**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**MISCELLANEOUS APPLICATION 791 OF 2023**

**[ARISING FROM CIVIL SUIT NO. 1081 OF 2022]**

**PATRICK KATTO ] APPLICANT**

**VERSUS**

**DIRK TEN BRINK ] RESPONDENT**

**Before: Hon. Justice Ocaya Thomas O.R**

**RULING:**

**Introduction:**

The Applicant brought this application under the provisions of Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act ["CPA"] and Orders 36 Rule 11 and 52 Rule 1 of the Civil Procedure Rules ["CPR"].

The Application seeks the following reliefs:

(a) The default judgment/decree entered by Court on the 18th day of April 2023 be set aside for good cause

(b) Taxation of costs in Civil Suit 1081 of 2022 ["the main suit"] be stayed

(c) Execution of judgment and decree in Civil Suit 1081 of 2022 be stayed pending the hearing of this application.

(d) Upon setting aside the judgment and decree, the application for leave to appear and defend be fixed interparties.

(e) Costs of this application be in the main cause.

**Background**:

According to the Applicant, the facts leading to this application were as below; the Respondent filed the main suit against the Applicant by way of specially endorsed

plaint and served the Applicant with summons in respect of the same on 18th January 2023. The Applicant filed an application for leave to appear and defend on the 30th January 2023, being the tenth day named in the summons. Before the application was admitted on the ECCMIS system, the Applicant served the Respondent's advocates with a copy of the application on 31st January 2023.

The Applicant's advocates followed up on the signing and fixing the said application (Draft No. 71 of 2023) and were advised that it is the trial judge who fixes his matters. On 25th May 2023, the Applicants were shocked to learn that the main suit had been fixed for hearing on 18th April 2023 and that the Respondent had already obtained a default judgment. On the same day, the Applicant also learnt that the Respondents had filed a bill of costs which was pending taxation.

The Applicant contends that Counsel for the Respondent omitted to inform the court of the Applicant's application which had a plausible chance of success.

For the Respondent, the above was denied. According to the Respondent, he commenced the main suit against the Applicant for the recovery of USD 23,935 by way of a summary suit on 18th January 2023, serving the Applicant on the same date. The Respondent (through its advocates) filed an affidavit of service on 19th January 2023. On 31st January 2023, the Applicant served the Respondent with a copy of his application for leave to appear and defend but the same was not registered and did not have a hearing date.

On 8th March 2023, according to the Respondent, a person working with his advocates reached out to the Applicants on 8th March 2023 to request that the application filed on 31 January 2023 be fixed in order to ensure conclusion of the matter. The Applicant's advocates requested for three (3) weeks in order to fix the matter but did not do so after the expiry of that time.

Sixty One (61) days later, the Respondent filed an application for default judgment and the same was entered on 18th April 2023. According to the Respondent, the applicant's failure to fix its application was aimed at frustrating recovery and that the Applicant

only followed his application up after on 25th May 2023, a month after the default judgment had been entered.

**Representation**

The Applicant was represented by M/s Astral Advocates while the Respondent was represented by M/s Aegis Advocates.

**Evidence and Submissions**

The Applicant led evidence by way of an affidavit in support deponed by him. The Respondent led evidence by way of an affidavit in support deponed by Kelly Uwizeye, a person working with the Respondent's advocates handling this matter.

Both parties with leave of court made written submissions in support of their respective cases which I have considered before arriving at my decision below.

**Decision**

Setting Aside

**Order 36 Rule 11** of the CPR provides thus

"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."

For an application for setting aside under the provisions of **Order 36 Rule 11** to succeed on the ground of non-service, it must be demonstrated that service of summons was ineffective. See **RM Market Links & 3 Ors v Ugafin (U) Ltd HCMA 334 of 2019**, **Lydia Naiga v Ask Services Limited HCMA 482/2020, Attorney General v Wazuri Medicare Limited HCMA 283/2023**

The Applicant presented two reasons for setting aside of the default judgment in the main suit against him namely;

(a) He was not served with the summons or alternatively, that he did not see these in time

(b) His advocate neglected to file an application for leave to appear and defend in time.

Service

**Order 5 Rule 18(1) and (2)** of the CPR provides

"(1) Where the court is satisfied that for any reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy of it in some conspicuous place in the court house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally."

The Applicant contends that it had filed its application for leave to appear and defend by the time the default judgment was entered and that accordingly, the same was entered in error. This allegation is advanced as good cause for setting aside the default judgment.

Good cause has been defined in **Pinnacle Projects v Business in Motion Consultants HCMA 362/2010** as "a legally sufficient reason". It has also been defined in **Dr. B.B Byamugisha v Alison Kantarama HCMA 229/2019** as "the legal burden place upon a litigant, usually by court, to show why a particular request should be granted or an action or omission excused". The court noted that "good cause" was being used analogously with "sufficient cause".

Is good cause the same as sufficient cause? In Uganda, the expressions "Good Cause" and "Sufficient Cause" have been used interchangeably, and to mean the same thing.

In the Indian Case of **Parimal v Veema Civil Appeal No. 1467 of 2011**, the Indian Supreme Court defined "Sufficient Cause" this way;

""Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

In the case of **Arjun Singh v. Mohindra Kumar & Ors., AIR 1964 SC 993** the Indian Supreme Court has this to say about "good cause" and "sufficient cause":

"The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause."

I note that the CPR uses "good cause" and "sufficient cause" in different instances. For instance, "good cause" is used in **Order 1 Rule 15, Order 36 Rule 11 and Order 9 Rule 21**.

On the other hand, the CPR uses "sufficient cause" in **Order 9 Rule 18, Order 9 Rule 26, Order 43 Rule 16 and Order 43 Rule 18**, among other instances.

A review of these rules quickly shows that the expression "sufficient cause" is used where a litigant must explain their default, or failure to take a step as directed by the law or court.

In my view, "good cause" and "sufficient cause" are not the same. "Good Cause" requires a party to show a legally sufficient reason why court should exercise a discretion in their favour. Good cause may exist in spite of a party's own mistake; for instance, good cause may favour allowing a party amend a pleading to include a party who was mistakenly excluded or to amend their trial bundle and include a document they mistakenly forgot to include.

"Sufficient Cause" implies a much higher standard, requiring a party to show that they are not guilty of a default, or that it cannot be attributable to them. For instance, where an unrepresented party is hospitalised on the day of court, and accordingly an exparte decree is entered against them, there is sufficient cause to set it aside, since their failure to attend court is not a fault of their own. I do not believe the rules committee were being colourful when they used "good cause" in one instance, and "sufficient cause" in another. They intended to apply two different standards.

See **Mount Meru Millers v Atlas Cargo Systems HCMA 806/2022, Fred Byamukama & Anor v Micheal Katungye HCMA 773/2022, Green Meadow Limited v Patrice Namisono HCMA 1368/2022, Gids Consults & Anor v Naren Metha HCMA 864/2022**

**Order 36 Rule 3(2)** of the CPR provides thus:

"In default of the application by the defendant or by any of the defendants (if more than one) within the period fixed by the summons served upon him or her, the plaintiff shall be entitled to a decree for an amount not exceeding the sum claimed in the plaint, together with interest, if any, or for the recovery of the land (with or without mesne profits), as the case may be, and costs against the defendant or such of the defendants as have failed to apply for leave to appear and defend the suit."

From the above, a default judgment cannot be granted unless a party has failed to file an application for leave to appear and defend in time, or unless such application though filed has been dismissed under Order 36 Rule 5.

Did the Applicant file his application in time?

As noted above, the main suit was commenced by way of specially endorsed plaint under the provisions of **Order 36 Rule 2** of the Civil Procedure Rules["CPR"]. This procedure is used to originate liquidated or certain claims for which it is believed that the Defendant does not have a defence to the claim.

In this procedure, there is no automatic right to defend. The right to defend is only conferred by the leave of court, upon an application by the Defendant in the summary suit.

Under the provisions of **Order 36 Rule 3** of the CPR, a defendant to a summary suit, who is served with summons, ought to file an application for leave to appear and defend within the timelines indicated in the summons. Failure to do so will entitle the plaintiff to a judgment in default for the sums claimed. Equally so, when an application for leave to appear and defend fails, the plaintiff is entitled to judgment without further proof of the claim. [See **Order 36 Rule 5** of the CPR]

The rationale for summary procedure has been summarised in the long standing decision of **Post Bank (U) Ltd v Abdul Ssozi SCCA 8/2015** where the Supreme Court held thus:

"Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings."

See also **Zola & Another v. Ralli Brothers Ltd. & Another [1969] EA 691, 694**.

**Order 36 Rule 4** of the CPR provides thus:

"An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, and the court also may allow the defendant making the application to be examined on oath. For this purpose, the court may order the

defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant."

**Form 4** of Appendix A to the CPR provides that a defendant to a specially endorsed plaint has ten (10) days from the date of service of the summons and items accompanying the same to file an application for leave to appear and defend. It is an agreed fact that the Applicant was served with summons on 18th January 2023.

**Order 51 Rule 8** provides thus:
"In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the days shall be reckoned exclusively of the first day and inclusively of the last day."

The ten days within which to file the application were set to expire on 29th January 2023. However, **Order 51 Rule 3** of the CPR provides thus
"Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof the act or proceeding cannot be done or taken on that day, that act or proceeding shall, so far as regards the time of doing or taking the act or proceeding, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

It follows that the next working day after the 28th January 2023 which was a Saturday was Monday, 30th January 2023. I have looked at the ECCMIS print out presented as proof of filing within time (Annexure "A" to the affidavit in support). The same shows a submission time of 10:51 PM on 30th January 2023.

Prior to ECCMIS, filing was done by obtaining an assessment for court fees, paying the same, having the receipt verified, lodging the documents at the registry, checking of documents, (if acceptable) having them endorsed and stamp whereafter stamped and endorsed copies would be returned to the person filing. See **Pinnacle Projects v**

**Business in Motion HCMA 362/2010, Global Capital Save & Anor v Alice Okiror & Anor SCCA 57/2021**

With the migration to ECCMIS, documents are lodged electronically and after payment of court fees. Once the documents are acceptable, they are admitted. The date the documents are admitted is the date they are filed for purposes of the CPR. The admission is what has substituted the stamping and endorsement of the documents, which was used previously to demonstrate that filing has been completed. See **Lawrence Martin Mugerwa v Mugubi Stephen & Anor SCCA 15/2022, Equity Bank Limited & Ors v Simbamanyo Investments & Peter Kamya CACA 709/2022, ABJ Engineering and Contracting Co. KSC v Align Electrical Group Company Limited HCMA 122/2023**

Accordingly, the Applicant did not file its application on 30th January 2023 as alleged. I am cognizant that the role to admit documents is that of the Registrar and not a litigant. However, a litigant is under an obligation to aggressively and diligently pursue their defence and claim and follow the same up, including to ensure that documents are admitted. See **Femisa International Limited & Ors v Equity Bank Ltd HCMA 357/2022**, **Onesmus Bakanga & Anor v UEDCL HCMA 1495/2020, Geraldine Busingye Begumisa v EADB & Ors HCMA 436/2022**

In the instant case, the Respondent led evidence that his advocates continued to engage the Applicant to fix his application but did not. Further, the Applicant also led evidence that by the time it applied for and obtained default judgment, namely on 18th April 2023, the same application had neither been admitted in ECCMIS nor fixed for hearing. This evidence was not challenged. In **Energo Projekt v Brig. Kasirye Ggwanga HCMA 588/2009**, this court held that where one party depones a fact in an affidavit which is not controverted by the adverse party, the same is taken as admitted.

It must be noted that there is a difference between "admission" and "fixing". In the ECCMIS system, an application will typically be admitted before its fixed. Admission is the onboarding the document on the record, the electronic process that replaced the manual stamping and placing the document on the file. An application does not need

to be fixed (allocated a date and heard) before the same is admitted. Whereas the duty of admitting documents filed in ECCMIS and fixing applications is one of court, a litigant is expected to aggressively follow up admission and/or fixing of their documents/matters. An inordinate delay to do so may preclude a party from court's protection or discretionary reliefs. See **ABJ Engineering and Contracting Co. KSC v Align Electrical Group Company Limited HCMA 122/2023**

Moreover, where there are allegations of diligence in following up (such that the fault is one of court) there should be clear evidence of this follow up. Counsel should be able, especially where the follow up allegedly went from January to May, to present a clear record of that engagement such as by presenting copies of letters to court for assistance. Accordingly, the Applicant did not present compelling evidence of diligence in follow up to ensure the admission, let alone the fixing of his application.

The Applicant has not led evidence of a mistake of counsel or any other evidence excusing this delay. As a general rule of evidence, where a party fails to produce material evidence, the court may enter an adverse inference that such evidence would have been harmful to their case. See **Amos Ocan v Oyoo Wilson HCCA 51/2016**

Borrowing the same analogy, if there was evidence of any such incapacity, the same would have been presented in order to enable the court determine whether the interests of justice favoured a finding in favour of the applicant.

It is however the policy of this court that a substantive determination of disputes on the merits should be achieved as much as possible. See **ATC Uganda Limited v Smile Communications Ltd HCMA 621/2023**

Further, court may accommodate a party even when such accommodation may prejudice the other party, as long as such prejudice can be adequately compensated by an award of costs. See **Geralldine Begumisa v EADB & Ors HCMA 436/2022, Kisam Investments v The Attorney General HCMA 742/2023, Lam Lagoro v Muni University HCMC 7/2016,**

In my view, it is in the interest of justice to set aside the default judgment in order to enable determination of the dispute between the parties on the merits, subjects to the limitations imposed by summary procedure. Whereas this prejudices the Respondent who, by no fault of his had obtained a default judgment, such prejudice is one that can be atoned in an award of costs.

The Applicant is cautioned to, going forward, ensure to diligently file its pleadings and follow up to ensure admission of the same in time.

**Stay of execution and taxation**

Once an application for setting aside succeeds, there is nothing to execute as there is no judgment or decree on record. There is also no valid bill to tax. See **Gids Consults & Anor v Naren Metha HCMA 864/2022, Byaruhanga Mahmood v Top Finance Bank Limited HCMA 250/2023.**

**Conclusion**

Having held as I have above, I make the following orders

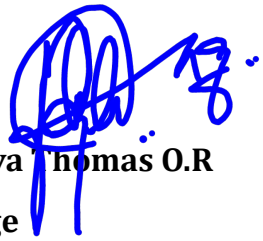
(a) The default Judgment and/or Decree in HCCS 1081 of 2022 is hereby set aside.

(b) The Applicant should seek to fix the application for leave to appear and defend at the earliest possible date.

(c) The Applicant shall bear the Respondents' costs for this application.

I so order.

Delivered electronically this 21st day of February 2024 and uploaded on ECCMIS.



**Ocaya Thomas O.R**

**Judge**

**21st February, 2024**