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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISCELLANEOUS APPLICATION NO. 455 OF 2020**

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**(ARISING OUT OF CIVIL SUIT NO. 309 OF 2020)**

**GUANGDONG HAO HE ENGINEERING & CONSTRUCTION**

**COMPANY (U) LTD.....APPLICANT**

**VERSUS**

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**ZEBRA SECURITY COMPANY LIMITED.....RESPONDENT**

**BEFORE: HON. LADY JUSTICE SUSAN ABINYO**

**RULING**

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This application was brought by notice of motion under the provisions of section 98 of the Civil Procedure Act, Order 36 Rules 4, 11 and Order 52 Rules 1 & 2 of the Civil Procedure Rules where the Applicant seeks for orders that;

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1. The default judgment entered by this Court against the Applicant on the 17<sup>th</sup> June, 2020 be set aside;
2. The time within which to file an application for leave to appear and defend the suit be extended;
3. The Applicant be granted unconditional leave to appear and defend the main suit;
4. Execution of the decree of court be stayed or set aside;
5. The costs of this application abide the outcome of the main suit.

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**Facts**

This application is supported by an affidavit deposed by Mr. Angulo Okiring the Applicant's Company Director and an affidavit in rejoinder. The facts are summarized as follows;

5 That on the 4<sup>th</sup> day of June 2020, the Respondent filed Civil Suit No. 309 of 2020  
against the Applicant for recovery of UGX. 92,642,338/- (Uganda Shillings Ninety  
Two Million Six Hundred and Forty Two Thousand Three Hundred and Thirty Eight  
only). That the Respondent served the Applicant on the 4<sup>th</sup> day of June 2020 but  
10 the documents remained at the Applicant's office due to the nationwide  
lockdown imposed by the Government of Uganda to curb the spread of  
Corona Virus(COVID-19) Pandemic.

That at the time when the Respondent served the Applicant, the Applicant's  
Lawyer was out of office and immobile due to the lockdown which rendered it  
impossible to access office. That the Applicant was able to serve the summons  
15 and pleadings to its Lawyers after the 10 days had lapsed and, upon perusal of  
the summons and pleadings thereafter, made an inquiry from court officials and  
discovered that the Respondent had obtained a default judgment against the  
Applicant. That the Applicant has a good defense to the Respondent's suit.

That the parties after reconciling their ledger accounts, agreed on the correct  
20 outstanding amount on the security fees. That after the said reconciliation, the  
Applicant discovered a breach of contract by the Respondent, where the  
Respondent's employees with accomplices still at large stole the Applicant's  
construction materials and equipment amounting to UGX. 87,262,600/- (Uganda  
Shillings Eighty Seven Million Two Hundred and Sixty Two Thousand Six Hundred  
25 only). That as a result, the Applicants have been advised by their Lawyers to file  
a counter claim against the Respondent to recover stolen construction material  
and equipment.

That there is a good cause as to why the Applicant was unable to file an  
application for leave to appear and defend the suit. That it is just and equitable  
30 that the default judgement be set aside and any orders arising from the same  
be set aside and the time within which the Applicant should file an application  
for leave to appear and defend the suit be extended.

The application was opposed by the Respondent in an affidavit in reply sworn  
by Abert Rukaari, the Managing Director and a supplementary affidavit sworn  
35 by Rwihura Ian, a supervisor of the Respondent's security guards at the  
Applicant's site in the New taxi park, which are summarized as follows;

That the Applicant was in breach of contract having failed to pay for the  
security services rendered by the Respondent.



5 That the Respondent having issued a notice of intention to sue to the Applicant which it did not respond to, instead filed a summary suit against the Applicant for recovery of UGX. 92,642,338/-( Uganda Shillings Ninety Two Million Six Hundred Forty Two Thousand Three Hundred Thirty Eight only) as the outstanding claim up to the month of June 2020.

10 That on the 4<sup>th</sup> day of June, 2020 the Applicant was served with the summons but did not apply for leave to appear and defend the suit. Consequently, the Respondent obtained a default judgement against the Applicant on the 17<sup>th</sup> day of June, 2020.

15 That the reason advanced by the Applicant that at the time they were served by the Respondent on 4<sup>th</sup> June, 2020, the office of their Counsel was still closed due to the nationwide lock down imposed by the government is very untrue as by 4<sup>th</sup> June, 2020, the lock down had been eased by the President of the Republic of Uganda and offices including courts were open and operating. That the lock down is not good cause for failing to apply for leave to appear and  
20 defend the suit.

That the default judgement has been forwarded to Execution Division and execution proceedings have already commenced. That the purported loss of the Applicant's property on site is an allegation intended to avoid payment of the Respondent's claim because none of the officials of the Respondent was  
25 ever informed of the loss of the said property in accordance with the contract.

That the service agreements between the Applicant and the Respondent clearly stipulates that incase of any default to deliver the services in accordance with the agreement, the applicant would give notice of seven days to the Respondent company and would subsequently terminate the  
30 services and replace the company with any other specialists who would take over the security of the site.

That the allegations of theft of property, if at all is provable, should form a basis of a separate suit against the Respondent but not by way of a counter claim in a matter that has been finally determined by court. That the application is  
35 misconceived and is an abuse of court process because the Applicant has no valid defense to the summary suit and the alleged counter claim cannot be brought in a summary suit.

That this application is an afterthought, frivolous, vexatious and should be dismissed with costs against the Applicant.

5 **Representation**

The Applicant was represented by M/S LIBRA Advocates while the Respondent was represented by M/S Lawrence Tumwesigye & Co. Advocates.

**Issues for determination:**

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1. Whether the Applicant has sufficient grounds for setting aside a default summary Judgment.
  2. Whether a counterclaim whose cause of action is alleged to have arisen after judgement can be entertained in the cause.
  3. Whether the defendant has a good defense to the suit.
  4. What remedies are available to the parties.

15 **Submissions**

Counsel for the Applicant submitted that given the then circumstances which rendered most professionals immobile and therefore unable to access their office premises even weeks after the said lock down was lifted is sufficient to account for its inability to apply for leave to appear and defend the suit within  
20 the statutory 10 days.

Counsel further submitted that the Applicant has a good defense to the main suit and relied on the provision of Order 36 Rule 11 of the Civil Procedure Rules to make an omnibus application seeking to set aside the default judgement and decree as well as leave to appear and defend where the service of summons  
25 was not effective or for any other good cause and relied on the case of **Uganda Telecom Vs Airtel Uganda (HCMA No. 30 of 2011)** where Hellen Obura.J(as she then was) held that where a default judgment has been entered and a decree obtained, the appropriate remedy would be to apply to set aside the decree under Order 36 Rule 11 of the Civil Procedure Rules.

30 Counsel further cited the case of **Caltex Oil Vs Kyobe (1989-90) HCB 141**, where the court found that it was endowed with wide discretionary powers to set aside a decree obtained under Order 33 Rule 3 (now Order 36 Rule 11) of the Civil Procedure Rules, however that the Applicant had to satisfy court either that there was no effective service or he had to show any other good cause and  
35 that in the case of **Nicholas Roussos v Gulamhussein Habib and Anor Supreme Court Civil Appeal No. 9 of 1993**, the Supreme Court laid down grounds which may amount to sufficient cause and listed the following: mistake by an advocate though negligent, ignorance of procedure by an unrepresented Defendant and illness by a party.



5 Counsel for the Respondent in reply contended that in order for the Applicant to succeed in the instant application, the Applicant has to prove any of the two things before an *ex parte* decree can be set aside, First that service was not effective and secondly, that there was good or sufficient cause for failure to apply for leave to defend the suit and submitted that the Applicant in this case  
10 admitted having been served with summons as seen in paragraph 3 of the affidavit in support of the application sworn by Mr. Angulo Okiring but that the Applicant has failed to prove the 2<sup>nd</sup> alternative requirement of "good or sufficient cause".

That the Applicant under paragraph 5 of his affidavit in support of the application states that," ...at the time the summons and a summary plaint were  
15 served on the Applicant, the offices of the company Lawyers were closed because the Lawyers had been rendered immobile due to a national wide lockdown by the Government of Uganda"; that this reason does not constitute good reason for the Applicant's failure to apply for leave to defend the suit on  
20 the following grounds;

- i) That at the time, lockdown had been ceased and offices were operating, people were moving and that is why the Respondent's Lawyers were able to file a case in court and serve the Applicant whose offices were open and operating. That if the Applicant's offices  
25 were open and they were able to receive the summons, there were several options available to the Applicant to call their Lawyers and instruct them as a matter of urgency or instruct another Lawyer to defend the suit, or inform court of their intention to defend the suit but that all these were not done.
- 30 ii) That the summons having been served on the 4<sup>th</sup> June,2020, the 10 days in which the Applicant was required to file an application for leave to defend ended on 14<sup>th</sup> June,2020 and that the fact that the Applicant filed this application on 9<sup>th</sup> July,2020 was dilatory conduct indicating that they did not have a defense to the suit.

35 Counsel for the Respondent relied on the decision of **Capt. Phillip Ongom Vs Catherine Nyero Owota Civil Appeal No. 4 of 2001** for the proposition that there cannot be good cause where the default resulted from the litigant's failure to give the advocate due instructions.

Counsel further averred that even if the Applicant had good cause for failure to  
40 apply for leave to defend the suit, a fact which the Respondent denies, that the



5 Applicant in this case has no valid defense to the suit. Counsel cited the  
decision of **Maluku Interglobal Trade Agency Vs Bank of Uganda 1985 HCB 65**,  
to support this contention as cited in the cases of **Begumisa George Vs East**  
**African Development Bank HCMA No. 451 of 2020** and **Jubilee Insurance**  
10 **&Co.Ltd Vs Fifi Transporters Ltd HCMA No. 0211 of 2008** where it was upheld that  
before leave to appear and defend is granted, the defendant must show by  
affidavit or otherwise that there is a bonafide triable issue of fact or law and any  
defense raised should be stated with sufficient particulars as to appear genuine  
and not vague statements denying liability.

Counsel submitted that the Applicant's affidavit in support of the application  
15 and the proposed written statement of defense annexed as 'C' does not raise  
any bonafide triable issues. That whereas the Respondent/Plaintiff's claim in the  
summary suit is UGX. 92,642,338/- being unpaid arrears up to the month of June,  
2020, that the Applicant avers that the indebtedness is to the tune of only UGX.  
74,920,608/-which amount excludes UGX. 9,982,800/- for the month of June,  
20 2020 and also 6% withholding tax.

Counsel referred to paragraphs 16 &17 of the Respondent's affidavit in reply  
deponed by Mr. Albert Rukaari and submitted that payment for the month of  
June 2020 cannot be excluded because they worked and earned since the  
guards were on site in that month and are actually still on site as of now. That  
25 while withholding tax of 6% is a statutory tax withheld by the payer upon  
payment to the payee, that in this case the contention is not about normal  
payment to the payee but a judgement debt. That the Applicant cannot claim  
to withhold a tax when it has not paid the Respondent. That the withholding tax  
must remain part of the Applicant's judgment debt until recovery when the  
30 Respondent would pay the tax in accordance with the tax laws and that the  
Applicant has no valid defense to the Respondent's claim of UGX. 92,642,338/-.

Counsel for the Applicant in rejoinder submitted that it is public knowledge that  
the Government- imposed Lock down was lifted in phases as per the Presidential  
Directives, initially only 30 Lawyers who were not specifically identified were  
35 allowed to operate. That the Respondents Lawyers could have been among the  
30 Lawyers that were allowed to operate but the Applicant's Lawyers' office  
was still closed during that same time and were not among the 30 Lawyers. That  
the Applicant's Lawyers managed to open their offices for normal operations on  
the 5<sup>th</sup> day of July, 2020 when the transport situation had gone back to normal  
40 and all the Ministry of Health SOPs were put in place for the safety of their



5 employees and as soon as it received the court documents, acted promptly to file this application.

Counsel further submitted that the case of **Capt. Phillip Ongom Vs Catherine Nyero Owota Civil Appeal No. 4 of 2001** can be distinguished from the facts of this case in that the Applicant had given instructions to his Lawyer in that case  
10 which the Lawyer had negligently carried out and in this matter, the Applicants Lawyer was unavailable due to the effects of the lockdown measures imposed by the government and had not resumed work at the time. That the Applicant had no way of forwarding to him the court documents since their offices were closed at the time. That the Applicant has a reasonable excuse for failing to  
15 appear in C.S No. 309 of 2020 but also has a good defense whose draft has been annexed which contains bona fide triable issues of fact and law.

### **Decision**

I have carefully perused this application together with the supporting affidavits of the parties and taken into consideration the submissions of both Counsel. I  
20 find as follows:

#### **Issue 1: Whether the Applicant has sufficient grounds for setting aside a default summary Judgment.**

**Section 98 of the Civil Procedure Act Cap 71** gives this court powers to make such orders as may be necessary for the ends of justice.

25 The provision of **Order 36 Rule 11 of the Civil Procedure Rules** enjoins Court to set aside a default judgment on two grounds; when service of summons was not effective and for any other good cause. For emphasis **Order 36 Rule 11 of the Civil Procedure Rules** provides as follows;

30 *"After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and defend the suit, if it seems reasonable to the Court so to do, and on such terms as the court thinks fit."*

35 Taking into further consideration the Supreme Court decision in the case of **Post Bank (U) Ltd Vs Abdu Ssozi SCCA 008 of 2015**, where the court set out the purpose of Order 36 as follows;

5            "Order 36 was enacted to facilitate the expeditious disposal of cases  
involving debts and contracts of a commercial nature to prevent  
defendants from presenting frivolous or vexatious defenses in order to  
unreasonably prolong litigation. Apart from assisting the courts in disposing  
of cases expeditiously, Order 36 also helps the economy by removing  
10           unnecessary obstructions in financial or commercial dealings."

Consequently, the Defendants in cases which fall under Order 36 of the Civil  
Procedure Rules are given the right to apply to court for leave to appear and  
defend the suit under Rules 3(1) and 4 thereof and, when the court receives  
applications of this nature and is satisfied by the Applicant's/Defendant's  
15           affidavit that it has raised a genuine defence and triable issues of fact or law,  
the court will grant the Defendant leave to appear and defend the suit. If the  
Defendant fails to apply for leave to appear and defend in the prescribed time  
of (10 days), the plaintiff is entitled to a decree for an amount claimed in the  
plaint with interest, if any as provided under Order 36 Rule 3(2) of the Civil  
20           Procedure Rules.

However, if court is not satisfied that the defendant has raised a triable issue and  
a plausible defense, it will refuse to grant leave to appear and defend the suit,  
and the plaintiff will be entitled to a decree in the amount claimed in the plaint  
with interest, if any as provided under Order 36 Rule 5 of the Civil Procedure  
25           Rules.

In the instant case, there is no contention as to the effectiveness of service of  
summons as Mr. Angulo Okiring the Applicant's Director under paragraph 3 of  
his affidavit in support of the application clearly admits that on the 4<sup>th</sup> day of  
June, 2020, summons to apply for leave to appear and defend the suit were  
30           served on the Applicant in its office.

The question as to whether there was effective service is answered in the  
affirmative.

The other ground that the Applicant has to prove is that of "good cause".

Following the decision in the case of **Caltex Oil Vs Kyobe (1989-90) HCB 141**  
35           where court stated that Sufficient cause had to relate to the failure by the  
Applicant to take the necessary steps at the right time. That there was no hard  
and first rule and each case had to be considered on its own peculiar  
circumstances.



5 In the instant case, the Applicant in its affidavit in support of the application  
deponed by its Director under paragraph 5 states that, "at the time the  
summons and a summary plaint were served on the Applicant, the offices of the  
company Lawyer were closed because the Lawyers had been rendered  
10 immobile due to a national wide lockdown by the Government of Uganda to  
curb the spread of Corona virus pandemic.

I am cognisant of the fact that there was a lockdown imposed by government  
due to COVID -19 pandemic. The total lock down was between 18<sup>th</sup> March 2020  
and 1<sup>st</sup> June 2020.

15 The President of Uganda, H.E Yoweri Kaguta Museveni in his speech on the  
Seventh Address to the country held on the 1<sup>st</sup> of June, 2020, directed inter alia,  
"Opening of public transport means by mini-buses, buses, taxis, provided they  
carry only one half of their normal capacity plus the conductor except in the 42  
border districts."

20 In essence, this meant that by the time the summary suit was filed on the 4<sup>th</sup> of  
June, 2020, transport had been relaxed however, most people could not access  
the courts which were in operation due to the requirement for public transport  
operators to register and obtain a route chart as directed by Kampala Capital  
City Authority which caused further delay.

25 Accordingly, I find that the Applicant's failure to give instructions to Counsel,  
whose offices were closed due to the lockdown is not a good cause to merit  
setting aside the default judgment. (**See Shamsudin Jivan Mitha Vs Abdulaziz Ali  
Ladak (1960) E.A 1054 at pg. 1057** cited with approval in the case of **Capt. Phillip  
Ongom Vs Catherine Nyero Owota S.C.C.A No. 4 of 2001.**)

30 **Issues 2, 3 and 4** will be resolved concurrently taking into consideration the  
nature of the application which was made omnibus under Order 36 Rule 11 of  
the Civil Procedure Rules.

In regard to the issue whether the Applicant has triable issues, I have looked at  
the Applicant's intended written statement of defense attached as annexure  
"C" and under paragraph 8 thereof, a counter claim is raised.

35 I agree with Counsel for the Respondent that the Law requires a Defendant who  
wishes to apply for leave to appear and defend to have a good defense to the  
suit but not a counter claim. This notwithstanding, a counter claim in itself is not a  
guarantee that there is a defense on the merit of the case; a Defendant who

5 wishes to raise a counterclaim has the liberty to institute a separate suit. (**See Karshe Vs Uganda Transport Company [1967] E.A 744 at pg. 783**)

I hereby find that the Applicant has not raised a triable issue to warrant the grant of leave to appear and defend the suit.

Consequently, this Application is dismissed with the following orders;

- 10 1. Miscellaneous Application No. 455 of 2020 seeking to set aside the default judgment entered by this Court on the 17<sup>th</sup> day of June, 2020, is hereby dismissed and the default Judgment is upheld.
- 15 2. The application for stay of execution of the Decree is disallowed.
3. The subsequent prayer for extension of time to file an application for leave to appear and defend and the grant of unconditional leave to appear and defend the main suit is untenable and is denied.
- 20 4. The Respondent is awarded costs of this application.

Ruling delivered by email on the 11<sup>th</sup> day of November,2020.

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SUSAN ABINYO

**JUDGE**

**11/11/2020**