

Co Advocates whom he gave full instructions to file the necessary court documents but for unknown reason Counsel never filed the documents.

- e) That the truth of the matter, is that Applicant averred that it was the 1st Respondent who breached the contract for hire of the said land when he cultivated beyond what was in the contract hence encroaching land that the Applicant had already hired to another person by the name of Mawanda Fred as per copy of the sale Agreement attached as Annexure
- f) That the said encroachment occurred after the 1st Respondent found out that due to heavy rains, a big chunk of his land had been covered by water,
- g) On 4th July, 2022 this court issued an order for attachment and sale of Applicant's land on which he stays with his family with various developments and derives his livelihood valued at approximately Ugx. 250,000.000/= (Two Hundred Fifty Million Shillings)
- h) On 23rd March 2023 this Honorable Court issued an Order for delivery of the said land to **Mbowa Apollo Kibirango** who was not a party to the suit and said eviction order is still in force to date. **(A copy of attachment of sale was attached and marked as E'**
- i) That the Applicant has been informed by his lawyers of Ojok Advocates which he believes to be true that the act of passing an Ex parte Judgment without being served violated his right to a fair hearing.
- j) That the Applicant has been informed by his lawyers that the act of issuing an eviction order for his land in a matter of breach of contract without giving the Applicant an alternative mode of payment violated the laws governing execution of proceedings.
- k) That the Applicant has been further informed by his lawyers that an act of giving execution orders to **Mbowa Apollo Kibirango** who was not a party to the main suit violated the laws governing Execution Proceedings in immovable properties.
- l) That the suit land which became the subject of execution proceeding is customary land belonging to the family of the **Late Yokofati Kigada** who was the father of the Applicant and not to him as an individual and for that reason executing against the said family land without looking at other alternatives execution was unfair.
- m) That the Applicant and her family are still in possession of the suit land and are in danger of being evicted from the suit land since it is where they derive a livelihood.
- n) The Applicant averred that the main case was heard ex parte and he lost the opportunity to be heard on merit because he was not served with neither the Petition nor summons to file a defense in the said suit.

- o) That it is just and equitable that this Application be allowed and the said Exparte Judgment entered against me be set aside and the Applicant be heard on merit.
- p) The Applicant is in danger of being evicted from his land.
- q) The main case was heard exparte and the Applicant lost the opportunity to be heard on merit.
- r) That it is just and equitable that the Application be allowed and the said Judgment entered against the Applicant be set aside.

In reply, the Respondent filed an affidavit in which he averred that the Application lacked merit, was an abuse of court process and ought to be dismissed with costs, as the same was brought after completion of execution, sale (Balance of Sale deposited on court account) and return made on court record as per **Annexure 'A' & 'B'** on the Affidavit on Reply.

1. Furthermore, that the Respondent was a paid the decretal sum in accordance with the order of court and in the Respondent's interest in the case was extinguished.
2. That in response to paragraph 3,4 & 10 of the Affidavit in support of the Application, the Applicant was duly served with court process , the summons, notice to show cause, Notice of Eviction for 90 days and application for execution as per **annexures 'C','D' & 'E'**.
3. That the Applicant when he appeared before the Honourable Court in answer to the Application for execution duly confirmed service on him of the entire court process, from summons that he instructed the chairperson to receive on his behalf and even confirmed his telephone number.
4. That save for the summons that the Applicant directed the Chairperson to receive on his behalf , the subsequent service was done to the Applicant personally including a notice to show cause as per photos attached marked collectively as 'F'
5. The Respondent further averred that paragraphs 6, 7 & 8 of the Affidavit in support of the Application, the Respondents never breached the contract as alleged, the property was valued and it was according to the value that was sold by the Bailiffs.
6. The Respondent averred in paragraph 9 & 12 of the Affidavit in support of the Application **Mbowa Apollo Kibirango** was the successful bidder and bought the suit land through the bailiff who had to vacant possession to him.
7. In response to paragraph 10,11,14,15 & 16 of the Affidavit in support of the Application, the Respondent averred that the land in question belongs

to the Applicant having handed the same to me his individual capacity witnessed by a family members and LC1, and even presented the same to the bank in a letter as security for a loan as per **annextures marked E & F.**

8. Further that the Application was brought in bad faith as the same was brought with inordinate delay and has no chances of success.
9. That the Applicant was given all the opportunities to be heard but locked himself out.
10. That it was in the in the interest of Justice and equity that the Application is dismissed with costs unless sufficient security of costs id given, since that the Respondents already received the proceeds of the sale.

REPRESENTATION

When this Application was put before me for hearing, learned counsel for the Applicant was absent, while the Respondent was represented by Karaoke John holding brief for Counsel Abule Julius of M/S Naita & Co. Advocates

Both parties were directed to file written submissions and have complied. I have had the benefit of analyzing them and I have considered in the determination of this Application.

THE LAW

Order 9 rule 27 of the Civil Procedure Rules:

“...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 satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient means from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs”.

Section 98 of the Civil Procedure Act, Cap 71 Laws of Uganda provides that *“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

This section empowers the court to grant any orders in all cases in which it appears to the court to be just and convenient to do so to ensure that justice is not only done, but seen to be done.

And

Order 52 rule 1 and 3 of the Civil Procedure Rules provide for the procedure that an Application of this nature must take.

RESOLUTION OF THE APPLICATION

I have carefully analyzed this Application and taken into account the Written Submissions of both parties.

Order 9 rule 27 of the Civil Procedure Rules (supra) lays down the procedure for setting aside an ex parte judgment. This nature of Application requires that the court be satisfied that:-

- i) The Applicant was not duly served with summons.
- ii) The Applicant has furnished sufficient cause to set aside the judgment of the court.

The principles governing the determination of what amounts to sufficient reason or cause for setting aside an ex parte decree under **O.9 r 27 CPR** have been severally enunciated in many decided cases, but suffice it to rely on **S.C. Civil Application No. 6 of 1987 Florence Nabatanzi v. Naome Binsobedde (cited with approval in Hikima Kyamanywa v. Sajjabi Chris CACA No. 1 of 2006)**, where it was held by the Supreme Court that “*sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time.*”

Further, **In Nicholas Roussos v. Gulamu Hussein Habib Virani & others, SCCA No. 9 of 1993 cited in Hikima Kyamanywa (supra)**, the Supreme Court held that a mistake by an advocate though negligent may be accepted as a sufficient cause to set aside an Ex parte Judgment.

The court in this case has the duty to investigate and also make a finding as to whether the Applicant was duly served with hearing notices for those particular dates as was held in the case of **Gahire David vs Uwayezu Immaculate Civil Appeal No. 34/2008**.

Relating the above to the current Application, the proceedings attached to the Applicant’s Notice of Motion as **Annexure ‘C’**, shows that on the 28th February, 2022, the Applicant counsel did not attend court nor did the Applicant.

The record also confirms that court inquired about the affidavit dated 26th March, 2021 and it is clear that Court was concerned because the record did not reveal in any way that the Applicant/Defendant had instructed any firm of Advocates to represent him since there was no proof of any Notice of Instructions

filed on the record. The Honourable Justice went ahead and pointed out that she didn't know where the Plaintiffs had got out that the firm had instructions.

It is also noted that on 20/01/2022, a Default Judgment was entered by the Honorable Deputy Registrar of the High Court, however, this Honorable Court expressed concerns on how the Respondent/Plaintiff served a firm of Advocates who never filed instructions to confirm that they were defending the Applicant/Defendant.

Court further noted that there was no Return of Service to prove that service was done and on whom it was exactly served.

Court in its wisdom instructed that the matter be fixed on another date; and it was adjourned to 28.02. 2022.

When the matter came up on 28.02. 2022, counsel for the plaintiff stated that the matter was coming up for formal proof. That they had filed the scheduling notes and witness statements. He further added that they had three witnesses in court and that they were ready to proceed with the identification of the witness statements.

The learned Trial Judge stated that the file had just been availed to her. She found that it was first handled by the Registrar of the High court. She intimated that she did not know the last entry counsel for the plaintiff had given her. That what she could see on file is that there was a plaint and summons to file a defence which were dated 24/02/2021 and one of them was received by one Waako Samuel of Musimami & Co. Advocates on the 26th March 2021. The learned Trial Justice still stated that she still had concerns because nowhere on the record was it indicated that the Defendant was represented by the firm/advocates served. She stated that she didn't know where the Plaintiffs had got it and she was wondering where it came from, then on the 20/01/2022 a default Judgment was entered by the Registrar. The Learned Trial Judge kept wondering how they served a firm, of advocates who never filed instructions that they are defending the defendants.

The Learned Trial Judge further noticed that indeed the Learned Trial Registrar entered a default Judgment and that even so, the return copy, she couldn't see an affidavit of service to prove that service was done.

The Learned Trial Judge later saw an Affidavit of Service on file dated 26/03/2021 to which she still expressed some concerns because the Affidavit of Service by one Bluing Ali who claimed that on 26/03/2021, he received Summons from Court and went to Buwaiswa Zone, Kibuye Parish, Kigumba

Sub-County, Kamuli District where he was directed by the Respondent/Plaintiff. He further averred that he met the Chairperson of the place and mentioned the names Kechano Stephen, introduced himself and explained the purpose of his visit and that they called the Defendant on his phone number 0752937013 and explained the purpose of his visit and the gist of the documents to which the Defendant asked the process server to give back the phone to the Chairman whom he instructed to receive on his behalf because he wasn't around.

Court again observed that the Summons were received by Kachano Stephen, the LC1 Chairperson.

In addition, Court also wondered if that was what happened, why there was nothing indicated on the file as there were no notes entered on the file by the Learned Deputy Registrar.

What seemed to be clearly indicated on the file was that on the cover, a Default Judgment had been entered by the learned Deputy Registrar.

Learned Counsel for the Respondent/Plaintiff replied to the concerns of Court that they filed an Application for Default Judgment that the Registrar signed and on and thereafter, he went ahead and fixed the matter for formal proof for 9/02/2022, but when they came to court on that day, the file could not be located.

“.....Court: having examined the default Judgment entered by the Registrar. This court will agree with it. And the scheduling notes which have been filed, the matter can come now for formal proof, the Plaintiffs can call their first witness...”

The Honourable Judge directed that they scrutinize the Scheduling Notes; and On pg. 4 line 3-4, stated that since the matter was one sided, the Plaintiffs' counsel was comfortable with the issues raised to which counsel for the Respondent/Plaintiff replied in the affirmative. Upon learned counsel for the plaintiff confirming that position to the court, the court then proceeded to hear the three witnesses of the plaintiff, namely, **Mayanja Fredrick (PW1), Muwonge Brian (PW2) and Baali Yahaya (PW3)**.

The typed proceedings, however, do not show what happened when the matter was adjourned to 3/03/2022 when it was then set for further hearing for the Respondent's /Plaintiff's last witness to be produced.

In my view, the mere fact the Applicant in the Affidavit in Support of the Notice of Motion in paragraph 3 averred that he was never served with the Plaint nor the summons to file a defence in the said suit and even in the typed record of proceedings it is shown that it was the Chairman who signed the Summons,

there is sufficient cause to set aside the *ex parte* Judgment as provided for under **Order 9 rule 27 of the CPR**, that an *ex parte* decree can be set aside where the summons was not duly served .

From the above therefore, I find that the Applicant has raised merit on sufficient cause for this court to have its *ex parte* Judgment to be set aside to determine the fraud claimed.

Based on all the above, in the interest of justice, the Application is allowed, the *ex parte* Judgment is set aside and the suit be set down to be heard on its merits inter-parties.

1. Application granted with costs to the Applicant.
2. The *Ex parte* Proceedings in **CIVIL SUIT NO. 009 OF 2021** and all orders made thereunder are hereby set aside.
3. The Applicant should be served with the Summons to file a Defence within 15 days from reading of This Ruling and he should reply within 21 days.
4. Thereafter, the suit shall follow due process and shall be fixed for hearing interparty.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
08/12/2023

This Ruling shall be delivered by the Magistrate Grade 1 attached to the chambers of the Resident Judge of the High Court Jinja who shall also explain the right to seek leave of appeal against this Ruling to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
08/12/2023