THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.9 OF 1992

LIVINGSTONE KATO…….PLAINTIFF

VERSUS

FILIMONI KAGWA…….DFENDANT

BEFORE: THE HONOURABLE JUSTICE MUKANZA

RULING

This is an application by notice of motion brought under rule 4 of the court vacation rules S I 41-7 and order 48 rule 1 of the CPR The applicant is seeking for an order that leave be granted to the applicant to apply to set aside the exparte judgment and stay of execution of the head suit during court vacation as an urgent matter.

Mr. Mayambila Ntegge the leaned counsel appearing for the applicant/defendant submitted that he intends to apply during court vacation to set aside the expert order in favour of the respondent/plaintiff. The respondent already has an attachment warrant. If the matter is not heard during court vacation he might lose his properties. He prayed that the application, be allowed.

In reply Mr. Ayigihugu opposed the application. He submitted that he was at a loss he did not know what application his learned friend wants to be heard during court vacation that there were two possible applications; An application to set a side the expert decree judgment, and secondly an application for stay of execution. He was wondering whether the two applications had been filed. He sought guidance from the court.

At that juncture Mr. Ntege intervened and explained that there is an application on the file to set aside the decree and judgment whose date for hearing has been given. There is no application for stay of execution on the record because if the expert decree is set aside the warrant of attachment

is rendered nugatory. It expired on 18/7/93 and no application for renewal has been made so if the order to set aside the decree is made that would enable the court to proceed.

After that clarification Mr. Ayigihugu submitted that no grounds have been advanced for setting a side the expert judgment as an urgent matter. It was the duty of the applicant to convince this court that there was an urgent matter and had to do so by evidence. The affidavit before you does not state any where that the setting aside of the expert judgment was an urgent matter. The contents of the affidavit is irrelevant to the present application. Apart from that failure the affidavit is full of inconsistencies and lies and should be rejected. Paragraph *5* states that neither the counsel then, counsel for the applicant nor the applicant himself was served with hearing notice and that there was no affidavit of service on record and that the procedure followed by the learned trial judge was accordingly irregular and that judgment should be set a side and that was also absolutely false because the hearing date of *23/* 9/92 was fixed by consent of both counsels. And it is on record, that it was a deliberate lie and the quest on of affidavit to prove that does not arise. In addition the allegation by para *5* is bellied by paragraph *3* of the same affidavit, In para *3* the applicant is aware that the matter was coming for hearing on 23/9/92. It states that the applicant was informed by his counsel Mr. Kibirige that the case had been adjourned. The affidavit is silent about this but there was a letter written by he counsel for the applicant to the deputy Registrar of this court applying for an adjournment. It was dated 22/9/92 just at the eve of 23/9/92 copied to him and received at *4.45* PM on the same day by him and the court. The letter also contained discrepancy because it said the lawyer representing the applicant was one Musoke and not Kibirige. It was supposed to be an application for an adjournment and the counsel for the applicant was aware that the case was coming for hearing on the following day. If one considered the time one wonders why the counsel had told the applicant that the matter was adjourned. As you could see from the record the learned judge refused to accept the letter as an application for adjournment and held that, the absence of the councel was inexcusable and that at least the applicant should have been there. The affidavits which tell deliberate lie can not be acted upon and must be ejected.

His final objection was that the affidavit itself was defective because it said that what was stated in paragraph 13 and *4* was according to the deponents information. The source of that information was not stated and it continued that matters deponed to in the rest of paragraphs

were according to his knowledge and belief. The affidavit did not distinguish matters on belief and the basis of such belief and matters of his own knowledge. It has been held in several cases in this court that an affidavit drawn in that meaning is totally defective and must be rejected under order 17 rule 3 of the Civil Procedure Rules. The deponent is supposed to confine to such points as the deponent was able to prove on his own knowledge except on interlocutory matters provided the grounds there in are stated, That was done and what was even deponed to could not be proved of his own knowledge. That is another reason why the affidavit in support of the application should be rejected. Those infact were delaying tactics on the part of the applicant to stop the respondent to enjoy the fruits of his judgment.

Mr. Ntege was permitted to reply and submitted that what was contained in paragraph 9 was a topographic error which was rectified by numbering the same and reiterated his earlier prayer that the application be granted.

I was opportuned to hear the submission of the learned counsels in this application and at the same time I perused the affidavits sworn in support of the application and the replies and in the Same vein I went though the court record . The matter before this court is simple and that is whether the application to set aside the expert judgment was an urgent matter that could be heard during court vacation.

The application is supported by the following ground set out in the affidavits sworn by one Filmon Kagwa. The grounds were namely

1) That this Honourable Court on 17/6/93 made an expert order in favour of the respondent that an order to sell the first applicants property issue within fourteen days therefore as well as payment of **Shs** 2088748 legal costs to the respondent.

2) The appellant was unable to attend hearing of the case because his counsel had advised him that the same had been adjourned.

3) That the property is liable to be sold during court vacation and the applicant will suffer irreparable loss thereby in the circumstance. It is a matter of urgency that the application as a foresaid he heard during court vacation.

It *must* be recalled that when the application came for hearing. It was consented by the counsels that the application to be proceeded with the application to set a side the expert judgment and not the application for stay of execution. As I stated earlier I perused the affidavit of the applicant in support of the application, I would at this juncture point out some of the salient points in the said affidavit, In para 4 the applicant was complaining that he was informed that the counsel for the plaintiff proceeded expert and that judgment was obtained in favour of the plaintiff.

Where as in paragraph *5* he averred that neither his counsel nor the applicant was served with a hearing notice and was advised by his counsel Ntege Mayambile that there was no affidavit of service and that the procedure adopted was irregular and that judgment obtained ought to be set a side again. In para *5* he swore that the Honourable court had issued a warrant of attachment of his property and was likely to suffer irreparable damage and loss and in pars *7* he swore that he intended to apply to court to have the expert judgment and execution set a side. Finally he deponed in Para 8 that the application to set a side the expert judgment and stay of execution was likely to succeed.

From what has transpired above there is no evidence to show that the application to set a side the expert judgment was an urgent matter that would be heard during court vacation. On this note I am agreeable with the submission of Mr. Ayigihugu. Also Mr. *Mayambile* Ntege informed this court from the bar that there was no more threat to attach the applicant's property. The threat was no longer there. The warrant of attachment had expired and that no renewal ha been made. He further submitted that a new date had been given. I construed this to mean that a hearing date had been fixed for the application to set a side the expert judgment.

In case I am mistaken that there was no urgency to hear this application during court vacation, I endorse the submission of the learned counsel for the defendant/Respondent that the applicant told a lie in his affidavit when he averred that he was advised by his counsel that there was no service on record and that the procedure adopted was therefore irregular and the judgment obtained ought to be set aside. I say so because on 9/4/92 when the parties appeared before Okello J. Mr. Kibirije then counsel for the applicant and Mr. Ayigihugu counsel for the opposite party agreed by consent and had the hearing of the substantive suit adjournment to another date. On the hearing date neither the applicant nor his counsel were in attendance. There was a letter

asking for an adjournment which the learned judge refused to accept and rightly too in my opinion. A 1etter was not the proper mode of applying for an adjournment. If the counsel was not able to attend court he would have instructed the applicant to come to court and apply for adjournment. Also there were some inconsistencies in the letter and whether the counsel for the applicant was with Mr. Musoke and not Kibirije. It was an application for adjournment. There were also lies in the affidavit.

The general principal is that where there are inconsistence in the affidavit however minor they cannot be ignored since a sworn affidavit is not a document to be treated lightly if it contains an obvious false hood it becomes suspect. An application supported with such an affidavit of the applicant who does not go to court with clean hands and tell the truth. The application should be struck off See Baintane Vs Kananura 1977 HCB P *34.* As already explained above the affidavit contained some false hood some lies and some discrepancies and as such the application becomes defective and the same ought to be rejected.

In para 9 of the affidavit in support of the application the applicant averred that what was stated in para 13 and 4 are according to information and the matters deponed in the rest of the paragraphs were according to knowledge and belief.

Order 17 r3 of the civil procedure rules provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory application on which statements of his belief may be admitted provided the grounds thereof are stated.

There are some authorities in connection with the above order. In corporative Bank Vs Kasiko 1983 HCB P 73 in which there was an affidavit in support of an application for leave to appear and defend was said to be defective because the deponent did not state in it the means of his knowledge, or his source of information and belief. The rational decidendi in one of the holding in that case was that an affidavit in which the deponent states that the information deponed to is true to the best of his knowledge information and belief without stating specifically which facts of which are true to his knowledge and which facts are merely stated out of his belief from

information received by him, The same is defective. See also In re Kikoma Saw Millers Co 1976 HCB P 50 at P 51.

In the instant case the deponent/Applicant did not state in his affidavit the means of his knowledge or his source of information and belief and in the end the affidavit is defective. Therefore the application to set aside the expert judgment as an urgent matter to be heard during court vacation fails. And the sane is dismissed with application.

I. Mukanza

JUDGE

19/8/1993