THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 122 OF 2022

(ARISING FROM MISC. APPLICATION NO. 0043 OF 2011)

GOEFREY MUTEGEKI :: APPLICANT

VERSUS

CATHOLIC RELIEF SERVICES PROGRAM :::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

RULING

The applicant brought this application under Order 52 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for orders that:

1. **The consent to withdraw Misc. application no. 0043 of 2011 be set aside and the application be reinstated.**
2. **That the costs of the application be provided for.**

The grounds in support of the application are contained in the affidavit in support of the notice of motion deponed by Mr. Mutegeki Goefrey in which he contended as follows:

1. That the applicant through his lawyers M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates instituted Misc. Application No. 043 of 2011 against the respondent. That the application was scheduled for hearing on 6th March

2012 and hearing notices extracted and served upon the respondent's advocates.

2. That as the case progressed, for many reasons, he decided to withdraw instructions from Mr. Kaahwa Joseph Muhumuza who was counsel in personal conduct of the matter. That on the 29th September 2011, a notice of change of advocates was filed and served upon the Respondent's counsel.
3. That to his shock and dismay, Mr. Kaahwa Joseph acted without instructions and authority and knowledge of the applicant when he entered into a consent to withdraw his application when he knew he no-longer had instructions in the matter. That he got knowledge of the said fact when the new advocate he had engaged checked on the file and found a consent signed by the Assistant Registrar on 14th November 2011 when the said advocate had been dropped as counsel for the applicant and as such he had no powers to bind the applicant.
4. That his former advocate never informed court that he had no instructions to represent the applicant. That his original claim is not barred by limitation. That the delay to file the application was because of financial and personal illness that left him bed ridden for years and rendered him physically and financially crippled. That it was in the interests of justice that the application was allowed.

The application was opposed by the Respondent through an affidavit in reply of Mr. Abdul Aziz Laye, the head operations of the respondent who affirmed as follows:

1. That after examining the record, he found out that the applicant on the 13th day of September 2011 voluntarily and freely accepted to settle the case he

had filed against the Respondent at shs 6,000,000/= and signed a deed thereto in the presence of his lawyer Joseph Kaahwa. That on the same day, the applicant's lawyers' M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates also signed an acknowledgment accepting a sum of Ugx 2,500,000/= as costs.

2. That a total sum of Ugx 8,500,000/= was paid into a bank account of Kaahwa, Kafuuzi, Bwiruka & Co. Advocates vide No. 0140077599101 held in Stanbic Bank Uganda Limited Fort Portal branch. That thereafter Civil Misc. Application No. 0048 of 2011 was duly settled and the settlement was endorsed by court.
3. That two weeks after the settlement, the applicant instructed Ms. Kaweesa-Kakooza & Co. Advocates and this was after the applicant had accepted the settlement and received the agreed payment.
4. That the affidavit in support of the application contains material falsehoods and as such the same is fundamentally defective. That the application has no merit since the applicant was aware of the settlement which he duly acknowledged and having benefited there from, it is not open for the applicant to challenge the same.
5. That the applicant is guilty of inordinate delay since the application at hand has been brought after 10 years. That the Respondent will suffer prejudice if the applicant is allowed to re-open a matter which was duly settled.

In rejoinder, the applicant contended that:

1. That he never signed in the deed dated 13th September 2011 and disowned the signature thereon. That it is not practicable for him to sign acknowledging receipt of money and the same is paid into the account of the

former lawyer. That it is also not practicable to pay money which was not reflected in the consent.

2. That the applicant was never aware of the impugned consent since he filed a notice of change of advocates on 28th September 2011 and the consent was endorsed on 14th November 2011. That it is good practice for consents to include a provision where litigants sign which was not the case herein. That the matter had been fixed for 6th March 2012 and the Respondent was duly served, and an affidavit of service was put on record and to his dismay, he found the case had been withdrawn by his former lawyer.
3. That it is the respondent's behavior and manner of doing things that has led to this application and if the same is not allowed the respondent will keep suffering.

In the supplementary affidavit by Mr. Joseph Muhumuza Kaahwa, he contended thus;

1. That the application is premised on an affidavit that is full of falsehoods as such an abuse of court process. That he represented the applicant in Misc. Cause No. 043 of 2011 which was settled and determined by consent with full knowledge and participation of the parties.
2. That prior to the consent and withdraw of the application, both parties and their counsel engaged in discussions and negotiation to settle the matter. That as a result of the negotiations, the Respondent agreed to pay a sum of shs 6.000,000/= as full and final settlement of the applicant's claims and shs 2,500,000/= as costs.
3. That the Respondent's advocates prepared a deed of settlement and acknowledgement which was signed by the applicant in his presence on

13/9/2011 and he witnessed the same and money was paid. That the denial by the applicant of the signature on the application is baseless and an afterthought which court should disregard.

4. That the applicant intended to defraud the Respondent. That after money was paid to the firm account, the applicant instructed him to withdraw the money and he acknowledged the same on annexure B. That by the time the applicant purported to change instructions, there was no subsisting case the same having been withdrawn and the notice of change of advocates was not served upon him.
5. That the application does not disclose grounds for setting aside the consent entered by court.

Representation and hearing:

Mr. Murungi Godfrey of M/s Ngamije Law Consultants appeared for the Applicant and ***M/s Mpanga & Co. Advocates*** appeared for the Respondent. Both counsel proceeded by way of written submissions which I have considered.

Issues:

1. **Whether the applicant's application is caught/barred by limitation/time.**
2. **Whether the application should be granted.**
3. **Remedies available to the parties.**

Issue No. 1: Whether the applicant's application is caught/barred by limitation/time.

It was contended that the applicant seeks to reinstate a suit whose original cause is not time barred; and that the applicant seeks to reinstate a labour dispute which had

been withdrawn illegally without the consent of the applicant. Learned cited the case of ***Eng. John Eric Mugyenzi Vs. UEGCL***, where the court of appeal held that there is no time to file a claim at the industrial court. That the limitation of three months only applies to a claim before the labour officer under section 71(2) of the Employment Act. That as such the limitation law does not apply to matters of employment.

In response, it was asserted by counsel for the Respondent that the application was brought with inordinate delay. It was pointed out that the applicant had knowledge that a settlement had been signed on 13th September 2011. That he took no steps to protest against it and set it aside. That he waited to receive payments and after spending the money, he returns seeking another bite on the proverbial cherry. That if the applicant was aggrieved with the consent settlement, why did he wait for ten years to file an application to set it aside? That the delay was inexcusable and inordinate as such the applicant should not be allowed to benefit from such delay.

Consideration by court:

The Civil Procedure Act and the Rules do not provide for timelines within which to challenge a consent judgment or decree. Under normal circumstances the parties and the courts are expected to pay attention to promoting efficiency and avoiding delays. In particular, parties are expected to act on applications promptly. In ***Standard Bank plc and another v Agrinvest International Inc and others [2009] EWHC 1692 (Comm)at [22]*** which position was cited with approval in ***RegionePiemonte v Dexia Crediop Spa [2014] EWCA Civ 1298 at [34])*** **Moore-Bick LJ** stated thus:

The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. <u>The strength of the defence may well be one. However, promptness will always be a factor of considerable significance …and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.</u> (Emphasis is mine).

Lord Atkin in ***<u>Evans v Bartlam [1937] AC 473</u>*** also stated as follows:

"there must reach a point when, because of delay, even a defendant with a meritorious defence is precluded from defending.....Important too will be any delay in applying to set aside the default judgment and any explanation for this also"

In the ***Jamaica case of Flexnon Limited v Constantine Michell and others [2015] JMCA App 5*** *it was observed in relation to delay thus**:***

> ***"In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application. The application to set aside a regularly obtained default judgment is one such type of application where the consideration of delay should figure prominently."***

In the same vein, a deliberate or extended delay on the part of the defendant in applying to set aside a judgment is a factor that weighs against setting aside. (**See UMyoNyunt @ micheal Nyunt v First Property Holdings Ltd (2021) SGCA 73) and** ***Regione Piemonte v Dexia Crediop Spa [2014] EWCA Civ 1298 at [34]***). Ordinarily, the court should in every case scrutinize the reasons for the delay. A deliberate choice on the part of a defendant to stay away from the proceedings because of his litigation strategy would be a very strong factor which weighs against the court's discretion to set aside a regular order or judgment. (See **U MyoNyunt @ MichealNyunt v First Property Holdings Ltd (supra).**

It is thus my considered position that unreasonable delay has the consequential effect of abating a party's claim no matter how legitimate and eye catching it may be. The wisdom behind court lending little mercy to applications brought after such unreasonable delay is that it has the effect of raising issues which are deemed to have been settled due to passage of time. I thus adopt the persuasive reasoning in the authorities above that delay is a serious matter to be considered in applications to set aside any judgment either default or consent judgment within the precincts of

the law. Unless the delay is un-intentional or is properly accounted for by the party, it weighs in heavily in having the application rejected.

In the present case, the applicant seeks to set aside a consent which was signed by parties on 13th September 2011 withdrawing Misc. Application No. 43 of 2011 and endorsed by court on 14th November 2011. The application to have the consent set aside was filed on 22nd December 2022 after a period of 11 years. The applicant in the supporting affidavit indicated that he got the wind of the disturbing information when the current advocate took over instructions.

I have perused the record of court in high court Misc. Application No. 0043 of 2011 and indeed established that there exists a consent and a notice of withdrawal of the said application signed by counsel Joseph Muhumuza Kaaahwa for and on behalf of M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates who were counsel for the applicant and M/s AF. Mpanga and Co. Advocates who were counsel for the Respondent on 13th September 2011. The consent was endorsed by court on 14th November 2011.

There is equally a letter by the applicant that was received by court on 2nd March 2012 where he disputed the consent in issue and attached it as annexure 'A' to his letter plus a notice of change of instructions from M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates to Kaweesi – Kakooza& Co. Advocates. In the said letter, the applicant indicated to court that at the time the said consent was signed, he had withdrawn instructions from M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates and a notice of instructions was filed. He thus asked court's indulgence to recall, retract, cancel and nullify the consent of withdraw of the suit as the counsel who entered it had no locus in the matter.

Since then, the applicant did not make any follow up on the matter or take progressive steps to have the consent set aside. It is therefore not true that the applicant became aware of the consent upon instructing the current advocates. Further in his affidavit in support of the application or the one in rejoinder, he did not offer any explanation to account for the delay. The excuse that he was not aware of the consent is defeated by his own letter signed by himself filed on court record on 2nd March 2012.

I thus agree with learned counsel for the Respondent that the delay of 11 years is unreasonable and unrealistic in the absence of any explanation to account for the same. The applicant became aware of the consent and chose to sleep over his rights only to wake up when it's too late. The equitable maxim that equity aids the vigilant becomes of relevancy here. The law aids the vigilant and not those who sleep over their rights.

I find that this application was brought with unreasonable delay and the same should fail. I therefore answer this issue in the affirmative. This application fails at this stage and is hereby dismissed. Since this is a case where one lost employment and no great prejudice has been suffered by the Respondent, I order that each party bears their own costs.

I so order.

Vincent Wagona
High Court Judge / Fort-portal

DATE:22/03/2024