

UGANDA / JUDGMENT

Nalubwama v Swift Hardware Ltd

(Miscellaneous Application No. 803 of 2016) [2017] UGCommC 7 (9 February 2017)

[2017] UGCommC 7

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 803 of 2016

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THE REPUBLIC OF UGANDA,**IN THE HIGH COURT OF UGANDA AT KAMPALA****(COMMERCIAL DIVISION)****MISCELLANEOUS APPLICATION NO 803 OF 2016****(ARISING FROM CIVIL SUIT NO 629 OF 2007)****JULIET NALUBWAMA LULE}..... APPLICANT****VERSUS****SWIFT HARWARE LTD} RESPONDENT****BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA****RULING**

The Applicant to this application who is also the Defendant to the main action filed this motion through Messieurs Oundo & Company Advocates under the provisions of section 98 of the Civil Procedure Act, Order 9 rule 27 of the Civil Procedure Rules for orders that an ex parte judgment and decree and all subsequent orders passed against her in HCCS No. 629 of 2007 is set aside. Secondly, it is for an order to issue for the warrant of attachment registered against the Applicants land comprised in Kyadondo Block 255 Plot 611 land at Munyonyo to be set aside. Thirdly it is for an order for the Applicant to be allowed to appear and defend Civil Suit Number 629 of 2007. Lastly it is for costs of the application to be borne by the Respondent/Plaintiff to the main suit.

There are 5 grounds to the application namely:

1. The summons in High Court Civil Suit Number 629 of 2007, was never served on the Applicant.
2. The Applicant has never been indebted to the Respondent, neither is the Respondent a registered entity with capacity to sue and be sued.
3. The Applicant has a good defence in Civil Suit Number 629 of 2007.
4. The warrant of attachment issued against the Applicant's land is still subsisting and has prevented the Applicant from further dealing with her land.
5. It is in the interest of justice that this application is allowed.

The Notice of Motion was issued on 19th September, 2016 and is supported by the affidavit of the Applicant Julie Nalubwama Lule. She deposed that in July 2007 the Respondent filed Civil Suit Number 629 of 2007 against her claiming that she was indebted to it in the sum of Uganda shillings 12,350,000/= according to a copy of the plaint attached to her affidavit. She also attached a copy of the summons and plaint. She alleges that the affidavit of service sworn by one Lugya Alex that purported to serve the Applicant with a copy of the summons was full of falsehoods in as far as she never received any summons. Secondly, the signature that appears on the copy of the summons attributed to her is a forgery and is not her signature. Thirdly subsequent to a default judgment and decree entered against her, a warrant of attachment was issued attaching her land namely Kyadondo Bock 255 Plots 611. A search in the registry by her counsel revealed that a warrant of attachment had been issued attaching her property and it subsists as an encumbrance on the title. Consequently she has been prevented from freely dealing with her property inclusive of selling it to prospective buyers.

The Applicant further deposed that she does not know the Respondent company and has never dealt with the in any way. She conducted a search with the company registry through her former lawyers Messieurs Mubiru – Musoke & company advocates and it was discovered that the Respondent has never been registered as a company and therefore is a non-existent entity. She accordingly instructed her lawyers Messieurs Mubiru – Musoke & company advocates to apply to set aside the default judgment entered against her but they never took any steps to set aside the default judgment/decree. She subsequently instructed Messieurs Oundo & company advocates who informed her that she has a good defence to the main suit and that it is in the interest of justice that the application is granted by this court.

The affidavit of Nattu Esuka of care of Oundo & company advocates deposed that she is a female adult Ugandan of sound mind and an authorised process server of the courts of judicature of Uganda. On 21st of October 2016 she received the notice of motion to be served upon the Respondent. She did not know the address of the Respondent but from previous court documents filed by the Respondent in the main suit, the address is Plot 9 Kayunga Road, Mukono Town. She proceeded to the address and discovered that the address was occupied by another hardware business in the names of Mwebaza Hardware and Good Price Supermarket. She enquired from traders around who carried on similar trade of supplying hardware and general merchandise and

was informed that such a business entity in the names of Swift Hardware Ltd had never existed or ever been heard of or even occupied in the premises in Mukono town. She left without serving the Respondent having failed to locate them. Subsequently she attempted to serve hearing notices upon the same address with the same result.

On 12 January 2017 I directed that the court bailiffs who obtained the warrant of attachment of the Applicant's property should be served. The court bailiffs are Bailiff Masters Ltd and they were summoned to explain who instructed them before the matter progresses any further. The application was fixed for 2nd of February, 2017 to get a feedback and for further progress to be made in the matter.

By affidavit of service of Nattu Esuka sworn to on 27th January, 2017 she deposed that on 16th January, 2017 she received court documents summoning Kenneth Mabondo t/a Bailiff Masters and established upon getting his telephone contact that he resides at the Buganda road flats block 667 second floor where she found his office premises in the name of Bailiff Masters Ltd. She did not find him in the offices and went back on 17th January, 2017 but he was not in the office. He was called on the telephone and asked his colleague Mr Jotham to receive summons on his behalf as well as money to attend court pursuant to the witness summons. Subsequently she served the witness summons on Mr Jotham.

Without much ado Mr Kayiwa Wilber counsel who appeared on behalf of the Applicant requested to address the court and he was directed to do so in written submissions. Written submissions were received on 3rd February, 2017 and the matter fixed for ruling on 9th February, 2017 at 2:30 PM.

I have carefully considered the written submissions and have singled out ground 2 of the notice of motion which is to the effect that the Respondent is not a registered entity with capacity to sue and be sued. The question of whether the Respondent is a registered entity is a fundamental question that affects the rest of the other issues and has to be handled first. A non-entity cannot commence an action and cannot be sued or served with court process. A lawyer who commences an action without instruction is guilty of professional misconduct since a non entity cannot instruct a firm. Individuals who use a name to commence proceedings ought to be followed up in another forum for a possible commission of an offence.

According to the plaint which was filed on 18th July, 2007 in HCCS 629 of 2007, the Plaintiff is a limited liability company called Swift Hardware Ltd. The plaint was extracted by the Plaintiff and there is no name of any firm of advocates who drew the plaint. The affidavit of service of Mr Lugya Alex is c/o PO Box 7085 Kampala. The box number is that of the Commercial Court Division of the High Court. He deposes that he is an authorised court process server attached to the High Court, commercial division and on 18th July, 2007 he obtained court summons in the main suit for service on the Defendant who is the Applicant to this application. Summons was purportedly served on 31st July, 2007. He claimed that on 31st July, 2007 on the direction of the Plaintiffs Finance Manager he went to Sita Restaurant on the ninth floor, Workers House along Pilkington road Kampala where the Plaintiffs Finance Manager pointed out to him a brown lady

who was identified as the Defendant. He introduced himself and the purpose of meeting her and showed her court summons and plaint. She accepted service and signed a copy of the summons. The signature appearing on the return of summons is just below that of the registrar who issued the summons and was purportedly served on 31st July, 2007.

By letter dated 20th of August 2007 on the letterhead of Swift hardware Ltd PO Box 1118, Mukono, an application was made to the registrar for judgment as prayed for in the plaint in default of filing a defence. Judgment was entered on 22nd August, 2007 as prayed for in the plaint against the Defendant. A decree was extracted on 4th September, 2007. Subsequently a return was made to the registrar of the High Court of Uganda commercial division on 15th October, 2007 indicating that they had advertised the property of the Defendant pursuant to a warrant of attachment issued in the main suit. The letter was received in the commercial court division on 15th November, 2007.

I have considered the written submissions of the Applicants counsel and particularly noted the very last point which is based on ground two that the Respondent is not a registered entity with capacity to sue and be sued. Counsel submitted that the deponent in support of the application testified that the Respondent does not exist as a legal entity according to annexure "E" to the affidavit and paragraphs 8 and 9 of thereof. A non-entity cannot be served with any court process and therefore even attempts to serve the notice of motion were futile. In non entity cannot be served and cannot sue or be sued because it does not exist in law. It does not have legal capacity. Moreover it purports to be a limited liability company according to the plaint. It never proceeded through a firm of advocates which can be held personally liable. The Plaintiff purported to file its own plaint and to apply for default judgment after service. The court cannot on its own investigate the parties behind the service of process though I directed that the firm of bailiffs which purported to attach the Defendant's property should be summoned to explain who gave them instructions. They were not properly served and notwithstanding that, I will subsequently deal with the question after considering the merits of the application.

I have duly examined the plaint which was extracted by the Plaintiff claiming a sum of Uganda shillings 12,350,000/= with interest at 28% per annum as well as costs of the suit. Attached to the Plaintiff is a delivery note indicating that the Defendant had been supplied with 650 bags of cement as well as 200 Iron sheets. There is also an invoice for Uganda shillings 12,350,000/= and it is in the invoice document that it is indicated that the Plaintiff's address for doing business is plot 9 Kayunga Road Mukono – Uganda.

I have also considered annexure "D" which is a letter from the Commissioner land registration dated 27th of July 2016 in which it is indicated that Kyadondo block 255 plot 611 lands and Munyonyo is registered in the names of the Applicant. Secondly it is also indicated that the plot is encumbered by a court order issued by the High Court of Uganda with a warrant of attachment in civil suit number 649 of 2007 registered as instrument number KLA 363086 on 4th April, 2008 at 2:46 PM. Secondly I have considered annexure "E" from the Uganda Registration Services Bureau, Registrar General's office issued on 12th August 2008 by the Assistant Registrar of Companies. The subject matter of the letter is SWIFT HARDWARES LTD. In the second paragraph of the letter

it is written as follows:

"We have searched our records and now confirm that the above named company is not registered with us."

The judicial precedents are clear on the point that a non entity cannot sue or be sued. The ruling of Hon. Justice Remmy Kasule is in the **Trustees of Rubaga Miracle Centre vs. Mulangira Ssimbwa HCMA No 576 of 2006 and Mulangira Ssimbwa A. K. A Afidra Milton vs. The Board of Trustees, Miracle Centre and Pastor Robert Kayanja HCMA No. 655 of 2005** (both arising from **HCCS No. 768 of 2004**) addressed the issue. In the first application the Defendant sought to have the plaint rejected on the ground that the Defendant **the Board of Trustees, Rubaga Miracle Centre Cathedral** is a nonentity with no capacity to sue or be sued. On the other hand the Plaintiff in Miscellaneous Application No. 655 sought leave to amend the plaint by adding Pastor Robert Kayanja as a party. It was held that where the amendment by way of substitution of a party purports to replace a non-entity, the plaint must be rejected as it is no plaint at all. In the Tanzanian case of **Babubhai Dhanji Pathak vs. Zainab Mrekwe [1964] EA 24**, a suit was filed in the lower court in the name of a dead Plaintiff 45 days after her death and an application to substitute the deceased Plaintiff under Order 1 rule 10 was allowed in ignorance of the fact by the Magistrate and on appeal was set aside on the ground that a suit instituted by a deal person is a nullity. In **Fort Hall Bakery Supply Co. Ltd v. Fredrick Muigai Wangoe [1959] EA 474**, the Plaintiff's were an association consisting of 45 persons trading in partnership for gain but their firm was not registered under the Business Name Registration Ordinance. The Plaintiffs were a group of persons without a legal existence under the Companies Ordinance and the suit in the name of "Fort Hall Bakery Supply Company" was a non entity. Templeton J cited with approval the holding of Bankes L. J in **Banque Internationale De Commerce De Pertograd v Goukassaow (3), [1923] 2 K. B. 682** for the proposition that the: "The party seeking to maintain the action is in the eyes of our law not party at all but a mere name only, with no legal existence." He held at page 475 that:

"A nonexistent person cannot sue and once the court is made aware that the Plaintiff is nonexistent, and therefore incapable of maintaining the action, it cannot allow the action to proceed."

From the above cited authorities and the evidence adduced in support of the application, a non-entity filed a suit against the Applicant. Such a non-entity cannot be made to appear in any proceedings. It cannot instruct advocates or bailiffs. In the circumstances, the judgment of the court issued on 22nd of August, 2007 by the honourable registrar is hereby set aside. It follows that the decree extracted from the judgment on 4th September, 2007 cannot stand and is set aside.

It follows that the warrant of attachment issued by the honourable court to enforce the decree issued on 15th of October 2007 to one Kenneth Mabondo, Bailiff of the Court and another warrant of attachment and sale of immovable property dated 18th of December 2007 cannot stand and are hereby set aside. The encumbrance registered on Kyadondo Block 255, Plot 611 land at Munyonyo

registered under instrument number KLA 363086 on 4th of January, 2008 at 2:46 PM is hereby vacated and the Commissioner for land registration shall deregister the same forthwith upon being served with this order.

An order for costs cannot be issued against a nonentity and therefore there shall be no order as to costs.

Ruling delivered in open court on 9th February 2017.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Mwanja Brian Counsel for the Applicant

Julie Nalubwama Lule in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

9th February 2017

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