

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC. APPLICATION NO. 325 OF 2013

(Arising from HCCS No. 05 of 2013)

NAKITTO MARGARET VEILLEUX ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. KARUGABA JOSEPH

2. SABITI STEPHEN ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON JUSTICE STEPHEN MUSOTA

Civil procedure – setting aside executed decree

Leave to appear and defend where judgment has already been entered and decree executed

Civil procedure- applicant already committed to civil prison

RULING

This is an application brought by way of Notice of Motion seeking for orders that:-

- (a) The *exparte* judgment and decree obtained in civil suit No. 5 of 2012 be set aside.
- (b) The applicant be granted unconditional leave to appear and defend the main suit.
- (c) The execution of the *exparte* decree be set aside and the applicants incarceration in civil prison be set aside.

(d) Costs of the application be provided for.

The grounds of the application are that:-

1. The applicant is not indebted to the respondents as alleged at all.
2. The applicant has a good and valid defence to the suit.
3. The applicant was misled by the respondent that the case has been settled and withdrawn.
4. The applicant is bound to suffer gross injustice and financial loss if the exparte judgment and decree are not set aside and execution continues.
5. That it is in the interest of justice that the exparte judgment and decree be set aside and the applicant be allowed to defend the suit.

The Notice of Motion is supported by the affidavit of the applicant which outlines the chronology of events concerning this dispute. She acknowledges that she obtained a loan of 237.381.000= from the 1st respondent Sabiti Stephen repayable on the 15th day of November 2011. The loan agreement is attached to the affidavit as annex "A".

As security she deposited a certificate of title to LRV 2455 folio 4 plot 13 Queens Road Entebbe registered in the names of her husband Ronald Paul Veilleux (annex 'B'). That on 14th October 2011 the applicant offered and the 1st Respondent Karugaba Joseph agreed to release annex 'B' in order to be used to obtain a loan facility from Stanbic Bank Entebbe Branch and she issued a cheque deposit of shs 237.381.000 on cheque No. 000501 against the title deed (annex 'C').

Thereafter, the applicant depones that she made cash payment against the loan amounts to the 2nd respondent who is an agent of the 1st respondent who was duly authorized to collect the loan amounts from the applicant. That the applicant made payments to the 2nd respondent amounting to shs 27.381.000= but this was not acknowledged despite a

promise to do so. Later in time, the applicant depones that she agreed with the 2nd respondent that she would make further cash payments amounting to 81.200.000= to him and also pay \$46,000 by way of two post dated cheques of \$16,000 dated 22.03.2012 and \$30,000 dated 14.02.2012. The 81.200.000= was to be paid on or before 31st January 2012. According to the applicant the post dated cheques were to act as security not to be banked and/or cashed (annex 'D') and on 19th January 2012 the applicant's husband deposited on account No. 0140041419701 Entebbe Stanbic main branch \$75000 (annex 'E') upon which the applicant issued cheque 000533 for \$ 75,000 to the 2nd respondent at the then rate of 2800= which would translate into 210.000.000= in tandem with the outstanding loan balance.

That the 2nd respondent duly encashed the same and received the money as per annex 'F'. However on 22nd January 2013, the applicant was surprised when an official from court served her with a plaint demanding \$46,000.

When the 2nd respondent was contacted, he claimed that he had mistakenly included the applicant amongst the people who owed the 1st respondent money.

That when the applicant approached her lawyers M/s Magellan Kazibwe & Co. Advocates, one Ojambo Bichachi advised the applicant to approach the respondents to unconditionally withdraw the suit which the respondent undertook to do. This was on 25.01.2013. The applicant further depones that she was surprised and shocked when a warrant of arrest was brought to her on 06.05.2013 demanding \$46,000 and shs 3.544.600 as costs. (annex 'G'). She was eventually put in civil prison and according to the applicant this was wrongly done.

The applicant further deponed that she has a prima facie and good case with high chances of success because she duly paid \$75,000 although it is not talked about in the plaint. Further that it will be a trial issue whether a cheque may amount to security and/or is sacrosanct cash payment. That the other issue regards compulsion of the respondents to adduce receipts of acknowledgment of UGX 27,381.000=. In another affidavit in support of the application one Ojambo Bichachi an advocate supported the deponments by the applicant.

In the affidavit in reply by the 2nd respondent, he depones that the applicant is indebted to the respondents in the amount of \$46,000. That since committal to civil prison the applicant has not denied her indebtedness to the respondents. That this application is an afterthought intended to delay the course of justice because the applicant has no defence whatsoever and does not have any triable issues.

The 2nd respondent further depones that the applicant's cheques of \$30000 and \$16000 were intended as payment in settlement of the applicant's indebtedness and not as security for payment and upon dishonor the respondents were entitled to claim payment of \$46,000. That the cheque of \$75,000 was in respect of different loan obligations. That the cheques for \$16000 and \$30000 were made after payment of \$75000. He denies intimating that he would withdraw the suit nor did he agree to be paid shs 81.200.000= cash neither was shs 27.381.000= paid. That the email, annex 'A' acknowledges the applicant's indebtedness.

In rejoinder the applicant denied the email in the respondent's annex 'A' as a fabrication.

During the hearing of this application, Mr. Kiwanuka for the applicant reiterated the contents of the application and the supporting affidavits with its annexures. He cited a number of authorities to support his submissions. On the other hand, Mr. Bakidde for the respondents submitted that the applicant has not shown sufficient cause to warrant setting aside the summary judgment and the ex parte decree. That this application is an afterthought intended to delay the course of justice. That the issue of mistake of counsel does not arise because no counsel is cited. That the affidavit of Ojambo is irrelevant which should be struck out. That upon dishonor, the money became due to the respondents. Otherwise, learned counsel for the respondent relied on the affidavit in reply.

The orders sought by this application are governed by O. 36 r11 CPR which provides that:-

“11. Setting aside decree

After the decree, the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit”.

From the above rule, it is apparent that a summary suit decree can be set aside if it is proved on a balance of probabilities that service of the summons was not effective or that there is any other good cause to warrant the setting aside. Court is also given authority if satisfied that the above conditions exist to stay or set aside execution and give leave to the defendant to appear to the summons and defend the suit if it is reasonable to do so. These orders are made on such terms as the court thinks fit.

After a careful consideration of the notice of motion and the affidavit by the applicant as well as the affidavit in reply by the respondent and after relating the same to the law applicable and the submissions by both learned counsel in support of their respective cases, I am inclined to find that the applicant has raised many triable issues and had reasonable cause for not applying to appear and defend the suit. Her averments were not sufficiently rebutted by the respondent's affidavit. The applicant vehemently denies the extent of indebtedness to the respondents. She avers that she made substantial payment in service of the loan to the respondents. When she was served with process, she raised issue with the 2nd respondent who is an agent of the 1st respondent. The second respondent is said to have told her that she was included on the list of debtors by error. That the applicant sought guidance from her lawyers and one Bichachi Ojambo an advocate with M/s Magellan Kazibwe & Co. Advocates advised her to tell the respondents to withdraw the case from court immediately since the latter admitted the error. The applicant says she followed the advice and was promised action by the respondent which was not done. However the respondents deny this averment which makes the matter a triable issue.

There is controversy over whether the applicant paid \$75000 and for what transaction. The respondent claim that this payment was for a different loan. This issue cannot be determined without hearing the parties. Should it turn out that this colossal sum was paid, injustice would have been meted out to the applicant. Further to this, there is an allegation of payments which were not acknowledged and an issue whether cheques of \$30000 and \$16000 issued by the applicant were security.

In their submissions, learned counsel for the respondents insisted that once these cheques were issued to the respondents and were dishonoured the indebtedness became due. The

respondents referred to the case of **Uganda Baati Ltd Vs Patrick Kalema C.S 126 of 2010** to support this contention. On the other hand learned counsel for the applicant contended and I agree that the purpose for the post dated cheques issued is contentious and there is need to establish whether these cheques were security, conditional payments or sacrosanct cash payments.

Nevertheless, the case of Uganda Baati supra is also distinguishable from the instant case. Whereas that was a suit on ordinary plain where an interlocutory judgment was entered, the instant case is under summary suit on a specially endorsed plaint under O.36 r 2 CPR. Whereas in the former an interlocutory judgment is followed by formal proof, in the instant case once no application to appear and defend is made and/or if made but leave to appear and defence is refused, the plaintiff is entitled to a decree. The rights between the parties were finally determined. The remedy here lies in O.36 r 11 CPR. Since no evidence has been led to prove the value of cheques issued, the authority cited appears not to be applicable. All these issues play in favour of the applicant.

Before setting aside a summary judgment/decreed court has to be satisfied that the defendant had some reasonable excuse for failing to appear but also that he/she has a *prima facie* defence. **Alfred Oroch Vs Abdulrhman Kasim [1978] HCB 53**. The applicant's intended defence has merit. This defence need not mean one which should succeed. It means a triable issue for adjudication. The applicant herein sought and was given advice by Mr. Bichachi her advocate which she followed. The wise thing the said advocate ought to have done was to file an application for leave to appear and defence the suit. In my considered view he negligently did not do this but advised his client to approach the adversary to withdraw the suit because of the mistake involved. It is trite law that a mistake or oversight on the part of an advocate through negligent is sufficient

cause for setting aside an exparte decree. **Ahmed Zirindomu Vs Mary Kyamulabi [1975] HCB 337.** The applicant cannot be blamed for taking a risky advice.

Even if the decree has been executed it cannot be a bar to an application to set aside an exparte decree. **Makubi Vs N.I.C [1979] HCB 230.** The decree can still be set aside.

I have noted that the applicant has shown an interest in being heard. It would not serve the interest of justice to deny her that opportunity consequently, I will order that the decree in the head suit be set aside and the execution be set aside. The applicant will be given leave to appear to the summons and defend the suit within 15 days from today. The revelations in this ruling do not warrant penalizing the respondent in costs. Therefore each party shall meet its costs. I so order.

Stephen Musota

J U D G E

16.09.2013