

UGANDA / JUDGMENT

Kibibu Engineering Co Ltd & Ors v Fanrong Ltd (Miscellaneous Application No. 371 of 2016) [2016] UGCommC 68 (21 September 2016)

[2016] UGCommC 68

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 371 of 2016

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 371 and 372 OF 2016

(ARISING FROM CIVIL SUIT NO 121 OF 2015)

1. KIBIBU ENGINEERING CO LTD}
2. PATRICK BIGIRWENKYA KYOMYA}
3. BUSINGE ALEX BIGIRWENKYA}
4. ALAN KIHANGIRE} APPLICANTS

VERSUS

FANRONG LIMITED}..... RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants filed this application under section 98 of the Civil Procedure Act Cap 71, Order 9 rule 12, Order 9 rule 27 and Order 52 rule 1 of the Civil Procedure Rules for the following orders:

1. Setting aside the ex parte judgment entered in Civil Suit Number 121 of 2015;
2. Setting aside the ex parte decree entered in Civil Suit Number 121 of 2015;
3. The main suit is heard inter partes;
4. Staying execution of the decree; and

5. For costs of the application to be provided for.

Miscellaneous Application No. 371 of 2016 filed by Allan Kihangire was consolidated with that of Miscellaneous Application No. 372 of 2016 that purports to be filed by all the 4 Applicants including Allan Kihangire as the 4th Applicant. The grounds of Miscellaneous Application No. 372 of 2016 are that this court entered an ex parte judgment against the Applicants and a decree was extracted against the Applicant in H. C. C. S. No. 121 of 2015. Secondly, it is averred that the Applicants were never served with summons in the main suit and are therefore unable to defend it. Thirdly, it is averred that the Applicants only became aware of the suit when the Respondent executed the decree and placed the third Applicant in civil prison. Fourthly, it is averred that the Applicants have a good defence to the main suit as the second, third, and fourth Applicants have no contractual relationship with the Respondent and owe the Respondent no money. Fifthly, it is averred that the first Applicant had a joint-venture and profit sharing agreement with the Respondent which it performed and the main suit was and remains frivolous and vexatious. Finally the Applicants aver that it is just and equitable that the application is allowed.

The application is further supported by the affidavit of the second Applicant Mr Patrick Bigirwenkya Kyomya sworn at Kampala on the 18th of May 2016 in which he deposed that he is a director of the first Applicant and also the second Applicant and a brother to the third Applicant who is currently in civil prison. He knows that the Respondent obtained an ex parte judgment against the Applicants according to a copy of annexure "1" which is a copy of the judgment entered under Order 9 rule 6 of the Civil Procedure Rules on 3rd July 2015. Secondly, the Respondent applied for execution of the decree and a warrant of arrest was issued against the second, third and fourth Applicants according to a copy of the warrant of arrest annexure "2" dated 17th of June 2016. Thirdly, the Applicants were never served with summons to file a written statement of defence. Fourthly, the Applicants have a good defence to the suit according to a copy of the proposed written statement of defence attached to the affidavit as annexure "3". Finally he deposed that it is just and equitable to grant the application and determine the main suit on the merits.

The grounds of Miscellaneous Application No. 371 of 2016 filed by Allan Kihangire are that the Applicant was never served with court summons and plaint in accordance with Order 5 rule 2 of the Civil Procedure Rules. Secondly, the Applicant has a good defence with a high chance of success. Thirdly, it is in the interest of substantive justice that this honourable court sets aside the judgment and decree and permits the Applicant to prove his defence.

In support of his application Alan Kihangire deposed that he is one of the Defendants where the Respondent brought a suit for recovery of Uganda shillings 80,000,000/= against him and the other Defendants. Judgment and decree in the suit was delivered on 20th July, 2015 when court inter alia ordered that they pay the sum, interest and costs of the suit. He only came to learn about the case when they received a call from one Busingye Alex's sister whose brother was arrested and committed to Luzira prison on the same matter and informed him that he was also on the same warrant of arrest. He immediately contacted his lawyers who advised him to photocopy the file and documents on record. After perusing the file, his lawyers advised him that

they can apply for an order setting aside judgment because service was not done in accordance with the law and there was non-compliance with the rules of service. Only summons were published without the plaint and accompanying documents. In the premises, he has a good defence with a high chance of success.

The affidavit in reply is that of Mr Emmanuel Angwella, an advocate of the High Court practising with Mamawi, Wamimbi & Company Advocates who deposed that he read the affidavits of the second Applicant in support of the HCMA No. 372 of 2016. He further deposed that the Applicants were served summons by way of substituted service and as such the service was defective. The Applicants have not raised any grounds as to why the application to set aside judgment should be allowed. Thirdly, the Applicants are simply trying to deny the Respondent the fruits of the Respondent's judgment. Fourthly, the application lacks merit and was brought mala fide. Lastly, in the event that the court is inclined to grant the prayers sought by the Applicants, it should further make an order that the Applicants deposit the decretal sum in court.

The matter came for hearing on 20th June, 2016 when Counsel Ellison Karuhanga appeared for the Applicant while Counsel Bill Mamawi appeared for the Respondent. The Respondent's Counsel informed the court that they had been unable to get in touch with the Respondent's directors and in the circumstances he could not proceed. By consent of Counsel, time was extended for the Respondent's Counsel to trace the directors of the Respondent and file an affidavit in reply. The affidavit in reply was supposed to be filed within two weeks from 20th June, 2016. None was filed within the period and the affidavit in reply reproduced above was filed on 7th September 2016. An interim stay of execution was issued and was to last until 11th of July 2016. Apparently the matter did not proceed on 11th July, 2016 because I was attending a mediation proceeding in the Land Division of the High Court. Counsel Annette Kobusingye appeared for the fourth Respondent on 7th September 2016 and informed the court from the bar that the date was agreed upon and that is why there was an affidavit in reply which was filed on 7th September 2016. After examining the court clerk who had interacted with the Counsels I allowed the application to proceed ex parte. When writing this ruling I examined the record and was unable to trace any records of what transpired at the registry in terms of the agreement for the matter to be heard on the 7th of September, 2016 though the application was indeed cause listed for 2.00 pm and appears on the cause list of 7th September 2016. Basing on the evidence of the cause list and the submission that both Counsels fixed the application by consent, the application proceeded ex parte. Subsequently the Court Clerk Mr. Charles Okuni deposed an affidavit sworn to on the 20th of September deposing to the facts of how the application was fixed for the 7th of September 2016 with the participation and consent of Counsel Annette Kobusingye, Counsel for the 4th Applicant, Counsel Bill Mamawi for the Respondent and Ellison Karuhanga. The court diary was compared with the diaries of the Counsels. Lastly Charles Okuni deposed that Bill Mamawi called him on the 7th of September to inquire whether the application had proceeded and informed him that he had forgotten the date of hearing. In the premises, I proceeded to conclude writing the ruling of the court on the application.

The Applicant through Counsel submitted that at the time of filing the case, he had ceased being a shareholder and director of the first Applicant in Miscellaneous Application Number 372 of 2016 which was consolidated with his application. The Applicant was wrongfully sued and judgment and decree were wrongfully entered against him. The first Defendant being a body corporate which is distinct from the other Defendants and in any case the Applicant had ceased to be a member thereof and a director in the first Defendant and he was not in any way personally indebted to the Respondent. In the premises, the Applicant has a good and plausible defence to the claims in the suit which merit adjudication by the court and the court should be pleased to set aside its judgment and decree in the main suit.

I have carefully considered the application and I do not see any ground indicating that the Applicant is not a member of the Defendant Company nor is there any deposition in the affidavits which advances any facts for the court to rely upon. The averment is contained in the draft written statement of defence that the fourth Defendant is neither a director nor a shareholder in the first Defendant. It is also contained in ground 4 of Miscellaneous Application Number 372 of 2016 which had been consolidated with Miscellaneous Application Number 371 of 2016. The written statement of defence proposed by all the four Applicants is attached to paragraph 6 of the affidavit of Patrick Bigirwenkya Kyomya. In other words the Applicants intend to prove that they are not members of the first Defendant. These are the second, third and fourth Applicants who are also the second, third and fourth Defendants to the main suit H. C. C. S. No. 121 of 2015.

I have further considered the other submissions of the fourth Applicant's Counsel that there was no proper service of summons or effective service of the summons and pleadings on the Applicant. She submitted that the Applicant was sued in his personal capacity in the plaint allegedly as a director whereas he is not a director.

Secondly she submitted that service has to be made on the Defendant personally which was not done. She relied on the judgment of Honourable Mr Justice Geoffrey Kiryabwire in **Emiru Angose vs. JAS Projects Ltd Miscellaneous Application Number 429 of 2005** for the holding that service is to be effected on the Defendant in person or an agent empowered to accept service. In that case it was held that service on the receptionist was not service on a recognised agent. Counsel also relied on the case of **Electoral Commission versus Mbabali Jude High Court Miscellaneous Application Number 53 of 2006** where personal service was defined as service on the person of the Defendant. Failure to serve the process on the Defendant went to the root of proper service in litigation. Counsel relies on **Lukyamuzi James versus Akright Project Ltd and another H. C. C. S. No. 219 of 2002** for the holding that a director is separate from the company as held in **Salmon versus Salmon [1897] AC 22** and other authorities cited on the matter.

Lastly, as far as the substituted service is concerned, whereas summons was advertised, it was not accompanied by a plaint and attachments thereto. Counsel relied on the decision of this court in **Valery Alia versus Alionzi John High Court Civil Suit No. 156 of 2010** where it was held that there was no copy of the plaint attached as ordered in the summons and therefore there was no proper service in terms of Order 5 rule 2 of the Civil Procedure Rules.

I have carefully considered the Applicant's application. High Court Civil Suit No. 121 of 2015 was filed by the Respondent against the Applicants in High Court Miscellaneous Application Number 372 of 2015. Summons was issued on 4th March 2015. The affidavit of service is that of Mwebesa Julius who deposed that he is an adult male Ugandan and an authorised court process server. On 5th March, 2015 he contacted Patrick Bigirwenkya Kyomya, the Managing Director of the first Defendant and is also the second Defendant. He went to the offices at Plot 53 Jinja road, Kitgum House where he informed him and tendered the court documents on him. He did not acknowledge service by endorsing on the copy of the summons. There is therefore no evidence other than the affidavit showing that he was served. The affidavit of Julius further discloses that he asked Mr Patrick Bigirwenkya Kyomya whether he was going to receive service on behalf of the third and fourth Defendants who were directors and he said he would do so after consulting his lawyers. He left the copies of the third and fourth Defendants summons with him.

On 20th April 2015 Messieurs Mamawi, Wamimbi & Company Advocates, Solicitors & Legal Consultants wrote to the registrar. The application was filed on the 6th of May 2015. The letter reads in paragraphs 2, 3 and 4 as follows:

"Summons to file a Written Statement of Defence were delivered on the Defendants on the 5th Day of March 2015. The affidavit of service has been filed on court record.

The Defendants having failed to file a written statement of defence within the prescribed time and the suit being for a liquidated demand we pray that you be pleased to enter judgment under the express provisions of Order 9 rule 5 of the Civil Procedure Rules.

We abandoned our prayers for damages as earlier prayed for...."

The registrar accordingly entered judgment under Order 9 rule 6 of the Civil Procedure Rules for the liquidated demand in the plaint.

It is very clear that there is no evidence in the affidavit of service of Mwebesa Julius that the 3rd and 4th Defendants were served. These are the 3rd and 4th Applicants in Miscellaneous Application Number 372 of 2016. The fourth Applicant is the sole Applicant in Miscellaneous Application Number 371 of 2016.

I agree with the authorities cited by the Applicant's Counsel. I do not need to regurgitate the authorities quoted by Counsel Annette Kobusingye. It is sufficient to quote the express provisions of the Civil Procedure Rules and particularly Order 5 rules 9 and 10 of the Civil Procedure Rules which provides as follows:

"9. Service on several Defendants.

Except as otherwise prescribed, where there are more Defendants than one, service of the summons shall be made on each Defendant.

10. Service to be on Defendant in person or on his or her agent.

Wherever it is practicable, service shall be made on the Defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

Furthermore the rules provide that service on a recognised agent is effective service. Order 3 rule 3 of the Civil Procedure Rules provides as follows:

“3. Service of process on recognised agent.

- (1) Processes served on the recognised agent of a party shall be as effectual as if they had been served on the party in person, unless the court otherwise directs.
- (2) The provisions for the service of process on a party to a suit shall apply to the service of process on his or her recognised agent.”

Order 3 rule 5 of the Civil Procedure Rules provides that appointment of an agent shall in writing. Finally the above rules are reinforced by the rules on service on an agent under Order 5 of the Civil Procedure Rules. Order 5 rules 10 of the Civil Procedure Rules envisages service on an appointed agent by use of the words “agent empowered to accept service”. An agent is empowered by written appointment.

In the circumstances detailed above there was no service on each Defendant as prescribed by Order 5 rule 9 of the Civil Procedure Rules and which rules are mandatory. Service on the 2nd Applicant cannot be service on the 3rd and 4th Applicants or the 3rd and 4th Defendants. There is no evidence that the 2nd Defendant is an agent of the 3rd and 4th Defendants. There is therefore no evidence of service on the third and fourth Defendants on the court record. In other words they were not served as prescribed by the rules of procedure quoted above. Service is supposed to be made on each Defendant in person or on an agent empowered to accept service.

Under Order 3 rule 1 of the Civil Procedure Rules, service may be made on a recognised agent. Was the 2nd Defendant, a recognised agent of the 3rd and 4th Defendants? A recognised agent is defined by Order 3 rule 2 of the Civil Procedure Rules as follows:

“2. Recognised agents.

The recognised agents of parties by whom such appearances, applications and acts may be made or done are—

- (a) persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties; and
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.”

Recognised agents are persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties or persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court where there is no express authorisation to empower them make such appearances, applications and acts. In other words, in the absence of a power of attorney authorising the second Defendant to make an appearance or to make an application or do such acts on behalf of the second and third Defendants, he had to be an agent carrying on trade or business for and in the names of the third and fourth Defendants who are not within the jurisdiction of the court. That is not the situation here and there is no evidence as I have held above that the second Defendant was an agent of the third and fourth Defendant.

The above grounds are sufficient to dispose of the Applicant's application especially affecting the third and fourth Defendants who are also the third and fourth Applicants in Miscellaneous Application Number 372 of 2016. The fourth Applicant is the sole Applicant in Miscellaneous Application Number 371 of 2016 and the fourth Defendant to the main suit.

Before taking leave of the matter the plaintiff describes the second Defendant as a male adult of sound mind, a director in the first Defendant Company. Paragraph 7 avers that the Plaintiff entered into a joint-venture with the first Defendant. The averments indicated that the contract was between the Plaintiff and the first Defendant though there were directors who acted and received the money which was paid on the first Defendant's account. While there may be no clear averment about the liability of the other Defendants, it is a matter that requires evidence. For the moment it is sufficient for the second Defendant to assert that he is a mere director and not personally liable. In other words, there is sufficient cause to investigate whether the second Defendant who is also the second Applicant in Miscellaneous Application Number 372 of 2016 is personally liable. Even though there is prima facie evidence that he was served and refused to acknowledge service, the interest of justice is that he is allowed to present his defence.

In the premises judgment entered against the second, third and fourth Defendants under Order 9 rules 6 of the Civil Procedure Rules will be set aside. Execution proceedings against the second, third and fourth Defendants will also set aside. There is no ground to set aside the default order against the first Defendant. No representations were made on behalf of the first Defendant Company and the order of the registrar will stand as against the first Defendant Messieurs Kibibu Engineering Co. Ltd.

In the premises, Miscellaneous Application Numbers 372 and 371 of 2016 succeeds and the judgment and decree against the second, third and fourth Defendants to High Court Civil Suit No 121 of 2015 is set aside.

Execution proceedings against the second, third and fourth Defendants in High Court Civil Suit No 121 of 2015 are also set aside.

Default judgment against the first Defendant remains as decreed.

The application of the second, third and fourth Defendants to the main suit in Miscellaneous Application Numbers 372 of 2016 and 371 of 2016 succeed with costs awarded to Alan Kihangire only.

There are no costs awarded to the 2nd and 3rd Applicants.

The application of the first Applicant stands dismissed with no order as to costs.

Ruling delivered in open court on 21st of September 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Annette Kobusingye Counsel Allan Kihangire

No one for the Respondent Company

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

21st September 2016

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