

## MUGUME BEN AND ANOTHER Vs AKANKWASA EDWARD

## HIGH COURT (ARACH-AMOKO, J.)

## MISCELENEOUS APPLICATION NO. 04 OF 2008

MAY 26, 2008

(An Application brought under Order 36 rule 11, Order 52 rules 1, 2 and 3, Order 5 rule 6 of the Civil Procedure Rules, Sections 96 and 98 of the Civil Procedure Act and Article 28 of The Constitution of the Republic of Uganda, 1995, arising from Civil Suit No 356 of 2007)

*Civil Procedure—Affidavits—Inconsistencies in affidavits—Effect.*

*Civil Procedure—Affidavits—False Affidavits—Application supported by a false affidavit is null and void.*

*Civil Procedure—Summons—Service—Order 36 Rule 3 Civil Procedure Rules SI 71-1—Summons to be accompanied by a copy of the plaint and served upon the defendant.*

*Civil Procedure—Execution—Execution by attachment and sale of property—Advertising—Statutory period required for advertising before sale to be followed.*

*Civil Procedure—Execution—Stay of execution—Application for stay of execution—Period in which application may be made.*

*Civil Procedure—Court orders—Defying Court orders—Court protection—Unlawful activities—Person who defies Court orders cannot seek Court protection for the unlawful activities.*

This was an application by way of Notice of Motion seeking to

- (a) stay or set aside an ex parte judgment and decree in High Court Civil Suit No.356 of 2007,
- (b) stay or set aside execution,
- (c) leave to file a defence out of time, and;
- (d) costs.

The applicants, who were respondents in High Court Civil Suit No.356 of 2007, among others denied having been duly served in any way. They claimed that they had a good cause and defence to the suit, and that justice required setting aside the said judgment, decree and staying execution to enable them file a defence.

The respondent claimed that they executed a loan agreement of Ug Shs 18 million in November 2006 with the first applicant of which the second applicant guaranteed and pledged her plot of land and developments thereon as security for the said debt. The said

money was not paid, hence successfully filing Civil Suit No 356 of 2007 for recovery of the said debt.

Summons were issued. Counsel for the respondent applied for judgment against the applicants upon their failure to apply to appear and defend the suit within the prescribed time. An affidavit to prove service of summons to the applicants on June 30, 2007 at their home was attached and the Registrar subsequently entered judgment against both of them. A decree for full amounts plus interest and costs were also extracted on September 19, 2007 and a warrant of attachment for the 2<sup>nd</sup> applicant's house was issued. The house was attached and sold to a third party.

**HELD:**

1. Inconsistencies in affidavits cannot be ignored however minor as sworn affidavits are documents not treated lightly. If an affidavit contains an obvious falsehood, then it naturally becomes a suspect. In the instant case, the two affidavits of the applicant were found inconsistent.
2. An application supported by a false affidavit is bound to fail because the applicant in such a case does not come to Court with clean hands to tell the truth. In the instant case, the applicant was aware of the case at the time when she had been served with summons on June 30, 2007 as per affidavit of service. The respondent lied on oath and could not be trusted.
3. Under Order 36 rule 3 of the Civil Procedure Rules SI 71-1, Summons in Form 4 Appendix- A of the Rules must be accompanied by a copy of the plaint and served upon the defendant. It had been impossible in the instant case for an advocate to serve only summons and leave behind the plaint which contained the basis of the clients claim against the applicant.
4. In execution by attachment and sale, the statutory period required for advertising before sale must be followed. Any allegation of irregularity requires adducing satisfying evidence. The Court bailiff proved in the instant case to have conducted the sale as per the required procedures.
5. An application to stay execution must be made timely and filed without inordinate delay. In the instant case, the sale had been complete; the buyer paid for the house, proceeds were received by the seller/bailiff and advanced to the respondent through his counsel. The application was made inordinately late.
6. A person who defies Court orders cannot at the same time seek Court protection for the unlawful activities. The applicant in the instant case used soldiers to defy a lawful Court order amounting to contempt of Court; therefore she could not at the same time seek Court protection for her activities.

*Application dismissed with costs.*

**Legislation considered:**

Civil Procedure Rules, SI 71-1 Order 36 rule 11, Order 52 rules 1, 2 and 3, Order 5 rule 6  
Civil Procedure Act, Cap 71, Sections 96 and 98.

**Cases cited:**

Luciano Lippi *v*s Venice (U) Limited (1992) IV KALR  
Senyange *v*s Naks Limited [1980] HCB 31

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