exparte Judgment when Court Bailiffs stormed his office premises with a Warrant of Attachment.

That on the alleged date of the case, the Applicant was out of the country specifically in Dubai where he had travelled and had earlier been in Sydney-Australia. He attached a photocopy of his Passport specifically the page bearing his biodata and a page bearing Immigration stamps and Visa bearing the dates covering the period the case was heard and boarding passes.

The said copies are attested/certified as Annextures by Commissioner for Oaths in accordance with the Commissioner for Oaths Act and Rules.

The Applicant further alleges that Counsel for the Respondent/Plaintiff forged the Applicant's signature and swore a false affidavit that there was service, whereas not (Affidavit in rejoinder).

In the affidavit in support, he avers that the Plaintiff/Respondent is indebted to him to the time of Shs. 24 million and that the said debt has never been settled and is outstanding. He annexed a copy of an agreement to that effect.

An affidavit in reply was filed by Mr. Alenyo George. Counsel who was handling the case then on behalf of the Plaintiff wherein he claims the affidavit in support of the Application is defective, contains lies, untruths and is full of illegalities and irregularities.

The Respondent/Plaintiff also filed an affidavit in reply to the Applicant's affidavit in support. Therein she depones that the Applicant, in disregard of a loan agreement between her husband and himself, unlawfully transferred her husband's property in his names and evicted the Plaintiff's family from their premises and this resulted in the Plaintiff's husband filing the head suit which was eventually heard exparte.

At the hearing of this Application, the case of **REMCO Ltd Vrs. Mistry Jadva Parbat & Co. Ltd and others (1975) EA 227** was cited. It was also submitted that the failure to serve has not been denied.

In reply it was submitted by Counsel for the Respondent that the affidavit of service has not been proved to be false.

Secondly, that there is no evidence that the signature of the Applicant was forged.

Order 9 r.24 CPR (currently **Order 9 r.27**) under which this Application was brought allows the setting aside of an exparte Judgment on proof that there was no service, or other sufficient cause.

I have considered the Application pleadings, replies thereto and submissions by both parties.

I observe that the Applicant apart from claiming non service also raises defences to the head suit and hence triable issues.

I have looked at the exparte Judgment which gave rise to the instant application.

There in the trial Judge decided that on the evidence before him, the Applicant/Defendant had breached the terms of the loan agreement between him and the Respondent/Plaintiff.

I also observe that the claims of non-service are based on copies of the travel documents attached to the application.

It was incumbent upon the Applicant to prove the said copies in compliance with **Section 63 of the Evidence Act** or demonstrate that they fall within the exceptions outlined in **Section 64** of the Same Act.

This omission in my view leaves the allegation that the Applicant was out of the country unsupported, as the authenticity of the said copies cannot be tested.

Further, the Applicant has raised serious allegations that his signature was forged by Counsel for the Respondent/Plaintiff.

This allegation is not supported by evidence/proof of the said forgery.

The said Counsel was not put to task through cross-examination. The person who claimed had effected the service was not also tasked to explain through cross-examination to test the veracity of his claims. The alleged forged signature was not tested through expert evidence to so prove that it was so forged.

The provisions of the **Evidence Act Sections 101 and 102** are explicit on the requirement for an allegation to be proved and the burden thereof.

I must say that raising allegations and expecting the Court to believe them without proof is not acceptable especially when they are serious as in the instant case that there was forgery.

Court takes judicial notice of the fact that the practice of swearing false affidavits of service exists. But it is also as a direct result thereof for many litigants to take advantage of the provisions of Order 9 r.24 CPR (**then** currently Order 9 r.27 CPR) to claim there was no service without proof, for purposes of having Judgments set aside so as to avoid the consequences of the said decisions of Courts.

It is my finding specifically in this instant case that the allegations of non-service and those of forgery of the signature of the Applicant have not been sufficiently proved by evidence.

The Application cannot stand accordingly.

I have also alluded to the Judgment by the trial Judge at that time. On the evidence availed to him which in my view was detailed enough, he found that the Applicant/Defendant had breached the terms of his agreement with the Plaintiff. It is unlikely that a contrary finding would come out of a trial if this Application were allowed since the said Judge also had the opportunity/access to the Defendant's written statement of defence which had been duly filed.

I find this application wanting in merits and it accordingly fails.

The application is dismissed with costs to the Respondent/Plaintiff.

Godfrey Namundi

Judge

16/07/2014

16/07/2014:

Applicant absent

Legal Assistant to Counsel for Applicant (PreseptTushemereirwe)

Respondent present in Court

Court: Ruling read in open Court.

Godfrey Namundi

Judge

16/07/2014

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