THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 1248 OF 2021
(Arising from Civil Suit No. 407 of 2021)

DR. ROBERT AYELLA LAPYEM ..... APPLICANT

VERSUS

KINGSTONE ENGINEERING AND CONSTRUCTION CONSULTANTS LTD]..... RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by Notice of Motion under Sections 96 & 98 of the Civil Procedure Act, Cap 71, Order 9 Rule 12, Order 52 Rules 1 & 2 of the Civil Procedure Rules, SI 71-1 for orders that:

i. Default judgment dated 14/09/2021 entered against the Applicant be set aside.
ii. Costs for this application be provided for.

Background

The Applicant was on 7th June, 2021 sued by the Respondent by ordinary plaint vide Civil Suit No. 407 of 2021 (the main suit) in this court for breach of contract, recovery of UGX. 315,223,039/=, general damages, interest, and costs of the suit. The Applicant was served by email with the pleadings and summons to file a defense. However, the Applicant did not file a defense within the required 15 days. This prompted the Respondent to apply for default judgment under Order 9 Rule 6 of the Civil Procedure Rules.

The Applicant, who works and resides abroad, contends that once he received the summons via email, he forwarded the documents to his lawyer at the time, Mr. Simon Muhumuza of KRK Advocates to handle the matter on his behalf. However, his lawyers did not act on the instructions and the Applicant never heard from them again. That once he returned to Uganda he checked with his

lawyers then on the progress of the case and discovered that his lawyers had not filed a defense in the matter. He also claims that it is the Respondent who is indebted to him and not the other way around. For these reasons, the Applicant prays that the default judgment be set aside lest he suffers irreparable damage.

Counsel Simon Muhumuza filed an additional affidavit in support confirming that he received the summons, plaint and instructions to file a defense from the Applicant via email in early August. However, he realized he needed further and better particulars. He emailed the Applicant requesting for these, but unfortunately the email bounced and he did not realize this until much later. He contends that the Applicant intended to file a defense but his efforts were frustrated by events beyond counsel's control.

The Respondent, through an affidavit in reply sworn by Michael Muhumuza, Managing Director of the Respondent company states that the Applicant has not provided proof that engaging the services of the legal personnel. That the Applicant has no defense to the main suit and he is simply building up excuses to explain his failure to file a defense in time. That counsel Simon Muhumuza exercised no due diligence to ensure that he is in touch with his client. He prayed that the application be dismissed with costs for lack of merit and has been brought in bad faith.

Representation

At the hearing on 29th March, 2022, the Applicant was represented by Kamugisha Vincent, while Michael Aboneka appeared for the Respondent.

Issues for Determination

There is only one issue for determination, and that is whether there is just cause to set aside the default judgment dated 14/09/2021 in Civil Suit No. 407 of 2021.

Resolution

Issue: Whether there is just cause to set aside the default judgment dated 14/09/2021 in Civil Suit No. 407 of 2021.

Order 9 Rule 12 of the Civil Procedure Rules provides:

> Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases

> under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.

This application hinges on the existence of a judgment in default in the main suit. The Respondent avers that default judgment was entered in the main suit on 14th September, 2021 for the suit sum of UGX. 315,223,039/= by way of default judgment. The Respondent's application in default dated 25th August, 2021 on the main file was by way of ordinary letter and was brought under Order 9 Rule 6 of the Civil Procedure Rules.

Order 9 Rule 6 provides:

> Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defence, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8 percent per year to the date of judgment and costs.

This rule anticipates that once a Defendant fails to file a defense to a liquidated demand, then the court may pass default judgment for the sum claimed in the plaint plus interest. It is expected that the court will issue an interlocutory judgment in the matter. However, on file is no interlocutory judgment separate or as part of a record of proceedings. There is in fact no record of proceedings.

On the main file is an order attached to the Respondent's application for judgment in default stating that judgment in default is granted on 14th September, 2021. However, this order signed by the Deputy Registrar is not sealed. The same is true for the order attached to the affidavit in reply as Annexure A.

A court order according to Section 2(o) of the Civil Procedure Act is a formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi. Such order can originate from a ruling of a registrar of the court. A court order should state the reliefs granted by the court in its judgment, should be dated, should be signed by the judicial officer, and sealed. See Order 21 Rule 7 of the Civil Procedure Rules.

The court order in question here is dated and signed by the Deputy Registrar but the same is not sealed. It also does not state the orders/reliefs granted by the court save for the statement that "Judgment is hereby entered against the Defendant as prayed." The prayer referred to is that in the last paragraph of the

Respondent/Plaintiff's application which stated "We accordingly pray that the Court be pleased to enter a default judgment in favor of the Plaintiff in accordance with Order 9 r.6 of the Civil Procedure Rules, SI No. 71-1." Therefore, it is safe to assume that this was the relief granted by the impugned order.

In addition to the court order not being sealed, there is further confusion generated by the Respondent's letter on the main fie dated 12th October, 2021. In that letter counsel for the Respondent/Plaintiff relays that whereas judgment in default was entered on 14th September, the questions of interest, general damages and costs were said to be pending formal hearing. However, there is nothing on the court record that suggests the judgment in default was excluding interest, and general damages. As already captured above, the order was general in nature. There is also no record of proceedings before the Deputy Registrar to elucidate on the terms of the alleged order on the main file.

I find that the Applicant has demonstrated sufficient cause for setting aside the default judgment. The Applicant's ground for the default judgment to be set aside is essentially that the reason he did not file a defense is because of a mistake on his counsel at the time. The Respondent on the other hand argued that the Applicant is simply coming up with excuses and that the averments in the affidavits have not been substantiated upon. For example, that neither the Applicant nor his former counsel have provided proof of the email exchange to back up their assertions. Counsel for the Respondent also submitted that the litigant is privy to the default because of his failure to furnish further and better particulars to his advocate at the time. That upon issuing instructions to his counsel, the Applicant should have bothered to find out if indeed a defense had been filed.

The courts have over time found that the mistake or negligence of counsel should not be visited on an innocent litigant. This is in the spirit of Article 126(2)(e) of the 1995 Constitution of the Republic of Uganda. The Supreme Court held similarly in **Banco Arabe Espanol –v- Bank of Uganda, SCCA No. 8 of 1998**. In that case, Oder, JSC held:

> "Should a misunderstanding by an advocate be visited upon the appellant? There are a number of decisions where courts, including this court, have held that in circumstances like this one the blunders of an advocate should not be visited upon a litigant: *L.A.M Hussein v. G.I Kakiiza and 2 others. Supreme Court Civil Application 30 of 1994 (unreported)* an application under rule 4 but whose reasoning fits in the present application; See also *Delia Almeida v. Drule Almeida. Sup. Court Civil*

Application 15 of 1990 (unreported) and Shiv Construction Co. v. Endesha Enterprises Ltd, Supreme Court Civil Application No. 15of 1992 (unreported). Of course a contrary view exemplified by *Clouds 10 Ltd v. Standard Chartered Bank Ltd. Civil Application No. 35 of 1992(unreported)* exists; but the decision there was based on the peculiar facts of that case and are clearly distinguishable. Moreover, I think that now Article 126(2) (e) of the Constitution is relevant to this case....

I have no doubt that this is a case where the provisions of para (e) of clause (2) of Article 126 of the Constitution can be properly invoked. The appellant wanted to comply with the trial judge's order I take it that the appellant's advocates misunderstood the method of compliance. In my view in a case like this one, technicalities ought not to be a basis for denying justice to the litigant." (Emphasis mine).

In this case, the Applicant has demonstrated a willingness to file a defense to the main suit. The Applicant states in paragraphs 3,4,5, and 6 of his affidavit that he received service of the summons and plaint via email in early August. He immediately forwarded the documents to counsel Muhumuza and asked him to handle the matter on his behalf. Counsel Muhumuza swore in paragraphs 3,4,5, and 6 of his affidavit that he indeed received the summons and plaint from his client at the time, the Applicant. He upon perusal of the plaint discovered that he needed further and better particulars from the Applicant. He emailed the Applicant but unknown to him, the email bounced. He soon after got an emergency in the village and when he eventually got back in touch with the Applicant after his emergency he discovered that court had already entered default judgment against his client.

The Applicant's evidence does not point to dilatory conduct by the Applicant himself. He clarified in paragraph 4 of the affidavit in rejoinder that he diligently followed up his case with his advocate at the time, but because counsel Muhumuza was upcountry and taking care of his critically ill mother, there was no timely information emanating from him. All of this points to mistake of counsel.

The Applicant took the necessary steps to draft a defense to the suit and was not negligent on his part. However, his counsel at the time was unable to file a defense in time. I find that this is a case where mistake or negligence of counsel should not be visited on the litigant, who was himself not guilty of negligence on his part.

Affidavits in an application are the evidence in support of the claim. The law is that deponents of affidavits may be, should the circumstances require, be cross-examined on the contents of their affidavits. I find no reason to question the averments in the Applicant's affidavit in support and in rejoinder, or even those in counsel Muhumuza's affidavit.

Therefore, since failure to file a defense in time was not the Applicant's fault, I find that there is sufficient cause to set aside the default judgment.

This application is granted. Costs shall be in the cause.

I so order.

Jeanne Rwakakooko
JUDGE
22/06/2022

Ruling delivered on the 29th day of June, 2022.

29/06/22