THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 322/2015

ARISING FROM CIVIL SUIT 329/2014

ALERT GUARD AND SECURITY SYSTEMS LTD -------- APPLICANT

VS

TOUCH FM LIMITED ---------- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This is an application seeking to set aside the judgment and decree in civil suit No. 329 of 2014. Costs of the application were also applied for. The application was made under S.98 CPA, O.9 rr.12 and 27 and O. 52 r.2 CPR and is based on five grounds:

1. The summons was not effectively served on the Applicant.
2. The affidavit of service does not disclose who was served
3. The applicants have a good defence to the suit and should not be denied the right to be heard
4. The decree extracted by the Respondent is at variance with the judgment of the Court and is intended to cheat the Applicant
5. If the judgment and decree are not set aside a miscarriage of justice will be occasioned to the Applicant.

The Application is supported by the affidavit of Michael Mungoma the Company Secretary of the Applicant. There is an affidavit in reply deponed by Franco Baitwa, the Managing Director of the Respondent Company.

Both parties filed written submissions.

The issue for the Court to determine is **whether judgment and decree should be set aside.**

It was argued for the Applicant that service of summons was not effective as the name of the person upon whom they were purportedly served was not disclosed. O.29 r. 2 (a) CPR was relied upon to argue that for service on a company to be effective, the summons must be served on a director, secretary or principal officer of the Company. The Case of **Kampala City Council Vs Apollo Hotel Corporation [1985] HCB 77** was cited in support.

Stating that the words ***"effective service"*** were defined in the case of **Geoffrey Gatete and Another Vs William Kyobe, SCCA 07/2005** to mean "***having the desired effect of making the Defendant aware of the summons";*** Counsel contended that the summons in the present case were left at the reception with a secretary/receptionist who could not appreciate the urgency of the document received. To support his argument, he relied upon the case of **Crane Bank Vs Kabuye Victoria HCMA 719/2007, and Bandali Jaffer & Others Vs Yefusa Werage Ssegane [1972] 2 ULR,** where it was held that ***"there was no effective service as the summons had been left with an office attendant who is not a principal officer of the corporation".***

Counsel asserted that it was doubtable whether the secretary ever passed on the summons to a principal officer of the company to act on it. And that the affidavit of service does not disclose the address and person and who identified the secretary of the Applicant to the process server. That as was established by decided cases, ***"this was in breach of the statutory duty; and it was wrong for the Registrar to have acted on such a defective affidavit of service".*** – The case **M.B. Auto Mobiles Vs Kampala Bus Service [1966] EA 480 and Hannington Wassa Vs Maria Ochola & 2 Others were** cited in support.

In reply, Counsel for the Respondent relied upon O.29 r.2 CPR to argue that where a suit is against a corporation summons may be served on: (a) the secretary, director or the principal officer of the corporation; or

(b) by leaving it or sending it by post addressed to the corporation at the registered office; or where there is no registered office, then at the place where the corporation carries on business

The case of **The Cooperative Bank (In Liquidation) Vs Amos Mugisha HCMA 549/2009** was cited in support. And referring to paragraph 5 of the affidavit of service denied that the process server served the receptionist/secretary but went through the Company Secretary who

called the Director of Legal Affairs who received, stamped and signed the summons, but refused to disclose his name. And that service was accordingly effective.

Under O. 9 r.27 CPR an exparte decree against Defendant may be set aside on such terms as to costs, payment into court, or otherwise as it thinks fit if court is satisfied that the summons was not duly served, or that the Defendant was prevented by any sufficient cause from appearing when the suit was called for hearing, and shall appoint a day for proceeding with the suit.

In the present case, the Respondent contends that when the process server received the summons on 16th August, 2014, he went to the place of business of the Applicant on Yusuf Lule Road, Plot 81, opposite Garden City, found the Company Secretary, who called the Director of Legal Affairs who accepted service and stamped the summons in acknowledgement. - Refer to Paragraphs 7,8, 9, 10,11, 12 and 13 of the affidavit in support. This is confirmed by the affidavit of service of Peter Muleba the process server paragraphs 3, 4, 5, 6 and 7 Annexture "A" to the affidavit in reply.

However, as already pointed out in this ruling, the Company Secretary who deponed the supporting affidavit denies service.

But it is clear in this case that the process server went to the place of business of the Applicant- Yusuf Lule Road, where the registered office of the Applicant is and where it carries on business. Under O. 29 r.2 (b) CPR and S. 274 (1) Companies Act, service of summons at a registered office of a company in the absence of a director, secretary or senior officer thereof by delivery or tender of summons to be served to a person at such address willing to accept such service is effective service and in compliance with the rules governing service on a corporation.

The summons in this case were received, duly stamped and signed. So even if this were to believe that the Company Secretary and the Director of Legal Affairs were not found, it finds that service was effective for the reasons set out above. The applicant Company was made aware of the suit against it.

Failure to state the name and address of the person who identified the company secretary was not fatal as the affidavit of service as O.5 rr. 14 and 16 CPR were complied with. The process server stated the circumstances in which service of summons was made. The address of the

applicant company was stated and the affidavit clearly states that the Director of Legal affairs refused to disclose his name.

In addition to claiming that service of summons was not effective, the Applicant also sought to set aside judgment under O.9 r. 12 CPR on the grounds that the applicant has a good defence to the suit, the decree extracted is at variance with the judgment and that if the judgment and decree are not set aside, the Applicant will suffer a miscarriage of justice.

The interlocutory Judgment in this case was in this case under O. 9 r. 8 CPR and matter was fixed for formal proof; thereafter judgment was entered for the Respondent and a decree extracted.

It is the argument of Counsel for the Applicant that, the Applicant should not be made to suffer because there was no proper service of summons. He emphasized that it has been laid down by decided cases that ***"if there is no proper or any service of summons to enter appearance the resulting default judgment is an irregular one, and the court has unfettered discretion to set aside such judgment upon such terms as are just and courts concern should be to do justice between the parties, avoid hardship from the accident, inadvertence, excusable mistake or error and not assist a person who deliberately sought by evasion or otherwise to obstruct or delay the cause of justice".*** **–** See **Remco Ltd Vs Mistry Jadva Parbat & Co. Ltd and Others [2002] 1 EA 233**

It was also the contention of Counsel that the other principle established by court is that ***"unless and until the court has pronounced a judgment on the merits or by consent, it has power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules or procedure".*** **–** Refer to **The Cooperative Bank Ltd (In Liquidation) Vs Amos Mugisha HCMA 549 of 2009, Evan Vs Bartlam [1937] AC 473, Emiru Angose Vs Jas Projects Ltd, HCMA 429/2005 and Henry Kawalya Vs J.Kinyakwanzi [1975] HCB 372**

It was argued that the judgment awarded the Respondent pounds 268.97 and Ug Shs. 860,000/- as special damages (P.8 of the judgment) but that the amount was corrected when the Respondent wrote a letter and the amount was increased to UG. Shs. 9,553,203/-. It was not submitted that that was not a slip of the pen and the Respondent ought to have applied for review of the judgment under the CPR.

The Respondent's Counsel denied that the judgment was at variance with the order extracted. He referred to Annextures "C" and "D" and that no miscarriage of justice was occasioned by the correction.

Further that the Applicant has no good defence to the suit as none is disclosed in the affidavit in support but only states that there is a good defence. That court heard and properly evaluated the evidence and rightly entered judgment in favour of the Respondent after finding that the Applicant breached the contract between the parties; and no sufficient were given to set aside the interlocutory or exparte judgment.

However, that if court is inclined to exercise its discretion to set aside the judgment then it should be on condition that the Applicant deposits in Court the sums awarded in the decree including the costs.

Upon giving the submissions of both Counsel the best consideration that I can in the circumstances, this court finds that the submissions of Counsel for the Applicant cannot be sustained; more so as court has already held that the Applicant was effectively served with summons but chose to keep themselves out of court.

The judgment of the Court the Applicant complains of is not at variance with the decree extracted. As indicated by the record, the Respondent applied for correction of the figures that had been indicated upon realizing that some figures although mentioned in some Exhibits tendered in Court had been left out when the final figures were being totaled. That did not require the Respondent to apply for review as the error could be rectified under S.99 of the CPA.

The section empowers Court to correct ***"clerical or mathematical mistakes in judgments, decrees or orders, or errors arising in them from any accidental slip or omission …. either of its own motion or on the application of any of the parties".***

The purpose of allowing the Court to correct such errors is ***"to give effect to what its intention was at the time of giving judgment".***

Counsel for the Applicant also complained about the Respondent having sought the correction of the judgment by way of letter. However, the form the application should take is not provided for. And in light of Article … of the Constitution, which provides that

"*substantive justice should be exercised without any undue regard to technicalities"* court finds that seeking the correction to be made by letter as was the case in the current suit did not in any way cause a miscarriage of justice.

The other claim that there are triable issues was also not substantiated. The Applicant apart from merely stating that there are triable issues did not attach a proposed copy of the defence to the application.

For all the reasons stated in this ruling, Court finds that the application fails and it is accordingly dismissed with costs to the Respondent.

FLAVIA SENOGA ANGLIN

JUDGE

03.03.16