

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.12 OF 2010

ABDU SSOZI.....APPELLANT

VERSUS

POST BANK UGANDA LIMITED.....RESPONDENT

*(Appeal from the ruling of Hon. Lady Justice M.S. Arach Amoko,
dated 28th January 2008 in Miscellaneous Application No. 530
of 2008)*

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE RUBBY AWERI OPIO, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This is an appeal from the Ruling and Order dated 28th January 2008 of Hon. Lady Justice S. Arach Amoko J (as she then was) in High Court Miscellaneous Application No. 530 of 2008 and 448 of 2008 that arose from High Court Civil Suit No. 189 of 2008.

The brief background to this appeal, is that, the respondent brought an action through High Court Civil Suit No.189 of 2008 to recover a loan against the appellant and two others at the High Court by way of summary procedure under **Order 36** of the Civil Procedure Rules.

The appellant in response filed Application No. 448 of 2008 for leave to appear and defend the suit. The application was dismissed for having been filed out of the time prescribed under the Rules.

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The court upon dismissing the application for leave to appear and defend entered Judgment in Civil Suit No. 189 of 2008 in favour of the respondent for the sum of Ug.shs. 82,059,465 claimed in the specially endorsed plaint. It also awarded the respondents interest on the above sum at 25 percent per annum from the date of judgment until payment in full and costs of the suit.

The appellant then filed Application No. 530 of 2008 seeking to set aside the decree passed ex-parte in Civil Suit No. 189 of 2008. That application was also dismissed. Hence this appeal.

The grounds of the appeal are set out in the memorandum of appeal as follows:-

- 1. The learned trial Judge erred in law and in fact in holding that the judgment entered against the appellant in a summary suit, after his application for leave to appear and defend the head suit was struck out for having been filed out of time, was not a default judgment.**
- 2. The learned trial Judge erred in law and in fact in holding that the appellant as defendant then whose application for leave to appear and defend the head suit was struck out for incompetency and Judgment entered was not entitled to apply to set aside the decree on ground of good cause and to be allowed to appear and defend the head suit.**
- 3. The learned trial Judge erred in law and in fact in dismissing the applicant's application to set aside the decree and for leave to appear and defend the suit after she appreciated in the proceedings that the suit was wrongly filed under summary procedure.**
- 4. The learned trial Judge erred in law and in fact in striking out the appellant's application to set aside the decree without considering the merits after the**

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preliminary objection had been disallowed and hearing of the parties' submissions on the substantive application.

The appellant prays that the appeal be allowed, the ruling of the High Court be set aside, the ex-parte decree entered in the suit be also set aside, the appellant be let to appear and defend the suit and also be awarded costs of the appeal and those in the court below.

At the hearing of this appeal learned counsel **Mr. Eric Muhwezi** appeared for the appellant while **Mr. Isaac Bakayana** appeared for the respondent.

Mr. Muhwezi, with leave of the court, adopted as his submissions his conferencing notes.

In his written arguments, Mr. Muhwezi submitted that;-

A Judgment entered under Order 36 Rule 3 of the Civil Procedure Rules is a default Judgment and it is trite law that mistake of counsel is sufficient cause to set aside a default Judgment and it should never be visited upon a litigant.

When a court of law notices an illegality, for example fraud being pleaded in a summary suit, it must not close its eyes to it, for doing so, would be to sanction an illegality. This is exactly what the trial court did in this case.

Counsel further contended that matters of fraud must be put to a full trial and a default Judgment cannot settle them under the law.

That a court bailiff cannot serve court process as service of court process is governed by Order 5 of the Civil Procedure Rules, and a bailiff is not a recognised process server under the law.

Counsel argued that the existence of a good defense to a claim and wrong advice of counsel are sufficient cause to setting aside a



default Judgment especially when there are issues raised that need to be specifically proved.

He prayed court to allow the appeal.

Mr. Bakayana opposed the appeal. He supported the decision of the learned trial Judge as being correct in all respects. He submitted that the suit filed by the respondent met all the requirements of a summary suit under Order 36 of the Civil Procedure Rules. The claim in the suit was based on a contract which also provided for interest.

He submitted that the Judgment entered after the application for leave to appear and defend had been dismissed was not a default Judgment. An application for Judgment in default had been rejected as there was a pending Application for leave to appear and defend. The Judgment was only entered after the application for leave to appear and defend the suit had been heard inter parties and dismissed.

He urged court to uphold the decisions of the High Court in respect of the two applications.

We now proceed to resolve the grounds of the appeal.

We have heard the submissions of both counsel. We have read their conferencing notes and the authorities submitted to us. Since this is a first appeal we are required by Rule 30(1) of the Rules of this Court to re-appraise the evidence and to make our own inferences on all issues of law and fact.

We proceed to do so.

The respondent instituted a suit against the appellant, one Hamid Sheila and Zam Zam Noel on 23rd July 2008 by way of a specially endorsed plaint under Order 36 Rule 2 of the Civil Procedure Rules.

It is important that we reproduce in *extenso* excerpts of that plaint.

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Paragraphs 3, 4 and 5 stipulate as follows;

3. The Plaintiffs claim against the Defendants jointly and severally is for breach of contract and the recovery of Ug.shs. 82,059,465/- (Eighty Two Million Fifty Nine Thousand Four Hundred Sixty Five Uganda Shillings), interest thereon and the costs of this suit.

4. The facts constituting the Plaintiff's cause of action arose as follows;-

- a) **On the 25th January 2006, the Plaintiff advanced the 1st and 2nd Defendants a business loan of Ug. Shs. 58,000,000 (Fifty Eight Million Uganda shilling) at an interest rate of 25% per annum to be paid within 12 months. A copy of the Loan Agreement is attached hereto and marked "A".**
- b) **The loan was secured by the property comprised in Plot No.774 Block No. 11 Kabowa and supported by a power of Attorney duly executed by the 3rd Defendant in favor of the 1st and 2nd defendants (a copy of the certificate of title and power of attorney are attached hereto and marked "B" and "C" respectively.)**
- c) **That the 3rd Defendant duly obtained a spousal consent from his wife one Sarah Namuleme Ssozi authorizing the aforementioned transaction (a copy of the spousal consent form is attached hereto and marked "D")**
- d) **That it was agreed that the 1st and 2nd defendants would make monthly installments of Ug. Shs. 5,702,652 (Five Million Seven Hundred Two Thousand Six Hundred Fifty Two Uganda Shillings) on its account with the Plaintiff until February 2007 (see annexure "A")**

- e) *Despite several reminders to the 1st and 2nd Defendants to honor the servicing of the loan as agreed per the terms and conditions in the loan Agreement, the same were ignored and/ or neglected (a copy of the final demand notice is attached hereto and marked "E")*
- f) *That as a result of the 1st and 2nd Defendants' persistent defaults on the above mentioned monthly payments; the Plaintiff recalled the whole loan amount together with interest accrued thereof, which recall the defendants ignored/neglected (see annexure "E").*
- g) *That as a result of the 1st and 2nd Defendants' default, the Plaintiff attempted to sale the mortgaged property as per the terms of the loan agreement, though a one Sarah Namuleme Ssozi, purportedly the 3rd Defendant's wife, sought an interim and permanent injunction to restrain the Plaintiff from exercising the above powers (Sarah Namuleme V Post Bank and 3 Others H.C.C .S No. 782 of 2006.)*
- h) *That the 1st, 2nd, 3rd Defendants and a one Sarah Namuleme Ssozi have since the commencement of this transaction acted fraudulently with the intent of not paying the monies borrowed from the Plaintiff.*

PARTICULARS OF FRAUD

- (i) *The 3rd Defendant together with a one Sarah Namuleme Ssozi, his purported wife, executed an agreement of sale of land dated 4th April 2005 with Mr. Bagala Robert Ronald selling the land comprised in plot 774 Block 11 Kabowa at a cost of Ug shs. 13,000,000 (Thirteen Million Uganda Shillings) a copy of the sale agreement is attached hereto and marked "F).*



- (ii) That 3rd Defendant consequently allowed the land to be mortgaged to the Plaintiff with the knowledge of the existence of an earlier agreement of sale.
 - (iii) That the 3rd defendant executed a power of attorney in favour of the 1st and 2nd Defendants who had knowledge that the land was the subject of an earlier sale agreement,
 - (iv) The 1st and 2nd Defendants have to this date refused /omitted / neglected to pay the loan monies.
 - (v) That notwithstanding several interim orders issued by the High Court (Land Division) forbidding any sell, transfer or any other dealings in the said property, the 3rd Defendant and Ms. Sarah Namuleme Ssozi received 1,000,000/= (One million Uganda Shillings) on the 8th May 2008, a further 1,000,000/= (One Million Uganda shillings) on the 21st January 2008, and another 1,000,000/= (One million Uganda shillings) on the 27th February 2007) as consideration for the sale of the said property (See page 2 of annexure "F")
 - (vi) That the 3rd Defendant's wife, Ms. Sarah Namuleme Ssozi with the knowledge and encouragement of the 3rd defendant used a different signature to witness the sale to Mr. Bagala in comparison to her other signatures used to acknowledge receipt of the monies from Mr. Bagala (see pages 2 and 3 of annexure "F")
5. The plaintiff shall aver that due to the defendant's breach of the loan agreement and their fraudulent conduct, it has suffered great inconvenience and financial loss in its business.

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As already stated above, the appellant filed an application for leave to appear and defend suit. That application was dismissed having been brought out of the time prescribed by the Rules. The court then entered Judgment in favour of the respondent in the terms already set out above.

Order 36 Rule 2 of the Civil Procedure Rules upon which the suit was brought states as follows:-

**“ 2. Special endorsement on plaint
All suits-**

(a) where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising-

(i) upon a contract, expressed or implied (as, for instance, on a bill of exchange, hundi, promissory note or cheque, or other simple contract debt);

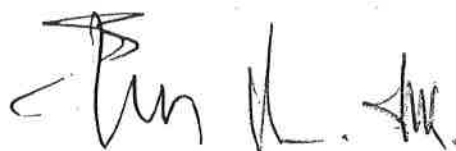
(ii) on a bond or contract written for payment of a liquidated amount of money;

(iii) on a guaranty where the claim against the principal is in respect of a debt or liquidated amount only;

(iv) on a trust; or

(v) upon a debt to the Government for income tax; or

b) being actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to

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forfeiture for nonpayment of rent, or against persons claiming under the tenant,

(b) may, at the option of the plaintiff, be instituted by presenting a plaint in the form prescribed endorsed "Summary Procedure Order XXXVI" and accompanied by an affidavit made by the plaintiff, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his or her belief there is no defence to the suit.:"

The whole of Order 36 of the Civil Procedure Rules provides for a summary procedure for disposal of cases at the High Court and Magistrates courts.

The Civil Procedure Rules provide for disposal of cases under summary procedure in order to facilitate speedy disposal of cases.

The object that underlies summary procedure is to guard against delaying tactics that are often indulged in by a defendant who has no genuine defence to a claim. Under summary procedure the defendant unlike in an ordinary suit does not have an automatic right to defend a suit. The right to defend is only granted if court is convinced as to the authenticity of the defence. Summary procedure therefore is a powerful tool at the hands of a court that is used to discourage frivolous defences.

The kinds of claims that can be brought by way of a summary suit are set out in Rule 2 of order 36 already reproduced above. They may be summarised as follows;-

- (1) Simple, direct and straight forward contracts expressed or implied such as a bill of exchange, hundi, **(In India, a hundi is an unconditional order in writing made by a person directing another to pay a certain sum of money to a person named in the order), promissory note, cheque or such other simple contracts.**



- (2) A bond or written contract for payment of a liquidation amount of money.
- (3) A guarantee where the claim against the principal in respect of a debt or liquidated amount only.
- (4) A trust
- (5) A claim by a landlord against a tenant whose tenancy has expired or has otherwise become liable to forfeiture for non payment of rent.

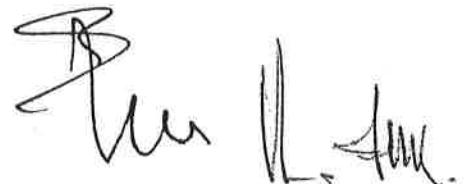
No claim can be brought under Summary Procedure otherwise than as provided above.

Before a court can entertain a suit brought by way of Summary Procedure it must first be satisfied that the claim falls under the ambit of order 36 Rule 2. A suit that does not fall under the provisions of that order is not maintainable as a Summary Suit.

Because under Summary Procedure the claim is based on affidavit evidence, the suit can only be maintainable if the claim can be proved by way of affidavit.

In the case before us, the plaintiff's claim which we have reproduced above sets out a number of allegations including fraud which is particularised therein. In the case of **Hajji Numani Mubiakulamusa versus Friends Estate Limited (Civil Appeal Number 0209 Of 2013)**, this court held as follows in respect of proof of fraud by affidavit evidence:

"We agree with Mr. Kateeba counsel for the appellant that the issues raised in the affidavit in reply could not have been properly resolved in an application of this nature. That they were serious issues of law and of fact

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that required proper pleadings upon which evidence would have been adduced.”

In that case this court set aside a Judgment of the High Court that had accepted affidavit evidence as proof of fraud.

We find that in this particular case the claim was based on a number of grounds including fraud and as such it fell outside the ambit of Order 36.

With all due respect to the learned trial Judge, we find that she erred when she entertained the claim and entered Judgment in favour of the respondent under Order 36 to which the claim was not applicable.

With the greatest respect, we hold that the learned trial Judge ought to have struck out the plaint on account that the claim did not fall under Order 36 and that such a claim ought to have been brought by way of an ordinary suit. The plaint was therefore incompetent and ought to have been struck out. On this account alone we would allow this appeal.

We order that the plaint be and is hereby struck out.

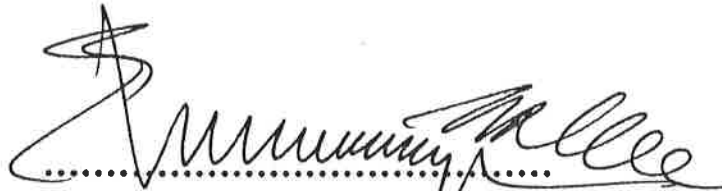
We set aside the ruling and Orders of the High Court and substitute them with the Judgment of this court. The appellant shall bear the costs in this court and those in the court below.

Before we take leave of this matter we would like to observe that the appellant brought one appeal against two separate and distinct orders of the High Court. We think this was irregular. He ought to have brought two separate appeals which, if he so desired, he would have applied to court to have them consolidated.

However, having determined the appeal the way we have done, no prejudice appears to have been caused by this error.

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Dated at Kampala this 01 day July 2015.



HON. REMMY KASULE
JUSTICE OF APPEAL



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HON. RUBBY AWERI OPIO
JUSTICE OF APPEAL



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HON. KENNETH KAKURU
JUSTICE OF APPEAL