

UGANDA / JUDGMENT

Kyambadde v Amdhan Khan

(Miscellaneous Application No. 719 of 2015) [2016] UGCommC 54 (17 June 2016)

[2016] UGCommC 54

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 719 of 2015

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THE REPUBLIC OF UGANDA,**IN THE HIGH COURT OF UGANDA AT KAMPALA****(COMMERCIAL DIVISION)****MISCELLANEOUS APPLICATION NO 719 OF 2015****(ARISING FROM CIVIL SUIT NO 764 OF 2013)****WILSON KYAMBADDE}..... APPLICANT****VERSUS****AMDHAN KHAN}..... RESPONDENT****BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA****RULING**

The Applicant commenced this application and citing the provisions of section 33 of the Judicature Act Cap 13 Laws of Uganda, section 98 of the Civil Procedure Act cap 71 Laws of Uganda, Order 36 rule 11 of the Civil Procedure Rules and Order 52 rules 1 and 3, as well as Order 22 rule 23 of the Civil Procedure Rules for orders that the default judgment/decree against the Applicant in HCCS 764 of 2013 is set aside. Secondly it is for an order that the execution of the default judgment/decree by way of a warrant of arrest and detention of the Applicant in EMA number 942 of 2015 is set aside. Thirdly it is for an order that the Applicant/Defendant is granted unconditional leave to appear and file a defence High Court civil suit number 764 of 2013. Finally the Applicant prays for costs of the application to be in the cause.

The grounds of the application are that the Applicant instructed his lawyers Messieurs Nsereko – Mukalazi and Company Advocates to file an application for leave to appear and defend HCCS 764 of 2013. Secondly the Applicant was informed by his then lawyers that the application for leave to

appear and defend HCCS number 764 of 2013 was duly filed. Thirdly the Applicant at all material times, cheque in with his lawyers to find out the status of the application and the lawyers assured him that the same had not yet been fixed for hearing. Fourthly the Applicant was later shocked to discover that the notice to show cause dated 7 September 2015 had been issued against him in EMA number 942 of 2015 arising from HCCS number 764 of 2013. Fifthly the Applicant was never aware of any hearing dates for the application for leave to defend or that the application for leave to appear and defend the suit had been dismissed or otherwise. Sixthly the Applicant was misled by Counsel on how to proceed with the application for leave to defend HCCS 764 of 2013. On the seventh ground the Applicant avers that as a result of having been was advised and owing to the negligence of his Counsel, an ex parte decree was issued against him in HCCS 764 of 2013. On the eighth round the Applicant avers that he has a probable defence to the suit which is frivolous, vexatious and is based on an illegal instrument. He avers that the application was brought without an unreasonable delay and is intended to avail the Applicant a right to be heard. Finally the Applicant avers that it is in the interest of justice that the application is allowed.

The application is supported by the affidavit of Wilson Kyambadde who is the Applicant himself. He deposes that on 20 December 2013 HCCS number 764 of 2013 was commenced against him through the Plaintiff's lawyers claiming for recovery of a liquidated sum of US\$300,000. He was informed by his lawyers that the application was duly filed and is pending the hearing date and at all material times kept on checking on the lawyers were assured him that the application had not yet been fixed for hearing. On 7 September 2015 the Applicant was shocked to discover that the notice to show cause dated first of September 2015 had been issued against him. He substantially verifies the averments in the notice of motion contained above and adds that he was not aware of the claim of US\$300,000 and it has a defence to the suit. Upon receiving the notes immediately called his lawyers Messieurs KMT advocates who advised him that the suit was not tenable on the ground of illegality because it is based on an illegal instrument and therefore does not disclose a cause of action. The application was brought without an unreasonable delay.

In reply the Respondent Mr Amdan Khan in the affidavit in reply opposed the application. He deposes that on 20 December 2013 he filed a summary suit in HCCS number 764 of 2013 for recovery of a liquidated sum of US\$300,000 but the Applicant did not apply for leave to appear and defend the suit. Consequently he obtained a default judgment and proceeded to carry out execution and the Applicant has since the execution effort frustrated efforts to recover the outstanding sum due by filing numerous applications all in abuse of court process. Contrary to the Applicants assertion that he has no knowledge of the sum claimed, the Applicant acknowledged the amount in a document dated 30th of October 2013 and undertook to refund the sum of US\$300,000 advanced as a loan and is therefore aware of the claim. The Applicant was aware of his contractual obligation and the suit was instituted against him but he deliberately ignored the suit in order to evade justice. On the advice of his Counsel Messieurs Tumusiime, Kabega and company advocates and in light of the acknowledgements attached to the affidavit in reply, the Applicant has no defence to the entire claim in the suit.

Additionally the Respondent deposes that following the execution process in which a warrant of arrest had been issued, the Applicant filed High Court Miscellaneous Application Number 2274 of 2015 in the execution and court bailiffs division of the High Court for stay of execution which application was allowed on condition that the Applicant deposits in court 50% of the US\$300,000 within 45 days as security for due performance of the decree and upon failure to deposit the decretal sum will fall due and execution would resume. The Applicant did not comply with the orders of the court which conduct amounts to contempt of court orders. The Applicant additionally filed miscellaneous application number 2983 of 2015 in the execution and court bailiffs division for leave to appeal against the orders. The application was heard and dismissed with costs according to a copy of the court order annexed. Since 9 September 2015 when this application was filed, the Applicant made no effort to have it fixed and heard until 14 March 2016 and that amounts to dilatory conduct and inexcusable delay. Finally the Respondent deposes that it is in the interest of justice that the application should not be granted.

At the hearing Counsel Barnard Mutyaba of Messrs KMT Advocates represented the Applicant while Counsel Oine Ronald of Messrs Tumusiime, Kabega & Co. Advocates represented the Respondent when court was addressed orally.

The Applicants Counsel submitted relied on the grounds in the application as pleaded and the affidavit in support. The Respondent fled HCCS No. 764 of 2013 against the Applicant and upon being served the Applicant instructed his lawyers Nsereko Mukalazi and Co Advocated to file an application for leave to appear and defend the suit. The lawyers were negligent and did not pursue the instructions hence judgment in default of an application was entered against the Applicant. The evidence in support of the application demonstrates that the Applicant took necessary steps to involve Counsel to file an application for leave to appear and defend and at all material times the Applicants Counsel informed him that they were handling the application on his behalf. The Applicant was shocked when on 7th Sep 2015 a year and a half (1 ½) after filing the suit he was served with notice to show cause why execution of a decree passed under the suit should not issue against him.

The Applicants Counsel further submitted that the evidence demonstrates that the Applicant was not even aware of the claim and the Applicant was a good defence to the suit. The application has been made without inordinate delay and it is intended to offer the Applicant a right to be heard. Furthermore it is against the norms of natural justice to condemn the Applicant unheard especially in matters involving colossal sums of money as in the Applicant's case.

The Applicant's Counsel submitted that an innocent litigant should not be condemned for mistakes of his or her Counsel and this was held in the cases of **Standard Chartered Bank (U) Ltd vs. Mwesigwa Geoffrey Philip HCMA NO 477 of 2012**; **Mutaba Balisa Kweterana Ltd vs. Babizakye Yereimia Court of Appeal Civil Application 158 of 2014**; **Banco Arabe Espanol vs. Bank of Uganda**.

The Applicants Counsel also submitted that the affidavit in reply does not in any way offer any evidence in rebuttal to the evidence of the Applicant and contended that failure to controvert the evidence in law is taken as an admission of the same according to the case of **Alan Mugisha Nyirinkindi vs. Commissioner for Land registration HCMA 47 of 2009**. In the premises he prayed that the application is granted.

In reply Oine Ronald Counsel for the Respondent opposed the application and on the basis of the facts deposed in the affidavit of the Respondent submitted the following. After execution process had been commenced, the Applicant filed two applications in the High Court Executions and Bailiffs Division and obtained an interim order of stay of execution. When the main application for stay of execution came up for hearing, Hon Justice Ezekiel Muhanguzi granted a conditional stay of execution pending disposal of the application before this court and the order is attached. The Applicant was ordered to deposit US\$ 150,000 in court within 45 days from the 11th of November 2015 and then proceed with this application. The Applicant failed or neglected to comply with the order and filed HCMA No. 2983 of 2015 in the High Court Executions and Bailiffs Division for leave to appeal against the conditional stay of execution order. Once again the application was granted on the 8th of February 2016 and leave was denied and application dismissed with costs.

To date the order to deposit US\$ 150,000 has not been complied with and failure to comply with a court order amounts to contempt of court. The argument of inability to pay was raised in HCMA 2983 of 2015 and determined and the matter is not *res judicata*.

In addition the Respondents Counsel submitted that failure to comply with an order of court means that the Applicant has come to court with dirty hands. He contended that this fact means the Applicant cannot be heard in another matter and Counsel relied on the Court of Appeal case of **Housing Finance Bank Ltd and Another vs. Edward Musisi Miscellaneous 158 of 2010**. In that case at page 11 thereof the court dealt with the principles. In that case an interim order had been made with the conditional order to deposit a land title with the registrar and the order was not complied with and when the main application for stay of execution came up the Court of Appeal held that non compliance was contempt of court. Non compliance to deposit pending disposal of this matter is thereof a contempt of court. Moreover there is no evidence that the Applicant purged himself of the said contempt. In total it was held that a party in contempt of court cannot be heard in a different but related matter unless he is purged of the contempt order. The Applicant cannot be heard in this application and the ground is sufficient to dismiss the application.

Secondly the default judgment in issue was entered on 30th of March 2014 well after the process of service of summons and the application was filed on 9th of Sep 2015 being a period of one year and six months. The delay cannot be explained anywhere and amounts to inordinate delay. Thirdly the submission on negligence of Applicant's alleged first Counsel is rebutted in paragraph 5 of the affidavit in reply and the submission of the Applicant's Counsel that evidence is not rebutted has not foundation and should be disregarded.

There is no evidence from Mukalazi and Company Advocates that the firm received instructions and did not comply and the allegations are statements in an afterthought.

The Respondents Counsel further pointed out that the suit from which the application arises is based on a bill of exchange and namely a cheque. The cheque was issued to the Respondent by the Applicant and dated 30th of October 2013 for US\$ 300,000. The Applicant has no defence to the check at all according to the decision of Hon Lady Justice Irene Mulyangonja in

Miscellaneous Application No 664 of 2009 Sembule Investments Ltd vs. Uganda BAATI ltd.

Counsel submitted that the facts of this suit are more or less similar. In the above suit the basis thereof was bill of exchange and Sembule Investments applied for leave to appear and defend when the application was refused. A bill of exchange is an unconditional order in writing and addressed to one person by another to pay a sum certain in money as defined by section 2 (1) of the Bills of Exchange Act. A cheque is defined as a bill of exchange under section 72 (1) thereof. The Plaintiff presented the cheque issued by the Applicant and it was returned with the words RTD (refer to drawer). The Applicant did not countermand the cheque and was aware or ought to have known that the cheque would be cashed. The defence was considered a sham and the application dismissed with costs.

The Applicant's application also has not issues raised for trial and his proposed defences are a sham. He deposed that he was not aware of the cheque. Counsel submitted that this was a deliberate falsehood. The Applicant should not be allowed to use court processes to circumvent the course of justice. He prayed that the application is dismissed with costs. Furthermore in the event that the Counsel is included to grant the application, it should be on condition that the Applicant deposits the entire sum of US\$ 300,000/= in court.

In rejoinder Counsel Barnard Mutyaba for the Applicant submitted that the issue of inordinate delay in filing and fixing the application was because the Applicant got to know about the default decree on 7th of September 2015. He had kept on checking with his lawyers the status of the application and the lawyers had informed him that the application had not been fixed for hearing. Since the filing of application on 9th September 2015, efforts were made to trace the court file but it was missing. Subsequently the registrar was moved and a duplicate file was opened and the proceedings were taken based on a duplicate file. There was no inordinate delay.

On the question of the bill of exchange being unconditional the Applicant deposed an affidavit in rejoinder in which he said that the debt does not owe from the Applicant to Respondent and the alleged acknowledgement is a forgery. Moreover the addressee in the cover note is different from the Respondent to the application.

He further submitted that it is to be wondered why the Applicant would issue a cheque and on the same date sign an acknowledgement in respect of the same debt. It defeats logic for the cheque which is to be paid within 30 days to be dated on the same day as the acknowledgement which says it is to be paid in 30 days. The same cheque was banked before the expiry of the 30 days and the question is whether that acknowledgement ever executed by the parties? The Applicant's Counsel submitted that this raises a red flag which amounts to a triable issue for which leave

ought to have been granted to the Applicant to defend the main suit.

The case of **Sembule Steel Mills vs. Uganda BAATI** (supra) is distinguishable from the facts presented in this application because it concerned an application for leave to appear and defend but in this matter the Applicant is challenging an ex parte decree where he was not heard.

Secondly the rules are clear. A suit has been brought to prove it.

On the issue of the order issued in the Execution and Bailiffs Division of the High Court, the conditional order is clear and has three orders. The first and the second are the important ones. The first order stays execution of judgment and decree pending determination of main application. The second order relates to deposit of 50% of the decretal amount within 45 days as security for due performance of the decree and upon failure of which the whole decretal sum became due and execution thereof was to ensue. Execution is underway and a warrant has been issued. The Respondent has not demonstrated that the Applicant has been arrested and failed to pay.

For Counsel to bring execution matters pending before another division in this court is unfortunate. This court is not dealing with the execution of the decree but rather with the circumstances to set aside the decree. The decree is being challenged and that makes it unfair to seek for the deposit of the decretal sum. It suggests that the Applicant has been found liable to pay this sum. The matter is before the court which ought to try it if the orders are granted. The outrageous sums being suggested would be punitive and would clog the opportunity and right the Applicant has to be heard in the application. In the premises he reiterated prayers that the application is granted.

Ruling

I have carefully considered the Applicant's application together with the affidavit in support and in opposition as well as the affidavit in rejoinder. Judgment in default of filing an application within the stipulated time was entered against the Applicant on 30 April 2014 in which a sum of US\$300,000 was awarded against the Applicant in the suit of the Respondent. This was in HCCS 764 of 2013.

Subsequently the matter was handled by the Execution and Bailiffs Division of the High Court. While it was being handled in that division the Applicant filed an application on 9 September 2015 for the default judgment/decreed entered against him to be set aside.

I have duly considered the submissions of both Counsels which are set out above. The submission of the Respondent's Counsel partly amount to a preliminary objection to the Applicant's application on the ground of orders of Honourable Justice Muhanguzi Ezekiel entered on 11 November 2015. This was about two months after the filing of the Applicant's current application in this court. In Miscellaneous Application Number 2274 of 2015 in the Execution and Bailiffs Division of the High Court an order of stay of execution of the judgment and decree in HCCS 764 of 2013 was issued until the determination of Miscellaneous Application Number 719 of 2015 filed at the commercial court division. This is the current application under consideration.

Furthermore in that order Honourable Justice Muhanguzi Ezekiel made a conditional order that the Applicant deposits 50% of the decretal amount of US\$300,000 within 45 days as security for the due performance of the decree in HCCS 764 of 2013. Secondly he ordered that upon failure of deposit as ordered, the whole decretal sum would become due and execution thereof would resume.

I agree with the Applicant's Counsel that the terms of the order were that upon failure to deposit US\$150,000 within 45 days as security for the due performance of the decree, the whole decretal sum would become due and execution would resume. It is not in dispute that the Applicant defaulted and never deposited security for due performance of the decree in HCCS 764 of 2013. The consequence of the failure is that the order for stay of execution lapsed. This is made apparent by paragraph 2 of the order where it is written that upon failure to deposit the whole decretal sum would become due and execution would resume.

In relation to the alleged contempt of court for failure to deposit, the first point to be made is that the court order was self executing. It provided for the consequences of disobedience or non-compliance. Accordingly the order lapsed upon failure to deposit US\$150,000 within 45 days from the date of the order. It follows that the order was not in operation and the consequence of non-compliance was the resumption of execution proceedings. The reasons for non-compliance have not been made the subject matter of this application. In the premises the refusal or inability to pay the sums ordered meant that execution would resume against the Applicant. In the premises the Applicant cannot be held in contempt of the court order which has since lapsed and the objection in the relation to the assertion that the Applicant is in contempt of court order is overruled.

The second matter regards an order issued on 1 March 2016 pursuant to an application appealing from the conditional order. The order is referred to in paragraph 11 of the affidavit in reply where the Respondent deposed that the Applicant filed Miscellaneous Application Number 2983 of 2015 for leave to appeal against the orders of stay of execution granted on condition of deposit of US\$150,000 being 50% of the decreed amount. The application was heard and dismissed with costs. A copy of the order attached shows that the application came for final disposal before Honourable Mr Justice Ezekiel Muhanguzi on 8 February 2016 in the presence of the Counsels of both parties. The application was dismissed with costs to the Respondent. By the time of the application, the Applicant had already applied to set aside the default decree. In fact by the time of the order for stay of execution was issued, it was made pending the hearing of this application. In other words Honourable Mr Justice Ezekiel was aware that the Applicant had applied in this application to set aside the default decree. The application for leave to appeal concerned the conditional stay of execution order. The matter is therefore not res judicata. The objection in relation to this application being res judicata is also overruled.

I would therefore deal with the merits of the application. Starting with the basics, summons was issued for the Applicant to apply to, within 10 days from the date of service, apply for leave to the court to appear and defend the suit. It is disclosed in the summons that there was a suit which would entitle the Plaintiff to an amount of US\$300,000 against the Applicant. Summons was

issued on 11th of March 2014 through extension of time to serve though the suit was filed on 20 December 2013. The Respondent/Plaintiff relied on an acknowledgement of the sum on 30 October 2013 by the Applicant. Secondly the Respondent/Plaintiff relied on a cheque dated 30th of October 2013 for the same sum of US\$300,000 drawn by the Applicant for the payment of the Respondent. The cheque is in the names of the Applicant. The cheque had been dishonoured and it was to be returned to the drawer. The Applicant was served with the plaint on 2 April 2014 according to a copy of the acknowledgement. Judgment was entered on 30 April 2014. The Applicant was also served with a summary of the case for mediation on the same day disclosing all the particulars of the claim. Subsequently a decree was issued on 15 October 2014. On 9 September 2015 the record shows that the Applicant filed a written statement of defence drawn by KMT advocates. On the same day the Applicant filed this application to set aside the default decree. The record shows that on 14 April 2014 the Applicant through Messrs Nsereko – Mukalazi and Company Advocates filed an application by notice of motion for unconditional leave.

The Applicant does not deny that he was served. However the affidavit of service is that of Mr Kamuremere George who deposes that on 20 March 2014 during the course of his duties, he received a mediation summary and plaint signed and sealed by the court from the registry for service upon the Defendant/Applicant. He proceeded on 24 March 2014 to the known office of the Defendant in KCCA Central Division Headquarters to effect service. The Defendant was not in office. He left the documents at that office with his contact telephone number and on 2 April 2014 he was called by the Applicant/Defendant to pick they received copies of the documents duly acknowledged.

The above facts disclose a serious flaw in the service of the Respondent. The first flaw is that there is no return of service of summons in accordance with Order 5 rule 8 of the Civil Procedure Rules. This rule prescribes the mode of service of summons which is made by delivering or tendering a duplicate of the summons signed by the judge and such officer as the judge appoints for this purpose and sealed with the seal of the court. The return of service on the court record shows that no court document was served on the Applicant. The acknowledgement is made on the plaint and not summons. The Plaint is signed on behalf of the Plaintiff by Tumusiime, Kabega and Company Advocates. The only evidence that it has ever reached the court premises is a stamp of acknowledgement of the High Court of receiving the plaint. This is confirmed by the affidavit of service paragraph 3 thereof which deposes that on 20 March 2014 during the course of his duties, George Kamuremere received a mediation summary and plaint signed and sealed by the court for service on the Applicant.

What was signed was an acknowledgement stamp on the plaint and not summons. I have seen the copy of summons issued on 11 March 2014 on court record. There is no acknowledgement attached to the affidavit other than the acknowledgement on the plaint. The second problem is that the summons was issued on 11 March 2014. Assuming that the summons was actually served with the plaint, though there is no evidence thereof, they were picked for service on 20 March 2014 (if at all summons was ever served). Subsequently on 24 March 2014 Mr George Kamuremere, the court process server purported to proceed to the known office of the

Defendant/Applicant at KCCA Central Division Headquarters to effect service. Service was acknowledged on 2 April 2014. Service is to be made within 21 days from the date of issue. 21 days from the date of issue from 11 March 2014 is Monday 31st of March 2014. If the days are reckoned from 12 March, the summons would have expired by 1 April 2014. By 2 April 2014 the summons had expired in accordance with Order 5 rule 1 of the Civil Procedure Rules which requires the suit to be dismissed if there is no application for extension of the period for service of summons. Secondly Order 5 rule 10 of the CPR provides that service on the Defendant 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 this case service was purportedly made on the Applicant/Defendant personally.

Where there is no court order served on the Defendant/Applicant directing him to apply for leave within 10 days, it cannot be held that the application for leave to defend filed on 14 April 2014 just 12 days upon service of the plaint was in breach of the court order in the summons to file the application within 10 days. There is no evidence that such a summons or court order was served on the Defendant/Applicant on court record.

The above point would be sufficient to set aside the default decree under the provisions of Order 36 rule 11 of the Civil Procedure Rules. The rule provides that the court may if satisfied that service of summons was not effective, set aside the decree. There was no effective service of summons but the Applicant filed an application 12 days after service of the plaint on him. The Applicant claims for leave to defend himself. He has also advanced the grounds for leave and not much prejudice has been occasioned.

I have duly considered the application for leave on the merits. The only ground for consideration that is left is contained in ground 8 of the application as well as grounds 9 and 10 in which the Applicant avers as follows:

The Applicant has a probable defence to the suit which is frivolous, vexatious and is based on an illegal instrument. Secondly the application was brought without unreasonable delay and is intended to avail the Applicant a right to be heard. Thirdly that it is in the interest of justice that the application is granted. The rest of the averments in grounds 1, 2, 3, 4, 5, 6 and 7 dealt with the alleged facts of the Applicant checking with his lawyers, instructing lawyers and alleged negligence of the lawyers for the default decree. Because I have held that there was no proper service of summons there is no need to consider these other grounds.

The Applicant in the affidavit in support of the allegation deposes that there was an illegal instrument in paragraphs 9 and 10 thereof. In paragraph 9 the Applicant deposes that he is not aware of the claim of US\$ 300,000 and he has a defence to the suit. In paragraph 10 he deposes on the basis of his belief upon the advice of his lawyers Messieurs KMT Advocates that the suit was untenable because it is based on an illegal instrument that does not disclose a cause of action against him. On the other hand the Respondent in the affidavit in reply has attached a cheque issued drawn by the Applicant for the sum of US\$300,000. Secondly he attached an acknowledgement for the same sum signed by the Applicant.

Nowhere in the affidavits in support of the application does the Applicant assert or allege that the cheque is a forgery. This allegation is made in rejoinder and I will deal with it subsequently. Secondly the acknowledgement is addressed to Mr Amudan. The Applicant's Counsel submitted that the acknowledgement annexure "A" to the affidavit in opposition to the application deposed to by the Respondent was not issued to the Respondent. I do not agree. The name Amudan is the way the Applicants wrote the name Amdan which is a phonetic variation of his way name is pronounced. In any case misspelling a name does not mean that the acknowledgement was not addressed to the Respondent. A misspelling is a misnomer.

The allegation that the acknowledgement is a forgery is made in paragraph 7 of the affidavit in rejoinder. In paragraph 8 the Applicant deposes that it defeats logic how he could have issued the cheque and on the same date signed an acknowledgement in respect of the same alleged debt. I do not see anything illogical about someone issuing a cheque and on the same date signing an acknowledgement. It may depend on when the cheque is dated. This may occur if the cheque is to be presented on another date. The acknowledgement may also be post dated. The real controversy should be whether the Applicant signed the acknowledgement. Secondly the issue would be whether he issued the cheque. There is no evidence of an expert attached to the application to support the forgery allegation. From the claimants point of view I have carefully scrutinised the affidavit in rejoinder signed by the Applicant. And it can easily be established that the signature in the affidavit in support of the application is completely different from the one in the affidavit in rejoinder. What is the intention of signing using completely different signatures in the affidavit in support of the application and the affidavit in rejoinder? Secondly the affidavit in support of the application of the Applicant has a signature that is clearly the same as that in the cheque book and the acknowledgement. In the absence of a forensic examination that may point out any difference which I cannot see, I believe the Respondents evidence that the Applicant issued the cheque and signed the acknowledgement the basis of the suit. However no one has challenged the affidavit in rejoinder on the ground that it is signed using a different signature. The Applicant may use a different signature and I doubt whether that would render the affidavit an illegality. So long as it is the deposition of the Applicant the affidavit dated 23rd of March 2016 would remain as it is. The way I perceive it is that the Applicant was trying to show that he has a different signature.

However I am not a forensic expert. I would therefore give the Applicant the benefit of doubt on the matter of alleged forgery. To avoid the slightest possibility that the two documents relied upon by the Respondent in the summary suit are forged by a master forger, I am inclined to give the Applicant conditional leave to defend the action because even the cheque used is in the Applicants names. Secondly it is my directive that all the signatures filed on the court record shall be referred to a forensic laboratory for analysis by the Respondent's lawyers. The Applicant's Counsel may also write a letter to the same government laboratory for analysis using the same documents on the court record. Any other document to be submitted should only be an original of any document which is a photocopy of that which is already on the court record.

In the premises the conditional leave to defend this action is granted.

1. The default judgment issued against the Applicant for the sum of US\$300,000 is hereby set aside.
2. The Applicant shall pay to the court the sum of US\$100,000 within a period of one month from the date of this order.
3. The Applicant has leave to file a written statement of defence within 14 days from the date of this order.
4. Should the Applicant fail to deposit the sum of US\$100,000 within one month from the date of this order, the written statement of defence that would be filed after this order will be struck off the record and the matter would proceed in default of a written statement of defence whereupon the order for payment of US\$ 300,000 shall be reinstated with any other terms.
5. The costs of this application are costs in the cause.

Ruling delivered in open court on 17 June 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Jimmy Muyanja holding brief for Counsel Ronald Oine

Amdan Khan present in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

17th June 2016

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Prepared on 13 October 2026 · Esheria