

UGANDA / JUDGMENT

Lutaaya Abubaker v Kanyoro Hassan (Miscellaneous Application No. 220 of 2020) [2022] UGCommC 30 (2 June 2022) [2022] UGCommC 30

COURT

Commercial Court of Uganda

BEFORE

Rwakakooko, J

CASE / FILE NUMBER

Miscellaneous Application No. 220 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION MISC. APPLICATION NO. 220 OF 2020 (Arising from Civil
Suit No. 251 of 2019)

LUTAAYA ABUBAKER APPLICANT

VERSUS

KANYORO HASSAN RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by way of Notice of Motion under Section 98 of Civil Procedure Act, Cap 98, Section 33 of Judicature Act, Cap 13, Order 9 Rule 12, Order 52 rules ¹ & 3 of the Civil Procedure Rules, SI 71-1 for orders that:

- (a) Default judgment and decree issued by this Honourable Court in Civil Suit No. 251 of 2020 be set aside.
- (b) Execution proceedings under EMA No. 83 of 2020 in the execution of the aforesaid default judgment be set aside.
- (c) Leave be granted to the Applicant/Defendant to file a defense.
- (d) Provision be made for the costs of this Application.

Background

The Respondent brought Civil Suit No. 251 of 2019 (hereafter referred to as the main suit) against the Applicant and Ssonko Ramathan (co-Defendant) t/a Yamazaki Parts Center. The claim was for recovery of Ugx. 135,250,000/= , general damages, interest and costs of the suit. The sum sought arose out of a contract of supply of spare parts between the parties. Under the contract, the Applicant was to purchase different spare parts worth Ugx. 150,000,000/= and deliver them through Ssonko Ramathan to the Respondent. The Respondent claimed that the Applicant & Ssonko Ramathan did not deliver to him spare parts worth Ugx. 135,250,000/= which had already been paid for by the Respondent.

Summons in a summary suit were issued and served by way of substituted service with leave of court on 25th July, 2019 in the Daily Monitor and a copy

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was also affixed to the Applicant's door of his place of work on 26th July, 2019. Still, the Defendant did not seek leave of court to file a defense. Subsequently, the Applicant through his lawyers applied for default judgment for the Ugx. 135,250,000/=, 24% interest per annum and costs by letter dated 21st August, 2019 which was granted by the Registrar on 2¹st January, 2019. The Respondent then initiated execution proceedings against the Respondent vide EMA No. 83 of 2020, and he was committed to civil prison for the debt by H/W Deo Nizeyimana. The Registrar of this court, vide Misc. Application No. 219 of 2020 released the Applicant from civil prison pending the hearing of this application, requiring him to deposit his passport and his other travel documents. The Applicant deposited his passport and Japanese disembarkation card with this court on 25th March, 2020.

The Applicant now seeks to have the default judgment set aside for reason that he was never served with a copy of the plaint in the main suit, and that he has a good and tenable defense to the main suit. He claims to have only learnt of the Respondent's claim on 21st February, 2020 when police officers arrested him. The Respondent opposes this application on the basis that the Applicant was indeed effectively served, and his purported defense is simply a sham, frivolous and a general denial of the main claim.

Representation

At the hearing, the Applicant and his counsel were absent. The Respondent was represented by Nuwamanya Balam. Parties were directed to file written submissions per court's set schedule.

Counsel for the Respondent was directed to write to the Applicant's counsel informing him of the directives and a copy proving service filed in court. The Respondent's counsel did as per court's directives. However, the Applicant did not file written submissions per the court's directives. The Respondent though filed written submissions. In the circumstances, the court will consider the application, affidavits in reply and in rejoinder, and the Respondent's submissions in determination of the suit.

Issues for Determination

- 1. Whether the default judgment in Civil Suit No. 251 of 2019 should be set aside for ineffective service of summons.
- 2. Whether execution proceedings in EMA No. 83 of 2020 should be set aside.
- 3. Whether the Applicant should be granted leave to file a defense in Civil Suit No. 251 of 2019.
- 4. What remedies are available to the parties?

Resolution

Issue One: Whether the default judgment in Civil Suit No. 251 of 2019 should be set aside for ineffective service of summons.

The Applicant claims in paragraph 7 of his affidavit in support that he first learnt of the default judgement against him on 21st February, 2020 when he was arrested by police officers effecting an arrest warrant issued by the High Court Execution & Bailiffs Division vide EMA No. 83 of 2020. The Applicant states that he is a resident in Japan, Nagoya Kasugai and has been for the last fifteen (15) years. That the Respondent has his Japanese telephone contact on which he has on different occasions contacted him, and therefore could have served the Applicant with the plaint effectively. On the advice of his lawyers, he avers that the proper mode of service ought to have been under Order 5 rule 28 of the Civil Procedure Rules, and not through substituted service. He states that the substituted service effected by the Respondent was an illegality which this court cannot condone. See paragraphs 9-19 of the Affidavit in Support.

The Respondent maintains that he effected service of summons and the plaint in the main suit on the Applicant and his co-Defendant. See paragraphs 21 & *22 of* the Affidavit in Reply. On file is an affidavit of service of summons by substituted service sworn by Arinaitwe Yonesan, a court process server with M/S Pearl Advocates & Solicitors dated 26th August, 2019. The Respondent also avers that he did not know at the time of service that the Applicant was in Japan, if at all. See paragraph 23 of the Affidavit in Reply.

It would be important, in this instance, to resolve whether the Applicant is resident outside Uganda, that is in Japan. A resident is a person who lives or has a home in a particular place. See **Black's Law Dictionary, 9th Edition**. Counsel for the Respondent argued that just because the Applicant frequently travelled to Japan, it does not make him a resident of Japan. The Applicant attached excerpts from his passport Annexures D, E, F and G to the Affidavit in support to prove this. Annexure G reveals that the Applicant entered Uganda through Entebbe International Airport on 18th December, 2019. Before that, as per Annexure E, he was last in Uganda on 10th December, 2014. And before that he was last in Uganda on 28th December, 2011. The immigration stamps in his passport show numerous trips in and out of Japan, with prolonged stays in Japan and shorter stays in Uganda.

From the above, the Applicant has proved satisfactorily that he does not ordinarily reside within Uganda. Therefore, service onto him by way of substituted service was ineffective for the simple reason that it was done in a newspaper of wide circulation in Uganda, and not Japan, the country where he

was resident. Order 5 of the Civil Procedure Rules provides for special procedures for service in a foreign country, and this does not include substituted service in a newspaper of wide circulation. As was held in **Mahad Ssentongo -v- Asia Rizo Nabisere, Misc. Application No. 843 of 2013**, a case with similar facts, the purported service onto the Applicant by the Respondent by way of substituted service was irregular and ineffective.

Arinaitwe Yonesan in his affidavit of service on the main suit file states that on top of serving the Applicant and his co-Defendant by substituted service, he together with the Respondent went to the Defendants' work place, an electronics shop in Katwe. They asked two gentlemen they found at the shop for their names, but the gentlemen declined to say. The Plaintiff/Respondent informed Mr. Arinaitwe that this was the Defendants' place of work although the 1st Defendant/Applicant was not among the two gentlemen at the shop. Mr. Arinaitwe then affixed a copy of the summons on the door and took photographs with his phone which he attached to his affidavit.

The Applicant executed this type of service under Order 5 Rule 15 of the Civil Procedure Rules. This rule allows for service by affixing a copy of the summons onto the outer door or some conspicuous part of the house in which the defendant ordinarily resides or carries on business for gain. However, the service under Order 5 Rule 15 of the Civil Procedure Rules, was intended for persons ordinarily resident in Uganda. The Applicant has proved that he is not ordinarily resident in Uganda. Therefore, such service was not applicable to him, and was therefore ineffective.

Order 36 Rule ¹¹ of the Civil Procedure Rules provides:

11. Setting aside decree.

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 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.

Having found that there was ineffective service of summons, it follows under Order 36 Rule ¹¹ of the Civil Procedure Rules above that the default judgment entered on 24th January, 2020 is hereby set aside. See **Habib Kamugo -v- Galya Umar Abdullah, Misc. Application No. 231 of 2008**. The Respondent should have served the Applicant as per Order 5 Rules 22, 24, 26, 27 & 28 of the Civil Procedure Rules which he did not.

Counsel for the Respondent submitted that just because the Applicant travelled regularly between Uganda and Japan, and has been working for gain in Japan for the last 15 years, this knowledge cannot be imputed on the Respondent. ^I find that it does not matter that at the time of service of the summons, the Respondent did not know that the Applicant was resident in Japan. The law expects a plaintiff to exercise due diligence in locating the intended defendant, and serving him or her effectively under the provisions of Order 5 of the Civil Procedure Rules. Furthermore, in this case the Applicant's evidence in paragraphs 12 & 13 of his affidavit in support is that the Respondent had on previous occasions contacted him via his Japan telephone number. This evidence went un rebutted by the Respondent in his affidavit in reply. In the circumstances this court believes the Applicant's assertion. Therefore, had the Respondent contacted the Applicant as had been in the past on his Japan telephone number, then he would have with leave of court effectively served the Applicant with the plaint and summons.

The summons in issue are the ones issued on 8th July, 2019 and served by the Respondent by substituted service on 25th July, 2019. The copy of these summons on the court file were not sealed by the court. Form 4 to the Civil Procedure Rules pursuant to Order 36 Rule 3, read together with Order 5 Rule 8 of the same rules require that the summons is sealed by the court. The purpose of a seal is to secure or authenticate a document, and it bears legal consequence on the document. See Black's Law Dictionary, 9th Edition. Without the seal, the summons is incomplete and invalidated. Therefore, the Respondent advertised invalid summons in the Daily Monitor of 25th July, 2019. The substituted service itself was invalid as it was based on invalid summons. This too justifies setting aside of the default judgment for service of invalid summons.

Issue one is answered in the affirmative.

Issue Two: Whether execution proceedings in EMA No. 83 of 2020 should be set aside.

This court does not for whatever reason have access to the complete file of EMA No. 83 of 2020. ^I have however seen the warrant of committal of the Applicant to jail marked Annexure ^I to the Affidavit in support.

The Respondent in paragraphs 30-32 of his affidavit in reply states that upon obtaining default judgment in his favour, a decree was extracted and execution proceedings undertaken. That the High Court Execution & Bailiff's Division issued a Notice to show cause why execution should not issue was served on the Applicant but he did not appear in court. That due to his non-appearance, the court issued a warrant of arrest and the Applicant was arrested and detained in

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civil prison. The Respondent relied upon an affidavit of service marked Annexure E by Nyangoma Esther, a court process server with Executions & Bailiff's Division of the High Court dated 20th February, 2020 to prove service of the notice to show cause why execution should not issue. The Applicant in paragraph 19 of his affidavit in rejoinder states that no notice to show cause why execution should not issue was ever served on him before he was arrested and imprisoned.

Regardless of whether or not there was effective service of the notice to show cause why execution should not issue was effectively served on the Applicant/Defendant; it still remains that the execution proceedings were birthed from an invalid default judgment. As already resolved in issue one above, the Applicant was under the law not effectively served with the summons in the main suit. Therefore, the default judgment was entered in error. It follows that any execution proceedings originating out of this default judgment were in error too.

Subsequently, the execution proceedings under EMA No. 83 of 2020 are hereby set aside.

Issue two is also answered in the affirmative.

Issue Three: Whether the Applicant should be granted leave to file a defense in Civil Suit No. 251 of 2019.

Order 36 Rule 3(1) of the Civil Procedure Rules provides that a defendant to a summary suit shall not appear and defend the claim against him or her unless he or she applies and obtain leave from the court to appear and defend the suit. The Applicant seeks such leave under prayer (c) in the Notice of Motion.

In **Maluku Inter Global Trade Agency -v- Bank of Uganda [1985] HCB 65**, the court stated that:

"Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage." (Underlined for emphasis.) __ -

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The Applicant took the liberty of attaching his draft defense to the affidavit in support of the application marked as Annexure J. This was to support his assertion that he has a plausible defense stated in paragraph 22 of his affidavit in support. The draft defense attached raises a preliminary objection that the Respondent has no cause of action against the Applicant because there was never an agreement between them as alleged. In the alternative, the Applicant denies ever receiving money from the Respondent for the purpose of supplying him with spare parts. That the Respondent dealt with one Shirat Ssekungu in her personal capacity as stated in the plaint and not on the account of Yamazaki Parts Center (U) Limited. That Shirat Ssekungu Nagayi placed an order for goods from Japan through the Applicant and the same were purchased, transported, and delivered and taxes paid.

What the above averments disclose are triable issues of fact and law. There are questions surrounding whether there was a contract between the Respondent and Applicant. There is also a question of fact relating to whether money was ever paid to the Applicant by the Respondent for supply of spare parts.

The law is that for as long as an applicant through his or her affidavit reveals a question of fact or law, the court must grant leave to appear and defend. The Applicant has satisfied this requirement.

In the premises, issue three is answered in the positive.

Issue Four: What remedies are available to the parties?

In resolution of this application, the following orders are granted:

- 1. The default judgment entered by this court in Civil Suit No. 251 of 2019 on 24th January, 2019 is hereby set aside.
- 2. The execution proceedings in EMA No. 83 of 2020 are hereby set aside.
- 3. This court shall immediately return the Applicant's passport booklet and Japanese disembarkation card.

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- 4. The Applicant is hereby granted unconditional leave to appear and defend Civil Suit No. 251 of 2019.
- 5. The Applicant is hereby ordered to file a defense in Civil Suit No. 251 of 2019 within Fifteen (15) days from date of this ruling.
- 6. Costs of this application are awarded to the Applicant.

I so order.

Jeanne-Rwakakooko JUDGE 31/05/2022

Ruling delivered electronically on this day of 2022.

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