THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 1082 OF 2019

[ARISING OUT OF CIVIL SUIT NO. 454 OF 2004]

FAUSTINO NTAMBARA :: APPLICANT

VERSUS

JACK KITYO SEGAWOLE :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

RULING

1. Background:

This application is brought under order 9 rule 27 and Order 52 rules 1 and 3 of the Civil Procedures Rules S.I 71-1, section 98 of the Civil Procedure Act Cap. 71 and section 33 of the Judicature Act Cap.31 for orders that;

a) The orders allowing the Respondent to proceed with hearing of civil suit No. 454 of 2004 in the absence of the Applicant be set aside.
b) That the *ex-parte* judgment granted in Civil Suit No. 4543 of 2004 be set aside

c) That Civil Suit No. 454/ 2004 be heard and determined on its merits *inter partes*

d) The costs of this Application be provided for.

2. <u>Grounds:</u>

The grounds for the application are contained in the affidavit of Faustino Ntambara and are that;

i. That this honourable court on the 6th September 2007 proceeded to hear the Respondent's evidence in the absence of the Applicant.

ii. That on the 12th June 2007, in the absence of the Applicant and his lawyers this honourable court adjourned the above matter to the 25th June 2007 for scheduling and further directed the Respondent's lawyers to effect service upon the applicant and or his lawyers.

iii. That on the 25th June 2007, court fixed the case for hearing on 30th August 2007 and counsel for the Respondent was again asked to notify the Applicant.

iv. That however the Respondent's lawyers never served the Applicant and or his lawyers with the hearing notices for any of the fore mentioned dates and therefore on the 6th September, 2007 when the matter came up for hearing, the Applicant and his lawyers were not aware.

v. That this honourable court then allowed the Plaintiff to proceed ex parte and subsequently entered an ex parte judgment and decree.

vi. The defendant was prevented by sufficient cause from appearing in court for the heating of civil suit No. 454/ 2004.

vii. That when the Applicant was following up on matter in the registry of the court, he established that the matter had proceeded ex parte and there was ex parte judgment and decree on the file.

viii. That the Applicant then approached his new advocates M/S Murangira Kasande & Co. Advocates and then gave them instructions to represent him.

ix. That M/s Murangira Kasande and Co. Advocates advised the Applicant to file an appeal against the decision of Justice Egonda Ntende.

x. That an appeal was then filed in the Court of Appeal but their Lordships advised that an appeal was not an appropriate remedy in the circumstances hence this application.

xi. That the Applicant should not be condemned unheard as this claim involves a big piece of land.

xii. The Applicant has a good defence to civil suit No. 454 of 2004 and is therefore committed to defending the matter to conclusion before the court.

xiii. That the mistake of the Applicant's counsel should not be visited on the innocent Applicant who has a good defence against the Respondent's claim as reflected in his defense.

Mr. Jack Kityo Segawole, the Respondent, swore an affidavit in reply to the application. In the affidavit, he deponed that he filed a suit against the Applicant but the matter proceeded *ex parte* under Order 17 rule 4 of the Civil Procedure Rules due to the Applicant's absence in court after he did not comply with the orders of court (See paragraphs 2, 4, 5 and 6).

Mr. Segawole also deponed that the Applicant has decided to file an application to set aside the ex parte judgment after more than ten years. He averred that the Application to set aside the judgment of the Honourable Court is an abuse of the court process; that the proper course is for the Applicant to appeal against the High Court decision and that the Applicant failed to follow the directions of court.

He stated that the Applicant's allegations that he was not served with court process are unfounded as the Applicant's counsel was fully aware of the proceedings and the hearing dates and that the Court only directed the case to proceed after it was fully satisfied that the Applicant had been served.

3. <u>Submissions:</u>

a. <u>Applicant's submissions:</u>

Citing ***Wamini vs Kirima [1969] E.A 172*** and ***Karutara and Mukairu [1978] HCB 215***, Counsel for the Applicant submitted that the lack of proper service is one of the grounds for setting aside an ex-parte judgment.

Counsel contended that neither the Applicant nor his lawyers at the time were served with hearing notices for the above mentioned dates of 12th June 2007, 25th June 2007, 30th August 2007 and 6th September 2007 and that the Applicant's lawyers did not attend proceedings because they were not aware of the hearing dates. That on page 13 of the record of proceedings, the court allowed the Respondent to proceed in the Applicant's absence and has not brought any proof that the Applicant was actually served hearing notices for the above mentioned dates.

He invited the court to make a finding that indeed the Applicant was not served with hearing notices and that is why he and his lawyers did not enter court appearances on the said dates. That the Applicant also took by filing an appeal against the ex-parte decision but was later advised by the learned justices of the court of appeal to that the proper procedure would be to apply to set aside the *ex parte* judgment.

The Applicant's counsel also submitted that he has a good defence to the Respondent's claim in Civil Suit No. 454 of 2004 as indicated in the defence and counterclaim to the suit. He submitted that the gist of the defence is to determine who breached the agreement and what remedies are.

The Applicant's Counsel also argued that the Applicant has a right to a fair hearing under articles 28 (1) and 44 (c) of the Constitution of the Republic of Uganda and ought to have been served with hearing notices.

According to counsel, if the Applicant's lawyers were served with hearing notices, and they failed to turn up for the hearing, then the lawyers' negligence should not be visited upon the Applicant.

b. <u>Respondent's submissions:</u>

Counsel for the Respondent submitted that before fixing the matter for hearing, the trial judge fully satisfied himself that the Applicant had been duly served with hearing notices but failed to appear for the hearing of the case against and also disobeyed the orders of the court and for this reason he made the decision to proceed with the matter without the attendance of the Applicant.

He submitted further that the Applicant's contention that the matter proceeded without his knowledge was false and unfounded since the Applicant and his counsel were at all times aware that the matter was fixed on 25th June 2017 which the matter was fixed.

He also referred to ***Kingsway Tyres & Automart Ltd. Vs Rafiki Enterprises Ltd Civil Appeal No. 220/1995*** where the court declined to set aside the *ex parte* judgment on grounds that the Respondent had failed to fault the service. He argued that as in the cited case the Applicant in this matter had failed to provide the legal basis for setting aside the ex-parte judgment.

On whether the Applicant had proved sufficient cause to set aside the *ex parte* judgment, counsel argued that there are no circumstances to prove sufficient cause in the instant case and that this ground was not pleaded by the Applicant. He also submitted that courts have found that litigation must come to an end and that the Applicant had engaged in dilatory conduct by filing the application after 12 years. He cited ***Stone Concrete Limited vs Jubilee Insurance Co. Ltd Misc. Application No. 358/2012*** on this issue.

4. <u>Decision of Court:</u>

I have carefully considered the submissions of both parties and taken into account each of their arguments, and all the cases cited by Counsel.

Order 9 rule 27 of the Civil Procedure Rules lays down the procedure for setting aside an *ex parte j*udgment. It provides thus:

<u>Order 9 rule 27 of the Civil Procedure Rules:</u>

"...In any case in which 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 aside; and if he or she satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient means from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs

This nature of application requires that the court be satisfied that;

i) The Applicant was not duly served with summons
ii) The Applicant has furnished sufficient cause to set aside the judgment of the court

The court in this case has the duty to investigate and also make a finding as to whether the Applicant was duly served with hearing notices for those particular dates as was held in the case of ***Gahire David vs Uwayezu Immaculate Civil Appeal No. 34/2008.***

According to the proceedings attached to the Applicant's notice of motion as Annexture 'A', on the 13th June 2006, the Applicant counsel did not attend court. On the record, he was reported to be indisposed and the matter was the adjourned to 12th July 2006. The Respondent's counsel was asked to notify the Applicant's counsel accordingly.

On the 12th of July 2006, the Applicant's counsel did not come to court. Counsel for the Respondent informed the court that he was in Soroti handling an election petition. The matter was subsequently adjourned *sine die.* On 25th September 2006, the matter came up for hearing, the Applicant's counsel Mr. Patrick Furah appeared in court but the matter was once again adjourned *sine die* as the parties were not ready to proceed.

On 12th June 2007, the matter came up once again and the Defendant (now Applicant) and his lawyer were absent but the Respondent's lawyers were directed by court to effect service and the matter was adjourned to 25th June 2007 for scheduling.

From those proceedings, it is shown that the neither the Applicant nor his Counsel were present in court. The Court then fixed the matter for hearing on 30th August 2007. On that date, the court made an order that the matter would be heard ex-parte following the Applicant's counsel's failure to make an appearance before court.

From the record of proceedings in this court as seen from the attachment on the record of appeal shows that this court did sit on the days in question including the 13th June, 2006, when it adjourned to 12th July, 2006 at 9.00 am.

On that date the matter was adjourned sine die following the courts determination that the defendant was not in court nor represented. The court then advised the parties to agree on the next date for

hearing. On 25th September, 2006 both parties were represented in court though the defendant was not in court. The court after satisfying itself that there was need to have the defendant in court adjourned the matter sine die. On 12th June 2007, the plaintiff and his counsel were in court though the defendant and counsel were not., the court though observing that the matter was not purely a commercial matter adjourned the same for scheduling on the 25th June , 2007.

The typed record, however, does not show what took place between 25th June, 2007 and the 6th September, 2007. But the proceeding the 6th September 2007, shows that the court after being informed by the counsel for the plaintiff who was present in court together with the plaintiff that the matter was for scheduling went on to state at line 20 page 13 of the typed proceedings (page 154 of bundle) as follows;

> ***" ... Court: I recall that I said that we shall proceed with the hearing since the defendant had refused to obey my orders in relations to scheduling and if only one party is present there is no purpose in scheduling so I fixed the case for hearing..."***

Upon stating the above and the counsel for the plaintiff confirming that position to the court, the court then proceeded to hear the two witnesses of the plaintiff, that is, Jack Kityo Segawole (PW1) and Christopher Mutagubya (PW2).

The typed proceedings, however, does not show when the matter was then set for further hearing though proceedings on 4th March 2008 as seen from the typed proceedings show that the hearing of the matter was set to resume. In court was the counsel for the plaintiff while both the plaintiff and the defendant were absent. The court after being informed that the witness who was required in court had not come from Nakasongola then adjourned the further hearing of the evidence of PW2 to 12th March, 2008 after advising counsel for the plaintiff that the said witness should be available in court even if it meant his coming earlier from Nakasongola and spending a night in Kampala so as to be able to attend court in time if he was finding difficulties in attending court on same travel day.

On 12th March, 2008, the court then proceeded to complete the hearing of the testimony of PW2 in the presence of the plaintiff and his counsel with the defendant still absent.

Upon doing the above the court set judgment of the matter on notice which it did eventually on the 14th July, 2008. The reading of the judgment show that there were two instances of breach of the contract by the defendant leaving the plaintiff to be entitled to its rescission. The court thus proceeded to rescind the agreement between the two parties thereto and made appropriate orders.

The defendant being dissatisfied with the court's decision appealed the judgment to the Court of Appeal which appeal was dismissed

with costs on 18th June, 2018 upon his seeking to have the matter withdrawn in to seek appropriate remedies elsewhere.

From the appeal proceedings I note the underlying advice to the appellant by the Court of Appeal that since there was breach of a contract by the appellant itself due to partial payment being made for the purchase of a piece of land which was never handed over to the respondent, the best option for the parties was come to a settlement so as to put back parties to the same situation they were before the purported land sale agreement, which wise counsel , in my view, should have been followed by the parties especially the appellant for the proceedings in this court previously show that both the Applicant and his counsel were aware of the court's previous hearing dates set for on 13th June 2006, 12th July 2006, and 25th September 2006 but provided no reasons for non-appearance were communicated to the court and neither did they take any action to remedy the situation other than choosing to appeal the matter which was later even dismissed.

That aside, however, while it is not immediately clear to me from the typed records of the court proceedings as to what transpired in court on the 25th September 2006 as some of the typed pages of the proceedings are apparently missing, I am of the firm view that the then trial judge proceeded to proceed with the hearing of the case *ex parte* with Applicant now seeking to impress upon this court that it was the fault of his previous counsels which fault should not be

visited upon, it clear to me that actually it was the dilatory conduct on the part of the applicant which made the trial judge proceed with the matter ex parte since the said court satisfied itself upon being informed that the applicant was indisposed no proof to that effect was tendered in court at that particular time .

Yet here we are with the applicant basing his wish to have overturned a decision where he opted to avoid himself by trying to rely on some missing pages of the proceedings yet his negative conduct towards the court was noted with the then trial judge basing his decision to proceed in the absence of the applicant being the applicant's failure to follow the order of the trial judge to have the main suit conferenced!!.

That being the case, I find that the applicant by his dilatory conduct placed himself out of the court's jurisdiction and that the trial court properly proceeded *ex parte*.

The above is can be gleaned from the decision of the trial judge at page 4 of its *ex parte* judgment paragraph 20 wherein he states that;

> ***"... In spite of the foregoing on the pleadings the plaintiff prayed for rescission of the contract and not specific performance of the contract by payment of the balance of the purchase price. It has been proved that the defendant breached two terms of the agreement, leaving the agreement unperformed. The defendant though served with process chose to ignore these proceedings and did***

not turn up to support his case at the hearing of this case, leaving the plaintiff to proceed ex parte..."

Further in paragraph 21, the then trial at the same page stated that;

"...The plaintiff, given the breach of contract by the defendant, is entitled to rescind the contract, and as he has prayed for rescission, an order for rescission is granted. The parties shall return to their positions before the agreement. The defendant shall hand back the suit land and other property to the plaintiff, and upon full hand over o all the properties that he took over as a result of the rescinded contract, the plaintiff shall pay back to the defendant the sum of shs. 60,000,000 that the defendant had paid to the plaintiff, as part payment..."

From the above therefore, I find that the applicant has raised no merit sufficient cause this court to have its *ex parte* judgment of disturbed.

Additionally, no documentary proof has been attached in accompaniment to this application to support the reasons the reasons for non- attendance of court to defend his case other than that it was the mistake of counsel which should not be visited on him yet this reason is fictional to the reason which the court used to proceed *ex parte* which was actually the disobedience of court order by the applicant.

It should be borne in mind that court orders are never issued in vain and since the applicant chose not to obey the court order through his carelessness then he is estopped from seeking to abuse the court process further through the filing of this application.

Additionally my reading of the *ex parte* judgment of this court show that indeed proper analysis of evidence adduced before the court led it the conclusion that there existed no genuine contractual arrangement between the two parties thereto as the purported agreement was found to have sullied in two parts and thus rescinded of non-performance and the failure of consideration.

In conclusion, therefore, this application raises no pertinent questions so that this court can give due consideration for the already resolved matter to be heard *inter partes* within the meaning of the principles laid down in ***Ojara Otto Julius vs Okwera Benson Misc. Application No. 23/2017*** and so this court is inclined not to interfere with the *ex parte* judgment delivered on the 14th day of July 2008.

Thus this application would on the basis of the above fail as it is not allowed.

Overall this application is dismissed.

5. Orders:

i. This application is dismissed with costs to the Respondent.

ii. The ex-parte judgment of this court in High Court Civil Suit No. 454 of 2004 is maintained and must be executed within the terms set by this court in that judgment.

I do so order.

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HON. JUSTICE DR. HENRY PETER ADONYO

JUDGE

20TH MARCH 2020