**THE REPUBLIC OF UGANDA**
**IN THE HIFH COURT OF UGANDA AT KAMPALA**
**[COMMERCIAL DIVISION]**
**MISC. APPL No. 1105 0F 2014**

*(Arising out of Civil Suit No.740 of 2014)*

1. **OWORI MEDIA (U) LIMITED**
2. **SYLIVIA OWORI :::::::::::::::::::::::::::::::: APPLICANTS**

**VERSUS**

**ECOBANK UGANDA LIMITED :::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: THE. HON. MR. JUSTICE B. KAINAMURA**

**RULING**

This application was commenced by Notice of Motion under the provisions of Order 9 rules 12 and 27**,** and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1, sections 79(1) and 98 of the Civil Procedure Act and section 33 of the Judicature Act. It is for Orders that; the default judgment, decree and orders of this court in Civil Suit No.740 of 2014 be set aside, execution of the judgment, decree and orders against the applicants in the above suit be stayed, this court enlarges or extends the time within which the applicants can file a Written Statement of Defence in the above suit and that the applicant's Written Statement of Defence in Civil Suit No.740 of 2014 be validated.

The main grounds in support of the application briefly are as follows:-

1. The applicants were prevented by good cause from filing a Written Statement of Defence in Civil Suit No.740 of 2014.
2. The applicants intend and wish to appear and defend the aforesaid Civil Suit on merit.
3. The 2nd applicant instructed her former Advocate to file a defence in the suit but the said Advocate did not take any steps in filing the defence.
4. The applicants are not responsible for the inadvertent mistake of their former Advocate whose oversight led to the lapse of time within which to file a defence.
5. The mistake or negligence of Counsel should not be visited on the litigants.
6. The applicants have a strong defence to the claim with a likelihood of success.

The application was supported by the affidavit of Sylvia Owori, the 2nd applicant herein. Her deposition is that on the 28th October, 2014, she was served with a copy of summons to file a defence and a plaint in Civil Suit No.740 of 2014. On or about 1st November, 2014, before her travel to London, she contacted her Lawyer, Ms. Namahe Sheila, an Advocate with WEB Advocates & Solicitors, whom she instructed and forwarded the summons and plaint for further management. She stated that since 8th November, 2014, since her return from London, her health has been fragile, which has affected her schedules and effective compliance with statutory obligations. She further stated that on 20th November, 2014, upon inquiring from her Advocate about the progress of the case, she discovered that no steps had been taken in filing a defence and she was later informed by her current Advocates that as a result, a default judgment had been entered against the applicants.

An affidavit in reply was sworn on behalf of the respondent by Alex Okello, who stated that he was an employee of the respondent as the Head, Early Warning Remedial and Recovery.

It was his disposition that the applicants had not shown to this court that they had actually instructed the Advocate as alleged and no proof had been adduced to show that the 2nd applicant was actually out of jurisdiction or hospitalized at the time. He further stated that the applicants had failed to show cause to merit the grant of the orders applied for.

At the hearing of the application, Counsel for the applicants and the respondent filed written submissions in support of and in opposition of the application respectively.

In his written submissions, Counsel for the respondent raised a preliminary point of law to the effect that the 2nd applicant had not shown in what capacity authority she had deponed the affidavit in support of the application on behalf of the 1st applicant, which is a Company. I shall first address this objection before considering the substance of the application.

In regard to the above point of law, Counsel for the respondent submitted that while the 2nd applicant had stated in the affidavit in support of the application that she was the 2nd applicant, in which capacity she was swearing the affidavit, she did not state in what capacity or authority she deponed the affidavit on behalf of the 1st applicant.

In Counsel's view, there was no affidavit in support of the 1st applicant's application and that, therefore, this court should affirm the judgment against it. Counsel submitted that the 1st applicant was a company which acts through its directors or holders of powers of attorney, but the 2nd applicant had not indicated if she held any of the above powers; therefore, there was no affidavit in support of the application in regard to the 1st applicant. Counsel relied on ***Makerere University Vs St. Mark Education Institute & Ors, HC Civil Suit No.378 of 1993*** and ***Eutaw Construction Company Inc Vs Uganda National Roads Authority, Constitutional Application No.47 of 2015***, to support the above submission.

Counsel further submitted that while the 2nd applicant had indicated that before her travel to London she had contacted her Advocate in regard to the suit, there was no evidence to support the above allegation. Counsel prayed that this court confirms the default judgment entered against the 1st applicant.

No reply was made by the applicants in answer to this preliminary objection raised by Counsel for the respondent. I shall therefore address the objection on the basis of the submissions made by Counsel for the respondent.

**Consideration of the Preliminary Objection;**

I have carefully perused the affidavit in support of the application sworn by the 2nd applicant. From the wording of the said affidavit, it appears to me that it was intended to be sworn on behalf of the 2nd applicant's own behalf as well as the 1st applicant, which is a Company.

I accept the submission of Counsel for the respondent that the 1st applicant, which is a company, is a legal person and can only act through its directors, authorized agents or holders of powers of attorney. In that regard, although the 1st and 2nd applicants filed the application jointly, they are still different persons under the law. It is not in dispute that the applicant had the capacity to swear the affidavit on her own behalf. The respondent's point of controversy is that the 2nd applicant does not state in what capacity or authority she swears the affidavit on behalf of the 1st applicant.

Paragraphs 1, 2 and 3 of the 2nd applicant's affidavit in support of the application read as follows:

*" 1. That, I am an adult female Ugandan of sound mind and the 2nd Applicant herein in which capacity I am competent to swear this affidavit;*

*2. That, I am the 2nd Defendant in Civil Suit No.740 of 2014;* ***Ecobank Uganda Ltd Vs Owori Media (U) Ltd & Another****;*

*3. That the Applicants are desirous of and wish to appear and defend the aforesaid Civil Suit on the merits;"*

From the reading of the above paragraphs of the 2nd applicant's affidavit in support of the application, I do not find any information with regard to the capacity or authority in which the 2nd applicant depones the affidavit on behalf of the 1st applicant. There is no indication whatsoever that the 2nd applicant is a director, authorized agent or has authority to swear the affidavit on behalf of the 1st applicant. I agree with the finding of court in ***Lena Nakalema Binaisa & 3 ors Vs Mucunguzi Myers, HC Miscellaneous Application No. 0460 of 2013,*** citing ***Makerere University Vs St. Mark Education Institute & Ors, HC Civil Suit No.378 of 1993***, that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other. In the present case, the 2nd applicant does not state the capacity in which she swears the affidavit on behalf of the 1st applicant, nor does she indicate that she had the authority to do so.

I have also taken the initiative of looking at the intended Written of Defence and there is no suggestion as to the capacity in which the 2nd applicant could swear an affidavit on behalf of the 1st applicant. The 2nd applicant is only stated to be a guarantor to the 1st applicant's loan facility transaction that is the subject of Civil Suit No.740 of 2014.

I, therefore, find that the affidavit in support of the application is untenable with regard to the 1st applicant.

I shall therefore address the application in regard to the 2nd applicant alone.

In his submissions, Counsel for the applicant made reference to the affidavit in support of the application and submitted that the applicant's were desirous of appearing to defend the suit on its merits. Further, that this court had a duty not to shut the applicants out of proceedings in which they were prevented by good cause from filing a Written Statement of Defence.

Counsel relied on Order 9 rule 12 of the Civil Procedure Rules which empowers this court with discretion to set aside or vary judgments entered in default of filing a defence within the prescribed time, for good cause or sufficient reason. Counsel cited ***Tahar Fourati Hotels Ltd Vs Nile Hotels Ltd, HC Miscellaneous Application No. 614 of 2003*** and ***Boney M Katatumba Vs Waheed Karim, SC Civil Application No. 27 of 2007***, to submit that this court had the jurisdiction to set aside the judgment passed in default of filing a defence for good cause.

With regard to what could be termed as sufficient cause, Counsel cited ***Nicholas Roussos Vs Gulam Hussein Habib Virani & Anor, SCCA No. 9 of 1993,*** and ***Banco Arabe Espanol Vs Bank of Uganda SCCA No.8 of 1998***, to submit that mistake by an advocate, though negligent could be said to be good cause that would warrant grant of the application and that such mistake, negligence or ineptness could not be visited on the litigant.

Counsel further submitted that the applicants having demonstrated and shown why they could not file a defence in time, this Court should exercise its discretion in the applicants favour and grant them a chance to belatedly file a defence. Further, that there was no inordinate delay in bringing this application and that the applicant's defence raises serious issues which ought to be considered substantively.

In reply, Counsel for the respondent conceded to the submission of Counsel for the applicant that mistake of Counsel was good cause for court to set aside a decree. However, he contended that in order for a litigant to benefit from the defence of mistake of Counsel, he/she ought to show that the mistake was an error of judgment. Counsel relied on ***Kiirya Grace Wanzala Vs Daudi Migereko & Anor, Election Reference Appeal No. 39 of 2012***, where it was stated that;

> *"Clearly there is a limit to the extent to which litigants can benefit from the many decisions of the Supreme Court and this court that a litigant should not be penalized by mistake of his Counsel. This only benefits litigants if the mistake of Counsel amounts to an error if judgment……".*

Counsel contended that in the present application, the affidavit did not show that there was an error of judgment on the part of Counsel for the 2nd applicant. Further, that the 2nd applicant did not provide any proof that she had actually instructed Counsel, nor did she attach any proof to her affidavit to show that she was sick or out of the country as had been alleged in her affidavit.

Counsel further submitted that if the 2nd applicant had been vigilant in pursuing the matter, she would have called the Lawyer while in the UK or when she returned. In that regard, Counsel submitted that the 2nd applicant could not benefit from the allegations of mistake of Counsel.

**Courts Consideration of the Application;**

This application was brought under both Order 9 rules 12 and 27 of the Civil Procedure Rules. However, although the above rules both provide for setting aside of judgments, they are different in principle. In ***Nicholas Roussos Vs Gulam Hussein Habib SCCA No.3 of 1993***, court held that the legal principles involved in application under rule 9 (now 12) and rule 24 (now 27) are not the same because under rule 9 (now 12), the discretion was unlimited whereas under rule 24 (now 27), the discretion was limited to sufficient cause. It appears to me that the present application falls under Order 9 rule 27.

In an application of this nature, the applicant has to satisfy court that there is good cause or sufficient reason why the judgment should be set aside. ***(See Lawrence Musiitwa Kyaze Vs Eunice Busingye SCCA No. 18 of 1990)***. In ***Nicholas Roussos Vs Gulamhussein Habib Virani & Anor, SCCA No.9 of 1993***, it was stated that mistake or negligence of Counsel was one of the grounds that would warrant the setting aside of a judgment.

In the present application, the 2nd applicant indicated that she instructed her Advocate to take steps in the matter and forwarded to her a copy of the summons and the Plaint, but the said Advocate never took any steps. The applicant further indicates that thereafter she traveled out of the country and upon her return, she was in and out of hospital due to frail health. Ordinarily, these would be sufficient grounds upon which this court would exercise its discretion to set aside the judgment.

However, the applicant did not bother to attach to her affidavit any documents to prove that she instructed the Advocate as alleged. No documents were attached to prove that she was out of the country or that she was hospitalized or undergoing medical treatment so as not to follow up with the matter. It would have been prudent if a copy of the applicant's passport showing her travels and copies of medical receipts had been attached to the application.

I agree with the submission of Counsel for the respondent that if the applicant had been vigilant in pursuing the matter, she would have contacted her Advocate while out of the country or immediately upon her return despite her alleged frail health.

I have also carefully looked at the applicant's intended written statement of defence. It appears to me that the issues of undervaluing and fraudulent sale of the applicant's property are different issues from the claims in the respondents' plaint. In my opinion, there are no serious triable issues raised in the intended defence.

For the above reasons, I am not convinced that this is not an appropriate case for this court to set aside the judgment and grant the orders for extension of time within which to file a defence.

I accordingly dismiss this application with costs to the respondent.

I so order.

**B. Kainamura**
**Judge**
**07.12.2016**