

UGANDA / JUDGMENT

Kobi v Barasi Investments Limited (Miscellaneous Application 2986 of 2023) [2024] UGCommC 291 (11 July 2024) [2024] UGCommC 291

COURT

Commercial Court of Uganda

BEFORE

Anna B. Mugenyi, J

CASE / FILE NUMBER

Miscellaneous Application 2986 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA ICOMMERCIAL
DMSIONI MISCELLANEOUS APPLICATION NO. 2986 OF 2023 IARTSING FROM CIVIL
SUIT NO.818 OF ²⁰²²1</sup>

KOBI SAMSON:.....]:.....APPLICANT

VERSUS

BARASI INVESTMENTS LIMITED: 3 : :RESPONDENT

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

RULING

INTRODUCTION

This Application was brought by way of Notice of Motion under section 33 of the Judicature Act, section 98 of the Civil Procedure Act (CPA), Order 36 rule 11, and Order 52 rules 1,2 & 3 of the Civil Procedure Rules(CPR) for orders that:

- 1) The decree and default judgment of the 14th day of February 2023be set aside.
- 2) An order allowing the Applicant to file his Application for leave to appear and defend civil suit No. 818 of 2022.
- 3) Leave be granted for the Applicant to file his defence.
- 4) Costs abide in the final outcome of the suit.

This Application was supported by the affidavit of Mr Kobi Samson, the Applicant in this case and opposed by the Affidavit in reply of Mr Nelson Nabimanya Katuuku, the managing director of the Respondent.

BACKGROUND

The Respondent filed a summary suit vide civil suit No. 818 of 2022 against the Applicant claiming that it advanced the Applicant a loan of Ugx 134,000,000ts (One

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hundred thirty-four million shillings) at an interest rate of 3Yo per month and the Applicant failed to pay back the loan. The Applicant did not file an application for leave to appear and defend the suit within 10 days as required by the Civil procedure Rules and the court proceeded to enter a default judgment against the Applicant on the 14n of June 2023. The Applicant now seeks to set aside the default judgment on grounds that he was not served with the summons to the suit thus this Application.

REPRESENTATION

The Applicant was represented by M/s Byamugisha, Lubega, Ochieng, and Co Advocates whereas the Respondent was represented by M/s praxlex Advocates.

RULING

I have considered the pleadings and submissions of the parties in this matter, and the main issue for determination before this court is whether the default judgment and decree entered against the Applicant in civil suit No. 818 of 2022 should be set aside and the Applicant granted leave to appear and defend the suit.

In this case, the court issued a default judgment under order 36 rule 3(2) of the civil Procedure Rules (cPR) and as such the same can only be set aside under order 36 rule 11 of the CPR which provides that:

'After the decree the court may, if satisfied that the service of the 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 the execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable so to do, and on such terms as the court thinks fit. "

The Applicant seeks to set aside the default judgment and decree on the grounds that he was never served with summons. Counsel for the Applicant submitted that the Applicant was never physically served and the Applicant never gave instructions to any lawyers to receive court documents on his behalf.

Counsel further submitted that the law provides for modes of service under order ⁵ of the CPR which must be adhered to and in the instant case, the Applicant has ^a place ofaboard yet the Respondent did not try to serve him at his place ofaboard.

counsel relied on the case of Sharon Asasira vs Housing Finance Bank Limited Miscellaneous Application No 660 of 2019 where the case of Geoffrey Gatete vs William Kyobe SCCA No.7 of 2005 was relied on to define what amounts to effective service.

counsel for the Respondent submitted that the Applicant was served with summons as evidenced in the affidavit of service where it was stated that the Applicant was called on his known telephone number to wit he instructed the process server to serve one of his lawyers and his lawyer retained a copy of the summons and refused to acknowledge receipt or file pleadings.

counsel for the Respondent contended that the Applicant was at all times aware of the summary suit as he does not deny knowledge of the lawyers served and one of them filed the instant application. Counsel submitted that the only inconsistencies are that the Applicant contends that he was served with the taxation notice yet the affidavit of service stipulates that he instructed the court process server to serve his lawyers.

Counsel concluded by stating that the Applicant's case does not meet the test in the case of Geoffrey Gatete vs William Kyobe(supra) as the Applicant had been made aware of the suit but only elected to not file an Application for leave to appear and defend.

order 5 rule 10 of the CPR provides for the mode of service of summons to an individual thus:

"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. "

In the instant case, service was not effected on the person of the Applicant or any agent but was purported to have been effected on his lawyers.

Order 3 rule 4 of the CPR provides for service on an Advocate thus:

"Any process served on the advocate of any party or left at the office or ordinary residence of the advocate, whether the process is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the advocate represents, and, unless the court otherwise directs, shall be as effectual for all purposes as if the process had been given to or served on the party in person. "

For a default judgment to be set aside under order 36 rule 11 of the CPR, the court has to establish that the service of the summons was not effective. The question therefore is whether the service of summons on the alleged lawyers of the Applicant amounts to effective service.

The Supreme Court in the case of Geoffrey Gatete vs William Kyobe(supra) defines effective service thus:

"The Oxford Advanced Learners' Dictionary defines the word "effective" to mean "having the desired effect; producing the intended result". In that context, effective service of summons means service of summons that produces the desired or intended result. Conversely, non-effective service of summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in a civil suit is to make the defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. The surest mode of achieving that result is serving the defendant in person. "

In the instant case, the affidavit of service attached as annexure ,A' to the Respondent's affidavit in reply states that the Applicant was called on his known telephone number to which he instructed the process server to effect service on his lawyer, Sserwadda of Sserwadda, Muhereza & Co. Advocates, who retained a copy of the summary plaint but refused to acknowledge receipt of the same.

I find that the non-acknowledgment of the summons by the purported lawyer should have been reason enough for the Respondent to realize that it was possible that the lawyer was not instructed by the Applicant to receive court process and they ought to have used other modes of service such as substituted service to ensure that the Applicant was effectively served. Service of summons on the lawyer which the Applicant purports to have not instructed to receive documents on his behalf cannot be effective service as it did not produce the desired results. Equally nonacknowledgment of the summons by the lawyers is a clear indication that service is not effective thus the need to serve through alternative modes of service such as substituted service.

I, therefore, find that there was no effective service of the summons on the Applicant.

Cw\

In the circumstances, and in accordance with the law, the default judgment is set aside as prayed and the Applicant is allowed to answer to the summons and file his written statement of defence within 14 days after delivery of this Ruling.

Costs shall abide the cause.

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HON. LADY JUSTICE ANNA B. MUGENYI DATED.....

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