THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1786 OF 2022

(ARISING FROM MISCELLANEOUS APPLICATION No. 359 OF 2020)

(ARISING FROM CIVIL SUIT No. 297 OF 2020)

ABDUL RAZAK KASMANI ..... APPLICANT

VERSUS

PRIME FINANCE COMPANY LIMITED ..... RESPONDENT

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction

This application was brought by Notice of Motion under the provisions of sections 82 and 98 of the Civil Procedure Act Cap 71, Order 9 Rules 12 & 23, Order 36 Rule 11, and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules SI 71-1, seeking for orders that:

1. The Court reviews and sets aside the judgment entered in Civil Suit No. 297 of 2020 on the 26th day of April 2022.
2. The Applicant be granted unconditional leave to appear and defend in Civil Suit No. 297 of 2020.
3. The Court sets aside the Order of dismissal, and reinstates Miscellaneous Application No. 359 of 2020.
4. The costs of the application be provided for.

Facts

This application is supported by an affidavit of Abdul Razak Kasmani the Applicant, deponed in paragraphs 1-19; briefly the grounds are as follows:-

That the Respondent filed HCCS No. 297 of 2020 for recovery of USD. 380,730 plus costs, and that the Applicant filed an application for leave to appear and defend supported by an affidavit of the Applicant on the 2nd day of June 2020, which disclosed the defence to the suit.

That the Applicant's previous Lawyer was given proper instructions to defend the suit and prepare all the necessary papers and attend Court hearings, and that at all material times the Applicant followed up with his previous Lawyer who informed him that the said suit was ongoing, and that he would inform him when the matter would be coming up for hearing, and when his evidence would be needed.

That to the Applicant's utter shock, around the 17th day of December 2022, the Applicant received a document on his WhatsApp from an unknown person who claimed to be the Lawyer of the Respondent.

That when the Applicant inquired from his Lawyers of Newmark Advocates on Sunday, he discovered that it was a notice to show cause why execution should not issue, and that this was completely new to the Applicant, and so he instructed his Lawyers at Newmark Advocates to find out the status of the said matter; only to find out that a default judgment was entered against him for failure to attend Court when the application for leave to appear, and defend came up for hearing.

That the Applicant was therefore prevented from prosecuting the application for leave to appear and defend when it came for hearing, and consequently defending himself.

That the Applicant has been advised by his Lawyers NEWMARK Advocates that the former Lawyer had proper instructions, and his negligence cannot be visited on him.

That the Applicant has a clear defence to the suit, which was stated in the application, and that this application has been made without undue delay.

That it is just, fair, and equitable, and in the interest of justice that this honorable Court grants the orders herein.

The Respondent opposed this application in an affidavit in reply deposed in paragraphs 1-24 by Seiko Kasuku Bashir the Manager of the Respondent, and summarized as below:

That the affidavit in support of the motion by the Applicant herein is riddled with falsehoods, contradictory, and brought in bad faith.

That the said Lawyer of Lwere, Lwanyaga & Company Advocates is personally known to the deponent, and informed him much later after the decree had been pronounced that he withdrew from the conduct of the Applicant's matter because he had not received any legal fees from the Applicant despite repeated reminders to pay up.

That it is therefore not true that the Applicant's Lawyer was always in touch with the Applicant when a notice of withdrawal was filed way back on the 26th day of April 2021, as seen in the copy of the Advocate's notice of withdrawal attached and marked Annexture "G".

That the Applicant was at all material times aware that the suit had been dismissed for want of prosecution, and that after the decree was entered on the 26th day of April 2021, they informed the Applicant of the decision of the suit in his mobile number, and that the Applicant directed them to serve a copy on his wife.

That it is evident that the Applicant never sought any new information regarding the status of the case from his old Lawyers because they had parted ways, and instructed new Counsel to pursue the matter.

That the Applicant has brought this application with inordinate delay after 18 months, and only filed it after the Respondent had commenced execution proceedings so as to frustrate the execution process.

That he is informed by their Lawyers that the Applicant neither has any sufficient reasons for nonappearance nor any bonafide defence.

The Applicant further deponed an affidavit in rejoinder, reiterating his earlier averments and further contended that the alleged notice of withdrawal by his former Lawyer had never been served on him, which establishes that his former Lawyers were negligent, and that it cannot be visited on him.

That he has never been called or authorized anyone to receive the documents on his behalf.

Representation

The Applicant was represented by Counsel Nelson Ainebyona of NEWMARK Advocates while the Respondent was represented by Counsel Joel Olweny of ADSUM Advocates. Counsel for the parties herein, filed written submissions as directed by the Court.

Issues for determination

Counsel for the Applicant framed issues for Court's determination however, in accordance with Order 15 Rule 5 (1) of the Civil Procedure Rules SI 71-1, this Court amended the issues to read as follows: -

1. Whether the Applicant disclosed sufficient grounds to set aside the default Judgment entered in Civil Suit No. 297 of 2020?
2. Whether the Applicant disclosed sufficient grounds to warrant the grant of leave to appear and defend in Civil Suit No. 297 of 2020?
3. What remedies are available?

Decision

Issue No.1: Whether the Applicant disclosed sufficient grounds to set aside the default Judgment entered in Civil Suit No. 297 of 2020?

Order 36 Rule 11 of the Civil Procedure Rules SI 71-1 provides that:

11. Setting aside decree.

"After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit." (Emphasis is mine)

In the instant case, it is not disputed that the Applicant's Lawyers were served with a copy of the plaint and summons in Civil Suit No. 279 of 2020, and that the Applicant filed an application for leave to appear and defend on the 2nd day of June 2020.

The term sufficient cause has been interpreted to relate to the failure by the Applicant to take the right step at the right time. ***(See Caltex Oil Vs Kyobe [1989-90] HCB 141 at pg. 142)***

The proposition of the law on what amounts to sufficient cause in respect of Order 36 Rule 11 of the Civil Procedure Rules SI 71-1, is evidence that the Defendant has a triable defence to the suit. ***(See Geoffrey Gatete & Anor Vs William Kyobe, SCCA No. 7 of 2005 [2007] UGSC 7,*** as per Justice Mulenga. JSC (as he then was), and ***National Insurance Corporation Vs Mugenyi & Co. Advocates, CACA No.14 of 1984 [1987] HCB 28 at pg.29)***

A triable issue has been defined in a replete of cases to mean an issue or question in dispute which ought to be tried. ***(See Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65, at 66***, and ***Zebra Telecom & 2 Others Vs Stanbic Bank (U) Ltd, HCMA No. 18 of 2014)***

In the instant case, the Applicant averred under paragraph 10 of the affidavit in rejoinder that moreover, after the notice to show cause was served on him, he made attempts to pay part of the sum that he knows he owes worth UGX 100,000,000 to the Respondent but in vain, as the Lawyer refused to give him the account number, and all the officers of the Respondent have refused to receive the money.

The above statement by the Applicant, in my considered view, amounts to an admission, for which this Court finds that the Applicant has not established a plausible defence to the suit.

In addition, the Applicant contended that the previous Lawyer was given proper instructions to defend the suit; prepare all the necessary papers, and attend court hearings, and that at all material times the Applicant followed up with his previous Lawyer who informed him that the said suit was ongoing, and that he would inform him when the matter would be coming up for hearing, and when his evidence would be needed.

The proposition of the law is that a mistake of an Advocate though negligent may be accepted as sufficient cause. ***(See Nicholas Roussos Vs Gulamhussein Habib Virani & Anor, SC Civil Appeal No. 9 of 1993 [1994] KALR 278 at pg. 283)***

Similarly, in ***Captain Philip Ongom Vs Catherine Nyero Owota [2003] KALR 52 at pg.54***, Mulenga. JSC (as then was) had this to say: -

> "A litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure on the part of the litigant, to give to the advocate due instructions"

It is therefore my considered view that payment of professional fees constitutes due instructions to an Advocate, as such, any default by an Advocate amounts to either a mistake, negligence, oversight or error, which depends on the circumstances of each case. ***(See Banco Arabe Espanol Vs Bank of Uganda, SCCA No. 8 of 1998 [1997-2001] UCL 1 at pg.15)*** cited by Counsel for the Applicant.

In the given circumstances, I find that the Applicant failed to rebut the Respondent's allegation that the Applicant did not pay professional fees to his former Counsel, and that this contributed to the default by the former Advocate.

I therefore, find that the default by the Advocate was a result of the Applicant's failure to pay the professional fees, for which the Applicant should be held responsible for his fault. ***(See Regulation 3 (1) (d) of the Advocates (Professional Conduct) Regulations, SI 267-2)***, and ***Mitha Vs Ladak [1960] E.A 1054 at pg.1055*** on the principle that failure to instruct an advocate is not sufficient cause.

Accordingly, I find that the Applicant has not adduced any sufficient cause to enable this Court to exercise its discretion judiciously, and to grant the remedies sought for by the Applicant.

The above notwithstanding, this Court further finds that this application was filed on 21st December, 2022, after a period of 20 months had lapsed from the date of 26th April, 2021, when the decree was entered in the main suit.

Accordingly, this Court finds that the Applicant brought this application with inordinate delay.

It is notable that the cases cited by Counsel for the Applicant in rejoinder are distinguishable on facts, and not relevant to this case however, this Court will not delve into the distinctions here.

For reasons above, the answer to this issue is in the negative.

Before I take leave of this issue, I have looked at the affidavit in support of this application, and in particular paragraph 4, in which the Applicant averred that the said application disclosed a defence to the suit that the Money lending agreement was illegal & void abinitio; that the cheque relied upon to claim the sum was never presented to the bank to confirm that there was no money, and that the loan provides for a compound, unconscionable, harsh, and excessive interest.

This Court finds the contention by the Applicant on the illegality of the Money lending Agreement untenable. The Applicant is estopped by conduct from denying the transaction with the Respondent, from which he obtained a benefit of a loan; in all fairness, the Applicant who seeks justice must be seen to do justice, and must come to Court with clean hands. The Applicant cannot be seen to approbate, and reprobate on the said transaction with the Respondent. ***(See Ken Group of Companies Ltd Vs Standard Chartered Bank (U) Ltd & 2 Others, HCCS No. 486 of 2007) [2013] UGCC 171)***

Issue No.2: Whether the Applicant disclosed sufficient grounds to warrant the grant of leave to appear and defend in Civil Suit No. 297 of 2020?

This Court having found issue (1) above in the negative, further finds that it is unnecessary to delve into the merits of this issue.

Issue No.3: What remedies are available?

Having found issue (1) above in the negative, this Court further finds that this application is devoid of merit.

This application is dismissed with costs to the Respondent.

Ruling delivered electronically this 13th day of June, 2023.

SUSAN ABINYO

JUDGE

13/06/2023