THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HIGH COURT MISCELLANEOUS APPLICATION NO. 193 OF 2015

(Arising from High Court Civil Suit No.750 of 2013)

KAIKA INVESTCO LTD & OTHERS……APPLICANTS

VERSUS

IMPERIAL BANK (U) LTD……RESPONDENTS

BEFORE THE HON. MR .JUSTICE HENRY PETER ADONYO:

RULING:

1. **Background:**

This is an application brought by way of notice of motion under Order 9 rules 12 and 27, Order 52 rules 1 and 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act and Article 126 of the Uganda Constitution, 1995 as amended.

The applicant seeks several orders to be granted by this Honourable Court which are indicated in the application as follows;

a) The judgment and decree of this court entered on the 13th March 2015 in HCCS No. 750 of 2013 be set aside,
b) The interlocutory judgment entered on 24th August 2014 in HCCS No.750 of 2013 be set aside,

c) The applicant be granted leave and extension of time by this Honourable Court grants within which to file a written statement of defence out of time, and that,
d) The costs of the application be provided for.

2. Grounds:

The grounds upon which this application is premised are set out in the affidavit of a one Mr. Justus Mugisha who is stated to be a director in the applicant company. Briefly, he deposes that while unknown to the applicants the respondents did sometime in November 2013 recall a loan it had given to the applicants and thereafter immediately proceeded to institute a civil suit for the recovery of the due sums under the loan facility and even proceeded to pay its legal counsels on the 12th day December 2013 from the first applicant company's account held with it without the consent or notice of the first applicant on top of the fact that even the suit for the recovery of the loan facility being instituted without the sending of a demand notice to the first applicant company or the other applicants who were guarantors of the loans which the first applicant company had secured from the respondent bank.

Further, the said Mugisha deposes that inspite of the respondent bank recalling the loan facility it continued to charge default and penal interest which in the view of the applicants was illegal for it was an attempt by the respondent bank to unjustly enrich itself as it deliberately concealed this fact to the court of the right amount due to it from the first applicant company.

Additionally, it was deposed that the respondent bank further failed to serve the applicants with court summons at the applicant's offices located Kazinga in Namanve just a short distance away from Kampala yet went on to propose that the first applicant company could not be traced thus its opting to use the means of a substituted service of summons advertised in the press to have been obtained irregularly in addition to it having been placed for advertisement out of time.

For these reasons the deponent stated that it was just, equitable and in the interest of substantive justice that this application is allowed. The respondent bank did not file a reply to the application but appeared through its lawyer on the day of hearing of the application and did opposed the same orally from the bar arguing that the issues raised in the application were of legal nature which did not require a written reply.

3. Facts:

The background to this application is that HCCS No.750 was filed on the 18th day of December 2013 by the respondents/plaintiff and it took the necessary summons to file defence to be served on the applicants/ defendants. It later filed an affidavit of service deposed by one Ainomugisha Robert Nabasa dated the 6th of February , 2014 stating among other reasons that all reasonable means had been used to trace the applicants/defendants including the known business address of the applicants/ defendants as making telephone calls onto cell-phone numbers 0701780824 and 0712830197 of the second and third respondents/defendants respectively but to no avail and thus could not find trace the applicants forcing the respondent to make an application before the court for to enable substituted service to be made on 11th day of February 2014 which application was heard by the registrar of this court on 17th day of March 2014 and the same was granted with orders that the respondent/plaintiff was allowed to serve the applicants/ defendants by way of substituted service which directive the respondent/ plaintiff s complied with and thus did served the applicants/ defendants by way of substituted service vide an advert in the New Vision newspaper of 31st July 2014, a copy of which was filed on the court record in the company of an affidavit of service to that effect sworn on the 4th day of August , 2014 by one Sankara Richard which was put on the court record on the same date. This position was brought to the attention of the trial court on the 29th day of August, 2014 and thus the court directed that the matter proceed for formal proof hearing upon satisfying itself that the applicants / defendants had been properly notified of the suit in accordance with the laid down legal procedures. That being so , the applicant filed this application for orders sought as contained in this application.

The law in regards the setting aside of exparte judgments/decree is set out in **Order 9 rules 12 and 27 Civil Procedure Rules**. Order 9 rule 12 of the Civil Procedure Rules provides to the effect that where judgment has been passed pursuant to any of the proceeding rules of the order or where judgment has been entered by the registrar in cases under Order 50 of the said rules, then the court may set aside or vary the judgment upon such terms as may be just, and Order 9 rule 27 of the Civil Procedure Rules provides that in any case in where a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside and if he or she satisfies the court that the summons was not duly served or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing then the court shall make an order setting aside the decree as against him or her upon

such terms as to costs, payment into court, or otherwise as it thinks fit and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it can not be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.

The rationale upon which these rules is premised is that an *ex parte* judgment is not a judgment on the merits of the case and where the interest of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing by a court of law.

4. <u>Submissions:</u>

At the hearing of this application, learned counsel for the applicant Mr. Kalule Ssebowa submitted that the application herein sought for orders of this honourable court for it to set aside its judgment/decree entered on the 13th day of March, 2015 in HCCS No. 750 of 2013 in addition to its setting aside the interlocutory judgment entered on the 24th day of August, 2014 in the same suit and to grant applicants the leave and to extend the time within which the applicants would be able to file their written statement of defence out of time and that also costs the costs of this application be provided for.

In the preliminary before going into the merits of the application, learned counsel for the applicant pointed out to the court that since the respondent had not filed any reply in opposition to the application as per procedural requirements it should be taken as having conceded to this application which was supported by a affidavit evidence in light of the decision of the court in the case of as per the case of **Stop and See**, a copy of which was never availed to the court to verify the truth or not of this assertion and thus was not considered by the court.

That apart, learned counsel pointed out that for the reason that this application was filed promptly without any delay upon the court decision being made then the court should consider it as a sufficient ground for the grant of the application. He cited the case of **Trans Africa Assurance Co. Ltd v Lincoln Mujuni Misc. Application No.789 of 2014** in support of this assertion. Further learned counsel for the applicant requested this court to take note of the fact that the service of summons in the main suit was ineffective thus leading to the hearing of the suit *ex parte* which action disenfranchised the applicants with their of the rights to be heard since they had attached a draft statement of defence which disputed the amount and interest claimed

and granted to the respondent by the court thus showing that the applicants had sufficient defence to the matter which should then be considered sufficient ground for which to set aside the ex parte judgment. The case of **David Ssesanga v Greenland case** was cited by counsel for the applicants to reinforce this assertion but once again a copy of of the same was not provided for court's verification and consideration and thus was not considered.

Learned counsel then wound up his submissions on behalf of the applicants that this honourable court would find it in the interest of the justice of the matter to stay the execution of the judgment and decree.

Mr. Ndyagambaki Raymond counsel for the respondent in reply to the above submissions drew the court's attention to the fact that not only did the applicants fail to serve the respondents served with this instant application on being informed by the court while it was delivering its judgment in the main suit but that the court should find that this application had been overtaken by events for the final judgment in the matter in the main suit had already been delivered and therefore the applicants had only two options of either appealing against the decision of this court to the Court of Appeal of Uganda or to file an application which a review as showed in High Court Miscellaneous Application No.1068 of 2014 which was even dismissed on the 3rd day of march, 2015 for indeed as regards this matter the applicants have not only showed dilatory conduct but were indeed practising serious abuse of the court process well knowing that this Honourable Court was now indeed *functus officio* and could not therefore grant the remedies sought herein other than those which could be explored as stated above.

Learned counsel for the respondent pointed out that while the interlocutory judgment was entered in August 2014 and this instant application was filed in March 2015 well over six months thereafter and more so the matter was then set for formal proof and judgment delivered concluding the matter making it now not possible to recall witnesses thereafter considering that when the court proceeded to hear the matter ex parte for formal proof it was satisfied that proper efforts had been made to serve the applicants and did make consequential orders directing the matter to proceed as it did and so the respondent should be left to enjoy the fruits of the judgment it had got after the court consciously resolved that the respondent could present its case *ex parte* and eventually found for it.

5: Ruling on an application for setting aside interlocutory and final judgments and for the enlargement of time within which to file a defence. Per Hon. Justice Henry Peter Adonyo, May 2015.

Learned counsel also requested the court to find the tricks being used by the applicants to try to stay execution of the judgment/ decree for there was no formal application for stay of execution. Indeed learned counsel for the respondent drew this court attention to the fact that there was filed an application between the same parties registered as High Court Miscellaneous Application No.165 of 2015 seeking the similar remedies as those in this instant application which should be seen and regarded as a clear abuse of court process and thus implored the court to order learned counsel for the applicants to pay costs personally for this unbecoming conduct. Learned counsel also prayed for the dismissal of the application with costs to the respondent.

In rejoinder learned counsel for the applicants submitted that High Court Miscellaneous Application No.165 of 2014 was filed during the hearing of High Court Miscellaneous Application No. 1068 of 2014 which was overtaken by events and to prove this he invited the court to look at the instant application and that particular onr and thus would find that this particular application was clear on its prayers. He further went on to state that the fact of the court being *functus officio* was not bar for it to consider this application on the authority of Order 9 rule 23of the Civil procedure Rules with the rest of the statement made by learned counsel for the respondent to be considered by court as evidence from the bar since the instant application was filed in time and there was no dilatory conduct on the part of applicants and that the court should consider the fact that since the applicants were making claim which was justifiable them the same should not be brushed away but should be judiciously determined and High Court Miscellaneous Application No.165 of 2015 he informed court that issues arising from it should only be considered when it falls due for hearing and they would handle accordingly at the appropriate time and not in this application.

5. <u>Resolution:</u>

In resolving this application I have considered the practice adopted the by courts while considering applications made seeking for orders for setting aside *ex parte* judgments. These practice can be seen from decided case such as those of **National Enterprise Corporation versus Mukisa Limited Civil Appeal No.42 of 1997** in which the Court of Appeal of Uganda cited with approval a quotation by **Fry L.J in Analaby v Praetorius (1888) 20 QBD 764 at 769** where it was stated thus:-

"There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside and setting aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has discretion to impose terms as a condition for granting the relief''.

In this regard the Court of Appeal then went on to state that the primary consideration when considering the setting aside *ex parte* judgment was for a court to consider whether there was merit to which the court should pay heed and if there are merits shown then the court will not *prima facie* desire to let such judgment proceed as it were on which there has been no proper adjudication.

Relating the above holdings to the instant matter, it was submitted by learned counsel for the applicants that the instant application was filed promptly and without delay and that this should be found to be sufficient ground to set the judgment aside. On the other hand , learned counsel for the respondent pointed out that indeed the court should find that the applicants were guilty of dilatory conduct for *ex parte* judgment in the matter in issue was entered way back in August 2014 yet the applicants only filed this application in March 2015 which was a period which was over six months after the event.

The perusal of court record shows that an interlocutory judgment in the main suit High Court Civil No. 750 of 2014 was entered by the learned registrar of this court on the 29th day of August 2014 and consequently upon the court satisfying itself that the Applicants had not shown any interests in being party to these proceedings, this court proceeded to set down the main suit for formal proof. The respondent set down the matter for formal proof and after a full hearing a final judgment was entered in its favour on 13th March 2015. It was thereafter that learned counsel for the applicants then filed the instant application seeking to set aside the said judgment. In my view and which i tend to share with those of learned counsel for the respondent, this action was procedurally untenable for in the first place I would tend to think that the applicants ought to have first sought to set aside the interlocutory judgment entered by the registrar of this court in August 2014 and that should have been within time before going on to file another application for the court to vacate its judgment which was entered after a hearing. However considering the fact that the application for setting aside the interlocutory judgment was filed way out in March

2015 for a matter which was decided in August 2014 would rightly tantamount to dilatory conduct on the part of the applicants as correctly argued by learned counsel for the respondent for indeed this delayed action which comes after a period of over six months after the fact can be considered as an afterthought.

On the question of the service of summons not having been properly done, I take note of the holding in the High Court decision in the case of **Gahire David v Uwayezu Immaculate Civil Appeal No.034 of 2008** where it was held that a court handling an application for setting aside a decree obtained exparte is duty bound to investigate and make a finding as to whether summons was not duly served. This being so, a look at the court record in regards to the instant matter shows that an order for substituted service was issued by the learned registrar of this court upon appropriate application on the 19th day of March 2014 and it directed the respondents to serve the applicants by way of substituted service after the respondent had tendered in affidavit evidence and the court believed that it had indeed having failed to serve the applicants personally through the known registered addresses and telephone lines communication on record. The records show that the applicants complied with the stated court order and duly served the defendants by way of substituted service through the New Vision newspaper published on the 31st day of July 2014 and an affidavit of that type of service which was sworn by one Sankara Richard dated the 4th of August 2014 was put on the record as proof. With no contradiction to that fact, it is apparent by the respondent doing what is required of it by the court through known procedural processes, then it would sufficiently prove that the applicants had been adequately informed of the pending against them in court since proper service had been carried out as by law required and thus this fact would rule out the argument by the applicants that the service made against them was improper for I would find that they simply failed to defend the suit when properly informed and cannot therefore be allowed to bring to their aid the fact of inadequate service as an excuse for failing to defend and the suit at the time when it was appropriately listed.

The other matter which was brought for consideration was the oral submission by learned counsel for the applicant from the bar that an order for stay execution be made by this Honourable court. What is of interest is that this request though sound is coming out from the blue for it was not pleaded and even no legal provision was quoted to justify under which such an application was brought . Furthermore, consideration ought to be taken of the fact in the

schemes of management of court activities , the Judiciary has since established a distinctive sand separate Division of this Court to deal with matters in regards to execution of judgments and orders matters thus I would think that the most appropriate action to be undertaken by the applicants would be in order not to suffocate or minimise the role played by each of the divisions of the High Court to utilise the appropriate divisions so that requests such as this is made before the most appropriate Division if not then properly pleaded to enable the court to examine the party's pleadings as it is trite that parties are bound by their pleadings as was held variously in the case of **Uganda Breweries Ltd versus Uganda Railways Corporation SCCA No.6 of 2011,** the case **of Libyan Arab Uganda Bank versus Messrs Interno Ltd [1998]HCB at 73** and that of **John Kagwa v Kolin Insaat and 2 Others HCCS. No. 318 of 2012** and many others thus this court would politely decline to grant such the order sought for which there is in the first no appropriate pleading secondly it is a misplaced application before the wrong forum.

On the issue of granting leave and extending time within which to file a written statement of defence this is a procedural matter for by Section 96 of Civil Procedure Act and O.51 rule 6 of the Civil Procedure Rules. These are the governing law which empowers a court to consider the question of enlargement of time. Looking at the application before me, i find that these appropriate provisions of the law as not been cited to aid this cause in addition to the fact that the matter was not even sufficiently argued by learned counsel for the applicants during the hearing the application to justify any consideration of the same by this court and thus in the circumstances, I would decline to grant the order sought as the same would not be grounded appropriately.

During the hearing of this application, learned counsel for the respondent drew the attention of this court to the fact that there was pending an application registered as High Court Miscellaneous Application No.165 of 2015 filed by the applicants which was seeking for orders which in his view were similar to those in the instant application which he termed as an abuse of the court process and urged the court to take note of that fact and condemn the t counsel for the applicants to pay costs of the same personally for this unbecoming conduct. In rejoinder, however, learned counsel for the applicants pointed that the court should only address its mind to the current application and not the High Court Miscellaneous Application No.165 of 2015 for that application would be handled at the appropriate time when it was due.

9: Ruling on an application for setting aside interlocutory and final judgments and for the enlargement of time within which to file a defence. Per Hon. Justice Henry Peter Adonyo, May 2015.

On perusal of the court records it is indeed true that there is a pending High Court Miscellaneous Application No.165 of 2015 a close scrutiny of which shows that it is indeed seeking the similar orders as to those in the instant application. In my view , I would seem to think that by filing an application with prayers which sought similar orders in the very same court would not only be an unnecessary multiplication of matters before a court of law but a recipe for uncalled for case backlog in courts and I would thus condemn such conduct as unbecoming on the part of the advocate concerned who could have been fishing in the dark for even at the time of writing this instant ruling there was on record a letter dated the 16th day of April 2015 written by learned counsel for the applicants withdrawing the same. Inspite of this withdrawal, I believe and do agree with learned counsel for the respondent that the very fact that the said application was put in the first place on record was indeed an abuse of the court process which conduct I do unreservedly condemn.

On the whole, looking at this instant application, it would appear that on all stated grounds , the applicants have failed to proved any of the grounds laid down in the case of **Arochu v Kasim [1978] HCB 52** it was held that before a court could consider setting aside an ex parte judgment, it has to be satisfied not only with the fact an applicant had some reasonable excuses for failing to enter appearance but also that there was merit in its proposed defence of the case itself to warrant the court to act as prayed since in the instant matter the applicants have failed to satisfy this court that they were prevented by sufficient cause to enter appearance and defend the suit and have failed to show by affidavit evidence that that they do have a plausible defence in this matter, I would find that this application would lack the merit for which this court would act as prayed by the applicants for apparently it appears that this application was well woven ploy to defeat the ends of justice and I would accordingly be constrained to dismiss with costs to the respondent in any event.

6. **Orders:**

In the premises, I would find that the applicants have not proven any sufficient matter before this Honourable court in the terms of the proof required for setting aside both the interlocutory and the final judgments for this court to make orders in their favour thus I would be constrained to order the dismissal of this application for it lacks merits with costs to the respondent in any event accordingly.

10: Ruling on an application for setting aside interlocutory and final judgments and for the enlargement of time within which to file a defence. Per Hon. Justice Henry Peter Adonyo, May 2015.

Henry Peter Adonyo

Judge

7th May, 2015

11: Ruling on an application for setting aside interlocutory and final judgments and for the enlargement of time within which to file a defence. Per Hon. Justice Henry Peter Adonyo, May 2015.