

UGANDA / JUDGMENT

Sembatya Ibrahim v Daniel Walugembe (Miscellaneous Application No. 2038 of 2024) [2025] UGCommC 158 (28 March 2025) [2025] UGCommC 158

COURT
Commercial Court of Uganda

BEFORE
Ocaya, J

CASE / FILE NUMBER
Miscellaneous Application No. 2038 of 2024

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL ON) MISCELLANEOUS APPLICATION NO. 2038 OF 2024 (ARISING
FROM CIVIL SUIT NO. 0713 OF 2024)**

SSEMBATYA IBRAHIM] APPLICANT

VERSUS

15 DANIEL WALUGEMBE] RESPONDENT

Before: Hon. Justice Ocaya Thomas O. R

RULING

Introduction:

This application was brought by way of Notice of Motion under Order 9 Rules 12 and 27; Order 52 Rules 2 and 3 of the Civil Procedure Rules; Section 96 and 98 of the Civil Procedure Act; and Section 33 of the Judicature Act, seeking the following orders: -

- (1) That the default/interlocutory judgement entered by this Honorable Court in 25 Civil Suit No. 0713 of 2024 be set aside.
- (2) That the costs of this Application be in the cause.

The grounds of the Application are contained in the affidavit of the Applicant, Sembatya Ibrahim, and it states that the Applicant was never served with any Court process and that

30 the affidavit of service relied upon is erroneous as it stipulates that he instructed a one Sabrina who is unknown to him to receive and acknowledged receipt of court documents on his behalf, and that the alleged WhatsApp number does not belong to him nor is it registered in his names; and he was never personally served at all with any Court process.

- That the first time he got to know of Civil Suit 713 OF 2024 was around 31st 5 July 2024 when I came back at office and he was told an envelope had been delivered to him indicating it was from the Respondent which he thought was for paying off balance from the car transaction but upon opening the said envelop, he got to know that he had been sued by the Respondent and he immediately engaged his lawyers of the above who filed a defense.
- 10

Further that he still demands the Respondent a balance of UGX 30,000,000/= as highlighted in his defense and the counterclaim that was uploaded on ECCMIS. That there are triable issues which would require the Court's attention had he been duly served with Court processes and given the opportunity to defend himself.

That the Respondent is using the court as a sham to unjustly enrich himself and should this Application be denied, he will suffer further injustice.

Further that in the interest of justice, the default/interlocutory judgment be set aside as it 20 is just and equitable for the Applicant to be heard and the suit be determined on its merits. The Respondent filed an affidavit in reply sworn by himself, Daniel Walugembe, wherein he contended and averred that this Application is devoid of any merit and does not satisfy the grounds for setting aside an interlocutory judgment.

- 25 That the Applicant was served by the summons in Civil Suit No. 0713 of 2024, issued by this court on the 1st July 2024, and the Applicant was served at his place of business at Makerere-Kavule, Kawempe Division through a one, Sabrina, who is the Applicant's receptionist. That to further ensure effective service, the summons and accompanying documents were electronically served via the Applicant's known WhatsApp number, which is the same 30 number the Applicant indicated in the Agreement between him and the Respondent. That
- the Applicant acknowledged the electronic service.

That upon the service of the summons, he was informed by his lawyers that an affidavit of service was sworn and filed in court in proof of the service. That the Applicant was well

35 aware of the suit against him and that upon this information, the Applicant obtained

5 lawyers; further that instead of applying to the Court to validate his Written Statement of Defense filed out of time, the Applicant chose not to do so.

That the Application lacks merit and is an abuse of court process intended to delay the Respondent from obtaining the fruits of his judgement in the main suit.

Representation:

The Applicant was initially represented by the law firm of M/s Matovu, Kateregga and Co. Advocates who later by letter dated 29th November 2024 and uploaded on ECCMIS on the 5th December 2025 notified Court of withdrawal of instructions; the said letter however on two

- 15 occasions stated that the law firm is withdrawing instructions from the Respondent. I think the letter was clumsily drafted as the said, M/S Matovu, Kateregga and Co. Advocates represented the Applicant and not the Respondent. It is something of an embarrassment to say the least for the law firm of M/S Matovu, Kateregga and Co. Advocates.
- 20 Nonetheless, the withdrawal of instructions of the Applicant's advocates has been taken notice of and is on record.

The Respondent on the other hand was represented by the law firm of M/S Mwesigwa Rukutana and Co. Advocates.

Evidence and Submissions:

The Applicant led his evidence by way of an affidavit in support of the Notice of Motion deponed by himself. The Respondent equally led evidence by way of an Affidavit in reply deponed by himself.

Court instructions were for written submissions filed and uploaded on ECCMIS. However, only the Respondent complied, whereas the Applicant did not and has no submission on record; as such, the Court shall rely on his affidavit in support of the Notice of Motion while deciding this Application.

5 Issues:

1. Whether there are sufficient grounds to warrant the setting aside of the default/interlocutory judgment entered by this Honorable Court in Civil Suit No. 0713 of 2024?

10 Decision:

Issue 1: whether there are sufficient grounds to warrant the setting aside of the default/interlocutory judgment entered by this Honorable Court in Civil Suit No. 0713 of 2024?

The Applicant in bringing this Application cited Order 9 Rule 27 and Order 9 Rule 12. It is 15 however pertinent to state that applications for setting aside under Order Rule 27 are different from Order 9 Rule 12. In both rules, an Applicant will be applying to set aside an ex parte judgment, except in circumstances where judgment is entered under Order 50. An Ex parte judgment is one entered after the participation of only one side to the litigation. See **National Resistance Movement v Kampala Modernity and Printers Ltd, HCMA No. 6* 20 *of 2016.**

Order 9 Rule 12 provides that Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.

Order 9 Rule 27 on the other hand provides that, in any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly

- 30 served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside
- 35 as against all or any of the other defendants also.
- 5 Order 9 Rule 12 is much broader in its application than Order 9 Rule 27, which only permits setting aside a judgment on the grounds of non-service of summons. However, that is not the sole ground under Order 9 Rule 27. See **Nicolas Rousos v Gulam Hussein Virani and Another SCCA No. 9 of 1993.**
- 10 For an Application brought under Order 9 Rule 12, to succeed, the Applicant must demonstrate that in light of all the facts and circumstances both prior and subsequent, it would be just and reasonable to set aside or vary the Judgment, if necessary, upon terms to be imposed. See **Mbogo v Shah (1968) EA 93, Nicholas Rousos Rousos v Gulam Hussein Virani and Another SCCA No. 9 of 1993**, and **Patel v E. A Cargo Handling Services (1974)* 15 *EA 76.**

Most of the judgments sought to be set aside under Order 9 Rule 12 or Order 9 Rule 27 are judgments issued after some sort of default by the litigant and the question thus is, how does a litigant know under which rule to proceed? The answer is that it depends on the default that allegedly caused the issuance of the said default judgment.

Therefore, a litigant should proceed under Order 9 Rule 12 if the judgment was granted under the preceding rules, that is, Order 9 Rule 6, Order 9 Rule 8, and Order 9 Rule 10 or Order 50. On the other hand, a litigant should proceed under Order 9 Rule 27 where an ex parte judgment has been given under any of the other rules of the CPR.

Ordinarily, where a party proceeds by the wrong law, interchanging order 9 Rule 12 and 27, it is not fatal as such, as long as the Court is clothed with jurisdiction to hear the matter and the procedure chosen can accommodate the application. See **Saggu v Road Master Cycles**

30 **(U) Ltd 2022 1EA 258.**

In this instant application, it can be said that the Applicant cast his net wide by citing both Order 9 Rule 12 and 27, I suppose leaving it up to the Court to proceed in findings under the right Rule; which in this instant case is Rule 27. This is informed per the averments of the

35 Applicant in the affidavit in support that summons in the main suit were never effected on him as required by the law.

5 The Applicant in paragraphs 7 and 8 stated that the said Sabrina who allegedly acknowledged the summons on his behalf is not known to him and that the electronic service via WhatsApp Application was not effective as the number used for effect the service does not belong to him nor is it registered in his name as such, he could not effectively file his defense to the main suit and be heard.

However, I have taken notice of the Applicant's statement in paragraphs 10 and 11, wherein he stated that he got to know about the suit around 31st July 2024, when he came back to his office, and he was told of an envelope delivered to him indicating it was from the respondent. Where he got to know that he had been sued by the respondent, and he 15 immediately engaged his lawyers to file a defense.

The foregoing statements of the Applicant is an admission under Section 16 of the Evidence Act CAP 8 which defines an admission to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of 20 the persons, and in the circumstances, hereinafter mentioned.

The Applicant admits to having known of the suit through the summons he got at his place of work and went as far as instructing his lawyers to file a defense to the suit. Therefore, the summons is said to have brought about the desired effect which is for the Applicant to know 25 about the suit and enter appearance.

It is trite law and in the case of *Geoffrey Gatete and Angela Maria Nakigonya versus William Kyobe SCCA No 7 of 2005*, the Justices of the Supreme Court noted that: -

"... There can be no doubt that the desired and intended result of serving summons 30 on the defendant in the 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. Rules of procedure, however, provide for such diverse modes for serving summons that the possibility of service failing to 35 produce the intended result cannot be ruled out in every case. For example, in appropriate circumstances, service may be lawfully made on the defendant's agent. If 5 the agent omits to make the defendant aware of the summons, the intended result cannot be achieved."

In my view, the summons served on Sabrina, who was found at the Applicant's place of work despite the Applicant's denial of her knowledge, brought about the desired effect. This is

10 informed by the fact that the only summons served at the Applicant's place of work was done on Sabrina per paragraph 5 of the affidavit of service deposed by Darius Nasasira, the process server in Annexure E of the affidavit in support.

Order 5 Rule 10 provides for service to be on the defendant in person or his agent, that 15 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.

Notwithstanding Order 5 Rule 10, the Courts are encouraged to take a proactive stand and 20 adapt to the times by adopting the numerous new technologies for communication and dispense with antiquated court processes and procedures in relation to service of court process. See **Abela and others v. Baadarani*, Trinity Term (2013) UKSC 44* and **Gray v. Hurley* [2019] EWHC 1636 (QB).*

- 25 The foregoing initiative has been buttressed legally under Rule 7 (2) (c) of The Constitution (Integration of ICT into the Adjudication Processes for Courts of Judicature) (Practice) Directions, Legal Notice No. 6 of 2019, which requires parties at all stages of the court process and during trial, to use technology for purposes of information exchange and to serve documents electronically through email, instant messaging applications and any other
- 30 widely used electronic communications service.

The Courts have so far interpolated Rule 7(2)(c) and acknowledged electronic service of court process as effective service. See **Male H. Mabirizi v. Attorney General*, H. C. Misc. Application No. 918 of 2021*, where service was done through e-mail; **Musumba Isaac**

35 **Isanga v. Quid Financials Ltd*, H. C. Misc. Application No. 139 of 2020*, and **Nyanzi Fred Sentamu v. The Electoral Commission and 2 others*, C. A. Misc. Application No.10 of 2021* 5 **arising from Election Petition Appeal No.20 of 2021**, In these two cited cases, the Courts acknowledged and allowed service that was done through the WhatsApp messenger Application. The same mode in which the Applicant herein was served the second time.

In circumstances where the addressee/the intended recipient of the summons/ the 10 intended Defendant denies receipt of the court summons; the onus is on the sender/server to prove that the summons was indeed delivered. See **Peace Barigye v. Rosemary Kizza Omamteker*, H. C. Misc. Application No. 2075 of 2022.*

In this instant case, the Counsel for the Respondent submitted that the said WhatsApp 15 number where the Applicant was served through belongs to the Applicant and is the same number that the Respondent has always used the same to communicate with him and it is the same number the Applicant used as his Telephone contact while executing the agreement between himself and the Respondent. This is the same agreement from which this dispute arises.

- 25 his affidavit in reply stated that the WhatsApp number used to serve the Applicant is the same number which he [the Applicant], indicated in the agreement between the parties. The said agreement is in annexure B of the affidavit in reply and to quote verbatim the introduction part states that: - "I Ssembatya Ibrahim of Gayaza on tel 0700848600".*
- The Respondent's proof of service of the electronic service through WhatsApp is in 30 annexure C of the affidavit in reply, and it is what is called a "screen shot" copy, and the number of the recipient reflected there is "0700848600".

- 5 *Mukisa Foods Limited, CACA No. 42 of 1997,* the Court held that in an application to set aside a default judgement... the primary consideration is whether there is merit to which the Court should pay heed; if merits are shown, the Court will not prima facie desire to let judgement pass on which there has been no proper adjudication.
- 10 In the premises, the Applicant's argument and ground of non-service lacks merit as the evidence adduced by the Respondent all point to the fact that the Applicant was served with summons and his failure to enter appearance, or to apply for leave to file defense out of time is entirely his own making.
- 15 Therefore, this Application fails and is dismissed with costs.

Ocaya Thomas O. R Judge, 28th March, 2025.

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