THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPLICATION NO 51 OF 2015

(ARISING FROM CIVIL SUIT NO. 17 OF 2010)

PARMINDER SINGH MARWAH KATONGOLE:::::::::::::::::::::::::::: APPLICANT

VERSUS

MUZAFARU MATOVU ::: RESPONDENT

BEFORE: HON. JUSTICE DR ZEIJA FLAVIAN

RULING

The applicant through his lawyers M/s Lumweno and Co. Advocates filed this application against the respondent by Chamber Summons under Order 9 rule 27, Order 52 R1, 2 &3 of the Civil Procedure Rules and S. 98 of the CPA.

This application is seeking for orders that**:- *an Exparte Judgement and /Decree and consent settlement entered in favour of the Respondent against the applicant in this matter be set aside. It was also seeking for costs of the application.***

This application is supported by the affidavit sworn by the applicant on 18th day of March, 2015. The affidavit substantially repeats in more detail the contents of the Notice of Motion. The grounds for the application as per the Notice of Motion are the following:

(a) That on the 26th day of February 2014, when the matter came up for hearing in court, the respondent did not serve the applicant with a hearing notice

(b) That on the 26th day of February 2014 when the matter came up for hearing in court, his counsel Asa Mugenyi was not served with a hearing notice by the respondent.
(c) That neither himself nor his counsel were aware of the hearing date fixed by court.
(d) That court Bailiffs executed the decree by arresting him and imprisoning him
(e) That whilst in custody, he was forced to sign a consent settlement in order to be released from Prison.

The affidavit in support repeats the contents of the notice of motion without any great departure and I shall not delve into its contents. Both Parties made written submissions for convenience's sake and quickening the conclusion of this mater.

Counsel for the applicant submitted that the applicant was not served with a hearing notice on the day the suit came up for hearing. His counsel was also not aware of the hearing. He argued that in the affidavit in reply, the respondent did not controvert that fact as raised in the affidavit of the applicant and this tantamount to an admission. He referred to the case of ***Millly Masembe Vs Sugar Corporation Uganda Limited and Richard Kaajiri***, ***Civil Application No. 17/2001*** to support his submission. He further argued that even if counsel for the applicant was served and failed to appear, his negligence should not be visited on his clients. He cited the case of ***Banco Arabe Espanol Vas Bank of Uganda, (1999) KALR 354***. Counsel further submitted that the consent settlement which was signed between the applicant and the respondent upon being arrested for execution was illegal as it was procured by duress. He referred to Chitty on Contract, 24th Edition.

Counsel for the respondent on the other hand argued that the affidavit in support of the application has falsehoods and that rendered the application defective. He referred to the case of ***Jetha Brothers Ltd Vs Mbarara Municipal Counsel and 4 ors High Court Misc. Appl. No 31 of 20014***. He further argued that the applicant was dully served through his lawyers Asa Mugenyi and had sufficient notice of hearing. He also stated that the respondent rebutted the averments in the affidavit in support that the Applicant was not served. He further argued that although the applicant pleaded that sufficient cause prevented him from appearing when the

matter came up for hearing, the applicant failed to demonstrate that there was sufficient cause, because he did not show that he intended to be present at the hearing. He was instead elusive together with his counsel. He referred to the case of ***Nakiride Vs Hotel International Ltd (1987) HCB 85***. On duress, counsel for the respondent argued that the applicant entered into the consent after consulting his lawyers Akampumuza and Co Advocates and Mugenyi and Co Advocates. On the registrar not endoesing the consent settlement, he said that can be put before the registrar for endorsement. Failure to endorse it cannot take away the intention of the parties to fulfil their obligations.

Order 9 Rule 27 of the Civil Procedure Rules provides:

> ***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 essence, what this rule was intended to cure is the injustice of having a matter determined without going to the root of its merits. It is grounded on the Constitutional right to a fair hearing enshrined in article 28 of the Constitution of Uganda which provides:

> ***28. Right to a fair hearing.***
>
> ***(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law*.**

That notwithstanding, rights are not absolute. The foundations of setting aside an exparte judgement are enshrined in the doctrines of equity. However, it is a maxim of equity that equity helps the Vigilant not the indolent. It is also important to point out at this stage that the reasons for setting aside an exparte judgement are limitless

and the discretion to the judge is wide. It is also important to establish whether the action to set aside the judgement was swift or whether there was inordinate delay. See the case of ***Nyombi versus Ann Mary Nalongo [1987] HCB 82.***

In the instant case, the exparte Judgement was entered on the 26th day of February 2014. The final Judgement was read on the 16th day of April 2014. The applicant filled this application on the 19th day of March 2015. This was 9 months after Judgement was delivered. It is my considered finding that there was delay on the part of the applicant to bring this application for setting aside the exparte Judgement. 9 moths is a long period and it amounts to dilatory conduct. It appears the applicant was not interested in the quick disposal of his suit. The trial judge observed at page 2 of her judgement that counsel for the plaintiff prepared a scheduling memorandum and served it on the defendant but by the time of the hearing of the case, the defendant had not returned the memorandum with amendments. This confirms that there was intended delay on the part of the defendant/applicant to frustrate the quick disposal of the main suit.

Regarding the reasons for non attendance, the applicant claims he was never served. There is convincing evidence in the affidavit of service to the effect that the applicant's lawyer was served. Service on counsel is service on the litigant. However, it has been held that negligence of counsel cannot be visited on the litigant. In the case of ***Banco Arabe Espanol Vs Bank of Uganda, SCCA No. 8 of 1998***, it was held that

> ***A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial Judge to use his discretion in favour of such litigant so that the matter is considered on its merits.***

While it is on record that the applicant was served through his counsel, failure by his counsel to inform him cannot be visited on the applicant.

It is also a known legal principle that in order for an exparte Judgement to be set aside, the applicant must prove that he/she has a good case. Court does not have to

delve into the substance of the case but at least, a premafacie case/defence of sorts must be proved. Both counsels did not address me on this issue.

Hon Justice Margaret Oguli while reading her judgement formulated the following issues:

(i) Whether the driver of the plaintiff was negligent
(ii) Whether the driver of the defendant was negligent
(iii) Whether the defendant is vicariously responsible for the damage and loss to the plaintiff's motor vehicle
(iv) Whether the plaintiff is entitled to compensation for the damage and loss from the defendant

A close look at the police accident sketch plan shows that the motor vehicle of the applicant moved off its lane into the lane of the respondent's buss and knocked it. This creates a situation of res ipsaloquitor. I do not see this explained in the defendant's written statement of defence. Indeed my sister Hon Lady Justice Oguli while referring to the case of ***Josephine Etiang Vs Attorney General, Civil Suit No 86 of 2002*** where court held that:

> ***The burden to prove Negligence on the part of the defendant is upon the plaintiffs. Where circumstances of the accident give rise to the inference of Negligence, the defendant has to show that there is a probable cause of the accident which does not connote negligence.***

She also referred to the case of Kesi Kegwa Vs Sendya (1972) ULR 136 where court held that:

> ***...heavily laden Lories if driven with due care do not usually swerve off the road, run into an obstruction wall of the road and overturn. Under these circumstances, the doctrine of res ipsa loquitor applies in the absence of any reasonable explanation by the defendant, negligence may be inferred. The defendant has not put forward any reasonable explanation and in fact, he personally testified that the accident was due to the driver's negligence"***

She concluded that the accident occurred during broad day light at 1:30 pm in a clear weather on a straight stretch of the road with no corners. She concluded that the accident occurred due to the negligence of the defendant's driver when he swerved from his lane into the plaintiff's lane at high Speed and the accident was due to his negligence.

Counsel for the applicant did not address court on this and it is my finding that he failed to discharge this burden of proving that he has a good case worth reinstating. Given this finding by the trial Judge, it was incumbent upon counsel to convince this court that this finding needs to be subjected to vivavoce evidence by the applicant. The police accident sketch plan does not help the defendant/applicant either. I'am mindful of the right to be heard as enshrined in the constitution.

Tuning to the consent settlement, counsel for the applicant argued that it was signed under duress, since he was in prison. He referred to Chitty on Contracts 24th Edition where the Author states that "***duress to a person may consist in violence to a person, a threat of violence, or in imprisonment whether actual or threatened"***

The respondent states that the applicant signed this consent after consulting his counsel Akampumuza and Co Advocates and Mugenyi and Co Advocates, upon being presented before the execution division.

Duress is one of the factors that can set aside an agreement. It is defined in ***Black's Law Dictionary 17th Edition*** among other meanings as**;**

> ***"Strictly, the physical confinement of a person or the detention of a contracting party's property"; "Broadly the threat of confinement or detention, or other threat of harm, used to compel a person to do something against his or her will or judgment".***

The applicant in his affidavit does not state what prison he was in, when and where. It is not clear whether the applicant was committed to civil prison by court since it is alleged that he was in prison.

Be that as it may, the concept of duress is a matter which has evolved over time. In order to prove that a person was under duress when he/she executed contractual obligations, involuntariness is an important element. The following decisions can clarify the position of duress and how to get out of a duress situation.

In the case of ***Morgan v Fry [1968] 2 QB 710,*** Lord Denning MR defined the tort of intimidation (**which in essence is duress**) as follows:

> ***"The essential ingredients are these: there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances the person damnified by the compliance can sue for intimidation."***

Another instructive decision is the case of Pao ***On v Lau Yiu Long [1980] AC 614***

Lord Scarman while explaining what duress is and how to get out of a duress situation agreed with the observations of Kerr J in *The* ***Sibeon and The Sibotre*** that:

> ***in a contractual situation, commercial pressure is not enough. There must be present some factor 'which could be regarded as a coercion of his will so as to vitiate his consent'. In determining whether there was a coercion of will such that there was no true consent, it is material to enquire: whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not.***

In essence, in order for someone to plead duress, the court should interrogate the following questions

1. Did the victim of the alleged coercion protest before signing the agreement?
2. Was there any realistic practical alternative for the victim including an adequate legal remedy?
3. What steps were taken to avoid the agreement?
4. Was the victim independently advised?
5. Did the victim protest early, or take tangible steps to set aside the agreement (any act of affirmation may validate the contract!) and act quickly (lapse of time may extinguish the right to rescind the contract)?

The person challenging the agreement under duress must prove that duress was used to compel a person to do something against ***his or her "will or judgment***". Most of the cases in which duress of imprisonment has been successfully pleaded have involved imprisonment which was or would have been illegal either as amounting to false imprisonment. See the case of ***De Mesnil v Dakin (1867) L.R. 3***

Q.B. In the situation at hand, it was execution of a legal process. Merely knowing that there is an impending imprisonment does not necessarily invalidate an agreement for duress. The “will or judgment” is a key factor in determining whether there was duress. In paragraph 8 of his affidavit in reply, the legal assistant of counsel for the respondent stated that the applicant was advised by his counsel to enter into that consent settlement. This averment was not contraverted the applicant.

It should also be noted that once a person enters into an agreement under duress, he must act quickly to set it aside immediately he/she ceases to be under duress. Besides, I’am not convinced that the applicant was in prison. If so, he would have attached a committal warrant to his pleadings. I see none. Counsel for the applicant’s argument that the agreement was not endorsed by the Registrar is not convincing. An agreement does not have to be witnesses in order for it to have legal effect. It is sufficient if it is signed by the parties. It appears counsel mistook a settlement agreement with a consent Judgment.

It is my considered view that the applicant signed a settlement agreement willingly and cannot be seen to be running away from the obligations contained therein. Given that he consulted his counsel and they advised him to sign the settlement, he cannot claim that he was coerced, impending imprisonment notwithstanding.

In the result, I find no merit in this application and I dismiss it with costs to the respondent. Even if I was to allow this application, I would still have ordered the applicant to pay the Decretal sum in court given the findings of the trial judge. I did not take that direction given the weakness of the application.

I so order.

sgd
Flavian Zeija
Judge
20/10/2016