

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT SOROTI**

**MISC. APPLIC. 23 OF 2013**

**ARISING FROM CIVIL SUIT NO. 7 OF 2007**

**LITTLE SISTERS OF ST. FRANCIS .....APPLICANT**

**V**

**NO. RA 103690 SGT OLING NICHOLAS.....RESPONDENT**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**RULING**

In this application, the applicant through its counsel Ms Akiteng of Katende, Ssempebwa & Co. Advocates , seek orders that

- a) the ex parte judgment reinstated on the 17<sup>th</sup> May, 2013 be set aside
- b) the applicant/defendant be allowed to file a written statement of defense and therefore appear and defend the suit inter parties and on the merits.
- c) Costs abide the final determination of this suit.

Mr. Nagemi appeared for the respondent .

**Background**

The following facts , partially reproduced in the affidavit in support to the notice of motion and also apparent from the court record, are not disputed.

The respondent filed Civil Suit No. 7 of 2007 initially at the High Court Jinja on 21<sup>st</sup> June, 2006. The court file was transferred to Soroti High Court and registered as CS 7 of 2007. Subsequently, an interlocutory judgment must have been entered ( couldn't locate it) because the hearing proceeded ex parte before Justice S. Musota resulting in a judgment on 13<sup>th</sup> October 2009.

On 1<sup>st</sup> April 2011, the judgment was set aside by Justice Oguli on condition that the defendant deposits 2,000,000/ in court as security for costs.

On 17<sup>th</sup> May 2013, the case came up for hearing before Justice Nahamya . In attendance was Mr. Isodo for the defendant while Mr. Nagemi appeared for the plaintiff. Mr. Isodo then informed court that he had lost contact with his client and requested to withdraw from the case.

Mr. Nagemi then prayed that the ex parte judgment of Justice Musota be restored as the defendant had not complied with the order to deposit security for costs whereupon Justice Nahamya reinstated the judgment of Justice Musota giving reasons and also in exercise of inherent powers under section 98 of the CPA.

It is the decision of Justice Nahamya that the applicant now seeks to set aside.

### **The issue of jurisdiction**

The main issue for resolution before this court is whether this court has jurisdiction to interfere with the order of Justice Nahamya reinstating the ex parte judgment.

In para (a) of the notice of motion , the applicant seeks an order that 'the ex parte judgment reinstated on the 17<sup>th</sup> May 2013 be set aside'. What the applicant is

seeking is that this court sets aside or interferes with or varies the order of Justice Nahamya.

Ms Akiteng cited some authorities in support of her prayer to set aside Justice Nahamya's order. The decision of Ochola v National Bank of Kenya Ltd (2000) EA 475 is not relevant because in that case, the application by counsel was for an adjournment, which was declined by the court. Counsel declined to proceed and court went on to dismiss the suit. While in the Ochola case the result was dismissal of a suit, Justice Nahamya's order had the effect of re-instating an ex parte judgment upon failure to deposit security for costs as ordered.

The authority of CMC Holding Ltd v Nzioki (2004) 1 EA 23 (CAK) cited by Ms Akiteng is instructive. The application to set aside ex parte judgment was dismissed by the trial magistrate. On a second appeal, the court of Appeal held that a trial court ought to exercise discretion judiciously. However on appeal from the decision, the appellate court should not interfere with discretion unless the exercise of the same was wrong in principle or the court acted perversely on the facts. The effect of this decision is that where a trial court has exercised discretion, the remedy lies in appeal to a higher court.

Mr. Nagemu submitted that this court is functus officio. It cannot be asked to revisit a decision. I agree.

This court is therefore functus officio and will not interfere with the decision of Justice Nahamya reinstating the ex parte judgment.

### **Decision on the merits**

In the event that I am found to have erred, I will go into the merits of this application.

The affidavit in support of Sr. Esaete avers that she gave 2,000,000/ to Mr. Isodo on an unspecified date( para 6) as security for costs. She attached a schedule of payments extracted from her notebook as proof of payment. The date of the payment according to this extract is 15<sup>th</sup> April 2011.

What is noteworthy is that counsel Isodo acknowledged receipt of three payments to him by issuing receipts . The same sums that are acknowledged by Mr. Isodo also appear in the extract from Sr. Esaete's notebook. These are for 690,000/, 1,100,000/, and 300,000/. However the sum of 2,000,000/ was not acknowledged by Mr. Isodo .

Counsel Akiteng submitted that mistake of counsel Isodo should not be visited upon the applicant. Yet there is no evidence that Mr. Isodo has been reported to Law council for professional negligence.

On a balance of probabilities, I find that there is insufficient evidence to hold that Mr. Isodo received 2,000,000/ that he failed to deposit in court.

Indeed , as I write this ruling, the said 2,000,000/ has never been deposited in court.

The effect of this failure to deposit the security as ordered means I have no basis on which to set aside the ex parte judgment of Justice Musota.

In the premises, the application to set aside the ex parte judgment of Justice Musota is dismissed with costs to the respondent.

**DATED AT SOROTI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**HON. LADY JUSTICE H. WOLAYO**

