THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLENEOUS APPLICATION NO. 118 OF 2009

(ARISING FROM CIVIL SUIT NO. 18 OF 2008)

1. **ZENA ABDALLA OKELLO**
2. **RUKIA ANJELO OKELLO**
3. **SULAIMAN ANJELO OKELLO::APPLICANTS**

VERSUS

MAYAN AZIZ:::RESPONDENT

BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO

RULING:

The applicant brings this application **under order 9 r 27 and O52 r 12& 3** of the Civil Procedure rules SI 71-1 and **section 98** of the civil Procedure Act cap.71, for orders that the ex parte judgment and Decree in ***High Court Civil suit No. 18/2008***, be set aside and the execution of the proceedings against the applicants be stayed and the applicants are allowed to appear and defend the suit on its merits. In short be reinstated in the proceedings and for the costs of the application.

The application is supported by the affidavits of the 1st and 2nd applicants dated 7th of September, 2009.

The grounds of the application are as follows:-

1. Counsel for the respondent moved the court to precede ex parte, despite the fact that he had notice that counsel for the applicant would not be attending court.
2. That the applicants had filed a defense which is on record in another suit and which they contended had a high probability of success and the defense had a counter claim which was also on record.
3. That there was sufficient cause for non appearance by counsel for the applicants.
4. That if there is any negligence on part of the counsel, which is denied, this should not be visited on the applicants, who are also litigants in this matter.
5. That there has been no inordinate delay in pursuing this application
6. That the costs of this application be provided for.

At the hearing of the application, the applicants were represented by Mr. Henry Kunyo and the respondents by Mr. Richard Okecho.

Issue No. 1 – whether the applicants had sufficient course for not attending court?

Counsel for the respondent did move court to proceed, despite the fact that he had notice that counsel for the applicants would not be attending court.

That on Annexture "A" – of the 3rd applicant's affidavit shows the endorsement on the applicants showing clearly that the date would not be convenient and counsel proposed that another date be fixed by mutual consent of the parties.

Counsel for the applicants submitted that counsel for the respondent had prior knowledge that his colleague could not be in court on that hearing date and that the matter was coming up for hearing for the very first time, as it were, there was no inference that counsel for the applicants was in the habit of dodging court.

That the peculiar circumstances of the case, ought to have been interpreted in as not only counsel but the parties were not in court and they ought to have been given the benefit of the doubt on why the litigants did not appear.

Counsel cited the case of ***Samwiri Bamulere v Patrick Ngobi David and Anor 1978, HCB***, at ***p.249,*** where a party has been represented by counsel; it is not necessary for the party to be at the hearing and can appeal if required as a witness. The litigants could not appear because of what counsel had communicated to them and counsel for the respondent ought not to have pressed for ex parte proceedings..

Secondly, the applicants contend that they did file a written statement of defense and a counter claim on the original, which are already on record, that it is not a matter which is in dispute and by so doing they had subjected themselves to the jurisdiction of court and they wanted to be part of the proceedings.

Furthermore, that, there is a manifestation, as reflected in the defense and counterclaim that they deserved to defend the suit and it is their contention that, the defense that they raised is viable and would warrant being heard on its merits. That there is already a counterclaim in which the defendant/applicant raised pertinent issues regarding the matter at hand and specifically, the element of fraud against the respondent and in that respect, the applicants contend that, their defense has a high probability of success and to maintain the status quo would be akin to condemning them without the opportunity of being heard and this is against the principles of natural justice. In support of this, counsel cited the case of ***Tandjjhera vs. corporation Energo Project (1988-90) HCB. At p. 157*** where J. Tabaro, as he then was held that, *in exercising discretion as whether an ex parte judgment should be set aside or not, where there is a regular judgment, the court will usually satisfy itself that there is a defense in the merits before judgment is set aside* and he also cited the case of ***Patel vs. EA. Cargo handling Services Ltd, 1974 EA. At p.76***, the East African court of Appeal, held that a defense on the merits does not mean it is a defense that must succeed but it means a triable issue that is an issue that raises a prima facie defense which should go to trial for adjudication.

On the second ground, counsel submitted that, a perusal of the written statement of defense and the counterclaim brings out the defense in Patel's case, supra, and considering it in light of the issues that the grant of Letter of Administration is being disputed.

On the 3rd ground, counsel contended that, there was sufficient cause for non attendance by counsel.

Counsel submitted further that, he could not attend court as he was the counsel in personal conduct of the case, and he was taking children to school and he invited court to take judicial notice of the fact that, it was at the time of the opening of a new terms and he had to dedicate a whole day to this, and as a father he had to do it himself.

He further cited the case of ***Luca Marrisa vs. Uganda breweries Ltd. (1988-90) HCB. At p.131***, where Byamugisha J. as she then was held that,

"The applicant had to satisfy court that, there was sufficient cause for non appearance and the sufficient cause had to relate to the applicant's failure to take the necessary steps at the right time."

Counsel for the applicant, contended that, this was sufficient cause for him not to attend court.

On the fourth ground of negligence of counsel, counsel for the applicant submitted that, that is not the case. Counsel cited the case of a ***Golooba Godfrey vs. Harriet Kizito (2007) HCB at 31***, where the Supreme Court held that, a mistake on the part of the Advocate should not be visited on the party and ***S. Kyobe Senyange v. Nakis Ltd. (1980) HCB. At 20*** where J.B. Odoki held that, a mistake or oversight on the part of an advocate though negligent is a sufficient cause for setting aside an ex parte decree.

That in this case there was sufficient case for no appearance.

On the last ground of inordinate delay in pursuing the application, Counsel submitted that, the ex parte judgment was entered in November, 2008 and in May 2009; this application was filed and fixed for hearing today.

Counsel submitted that, in ***Marrissa's case (supra***) holds that the application should be brought within a reasonable time although the court does not define what a reasonable time is and counsel submitted that, the application should be allowed for having been brought within a reasonable time.

Finally, counsel submitted that it is their humble prayer, that the court in the exercise of its inherent powers under **section 98** of the Civil Procedure Act, sets aside in the interests of justice as is in the instant case, as the applicants desire to be given an opportunity to defend the suit besides pursuing their counterclaim and finally that in line with **O9 r27**, there was sufficient case for their non appearance when the suit was called for hearing as this is a fit and proper case for the court to exercise its inherent powers and grant the order sought.

Counsel for the respondent opposed the application on the following grounds that, the application is not properly brought under **O9 r 27** of the Civil Procedure rules.

That, **paragraph 27** details the grounds under which an application can be brought.

That **r.29** provides the procedure under which the application can be brought to the court.

That the wrong procedure was followed.

Mr. Oketcha submitted that, the application is an outright abuse of the court process which should be disallowed because of the following reasons;

1. That in opposing the application, he relies on the affidavit of the Mayan Aziz and there are two grounds that could enable the court to sit and set aside this judgment.

That the cases counsel for the applicant cited clearly lay down the grounds;

That the applicant must show that there is a triable issue that should go for a trial and they were prevented from appearing by sufficient cause.

That the applicants have failed on both grounds as laid down in the affidavit of the respondent that this is a case regarding the estate of the late Okello and Letters of Administration were taken in respect of this estate granted by court after the applicants were opposed to this grant. That the proper thing to do was to file a suit to set aside the grant or revoke the grant.

That the applicants even filed a suit to set aside and revoke the grant and their suit was dismissed, according to copy of judgment in ***Nakawa CS No. 302/04***.

That in that suit the original ground was that the will was null and void, that the court dismissed it as it found the will genuine.

That what the applicants are trying to do in the main suit is to counterclaim and plead fraud and the counterclaim is res judicator – see Annexture "A" to the respondents affidavit.

That the applicants appealed the decisions of the Chief Magistrate to the High court and the applicants actually appealed to the High Court HCCS No. 17/08, arising out of CS No. 302/04.

That the applicants are trying to let court determine what is before the High court in Nakawa, by way of appeal by filing a fresh suit by way of a counter claim.

That this is an abuse of the court process which should not be allowed or encouraged by this court.

Mr. Oketcho argued that, the applicants are aware that a court of competent jurisdiction had granted letters of Administration/Probate, came to this court to petition for Letters of Administration.

That based on the documents in the previous trial, which is the written statement of defense and the counter claim, they will show that the matter has been traced by another court.

On triable issues, counsel submitted that there could only be a triable issue if the applicants proved to this court that there had not been a previous ground in respect of the estate and that there is no triable issue.

On sufficient cause, on the day the matter was called for hearing, counsel presented to court which was filed in court on 23-5-08.

That the judgment was entered in September, 2008 and the decree was entered on 18/10/08, but the application was filed on 27/5/09, more than 7 months after the Decree was entered.

Mr. Oketcha argued that, 7 months was enough to cause the estate to go to waste if not resolved expeditiously.

Under **O9 r 21**, in any case, in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set aside, and if he or she satisfies court that, the summons was not duly served, or that he or she was prevented by sufficient cause from appearing when the suit was called on for hearing, the court may make an order setting aside the Decree as against him on such terms as to costs, payment into court or other use as it thinks fit and shall appoint a date for proceeding with the suit except the decree is of such a nature that it cannot be set aside as against the defendant only, it may be set aside as against the other defendants also.

That in the instant case, according to the documents on court record, the applicant/defendant was served with a hearing notice, personally through his lawyer who received the summons.

At the commencement of the hearing, I did ask for evidence of the service of the hearing notice and was shown the affidavit which was proof enough, that the applicants had been served. I therefore proceeded to hear the matter ex parte, since no reasonable explanation was given to court as to his absence.

Although counsel for the applicant stated that they had agreed to a new date by mutual consent, he did not show court any endorsement by counsel for the respondent that they agreed to fix a new date for the hearing.

Court is therefore not satisfied that there was sufficient cause for him not to attend the court for hearing.

On the possibility of service, the mere fact that he had filed written statements of defense with a counter claim, nothing guarantees that the suit had a possibility of success and the court should have postponed the hearing of the case to another date.

On the expeditious filing of the application, counsel was served and the case was and he did not file the application except after 7 months of the passing of the Decree and court considers this a long time for the applicants to have waited before filing this application.

Consequently, the application is dismissed with costs to the respondents.

Margaret C. Oguli Oumo.

JUDGE

13/10/2010