**THE REPUBLIC OF UGANDA**

 **IN THE HIGH COURT OF UGANDA AT KAMPALA**

 **(COMMERCIAL COURT  DIVISION)**

 **MISCELLANEOUS APPLICATION NO. 965 OF 2013**

 **(*Arising From Civil Suit No. 595 of 2012)***

**THE ADMINISTRATORS OF THE ESTATE**

**OF THE LATE JAMES  MATSIKO** **:::::::::::::::::::::::::::::::APPLICANT**

 **VERSUS**

**ITAL ALUMINIUM  (U) LTD::::::::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This application was brought under Order 36 rule 11 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act (CPA) for orders that:

1. The judgement and the decree dated 1st October 2013 in the matter be set aside and    execution be set aside.
2. The execution be stayed pending the determination of the application.
3. The warrant of attachment dated 22nd October 2012 be set aside
4. The applicant be granted unconditional leave to appear and defend the main suit.
5. Costs of this application be provided for.

The grounds for the application as stated in the notice of motion is that the summons which was received by one Sam Sserwanga who is a former administrator of the estate whose Letters of Administration were revoked was not effectively served because he (Sserwanga) colluded with the respondent to defraud the estate of the deceased by receiving the court summons and taking no action on the same. Furthermore, that it is just, equitable and in the interest of justice that he should not be allowed to defraud the estate and lastly, that the applicant has a good and valid defence to the claim.

The application was supported by an affidavit deposed by Mr. Barnabas R. Tumusingize, an advocate from the law firm representing the applicant. The application was contested and the respondent filed an affidavit in reply. In further answer to the reply, the applicant filed an affidavit in rejoinder deposed by Mr. Davis Ndyomugabe also an advocate who is a former partner of the late James Matsiko.

At the hearing of the application, the applicant was represented by Mr. Ecimu Nicholas whereas Mr. Emoru Emmanuel and Mr. Paul Wanyoto appeared for the respondent. In his submissions, counsel for the respondent raised a preliminary objection on the competence of the application. I wish to deal with the objection first before I delve into the merits of the application.

It was the respondent’s contention that the application is incompetent because the affidavit in support sworn by Mr. Barnabas Tumusingize was sworn by an advocate moreover on contentious matters as stated in paragraphs 3 – 30 regarding service of court process without attaching evidence that he is a duly authorised agent or duly appointed under Order 3 rule 1of the CPR. This court was referred to the decision of Madrama J. in the case of ***Mugoya Construction & Engineering Ltd vs Central Electricals International Ltd HCMA No. 699 of 2011*** where it was held that the word duly appointed to act as used in Order 3 rule 1 are clearly distinguishable from an advocate who has been duly instructed. The respondent also cited the case of ***Simon Tendo Kabenge vs M/s Mineral Access Systems (U) Ltd HCMA No. 565 of 2011 and Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998*** in which the Supreme Court of Uganda struck out an affidavit sworn by an advocate when it contained contentious matters.

Mr. Ecimu, counsel for the applicant submitted that the affidavit of Mr. Tumusingize does not offend the requirements of Order 3 rule 1. It was the applicant’s contention that the deponent swore to the affidavit as a duly appointed advocate and that is the premise of his ultimate instructions in the original suit in the Family Division and in the current suit. It was submitted for the applicant that the matters contained in paragraphs 3 - 30 are within the knowledge of the deponent and supported by documents and therefore it was regular for Mr. Tumusingize to swear the affidavit.

**Order 3 rule 1 of the Civil Procedure Rules provides:**

*“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person.”*

Whereas I agree with the observation of Madrama J. in ***Mugoya Construction & Engineering Ltd vs Central Electricals International Ltd (supra)*** that an advocate is forbidden from swearing an affidavit in contentious matters and conducting the suit as well which is the import of regulation 9 of the Advocates (Professional Conduct) Regulations, it is my considered view that the above case is distinguishable from the facts of the case before this court. In the abovementioned case, the deponent of the affidavit in support purported to depose to the affidavit in the capacity of a duly authorized agent of the applicant without any authority to that effect and not in the capacity of an advocate as is the case at hand.

In this case, the deponent swears the affidavit in his capacity as an advocate instructed by the beneficiaries of the estate of the late James Matsiko to challenge the grant of letters of administration to Mr. Sam Sserwanga. This is stated in paragraph 2 of the affidavit in support of the application which alludes to annexture “A” to the notice of motion being a plaint in Civil Suit No. 142 of 2011 which sought for revocation of grant of probate issued to Mr. Sam Serwanga. That plaint was drawn and filed by the law firm where the deponent is a senior partner. I would therefore have no reason to doubt his instructions to handle matters relating to the estate.

In the case of ***Standard Chartered Bank (U) Ltd vs Mwesigwa Geoffrey Philip HCMA No. 477 of 2012*** Madrama J. held that an advocate is entitled to make an affidavit in support of an application as may be enabled by Order 19 rule 3 of the CPR and that all the advocate needs to indicate is that he has instructions or that he or she is handling the matter as an advocate having conduct.

I am persuaded by that reasoning and applying it to the instant case I am convinced that Mr. Tumusingize being an advocate having conduct of the court matters relating to the estate has the capacity to swear an affidavit in support of this application.  I believe the reason why Mr. Sam Sserwanga directed a clerk working with Muganwa Nanteza & Co. Advocates to Mr. Tumusingize Barnabas to serve him with the court process confirms that even Mr. Serwanga was aware that he was the one handling the case in court. Mr. Tumusingize therefore deposed to facts well within his knowledge in accordance with Order 19 rule 3 of the CPR moreover with documentary proof to support his averments. Indeed no one could have been better suited to swear the affidavit than him. Therefore I find no reason to reject his affidavit in support since it was not sworn in a representative capacity as a recognised agent of the applicant. In the circumstances, I find no merit in the objection and it is accordingly overruled.

Turning to the merits of this application, it was submitted for the applicant that there was no service and any alleged service should not be allowed to be used to defraud the estate. The applicant argued that the dates of service of summons and the manner of service show collusion on the part of Mr. Sam Sserwanga and the respondent with the intention to defraud the estate whose beneficiaries he was bitterly embroiled with in a suit demanding accountability and challenging his administration of the estate.

On the other hand, the respondent argued that Mr. Herbert Okello picked up the summons on 7th December 2012 from Senkeezi- Sali Advocates and Legal Consultants and on the same day he served it on Mr. Sam Sserwanga, who was still the administrator of the estate of the late James Matsiko but he did not acknowledge receipt of the summons.

As to whether there is good cause warranting the setting aside of the judgement and decree, it was submitted that the applicant has a defence to the case, the suit is time barred and there is an element of fraud that needs to be investigated. In addition to that the applicant argued that the respondent sued a non-existent person as the suit refers to administrator of the estate without mentioning any name.

In reply, it was argued for the respondent that the applicant’s affidavit served to show that the applicant got to know about the main suit well in time when they could have applied for leave to appear and defend but chose to write a complaint to court about Mr. Sserwanga who had since consented to surrendering the administration of the estate.  It was also argued for the respondent that on the 10th of December 2012 when the administrator attempted to pass on court process to Mr. Tumusingize it was well within time for the beneficiaries to apply for leave to appear and defend and so that is not conduct consistent with a person who wishes to defraud an estate but rather conduct of a prudent administrator.

Additionally, the respondent argued that the claim that the suit is time barred is false because the debt acknowledgement was made in 2005 and 2008. Counsel for the respondent submitted further that on the whole, the applicant had failed to establish that there was fraud attributable to the respondent in the matter.

The respondent also submitted that the affidavit in rejoinder did not state the paragraph it was rejoining and apart from that the affidavit was served at 12:10 pm yet the hearing had been stood over until 12:00 pm so the matter was closed. The respondents also asserted that the affidavit in rejoinder contained many falsehoods.

I have analyzed the pleadings and the supporting documents filed in this matter. I have also addressed my mind to the submissions made by both counsels. Under Order 36 rule 11 of the CPR, this court is empowered to set aside a decree and if necessary stay or set aside execution, as well as give leave to the defendant to appear to the summons and to defend the suit, if satisfied that the service of the summons was not effective, or for any other good cause, if it seems reasonable to the court to do so.

Therefore the first issue to be resolved is whether there was effective service of summons. While the applicant disputes having been served with court process, the respondent insists that there was service on the administrator of the estate on 7th December 2012 prior to his relinquishing of office on 18th December 2012. Order 5 rule 16 of the CPR provides;

*“The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons.”*

In the case of ***Geoffrey Gatete and Angela Nakigonya vs. William Kyobe Supreme Court Civil Appeal No. 7 of 2005,*** it was stated as follows:

“*The Oxford Advanced Learners’ Dictionary defines the word “effective” to mean “having the desired effect; producing the intended result”. In that context, effective service of summons means service of summons that produces the desired or intended result. Conversely, non-effective service of summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in a 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 of serving summons that the possibility of service failing to produce the intended result cannot be ruled out in every case”.*

In the instant case, annexure “B” to the affidavit in reply is the affidavit of service deposed by Mr. Okello Herbert on 18th December 2012. The essence of his affidavit is that on 6th December 2012 he received summons in summary suit in Civil Suit No/ 595 of 2012 and on 7th December 2012 served the same on Mr. Sam Sserwanga, who was well known to him. He averred that the said Sserwanga refused to acknowledge receipt of the summons. It is on the basis of this affidavit that a default judgment was entered against the applicant and a decree issued.

It is the applicant’s case that Mr. Okello could not have served the summons on the dates he said that he did. This Court was referred to the statement of Sibanza attached to the affidavit of Mr. Tumusingize as annexture “C”, which shows that Sibanza picked the summons from court on 10th December 2012 upon the instruction of Mr. Sam Sserwanga and attempted to serve it on Mr. Tumusingize on the 10th of December 2012.

I find some contradictions which raise the question as to why Mr. Sserwanga again instructed another court process server to obtain summons from this Court for service on Mr. Tumusingize if at all he (Mr. Sserwanga) had already been served with the same on 7th December 2012. I would have expected him to forward the copy he had received to the firm of M/S Sebalu & Lule Advocates who he knew was representing the interest of the estate at the time. Most importantly, given the state of affairs where Mr. Sserwanga’s administration of the estate was being challenged in Court by the beneficiaries I do not think he could have acted in the best interest of the estate by taking the necessary action. In that regard, it is my firm view that service of the court summons upon him would not amount to an effective service because Mr. Sserwanga had already fallen out with the beneficiaries of the estate whose best interest he was meant to protect as the administrator of the estate. No wonder that no steps were taken and a default judgment was entered against the estate.

On a balance of probabilities, I am inclined to believe the applicant’s case and find that the applicant was not made aware of the suit and for that reason the desired effect of filing an application for leave to appear and defend the suit was not achieved. I therefore find that service of the summons upon Mr. Sserwanga was not effective. On that ground alone, this application would succeed.

With regard to the second issue, the applicant argued that there is good cause necessitating the setting aside of the judgement and decree while the respondents contended that no good cause was shown.  In the case of ***Geoffrey Gatete and Another vs William Kyobe (supra)***, it was held that in case of applications, the Court is not required to determine the merits of the suit and that the purpose of the application is not to prove the applicant’s defense to the suit but to ask for opportunity to prove it through a trial. It was further held that the Court has to determine whether the defendant has shown good cause to be given leave to defend. Apart from ineffective service of summons, what the Courts have consistently held to amount to good cause is evidence that the defendant has a triable defense to the suit.

Looking at the motion and the affidavits in the instant application, it is evident that the appellant wish to defend the suit on various grounds.  Firstly, it is contended that the sum of Ug. Shs. 265, 500,000/= was not actually owed to Ital Aluminium Ltd since the respondent only sued for a sum of US$ 3,368.1 in Civil Suit No. 276 of 2007 as per the plaint marked annexture “E” to the affidavit in support of the application to which the administrator filed a written statement of defence.  The applicant also contends that there is no mention of the debt of Ug Shs. 265,500,000/= in annexture “G” to the affidavit in support of the application which Mr. Sam Sserwanga sent to the beneficiaries but instead the administrator mentioned a pending suit whose claim amount was US$ 8,636.

In answer to that, the respondent contends that the respondent has never instructed M/S Muhimbura & Co. Advocates to file Civil Suit No. 276 of 2007. The respondent also denies the authenticity of annexture “E”. It is also argued that annexture “G” was unreliable and cannot be validated for accuracy.

The applicant also contends that the default judgment was procured by fraud since the suit from which this application arises was brought about at the time when Mr. Sam Sserwanga was still administrator of the estate but he chose not to file a defence leading to the current application. The submission on fraud is buttressed by claim that the letters of acknowledgement are fictitious.

For the respondent it was submitted that the beneficiaries could have filed an application for leave to appear and defend because they became aware of the suit within the prescribed time.

The above arguments of both counsels, in my view, raise a number of serious issues that can only be determined after a full trial. Firstly, as regards the amount claimed in the main suit, there would be need for additional evidence to ascertain the alleged claim of Ug Shs. 265,500,000/= especially in light of the contents of annexture “G” which also requires further proof that it was written by Mr. Sserwanga.

Secondly, there may also be need to ascertain if M/S Muhimbura and Co. Advocates was instructed to file the plaint attached to the affidavit in support of this application as annexture “E”. Thirdly, and most importantly there is an allegation of fraud which needs to be specifically pleaded in the defence to the main suit with particulars and strictly proved at the hearing thereof.

Lastly, it is also contended by the applicant that the suit is incompetent because it is time barred. The applicant claimed that the two supposed acknowledgements of debt are fictitious creations of Mr. Sam Sserwanga which were not part of the plaint. Conversely, the respondent argued that the claim that the suit is time barred is false because the debt acknowledgements were made in 2005 and 2008. These allegations also need further evidence to determine the author of the two disputed letters so as to resolve whether the suit is time barred or not.

In conclusion, I am satisfied that the applicant has raised a number of triable issues which to my mind are good cause that justify setting aside of the default judgement and decree so that the matter is heard on the merits. On the whole, for the reason that service of the summons was not effective and that the applicant has raised a number of triable issues which merit trial of the suit, this application succeeds.

 In the result, the default judgment and decree in the summary suit and the consequent execution are set aside. The applicant is granted unconditional leave to appear and defend the suit. The written statement of defence shall be filed within 14 days from the date hereof. Costs of the application shall be in the main cause.

I so order.

Dated this 3rd day of December 2014.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.30 pm in the presence of Mr. Kasuti Daniel h/b for Mr. Nicholas Ecimu for the applicant and Mr. Emoru Emmanuel for the respondent. Both parties were absent.

**JUDGE**

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