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

MISCELLANEOUS APPLICATION NO. 662 OF 2019
(Arising out of CIVIL SUIT NO. 701 OF 2016)

LUBOWA MUKASA PATRICK---------- APPLICANT

VERSUS

SSALI GRACE---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for setting aside the exparte decree obtained in the main suit arising out of a judgment delivered on against the applicant on the 7th day of March 2019. The application is brought under Section 98 of the Civil Procedure Act and Order 52 rule 1,2 & 3 of the Civil Procedure Rules.

The respondent filed an affidavit in reply opposing the said application on 05th December 2019.

The applicants were represented by Mr. Wanda Benjamin and the respondent were represented by Mrs. Zawedde Lukwago. In the interest of time court directed the counsel for both parties to file written submissions.

The main ground for this application is that the applicant instructed his lawyers to represent him but they were negligent and did not attend court and inform the applicant of the court attendances although they received hearing notices.

The applicant contended that dilatory conduct of the advocate should not be visited on the innocent applicant.

The respondent contended that the application to set aside is an abuse of court process and rules of procedure. The applicant's lawyer was properly served with the hearing notice.

Similar applications have been filed for stay of execution and setting aside judgment deliberately to frustrate the respondents' efforts to execute a decree.

The applicant's counsel submitted that affidavit in reply is incompetent because it was sworn by an advocate. Secondly, the former lawyer had received hearing notices under protest for that hearing date. The said counsel was negligent not to attend court and such negligence should not be visited on the applicant.

The respondent's counsel submitted that the order to proceed exparte was premised on the fact that the applicant's lawyer had on three previous occasions failed to attend court. Therefore the Trial judge was justified in the circumstances to proceed with the hearing. Even after the said hearing notice the applicant was duly served twice and never attended.

Determination

According to the court record, the applicant's counsel was served with hearing notices on several occasions but always declined to attend court and received hearing notices "under protest".

The applicant's counsel was duly served according to the Judgment of the court on 26th June 2016 and there is an affidavit of service on court record.

The affidavit of service under which the hearing notice was received under protest was not the basis of the order to proceed exparte. It would appear the applicant has no specific answer to the service of hearing notice at the next hearing after 24th May 2017 hearing which was served on 21st June 2019.

In absence of any information about the former lawyer's failure to attend court on 26th June 2019, the applicant has failed to show sufficient cause for not attendance of counsel.

This application is premised on negligence and mistake of counsel but the evidence adduced is not cogent enough to satisfy this court about the failure to attend court and the efforts the applicant as a litigant took in ensuring that his case is properly prosecuted. How often did he try find out about the progress of the suit or he opted to keep away from the advocates for over two years and only learnt of the case while at taxation of the bill of costs.

The applicant has failed to demonstrate that it has good cause to have the judgement and decree set aside. Sufficient cause or good cause must relate and include the factors which caused inability to take a particular step in prosecuting the matter. The application to set aside an exparte judgment cannot succeed if no good or substantial reasons are given to justify setting it aside. ***Twiga Chemical v Bamusedde [2005] 2 EA 325; Shah v Mbogo [1967] EA 116***

I agree with the submission of counsel for the respondent. The applicant has not shown any sufficient cause for the failure to attend court.

The applicant has not shown why the former counsel did not attend court since there is no affidavit from them. Where they still under the instructions and was it the applicant who had failed in obligations towards the former counsel or he avoided counsel for over two years and only resurfaced after the judgement.

It is not enough to merely change to new lawyers and then you argue mistake or negligence of counsel. The court ought to hear from the former counsel to explain himself in an affidavit whether he was negligent or failed to act due to a bonafide mistake or confusion or incompetence.

In the case of ***Capt Phillip Ongom vs Catherine Nyero Owota SCCA No. 14 of 2001***, Justice Mpagi-Bahigeine agreeing with Justice Mulenga stated that:

> *" it would be absurd or ridiculous that every time an advocate takes a wrong step, thereby losing a case, his client would seek to be exonerated. This is not what litigation is all about. Counsel applied a wrong strategy….no sufficient cause has been shown to entitle the applicant relief sought."*

This court needed to know why the applicant's former lawyers failed to attend court on the 26th June 2017 since the matter proceeded in his absence and that culminated in failure to represent his client. Litigation ought to come to an end otherwise endless applications make it costly to the litigants in the long run.

This application for setting aside is devoid of merit and no sufficient cause has been shown by the applicant and it is only intended to delay execution of the judgment of the lower court. The trial Judge heard the matter on merit considering that the applicant had filed a defence to the suit.

In the circumstances, the application is dismissed with costs to the respondent.

Dated, signed and delivered by email & WhatsApp at Kampala this 15th day of May 2020

SSEKAANA MUSA
JUDGE