

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI  
MISC. APPLICATION NO. 0110 OF 2022  
ARISING OUT OF CIVIL SUIT NO. 0031 OF 2020

ATTORNEY GENERAL ..... APPLICANT

VERSUS

AKENA MARTIN ..... RESPONDENT

BEFORE: Hon. Justice Isah Serunkuma.

RULING

This application was brought under Order 9 rule 27, Order 52 rules 1 & 3 of the Civil Procedure Rules, Rule 6 of the Government Proceedings (Civil Procedure) Rules, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act for orders that;

1. That the exparte judgement in Civil Suit No. 0031 of 2020; Akena Martin Vs Attorney General be set aside and the suit be heard interparty.
2. That the execution of the orders in Civil Suit No. 0031 of 2020; Akena Martin Vs Attorney General be stayed pending the disposal of the instant application.
3. Costs of the application be provided for.

***Background***

The respondent/plaintiff on the 28<sup>th</sup> day of May 2020, while at his work place (Butcher) at Kichwabugingo Trading Centre in Kiryandongo district, was shot at by the members of the Uganda police force attached to Kiryandongo and Bweyale Police stations who had come to quell a protest as a result of an accident which claimed the life of a child. The respondent sustained major injuries in the arm and ribs and was admitted at Kiryandongo Hospital where he underwent surgery in the arm. That the matter was reported at the police station which deliberately declined to issue a police report. That as a result of the injuries inflicted onto the plaintiff, the respondent is unable to regain full

use of his arm and that while at Kiryandongo hospital, he was treated and thus incurred medical expenses and lost daily income he was averagely earning.

When the matter came up for hearing on the 6<sup>th</sup> day of April 2022, the applicant despite having been served with summons to file its defence in time, had not filed any. The matter proceeded and an exparte judgement was delivered against the applicant hence this application.

The grounds upon which this application is premised are clearly laid out in the affidavit in support of the motion deponed by a one Mr. Allan Mukama on behalf of the applicant herein which states;

1. That the applicant is aggrieved/dissatisfied with the said exparte judgement and is desirous of setting it aside.
2. That the applicant has a good defence to the suit with the high probability of success. A copy of the draft written statement of defence is hereto attached and marked **"B"**.
3. That the applicant has reasonable chances of success with arguable grounds on substantial questions of law to wit;
  - a) The learned trial judge entered an exparte judgement without an application for leave by the respondent in accordance with rule 6 of the Government Proceedings (Civil Procedure) rules SI. 77-1.
  - b) The learned trial judge entered an exparte judgement for the respondent (plaintiff) without according the applicant (defendant) an opportunity to be heard.
4. That upon perusal of the court record, the applicant observed that the main suit was never set down for hearing, no summons for directions were taken out by the respondent (plaintiff) and there was no involvement of the applicant in accordance with Order XIA of the Civil Procedure (Amendment) rules 2019.

5. That the applicant is likely to suffer prejudice and grave injustice if the exparte judgment in Civil Suit No. 0031 of 2020 is not set aside.
6. That this application has been brought without undue delay.
7. That it is in the interest of justice that this application is granted for the applicant  
5 to be given an opportunity to be heard in accordance with Article 28 of the constitution.
8. That it is in the interest of justice that the execution of the orders in Civil Suit No. 0031 of 2020 be stayed pending the disposal of the instant application.

In rebuttal, the respondent deponed an affidavit in reply stating that;

- 10 1. That on the 29<sup>th</sup> day of June 2020, the respondent opened a civil case against the applicant for actions of its employee, a police officer who shot him and also claimed the life of a child named Mugisha Brian at Kichwabugigo trading centre.
2. That the applicant was served with summons to file a defence in Civil Suit No. 0031 of 2020 on the 15<sup>th</sup> day of July 2020 at the ministry of justice and constitutional  
15 affairs directorate of civil litigation and the applicant's secretary endorsed on the return of service.
3. That based on the information of the respondent's lawyers, upon proper service of the summons on the applicant, an affidavit of service was duly filed on court record. (A copy of the affidavit of service and the endorsed return of service are  
20 marked "A").
4. That the applicant did not file a defence in Civil Suit No. 0031 of 2020 in accordance with the law.
5. That based on the information of the respondent's lawyers, the respondent was not required by law to serve summons for directions to the applicant who had not  
25 filed a written statement of defence after proper and effective service of the summons.

6. That the respondent's lawyers exercised good faith and served a hearing notice on the applicant to attend court on the 6<sup>th</sup> day of April 2022 which was duly received by the applicant's secretary on the 22<sup>nd</sup> day of September 2021 but the applicant did not appear in court. (A copy of the affidavit of service is hereby marked "B").

5 7. That on the 21<sup>st</sup> day of May 2021, the respondent's lawyers filed his witness statement in Civil Suit No. 0031 of 2020 which was also served on the applicant and duly endorsed by the secretary of the applicant. (A copy of the received witness statement is marked "C")

10 8. That the applicant was also served with final submissions on the 14<sup>th</sup> day of April 2022 and the same were duly received and the secretary endorsed on the respondent's return of service. (A copy of the acknowledgement of receipt of final submissions is marked "D")

9. That the applicant is guilty of inordinate delay and this application is an abuse of court process in all events.

15 10. That the applicant sat on its rights and therefore cannot claim to be an aggrieved party.

11. That the respondent spent hefty costs in prosecuting his case where all documents were served on the applicant who chose not to appear or file a defence.

12. That it is in the interest of justice that this application be dismissed with costs.

#### 20 *Representation and hearing*

The Applicant was represented by Counsel Samuel Tusubira of M/S Attorney General's Chambers whereas the respondent is represented by Counsel Nabirye Gertrude holding brief for Counsel Simon Kasangaki of M/s Kasangaki & Co. Advocates. Both parties were given timelines within which to file their written submissions for this court's  
25 consideration.

### *Applicant's submissions*

In making his submissions, counsel relied on three issues as hereunder;

#### *1. Whether there is sufficient cause to set aside the exparte judgement*

Counsel relied on Order 9 rule 27 of the Civil Procedure Rules which provides for setting  
5 aside decree exparte against defendant upon satisfying court that the summons was not  
duly served, or that he or she was prevented by any sufficient cause from appearing when  
the suit was called on for hearing. Counsel submitted that in the main suit, the respondent  
alleged that unnamed officers of the Uganda police force shot at him while quelling a riot  
following a traffic accident which incident is alleged to have occurred on 28<sup>th</sup> May 2020.

10 Counsel submitted that the main suit was filed during the countrywide lockdown in  
place at the time due to COVID19 pandemic. Counsel added that when the respondent  
served the summons to file a defence, counsel for the applicant could not easily get in  
touch with police in Kichwabugigo trading centre to get the relevant facts so as to have a  
defence filed and served in time. Counsel further submitted that the cause of action in the  
15 main suit calls for specialized, technical investigative duties of the Uganda police force  
which could not be rushed or swiftly conducted due to the hardships of movement  
during the country wide lockdown.

Counsel further stated that the exparte judgement was delivered in such a short time after  
filing of the main suit and yet the applicant hardly had an opportunity to gather facts for  
20 his defence case within the short span of time. Counsel submitted that investigations  
relating to the respondent's claims have been concluded and a report by the Uganda  
police force was accordingly issued. Counsel added that there is a plausible defence to  
the respondent's claim. Counsel relied on the case of *Remco Ltd Vs Miistray Jadbhra Ltd*  
(2002) 1 EA Pg 233 which defines a plausible defence as one which discloses bonafide  
25 triable issues.

Counsel also submitted that the principles governing the determination of what amounts to sufficient reason or cause for setting aside an *ex parte* decree under Order 9 rule 27 have been severally enunciated in the jurisprudence such as in the case of *SC. Civil Application No. 06 of 1987 Florence Nabatanzi Vs Naome Binsobedde* (cited with approval in *Hikima Kyamanywa Vs Sajjabi Chris; CACA No. 001 of 2006*) it was held by the supreme court that *"sufficient reason or cause depends on the circumstances of each case and must relate to the inability or failure to take a particular step in time."*

Counsel submitted that the main suit herein is a peculiar case which involved technical skills and therefore evidence had to be gathered in a professional way and not in haste. Counsel added that it is unfortunate that the suit was determined in a short time even when investigations were still ongoing and that there existed glaring challenges posed by the COVID lockdown. In conclusion, counsel prayed that this honourable court finds that he was prevented by sufficient cause from filing a written statement of defence and as such this is a proper suit for setting aside the *ex parte* order.

**2. Whether the *ex parte* judgement delivered in HCCS No. 0031 of 2020 is regular.**

Counsel submitted that the *ex parte* judgement entered in the main suit is irregular owing to the respondent's failure to seek for and obtain leave in accordance with Sections 10 & 26 (c) of the Government Proceedings Act Cap 77 and Rule 6 of the Government Proceedings (Civil Procedure) Rules. Counsel relied on Rule 6 of the Government Proceedings (Civil Procedure) Rules which states;

*"Judgement shall not be entered and no order shall be made against the government in default of appearance or pleading under any provision of the principal rules without leave of the court and any application for such leave shall be made by summons served not less than seven days before the return day."*

Counsel submitted that the respondent should have sought for leave of court to obtain an ex parte judgement hence ought to be set aside. Counsel prayed that this application is granted and costs provided for.

***Respondent's submission***

5 Counsel submitted that this application was brought under section 98 of the Civil Procedure Act, which empowers this court with inherent power and further under Order 9 rule 27 of the Civil Procedure Rules which provides in part that;

10 *“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 it 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 proceeding with the suit...”*

15 Counsel submitted that sufficient cause, usually used interchangeably with the term good cause is defined in the black's law dictionary as a legally sufficient reason. Counsel relied on the case of *Rosette Kizito Vs Administrator General & Ors; SCC Appln No. 096 of 1986 (reported in [1993] KALR 4)* the supreme court of Uganda held that sufficient reason must relate to the inability or failure to take the particular step (in time) although other  
20 considerations may be invoked.

With reference to setting aside the ex parte judgement, counsel submitted that the application lacks merit, an abuse of court process and the same should be dismissed with costs as the applicant was duly served with the summons to file a defence and a plaint, but the applicant with no sufficient reason never filed one. Counsel added that on several  
25 occasions, the respondent took out witness statements and served them on the applicant

but the applicant never appeared in court. Counsel further stated that the applicant was served with all court proceedings which the applicant does not deny being served but nonetheless is contesting the exparte proceeding.

Counsel submitted that the applicant herein was duly informed and aware of the hearing date and even if the applicant was present, the applicant had no locus since no written statement of defence was filed thus waiving her right to be heard as guaranteed under Articles 28(1) & 44(c) of the constitution of the republic of Uganda. Counsel relied on the Halsbury laws of England 4<sup>th</sup> edition vol.37 (practice and procedure) at paragraph 393 stating that;

*“the very nature of the judicial process requires an effective and appropriate sanction to compel due compliance by the parties to the proceedings with the rules of court or the orders of the court. Such non-compliance is treated as default and the sanction for such default is that, in the case of the defendant, a default judgement entered against him. A default judgement is the expression of the coercive power of the court obtained as a result of a failure by a party to follow any rules of procedure or orders of court”.*

Counsel added that upon failure by the applicant to comply with the rules of court, an exparte judgement was entered on the 30/08/2022, the respondent then filed a bill of costs which was fixed for taxation. Counsel relied on the case of *Kotokyo Wilber William Vs John K. Kaggwa & Another; HCMA No. 0278 Of 2019* where, while dismissing the application it was observed that;

*“An application to set aside an exparte/default judgement is primarily made on the basis of its irregularity..... the concern of the court at this level is whether the applicant’s case should go on trial on the basis of merit in addition to other circumstances of the case...”*



Counsel submitted that this application lacks merit as the applicant has not disclosed any sufficient reason to have the exparte judgment set aside.

With reference to failure to file written statement of defence of court, counsel submitted that the applicant has not stated any sufficient reason as to why no written statement of defence was filed neither has she prayed to this court either to validate and or extend the time within which to file the written statement of defence. Counsel relied on Section 7 of the Government Proceedings Act which provides for Civil Proceedings in the High Court that;

*“(1) Subject to this Act, all civil proceedings by or against the Government in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise.*

*“(2) For the removal of doubt, it is declared that all civil proceedings mentioned in the Schedule to this Act have been abolished in Uganda.”*

Counsel also relied on section 26(2) (c) of the Government Proceedings Act which states that;

*“.....(2) Provision shall be made by rules of court with respect to the following matters—*

*(c) for excepting proceedings brought against the Government from the operation of any rule of court providing for summary judgment without trial, and for enabling any such proceedings to be put in proper cases into any special list which may be kept for the trial of short causes in which leave to defend is given under any such rule of court as is referred to in this paragraph;*

Counsel submitted that the above section is not applicable to this Civil Suit No. 0031 of 2020 as it is not a summary suit but an ordinary plaint where the respondent leads evidence to prove his claims.

Regarding stay of execution, counsel submitted that the grounds for stay of execution are contained in Order 43 rule 4(3) of the Civil Procedure Rules made his submissions based on them as hereunder;

***That the applicant is likely to suffer substantial loss***

Counsel relied on *Tropical Commodities Supplies Ltd & Others Vs International Credit Bank (In Liquidation) [2004] 2 EA 331* where substantial loss was defined as one that does not represent any particular size or amount but refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or loss that is merely nominal. Counsel submitted that the applicant did not demonstrate any substantial loss it is likely to suffer if not granted a stay of execution, but instead it is the respondent who will suffer because he was shot and sustained major injuries and now is permanently disabled.

***That the application has been made without unreasonable delay***

Counsel submitted that it is clear that this matter proceeded exparte on the 6<sup>th</sup> day of April 2022, an exparte order was entered on the same day and formal proof was done and judgement entered on the 30<sup>th</sup> day of august 2022, bill of costs filed and fixed for taxation on the 07<sup>th</sup> day of October 2022. Counsel added that the instant application was served unto the respondent on the 22<sup>nd</sup> day of September 2022 which is clearly an afterthought thus inordinate delay by the applicant in bringing this application which is expressly prohibited by the established rules of court and the same should fail.

***Furnish security for due performance of the decree or order as may ultimately be binding upon him or her.***

Counsel relied on the case of Tropical Commodities Suppliers Ltd & Ors (supra) where on the issue of security it was held that;

5       *".... for the application to succeed the applicants must be willing to give security for costs rather than security for the entire decretal amount as pressed by the respondent."*

Counsel submitted that it is not in dispute that the applicant herein stubbornly, intentionally and is unwilling and did not deposit any security for the due performance of the said decree. Counsel added that the failure by the applicant to pay security for costs rendered this application incompetent before this court and ought to be dismissed with  
10       costs to the respondent.

In conclusion, counsel submitted that the applicant has not established sufficient cause to warrant setting aside the exparte judgement and orders issued by the court in HCCS No. 0031 of 2020 and not fulfilled any of the conditions for the stay of execution thus inviting this court to hold that the application is legally untenable, incompetent brought in bad  
15       faith, devoid of merit and that the same be dismissed with costs to the respondent.

### *Court analysis*

I have perused the record of the court, the pleadings of this application, submissions of both parties as well as their authorities. This application entails two issues to be discussed hereunder;

20       *Whether the exparte judgement passed in HCCS No. 0031 of 2020 is regular.*

It was the applicant's argument that the exparte judgement passed in HCCS No. 0031/2020 is irregular owing to the respondent's failure to seek for and obtain leave in accordance with Sections 10 & 26(c) of the Government Proceedings Act and Rule 6 of the Government Proceedings (Civil Procedure) Rules. On the other hand, the respondent did

not make any argument in rebuttal to the claim. Nevertheless, it is crucial to set a tone on the issue of seeking and obtaining leave before a default judgement has been granted against the applicant so as to understand its history and how it has been dealt with over the years. In the case of *Nampogo Robert & Anor Vs Attorney General; Constitutional*  
5 *Petition No. 043 of 2012* where the decision in the case of *HCT OO CC MA-437-2013 (Arising from HCCS NO. 0231 of 2013) Atukwase Nickson* (suing through his lawful Attorney Arinaitwe Reuben) vs Attorney General was disagreed with in relation to rule 11 of the Government Proceedings (Civil Procedure) rules which provides for;

*"Rule 11 of the Government Proceedings (Civil Procedure Rules), provides:*

10 *"11. Time for filing defence:*

*In the case of Civil Proceedings against the Government, Rule 1 of Order VIII of the principal Rules shall have effect as the words "thirty days" were substituted for the words "fifteen days" which occur in that Rule".* It was the court's decision that;

15 *With the greatest respect, I am unable to agree with the above High Court decision of His Lordship. Ordinary litigants, both individuals and companies, who are sued, may also have to contact other people all over the country, who may be their employees or otherwise, for necessary information and material to make defences to the suits brought against them. Transporters, banks and/or communication*  
20 *companies like MTN, Airtel are under this category. It is also a fact that a suit against the Government may involve officers and materials just in one department or entity of the Government where the suit is instituted and there is no need at all to carry out inquiries and contacts all over the country.*

25 *At any rate, under Section 96 of the Civil Procedure Act and Order 51 Rule 6 of the Civil Procedure Rules, and also under the exercise of discretion by a Court of law,*

5        *a party to a suit who has a genuine reason for having failed to take a step in a suit, may apply to Court for extension of time within which the necessary action can be taken. There is therefore no justification why the Attorney General should be treated differently from other litigants when it comes to filing a defence in the suit."*

Rule 6 of the Government proceedings (civil procedure) rules provides that;

10        *"Judgment shall not be entered, and no order shall be made, against the Government in default of appearance or pleading under any provision of the principal Rules without leave of the court, and any application for such leave shall be made by summons served not less than seven days before the return day."*

Indeed, I do agree with the findings in the above constitutional case and others such as *Dr. James Rwanyarare versus Attorney General (2003) 2 EA 664; Attorney General versus Osotraco Ltd; Court of Appeal Civil Appeal No. 032 of 2002; Kabandize and 20 Ors Vs Kampala Capital City Authority; Court of Appeal Civil Appeal No. 0028 of 2011.*  
15        Government should not be treated any differently and yet it is well equipped with all the resources to enable them ease their work whether in conducting investigations to obtain a defence as in this current case or not. Therefore, in resolution of the issue above, the exparte judgement in HCCS No. 0031 of 2020, is a regular decision.

20        *Whether the applicant has satisfied the grounds for setting aside the exparte judgement in HCCS No. 31 of 2020.*

Counsel for the applicants submitted that the main suit was filed during the countrywide lockdown in place at the time due to COVID 19 pandemic and upon being served with the summons, counsel for the applicant could not easily get in touch with the police in Kichwabugigo trading center to get to the relevant facts to have a defence filed and served  
25        in time hence it was impossible to get information in time from the Uganda Police Force

which the applicant needed to conduct the defence of the case and as a result, no Written Statement of defence was filed.

Counsel further submitted that the cause of action in the main suit called for specialized investigative duties of the Uganda Police Force which could not be rushed or conducted swiftly due to hardships of movement during the country wide lockdown.

On the other hand, counsel for the respondent submitted that this application lacks merit as the applicant has not disclosed any sufficient reason to have the exparte judgement set aside.

Order 9 rule 27 of the civil procedure rules provides;

*"27. Setting aside decree ex parte against defendant.*

*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 it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on 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 a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also".*

In other words, for an applicant such as in this case to have an exparte judgement set aside by the court he or she should prove to the satisfaction of this court that summons of the court was not duly served or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing. It is not in dispute that summons in HCCS No. 0031 of 2020 was served onto the applicant since the applicant agrees to

have been served with summons to that matter thus I will not delve deep into the issue. What is in contention is that the applicant was prevented by sufficient cause to enter appearance by filing a defence in time and appearing in court at the time the matter was called on for hearing.

- 5 Sufficient cause also termed as a legally sufficient reason or good cause means the burden placed on a litigant usually by court rule or order to show why a request should be granted or an action excused. In the current case, counsel pleads that there existed a countrywide lockdown which prevented their counsel from conducting the necessary investigations so as to come up with a plausible written statement of defence to be filed  
10 in court. it is important to note that in order for this court to ascertain whether an applicant has indeed a sufficient cause in applications such as this one, the facts and circumstances surrounding the non-filing must be put into consideration.

The facts of this application indicate that the respondent filed Civil Suit No. 0031 of 2020 in court on the 29<sup>th</sup> day of June 2020 and the summons to file a defence were served unto  
15 the applicant and received on the 15<sup>th</sup> day of July 2020 as per paragraph “b” & “d” of the affidavit of service and annexure “A”. Furthermore, the applicant was served with hearing notices on 22 September 2021 instructing the applicant to attend court on the 06<sup>th</sup> day of April 2022.

The Civil Suit was first heard on the 06<sup>th</sup> day of April 2022 a time when COVID 19  
20 Restrictions had already been eased by the president of the republic of Uganda vide the presidential address to the nation on COVID 19 Pandemic Response as of 30<sup>th</sup> day of July 2021. It is absurd that the applicant who was exposed to all resources or avenues within which it could conduct its investigations into the matter now claiming that it had been prevented by COVID 19 lockdown yet it had access to the permits granted during that  
25 time and the vehicles to carry out its duties.

It is my considered view that the applicant acted in a dilatory manner while dealing with the matter at hand. The applicant had all the time from the 15<sup>th</sup> day of July 2020 to 06<sup>th</sup> day of April 2022 to either file their written statement of defence or seek for an extension of time within which to file its written statement of defence but instead it chose laxity to  
5 take its course.

In addition to the above, in case where the exparte judgement is set aside, the applicant initially had no audience before the court since it had not filed its written statement of defence neither had it sought for an extension within which to file its written statement.

Clearly the circumstances surrounding this application are nothing but an abuse to the  
10 process of this court as government which should have been more attentive is coming before this court without any sufficient cause or reason to set the exparte judgement in HCCS NO. 0031 of 2020 aside. It is for the above reason that I need not determine the issue of a stay of execution since the applicant herself made no submissions on the same and the fact that no sufficient reason has been given to set aside the above mentioned  
15 exparte judgement. In the result, this application is dismissed with costs to the respondent.

**Application dismissed.**

**I so order.**

**Dated and delivered on this 22<sup>nd</sup> day of December 2023.**

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**Isah Serunkuma**

**JUDGE**