

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO. 2294 OF 2023
ARISING FROM MISCELLANEOUS APPLICATION NO. 0535 OF 2023
ALL ARISING FROM CIVIL SUIT NO. 0228 OF 2023**

- 1. TURF MASTERS (U) LIMITED**
- 2. RONALD KIDEGA**
- 3. NASSOLO TEDDY ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANTS**

VERSUS

DMK CAPITAL LIMITED ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

This application is brought under **Section 33** of the **Judicature Act Cap 13**, **Section 98** of the **Civil Procedure Act Cap 71** and **Order 52 rules 1 & 3** of the **Civil Procedure Rules S.I. 71-1** seeking an order that the applicants are granted time to file their defences in HCCS No. 228 of 2023 (hereinafter “the main suit”) out of the time prescribed by the Court in Misc. Application No. 535 of 2023 and an order that costs of this application be provided for. Briefly, the grounds of this application are that:

1. The respondent filed the main suit under summary procedure seeking to recover a loan debt of UGX 113,750,000 from the applicants.
2. The applicants then filed Misc. Application No. 0535 of 2023 seeking leave to appear and defend the main suit. That application was allowed on 31st August 2023 with orders that the applicants file their defences in the main suit within 15 days from the date of the order.
3. The trial Judge had informed the parties that the ruling in Misc. Application No. 0535 of 2023 was to be delivered on notice to all parties, but no notice was issued informing the parties.

4. The applicants' advocates and clerk have always checked with the clerk of the trial Judge to find out if the ruling was ready and they were always informed that it was not.
5. The applicants' advocates only became aware of the ruling on 22nd September 2023 when the time prescribed by the Court for filing their defences had already lapsed.
6. Neither the applicants nor their advocates have acted in any dilatory manner. They were all under the honest belief that the ruling in Misc. Application No. 0535 had not yet been delivered.
7. The Court has to determine the extent of applicant's indebtedness, if any, in the main suit and this cannot be done in ex parte proceedings.
8. It is in the interest of justice that this application is granted.

The application is supported by two affidavits. The 1st affidavit is sworn by Mr. Tumugabirwe Apollo, a certified process server working with the applicants' advocates. He told Court that towards the end of June 2023, upon a routine check at the Court to discover whether the ruling in Misc. Application No. 0535 of 2023 was ready, he was informed that the same would be delivered on 30th June 2023. On 30th June 2023, he came to the Court with Mr. Kidega Ronald, the 2nd applicant, but they were informed that the ruling was still not ready. On another routine check on 22nd September 2023, he discovered that the ruling had been delivered on 31st August 2023 and uploaded on the ECCMIS system on 7th September 2023 without a notice of the same being issued. The 2nd affidavit was sworn by Mr. Kidega Ronald, the 2nd applicant and a director in the 1st applicant. Mr. Kidega's affidavit largely reiterated the grounds of the application and recounted the contents of Mr. Tumugabirwe's affidavit.

The affidavit in reply filed and uploaded on EMMIS by the respondent does not relate to this application. Instead, it relates to an application for review of a judgment in the Chief Magistrate's Court of Mengo at Mengo *vide* **Kabogoza Dalaus v Musoni Dickson, Misc. Application No. 892 of 2023**. Therefore, the respondent did not file a valid affidavit replying to this application. It is trite law that a respondent who becomes aware of an application against him or her and fails to respond to that application is taken to have accepted and admitted all the contents thereof (See **Wamala Abdu v Commissioner Land Registration, High Court of Uganda at Masaka Misc. Cause No. 16 of 2021**).

Furthermore, it is now settled law that while there is no bar to a party who has not filed a response to an application from participating in the application on matters of law, such a party is barred from contesting the matters of fact raised by the applicant's affidavit evidence. See **Male H. Mbirizi K. Kiwanuka v Attorney General, High Court of Uganda (Civil Division) Misc. Application No. 089 of 2022**. Therefore, in this application, the respondent's submissions are relevant only to the extent that they raise matters of law.

Issue arising

1. Whether this application is competent.
2. Whether there is sufficient cause justifying setting aside the default judgment and enlarging time to enable the applicants to file defences.
3. What remedies are available to the parties.

Representation and hearing

The applicants were represented by M/S Barya, Byamugisha & Co. Advocates while the respondent was represented by M/s Newmark Advocates. Counsel filed written submissions which I have fully considered, along with all the materials on record and the laws and authorities cited.

Determination of the issues

Issue 1: Whether this application is competent.

Counsel for the respondent contested the competence of the application on grounds that it has been overtaken by events. Since a default judgment has been entered in the main suit, counsel submitted that this application is now moot and that the court is *functus officio* on the matter.

I note that by the time the default judgment was entered in the main suit on 18th October 2023, the applicants had already filed this application on 28th September 2023. Court acknowledges that the judgment ought not to have been entered before the disposal of this application. Nevertheless, entering the default judgment does not, in and of itself, bar the consideration of this application and the issuance of the orders sought herein. This is because the Court is still empowered to revisit and set aside, for a sufficient cause, all default judgments entered under Order 36 of the Civil Procedure Rules (CPR). This is an

exception to the functus officio rule and it is specifically set out in Order 36 rule 11 of the CPR. Accordingly, I find that this application is competent.

Issue 2: Whether there is sufficient cause justifying setting aside the default judgment and enlarging time to enable the applicants to file defences.

What constitutes “sufficient cause” is left to the Court’s discretion. It is often a factor which, in actual fact, prevented a party from taking a crucial step in the litigation process within the time prescribed. A party seeking to prove sufficient cause should show that he or she is not guilty of any unexplained or inordinate delay in seeking the indulgence of the Court and that he or she has a reasonable explanation for his or her failure to take the impugned step in the litigation process within the prescribed time. See **F.L. Kaderbhai & Anor v Shamsherali Zaver Virji & Ors, SC Civil Application No. 20 of 2008.**

In the instant facts, the ruling in Misc. Application No. 0535 of 2023 was uploaded on ECCMIS, and became accessible to the parties, on 7th September 2023. The ruling gave the applicants 15 days within which to file their defences. This implies that the defences ought to have been filed on or by 22nd September 2023. The uncontested evidence of the applicants is that they only became aware of that ruling on 22nd September 2023 when their lawyers’ clerk made a routine follow up at the Court. While the delivery of the decision on ECCMIS was notified to the parties’ lawyers’ ECCMIS accounts electronically on the same day, there had been no prior personal service of the ruling notice on the parties as anticipated by Order 5 rule 10 of the CPR.

Counsel for the respondent argued that, as a matter of law, this Court has already determined that ECCMIS notifications constitute adequate service of court process in **Mwesigye Nicholas v P & A Credit Investments Ltd, HCMA No. 1677 of 2022.** In my considered view, that argument is an oversimplification and a misconstruction of the true legal import of that decision. That case did not set down a “*one size fits all*” rule. In my considered opinion, the correct position of the law is that pending a formal amendment of the Civil Procedure Rules to recognise electronic service of court process and ECCMIS notifications as adequate notice to parties of the progression of the case, courts may flexibly recognise electronic service as effective service of court process, and only on a case by case basis.

In the present case, I had reserved the ruling to be delivered 'on notice' and the parties were not given further notification of the date of delivery of the ruling. I have also considered that this Court had already granted the applicants leave to appear and defend the main suit after finding that the amount currently outstanding and due from the applicants to the respondent is not clear and that there are triable issues concerning the applicants' alleged indebtedness.


In the circumstances I am satisfied with the applicants' explanation for the delayed filing of their defences. In the spirit of ensuring that substantive justice is achieved in this case, I find that there is a sufficient cause justifying setting aside the default judgment and enlarging time to enable the applicants to file defences.

Issue 3: What remedies are available to the parties.

Consequently, this application is allowed with the following orders:

- i. The default judgment entered by this Court in the main suit on 18th October 2023 is hereby set aside.
- ii. Leave is granted to the applicants to file their defences in the main suit within 15 days from the date of delivery of this ruling.
- iii. The parties shall file and serve their joint scheduling memorandum, trial bundles and witness statements on or by 31st January 2024.
- iv. The costs of this application shall abide by the outcome of the main suit.

Dated this 30th day of November 2023


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Patricia Mutesi

JUDGE