

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

MISC. APPL. NO. 429 OF 2005

(Arising from Civil Suit No. 280 of 2005)

EMIRU ANGOSE ::::::::::::::::::::::::::::::: APPLICANT/DEFENDANT

VERSUS

JAS PROJECTS LTD ::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application by way of Notice of Motion brought under sections 34(i) and 98 of the Civil Procedure Act; orders 9 rules 9 and order 48 rules 1 and 2 and Sections 33 of the Judicature Act.

The application seeks orders that;

- "a) Judgment passed exparte in ... suit No. 280 of 2005 be set aside and the applicant be allowed to file a defence for the case to be heard on its merits.*
- b) The execution in the above suit No. 280 of 2005 be set aside and the applicant be discharged from civil prison.*
- c) The costs be provided for"*

The grounds of the Application are set out in the Notice of Motion and the supporting affidavits of;

- (i) Emiru Angose the applicant dated 1st June 2005
- (ii) Abdullahi Ali Juma a receptionist/cashier at M/S Sky Forex Bureau dated 31st May 2005.
- (iii) Y.S. Yateesa-Waiswa a lawyer with the applicant's lawyers law firm M/S Kanyunyuzi & Co. Advocates dated 31st May 2005.

The application is opposed by the affidavit of Mohammed ABUBAKER Mohammed the Managing Director of the respondent/judgment creditor company.

The brief facts are that M/S Jas Projects Ltd. (The Respondent/Judgment Creditor) filed HCCS 280 of 2005 against Mr. Emiru Angose (The current applicants) for the recovery of US Dollars 250,000 (two hundred and fifty thousand only). Paragraph 3 of the plaint states that the money is for.

"... goods supplied to the defendant (Emiru Angose) under an agent principal contractual relationship entered on the 1st day of August 1997, general damages for breach, interest and costs of the suit".

Paragraph 5 of the plaint further states;

"... between 1999-2001 the plaintiff did under the said contract supply the defendant goods worth US Dollars 250,000 (Two hundred and fifty thousand

US Dollars) for the Democratic Republic of Congo branch, the Defendant took possession thereof sold but did not and has never remitted the proceeds of the sale to the Plaintiff ...”

The Defendant (the current applicant) did not file a defence and the Plaintiff (the current Respondent) through his lawyers applied for Judgment under order 4 r 4 of rule CPR and abandoned their claim for general damages. It was said that the Defendant had been duly served on the 5/4/05 but omitted to defend himself. An affidavit of service was attached and Judgment was accordingly entered by the learned Registrar of the Court. The Defendant/Applicant was subsequently in execution of the Judgment Decree arrested on a warrant of arrest in Execution (order 19 r 35) and on the 13th May 2005 was committed to civil prison for a period not exceeding 6 months hence this application.

The application was argued by Mr. Kanyunyuzi for the Applicant and Mr. Furah for the Respondent.

Mr. Kanyunyuzi counsel for the applicant prayed that Court set aside the exparte Judgment and that applicant be allowed to file a defence. He argued that the exparte Judgment was entered in error as there was no effective service of Court process on his client and that is why his client did not file a defence. He argued that if service had been effective the Applicant would have filed a defence as he denies the indebtedness as alleged. A draft written statement of defence is attached to the application. Counsel for the Applicant faulted the affidavit of service sworn by one

Moses Wacha a process server with the Respondent's lawyers M/S Mwesigwa-Rukutana & Co. Advocates. He says that the applicant is alleged to have been served at M/S Sky Forex Bureau through an unnamed receptionist there yet the applicant does not work there. The applicant further denies that he directed the process server to the said forex bureau during a telephone conversation. Counsel for the applicant submitted that the Respondent knew his residence and so wonders why service was not effected at his home. Counsel further submitted that he was brought to Court to be committed to civil prison without being served with a notice to show cause first. He therefore argues that his client, was ill prepared to defend himself against the warrant as he appeared before the learned Registrar without his Legal Counsel. Counsel for the Applicant insists that his client is not indebted to the Respondent and in the alternative the Respondent owes him unpaid commission of 20% on the sales he made. Counsel for the Applicant submitted that Court can grant the application if satisfied that there was no service of Court process and secondly if it is clear that the applicant has a defence.

In reply Mr. Furah for the Respondents argued that the application was misconceived and frivolous and should be dismissed. He submitted that the whole issue revolved around the service of summons. He further refer me to paragraph 7 of the affidavit in reply by the Managing Director of the Respondent Mr. Mohammed Abubaker Mohamed where he deponed that he knew where the Applicants "...hangs out..." so it was I supposed easy to determine where to serve.

Counsel for the Respondent further submitted that the affidavit of the process server Mr. Moses Wacha complies with order 5 r 16 of the CPR as to what do when a person refuses to accept service or cannot be found.

These were submissions of Counsel made to Court. I have perused the application and the affidavits for and against it. It would appear to me that in the main, the application rests on whether there was indeed effective service of summons on the applicant.

The Judicial process in this case has gone quite far. Judgment was entered against the applicant and execution levied through the arrest of applicant and his committal to civil prison about 2 and half months ago.

The Judgment itself was a default one in that the claim against the Applicant/Defendant was not heard on its merits because no defence was filed by him. It was therefore given so to speak *ex parte* (in the absence of one of the parties). It is this *ex parte* Judgment that the Applicant seeks to set aside.

The law to set aside such Judgments is fairly well settled now.

In the case of **Mbogo and another –Vs- Shah** [1968] EA 93 (CA). It was held that order 9 rule 9 gives the High Court an unfettered discretion to set aside or vary an *ex parte* Judgment.

Order 9 rule 9 reads;

“Where Judgment has been passed pursuant to any of the proceeding rules of this order, or where Judgment has been entered by the Registrar in cases under order XL VI, it shall be lawful for the Court to set aside or vary such Judgment upon such terms as may be just”.

The Court therefore has a wide discretion to exercise when dealing with applications such as these. The reason for such a discretion appears to have been well articulated in the case of **Henry Kawalya –Vs- J. Kinyakwanzi** [1975] HCB 372.

Where Ssekandi Ag. J (as he then was) held;

“An ex parte Judgment obtained by default of defence is by its nature not a Judgment on merit and is only entered because the party concerned failed to comply with certain requirements of the law. The Court has power to dissolve such Judgment which is not pronounced on the merits of the case or by consent but entered especially on failure to follow procedural requirement of the law”.

It seems clear to me in this case there is a procedural question as to whether there was effective service of summons on the Applicant. Critical to the determination of this question is the affidavit of the process server one Moses Wacha dated 5th April 2004 (this should 2005) where inter alia he depones.

3. *“That on the 4 day of April 2005, I proceeded with the guidance of Mohammed Abubaker one of the Directors of the Plaintiff to the Defendant’s place of work at Sky Forex Bureau situated on the Uganda Chamber of Commerce Building, with the view of effecting service upon the Defendant...*
4. *That on my arrival at the said place, I found present therein a receptionist who informed me that the Defendant was out of office and advised me to call him on his cell-phone 071-945884 or 078-667732...*
5. *That on the 5th day of April 2005, I again called the Defendant on his mobile phone and informed him about the service of summons to file a defence which was to be effected upon him.*
6. *That the Defendant informed me on phone that he was not in office but directed me to take the said summons with its attached copy of the plaint to the very place stated in para 3 of this affidavit.*
7. *That I proceeded as informed by the Defendant and on my arrival at the said place I found present therein a gentleman who did not reveal his names to me...*
8. *That I introduced myself to him and he informed me that the Defendant told him about me and instructed him to receive the Court documents which I had for service.*

9. *That I then tendered to him copies of the said summons with its attached copy of the plaint which he duly received but declined to acknowledge service on the original copy of the summons to file a defence.*

10. *That the original copy of the same on which the Defendant should have acknowledged service is hereby attached and returned to this honourable Court as proof of service..."*

Order v of the civil procedure rules (CPR) as amended provides order v r 11.

"Wherever it is practicable, service shall be made on the Defendant in person, unless he has an agent. Empowered to accept service, in which case service on such agent shall be sufficient".

The rule of thumb here therefore is that service of summons should be effected on the Defendant in person. Where service on the Defendant is not practicable then service should be on the Defendant's agent empowered to accept service.

In this case there was no service on the Defendant in person but rather on a receptionist who was not named. It is said/alleged that the said receptionist worked at the same office (Sky Forex Bureau) as the Applicant/Defendant.

One Abdillahi Ashir in his affidavit dated 31st May 2005 depones that he is a receptionist/cashier at M/S Sky Forex Bureau situated at Uganda Chamber of

Commerce Building - Ben Kiwanuka Street. He depones that the affidavit of the process server Mr. Moses Wacha is "utterly false" as the said Wacha did not come to the said forex bureau nor did he volunteer the telephone numbers of the Applicant/Defendant as alleged. He further adds;

11. *"That in further reply thereto I wish to state that no Court process has ever been served on me or any one else in our above company.*

12. *That I make this affidavit to dispel the falsehood peddled by one Wacha Moses that he effected service of Court process on me at Sky Forex Bureau on the 5th date of April, 2005".*

In order to have effected service upon the said receptionist, the receptionist would not only have to be the agent of the Defendant but a recognized one at that within the meaning of order III rr 1 & 2; and in particular rule 2 thereof which states;

"The recognized agents of parties by whom such... acts may be made or done are:-

(a) Persons holding Powers of Attorney authorizing them to make... and do such acts on behalf of parties;

(b) Persons carrying on trade or business for and in the names of parties not resident within the local limits of Jurisdiction of the Court... etc (not relevant to this case)".

The evidence before Court does not suggest that the service of summons on the Applicant/Defendant through the receptionist at M/S Sky Forex Bureau was that by way of an authorized agent, indeed there is no mention of any Power of Attorney to that effect.

Furthermore even in the absence of such a documented power, one Abdillahi Ashir the receptionist at Sky Forex Bureau denies ever being served with process. This matter is not helped by the affidavit of the process server Mr. Wacha which fails to name the receptionist and also states that service was effected but not acknowledged by the said receptionist signing the summons. This is a very unsatisfactory situation; surely Mr. Wacha as a process server of the High Court must have known that no defensible service if at all had taken place within the understanding of the law.

Surely if the process server could not effect service on the Defendant or his recognized agent he should have stated it so that alternative means of service are effected. Where service cannot be effected in the ordinary way then the Plaintiff or his Counsel should apply for substituted service rather than go ahead with an ineffective or desperate method of service to remain within time. In the case of **Katukulu –Vs- Transocean** [1974] HCB 46 it was held;

“...service should be personal or substituted with leave of Court; otherwise there is no proper service...”

In answer therefore to the issue at hand as to whether there was indeed effective service of summons on the applicant I find that there was no effective service.

Accordingly I order that;

- (a) The Judgment passed ex parte in HCCS No. 280 of 2005 be set aside and that the applicant be allowed to file within 30 days of this ruling.
- (b) The execution in HCCS No. 280 of 2005 be set aside and the applicant be discharged (if not already) from civil prison.
- (c) Costs of this application are to the Applicant.

Sgd: Geoffrey Kiryabwire

JUDGE.

Date:19/09/05