THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0624- 2008
(ARISING OUT OF HCT-00-CC-CS-0243-2008)

Ali Ndaula & Anor ……..……..…..…….APPLICATION

VERSUS

R. L. JAIN ……..……..…….. RESPONDENT

BEFORE: HON JUSTICE LAMECK N. MUKASA

RULING:

The Applicant, Ali Ndaula, had filed Miscellaneous Application 522 of 2008 for unconditional leave to appear and defend HCT-00-CC-CS-0243-2008, a suit filed under Summary Procedure by the Respondent, R.L Jain against the Applicant and another. On 27th October 2008, the Applicant and his Counsel did not turn up of the hearing of the Application. The Application was dismissed under order 9 rule 22 of the Civil Procedure Rules.

Now the Applicant brings this application by Notice of Motion under section 98 of the civil Procedure Act, Order 36 rule 11 and Order 52 rule 1 and 3 of the Civil Procedure Rules seeking orders that:-

(a) The judgment or Order entered against the Applicant/1st Defendant in Civil Suit 243 of 2008 be set aside.
(b) The Applicant be granted unconditional leave to prosecute Misc. Application 522 of 2008 for leave to appear and defendant Civil Suit No 243 of 2008.
(c) Costs of this Application be provided for.

The grounds for the Application are briefly that:

1. The Applicant was prevented form prosecuting Misc. Application No. 522 of 2008 for leave to appear and defend Civil Suit No. 243 of 2008 due to a bonafide mistake on his part.
2. Applicant's Counsel to wit, M/S G. M. Kibirige & Co Advocates negligently and without the knowledge of the Applicant omitted to attend court to prosecute Misc. Application No 522 of 2008 for leave to appear and defend Civil Suit No. 243 of 2008 on the date it came up for hearing.
3. The Applicant is and has at all material times been interested in prosecuting Misc. Application No. 522 of 2008.
4. The Applicant is and has at all material times been interested in defending Civil Suit No. 243 of 2008.
5. The Applicant stands to suffer irreparably if judgment in Civil Suit No. 243 of 2008 is not set aside.
6. It is just and equitable that the judgment and Decree entered against the Applicant be set aside.

Representation was Mr. Rashid Semambo for the Applicant and Ms Esther Kusiima for the Respondent.

At the hearing the second prayer was amended to read:

> "The order dismissing Misc. Application No. 522 of 2008 be set aside and the application re-installed for hearing."

Order 36 rule 11 of the Civil Procedure Rules provides.

> "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 the execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

Under the rule a decree may be set aside for either:-

(i) no effective service of the summons or
(ii) other good cause.

In his affidavit the Applicant states that he had instructed M/s G. M. Kibirige & Co Advocates to file an application on his behalf for leave to appear and defend the main suit. That in fact Ms Kibirige & Co Advocates had filed Misc. Application no 522 of 2008. But that the said lawyers did not inform the Applicant of the hearing date and did not attend Court on the hearing date resulting into the dismissal of the Application. The Applicant contends that he could not personally attend the hearing because his Counsel did not notify him of the hearing date and contends that he has interest in the prosecution of application.

Mr. Semambo submitted that in the circumstances the Applicant had been prevented by sufficient cause from appearing in court on the hearing date and that faults of Counsel should not be visited on the Applicant. He cited Fr *Francis Payer Vs Josephat Kawalya Mwebe & another HCCS No. 194 of 1994 (1995) IV KALR 143* where Kireju J stated:

> "It would not serve the interest of Justice to deny the two defendants who have shown an interest in being heard to be denied the opportunity. I have found that there are triable issues in the main suit. I am fully aware that the defendants were served but failed to make the necessary steps to defend the suit but they can be penalized for this by way of costs---"

However in *Arochu Vs Kasim (1978) HCB 52* it was held that before setting aside an exparte judgment the Court has to be satisfied not only that the defendant had some reasonable excuse for failing to enter appearance but also that there is merit in the defence or in the case itself. This holding was cited with approval in *Senyange Vs Naks Ltd (1980 Ltd (1980 HCB 30*

Considering the reasons given by the Applicant in his affidavit which are neither denied nor rebutted, I find that the Applicant had good cause for his failure to personally attend the hearing and he cannot be condemned for his Counsel's negligence. I must however consider whether Misc. Application No 522 of 2008 is meritious enough to warrant its re-instatement.

Mics Application No 522 2008 was seeking leave to defend Civil Suit 243 of 2008. I that suit the Respondent is seeking recovery of Shs121,880,000/= arising out of a loan by the Respondent to the Applicant. The grounds for Misc Application 522 of 2008 are that:-

1. The Applicant does not owe the plaintiff any money as alleged in the plaint.
2. The plaint does not disclose a cause of the action against the defendants.
3. The second defendant has never guaranteed the loan refereed to in the plaint
4. The suit herein was filed in a wrong jurisdiction.
5. The Applicant has a good defence to the claim.
6. There triable issues and the 1st defendant has a right to be heard in his defence.

Annexture B to the plaint is a letter dated 13th September 2007 by the Applicant to the Respondent, whereby the Applicant acknowledges indebtedness to the Respondent in the sum of Shs121,880,000/=. The Applicant does not deny this letter in his affidavit in support of the

application in Misc. Application No 522 of 2008. The Applicant has not provided evidence of payment of the above sum. It is not enough for the applicant to merely deny that he owes money to the Respondent.

A cause of action is disclosed if the plaint shows that:-

(i) The plaintiff enjoyed a right
(ii) The right has been violated and
(iii) The defendant is liable

See *Auto Garage & Another Vs Motokov (No 3) (1971) EA 514*.

The plaint shows that the Respondent claims a right to be repaid money for a loan advanced to the Applicant. That repayment was to be by the applicant and that the Applicant has failed to pay. The plaint thereby discloses a cause of action.

Annexed to the plaint in annexture A is a document whereby Nganda Kawesa agrees to stand as guarantor to Shs62,000,000/= loan. On Court record is Misc. Application 512 of 2008 whereby the 2nd Defendant Nganda Kaweesa seeks leave to defend the suit. In paragraph 3 of his affidavit in support of that application Nganda Kawesi admits being guarantor to the transaction. This Court cannot keep a blind eye to that admission on record.

The claim is for a sum of 121,880,000/= plus interest at 12% per month from 13th September 2007. The claim arises from a loan advanced by the Respondent to the Applicant. The claim is commercial in nature. This Court is a Division of the High court and as such have unlimited original jurisdiction in the matter - Article 139 of the Constitution. By the nature and value of the claim I find no substance in the ground that this suit was filed in a wrong jurisdiction.

Considering all the above I find that Misc. Application 522 of 2008 has no merit to warrant its re-instatement. The Application is accordingly dismissed with costs to the Respondent.

Hon. Mr. Justice Lameck N.Mukasa

20th March 2009