THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISCELLANEOUS APPLICATION 93 OF 2019

(Arising from Civil Suit No. 7 of 2013)

OKECH VERKAM.....APPLICANT

VERSUS

CENTENARY RURAL DEVELOPMENT BANK .....RESPONDENT

RULING

1.0 Introduction:

This is an application to set aside ex parte the ex parte judgment and decree issued by this court in Civil Suit No. 7 of 2013. The application was brought under section 98 of the Civil Procedure Act and O. 52 rules 1and 3 of the Civil Procedure Code. The application is seeking the following orders, namely, that;

1. The judgement and exparte decree dated April 25 2018 in the counter claim in Civil Suit No. 7 of 2013 be set aside;
2. The applicant be granted leave to file a reply to the counter claim out of time and appear and defend the counter claim in Civil Suit No. 7 of 2013 on merit inter parties; and
3. Costs of the application be provided for.

This application is supported by the affidavit of **OKECH VERKAM** but briefly the grounds are;

a) The Applicant was prevented by sufficient cause from filing a reply to the counter claim to civil suit No. 7 of 2013, the sufficient cause being negligence and/or mistake of his former counsel who omitted to file a rely to the counter claim in time.
b) That the Applicant is desirous to defend the said counter claim and denies liability of the sum of UGX. 138, 658, 026/= counter claimed by the Respondent which does not arise at all under his financing documents with the defendant on record.
c) That it is only fair, just and in the interest of justice that this honourable court grants the aforesaid orders.

Briefly, the Applicant sued the respondent in HCCS No. 007 of 2013 for inordinate/ deceptive accumulation of lease and overdraft interest. On the 25th of April 2018, judgement was entered on admission against the Applicant who was ordered to pay Ushs. 61,010,875/= within one year and on the 24th April 2019, a default judgement was entered against the Applicant on the counter claim in civil suit No. 007 of 2013 for the liquidated amount of Ushs. 138,658,026/=. The applicant is aggrieved by the default judgement hence this application seeking to set aside the judgement and be granted leave to file a reply to a counter claim out of time.

2.0 Representation:

Mr. Simon Kasangaki, represented the Applicant while Mr. Andrew Mauso, represented the respondent. Court allowed respective counsel to file written submissions.

3.0 Arguments of Counsel:

The applicant's counsel submitted that he had made the application to set aside the exparte decree under O.9 r. 27 of the Civil Procedure Rules. This Order provides that:
in any case in which a decree is passed exparte against a defendant, he or she may apply to court by which the decree was passed for an order to set aside; and if he or she satisfies court that...he or she was prevented by sufficient cause from appearing when the suit came up for hearing. The court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint the date for processing with the suit.
Counsel for the Applicant, submitted that in **Henry Kawalya vs J Kinyankwazi (1975) HCB** 386, the court held that:
an exparte judgement obtained by default of defense is by nature not a judgement on merit and it is only entered because the party concerned has failed to comply with certain requirements of the law. The has power to revoke such judgement, which is not pronounced on merit of the case or by consent but entered especially on failure to follow requirements of the law.
He submitted that the main issue for determination in applications to set aside exparte judgments is whether the Applicant was prevented by sufficient cause from filing a reply to the counter claim in Civil Suit No. 7 of 2013.

He submitted that according to **Rosette Kizito Vs. Administrator General and Others, SCCA No. 9 of 1986**, that *"sufficient reason (cause) must relate to the inability or failure (of the applicant) to take a particular step in time".*

He submitted that the applicant failed to file a reply to the counter claim due to the negligence of his counsel. He submitted that whereas the Applicant instructed M/s Oscar Associated Advocates to file Civil Suit No. 7 of 2013 against the Respondent challenging wrongful computation of interest, which they did, his former counsel, never filed a response to the counter claim which the Respondent filed alongside their written statement of defense. He submitted that the Applicant only came to learn of this default, after he changed his lawyers, who on perusing the record discovered that indeed, the applicant had not filed a response to the counter claim.

Counsel submitted that it would be unjust for the Applicant to be penalised for the mistake of his former counsel of not filing a reply to a counter claim court, when he duly instructed him. Counsel submitted that the mistake of the previous counsel .... is sufficient reason to warrant the setting aside of the judgement and exparte decree dated 25th April 2018 in the counter claim in civil suit No. 7 of 2013. Counsel for the Applicant relied on **Fred Kyewalabye vs Richard Ssevume & 2 others Civil Appeal No. 01 of 2004** where **Justice Rubby Awere Opio** held *that it is also trite law that mistake of counsel should not be visited on the litigants. The mistake was that counsel had entered a wrong time for the hearing of the case in his diary. That is why the two came to court late. Such negligence should not have been visited on an innocent litigant.* Counsel for the Applicant also relied on **Banco Arabe Espanol v Bank of Uganda (1999) Justice Stephen Mubiru** , where the court held that *"the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapse should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."*

Counsel for the Applicant then prayed to court to set aside the judgment and exparte decree dated 25th April 2018 in the counter claim in Civil Suit No. 7 of 2013 and grant the applicant leave to file a reply to the counter claim out of time and appear and defend the counter claim in Civil Suit No. 7 of 2013 on merit inter parties.

Counsel for the Respondent, in reply submitted that the application was brought under the wrong provision of the Civil Procedure Rules. He submitted that the application should have been brought under Order 9 rule 12 and not Order 9 rule 27 of the Civil Procedure Rules because the judgment sought to be set aside was a default judgement entered under O. 9 r.6 of the Civil Procedure Rules.

Secondly, counsel submitted that under O. 9 r.27 the applicant can only move court to set aside a decree for sufficient reasons which has been defined severally in judicial

precedent including in **Rosette Kizito Vs. Administrator General and Others (supra)**. He submitted that the application for setting aside of judgements should not be granted as a matter of right or as matter of course, but only after examining the circumstance of each case. He submitted that court should only grant the most deserving applications while exercising its discretion judiciously.

Counsel for the respondent further submitted that whereas they agree with the position in **Banco Arabe Espanol v Bank of Uganda** which was relied on by the applicant, the circumstances in that case are different from the circumstances in the instant case. Counsel submitted that in the Banco case, there had been a mistaken belief on the part of the applicant's counsel that a bank guarantee would suffice instead of cash deposit in court as security for costs. However, in the instant case, the applicant knew that a counter claim had been filed against him and that he had not responded to it as the parties were trying to resolve the matter amicably. Counsel referred to the long journey the case has gone through. He told court that the respondent filed a written statement of defence with a counter claim 7 years ago. The matter went through several mediation sessions which the applicant participated in and they were all not successful. Counsel submitted that the applicant had an opportunity from 2016 to 2018 during the botched mediation proceedings to file a reply to the counter claim but he did not. That even after the default judgement on 24th April 2018, the applicant time took time to file an application to side aside the default judgement.
It is the Respondent's case that the Applicant had not satisfied the requirements for leave to be granted for him to file a response to the counter claim outside time.

4.0 Resolution of the Application

I have noted from the file, that Justice Rugadya on 25th April 2018, entered judgment in favor of the Respondent under Order 9 rule 6 of the Civil Procedure Rules, in respect of the counter claim. If the applicant is interested in setting aside this judgment, like he is, then the right Order under which to make the application is Order 9 rule 12 of the Civil Procedure Rules and not Order 9 rule 27 of the Civil Procedure Rules. Order 9 rule 12 of the Civil Procedure Rules provides that:
Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order 50 of these rules, the court may set aside or vary the judgment upon such terms as may be just.
Here, the judgment to be set aside was made under Order 9 rule 6 which precedes Order 9 rule 12 of the Civil Procedure Rules. That being the case, then I am in agreement with

the Respondent's counsel that the application to set aside the default judgment was filed under the wrong rule.

That notwithstanding, I will be willing to ignore lapses for filing the application under the wrong rule. Given the magnanimity of the Respondents, who were willing to accommodate the Applicant, I will assume that the application was filed under Order 9 rule 12. According to Order 9 rule 12 of the Civil Procedure Rules, the applicant has to show good cause before the court can exercise its discretion to set aside the judgment.

In the matter before me, the Applicant employed counsel to represent him. Counsel filed all the pleadings. Counsel participated in the mediation, where the parties were seeking an out of court settlement. The Applicant attended all these proceedings and must have therefore, been aware that the Respondent(Bank) was seeking to recover money from him for breaching an overdraft facility in a counter claim since all disputes were on the mediator's table. I am therefore, surprised that the Applicant was not aware of the banks claim against him.

That said, it should not be forgotten that the Applicant, who is a lay man, may not have been aware that his counsel had not filed a reply to the counter claim since he did not have the professional competences to supervise counsel in the conduct of his work. Prima facie, mistake of counsel coupled with ignorance of the applicant, is a good reason for which, the court should not visit the sins of counsel on the client (applicant). See several authorities on the matter such as in **AG vs. AKPM Lutaaya SCCA No. 12 of 2007**, Katureebe, JSC (as he then was), held that the litigant's interests should not be defeated by the mistakes and lapses of his counsel. In **Godfrey Mageze & Brian Mbazira vs. Sudhir Ruparelia SCC Application No. 10 of 2002**_Karokora, JSC, **held that the omission, mistake or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of his appeal there by denying him justice.**

See also **Joel Kato & Anor v Nuulu Nalwoga (Misc. Application No 04 of 2012) [2012] UGSC 2 (26 June 2012);** the Supreme Court held: **I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the applicants found it necessary to engage new lawyers to deal with them."**

But before, the Applicant, can be excused from the mistakes of his counsel, he must show that he was not in any way negligent and that he took proactive steps in correcting the errors of his counsel, when he first became aware of the default. Pro activeness in this matter would include the applicant taking urgent steps to file an application to set aside the default judgment. According to the record, the Applicant filed this application to set aside the judgment on 10th September 2019. This Application was filed **one year and four months** after judgment was entered against the Applicant. It is worth noting that the Applicant was in court on the day judgment was entered against him.

The Applicant has not offered any reasons in the affidavit in support of the Application to explain why it took him more than a year, to challenge a judgment, he now seems to be very aggrieved against. Clearly, the *laissez faire* approach taken by the Applicant in challenging the default judgment, is negligence and indicative that he accepted the decision of the court ordering him to pay the liquidate demand to the bank for breaching the over draft facility. Otherwise, if the Applicant was reasonable and passionate about challenging the default judgment, he should have filed an application, within reasonable time, say within a month, to challenge the decision of the judge.

For this reason, I am unable to agree with the Applicant that he has demonstrated sufficient reasons or good cause for which I should exercise my discretion under Order 9 rule 12 of the Civil Procedure Rules to set aside the judgment.

5.0 Decision

The Application is dismissed with costs to the Respondent.

Gadenya Paul Wolimbwa
JUDGE
10th March 2020
Ruling read in the presence of Mr Mauso Andrew for the Respondents and in the absence of Mr. Kasangaki, for the Applicant. Mr. Olinga Kamuhanda, court clerk.

Gadenya Paul Wolimbwa
JUDGE
10th March 2020

Gadenya Paul Wolimbwa
Judge