THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

MISC. APPLICATION NO. 133 OF 2020

(ARISING FROM CIVIL SUIT NO. 030 OF 2018)

THE ATTORNEY GENERAL :: APPLICANT

VERSUS

1. NKINGA EPHRAIM (Minor)
   suing through Sarah Ssenyonga (grandmother and next friend)
2. SARAH SENYONGA :: RESPONDENTS

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This application is brought under Order 9 Rule 12, Order 51 Rule 6, Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules SI 71-1 and Section 98 of the Civil Procedure Act Cap 71 seeking orders that;

a) A default judgment entered in favor of the Respondents/Plaintiffs in Civil Suit No. 30 of 2018 against the Applicant be set aside for good cause;
b) The Applicant be granted leave to file a defence out of time so the suit can be heard on its merits;
c) Costs of the application be in the cause.

The grounds of the application as contained in the affidavit if Dr. Nathan Onyachi the Hospital Director, Masaka Regional Referral Hospital are briefly that;

1. The hospital issued instructions to the Office of the Solicitor General to lodge a defence in Civil Suit No. 30 of 2018;

2. One Kiyingi Josephine, Principal State Attorney in the Directorate of Civil Litigation in the Ministry of Justice & Constitutional Affairs assured them in March 2019, 13th that the instructions would be forwarded to the Mbarara Regional Office;
3. The file was re-allocated and in August 2019, the deponent together with one Twinomugisha an Attorney with the Ministry of Justice established from the court that a default judgment had been entered and the matter was scheduled for formal proof on 8th December 2020;
4. The Applicant has a good defence and mistake of counsel should not be visited on the Applicant;
5. There was no negligence or inordinate delay and there is sufficient cause to grant the application;

In reply, Atukunda Isaac of M/s Credo Advocates deponed an affidavit and stated that;

1. The Respondent filed Civil Suit No. 30 of 2018 on the 22nd day of June 2018;
2. Summons to file a defence was issued by court on the 29th day of August 2018 and the same was served on the Applicant on the same day;
3. The summons was ignored by the Applicant and on the 18th day of October 2018, the Respondents' lawyers filed an application for default judgment and the application plus its supporting affidavit were served on the Applicant on 28th October, 2018;
4. The application was fixed for hearing on 20th November, 2018 but the Applicant did not appear and an adjournment was made for the 13th day of March 2019 at which date the Applicant's lawyer Kiyingi Josephine appeared and requested for an adjournment to file a defence;
5. The adjournment was granted and the matter was fixed for the 4th day of April 2018 and further to the 24th day of September 2020 when the default judgment was entered and the matter was fixed for formal proof of damages on the 13th April, 2020;

6. On 8th October 2019, the Applicant's lawyer wrote requesting the Respondent's lawyer to consent to the late filing of a defence but was informed to appear for formal proof as the default judgment had already been entered;
7. There is no sufficient reason advanced for setting aside the default judgment as summons were properly issued unto the Applicant and no other sufficient cause for non-attendance has been advanced by the Applicants;
8. The Applicant while aware of the suit for the last two years and a half has chosen not to file a defence nor taken a step to prove that it is interested in defending the suit;
9. The application should be dismissed with costs as it is a mere afterthought to deny the Respondents` justice;

In rejoinder, Dr. Nathan Onyachi reiterated his averments in the affidavit in support of the application and added that the application is intended to have the suit heard inter parties and enable all parties meet the ends of justice.

Both Parties filed written submissions.

Counsel for the Applicant raised one issue for the determination by court;

Whether there are sufficient grounds for setting aside the default judgment and grant of leave to file a defence out of time in Civil Suit No.30 of 2018;

Counsel cited the case of *Nicholas Roussos Vs Gulam Hussein, Habib Viram & Anor SCCS 09/93* where the court stated that the grounds for setting aside such a judgment include mistake by an advocate through negligence. Counsel argued that the Applicant was let down by the officer who was handling the matter which was worsened by the bureaucratic tendencies in the Human Resource Department of the Applicant of which Masaka Regional Hospital had no control over.

Counsel argued that it would be unfair to condemn Masaka Regional Hospital unheard and the Respondent shall not be prejudiced by the grant of this application since the matter will be heard on its merits.

Counsel for the Respondent raised a preliminary objection challenging the Applicant's affidavit in support of the application for being incurably defective. As for whether the application discloses sufficient grounds, counsel for the Respondent argued that there is no affidavit to support the allegations from Dr. Nathan Obanchi that he was misled by the employees of the Attorney General's office about the case being handled. Further that the Applicant did not specifically denied the issues in the Respondent's affidavit regarding the adjournments made by court to enable the Applicant file a defence, and as such the Respondent has not proved any sufficed cause why the default judgment should be set aside.

It was also Counsel for the Respondent's argument that the inordinate delay by the Applicant to file court proceedings when fully aware pf the court processes cannot not only be blamed on Counsel but also on the litigant. Counsel invited this court to dismiss the application with costs and for the case to proceed for formal proof as this will serve justice on the Respondents and also send a message to the Applicant's lawyers who tend to delay cases to the disadvantage of innocent Ugandans. Counsel further challenged the Applicant`s intended defence on grounds that the Head of Department Masaka Regional Hospital authored a report admitting negligence in the matter. Counsel prayed for the application to be dismissed with costs.

In rejoinder, Counsel for the Applicants argued that it would occasion an injustice to shut out an innocent litigant to wit Masaka Hospital which had instructed the Attorney General to represent it. Further, that the Applicant has a plausible defence and the allegations raised by the Respondent can only be ably responded to by the Applicant being granted leave to file a defence.

Determination of the application;

Whether the Applicant has adduced sufficient cause for the grant of the application

This application was brought among other provisions, under ***Order 9 Rule 27 Civil Procedure Rules*** which provides for setting aside ex parte judgments passed pursuant to rules preceding Rule 27 of Order 9 Civil Procedure Rules on such terms as maybe **just**. '*such grounds as maybe just'* has been interpreted by courts to mean proof of sufficient cause.

Black's Law Dictionary 8th Edition at Page 231 defines "***sufficient cause***" to be analogous to "***good cause***" or "***just cause***", which simply means "***legally sufficient reason***." Sufficient cause is often the burden placed on a litigant by court rules or order to show why a request should be granted or action or inaction excused.

In the case of ***The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others quoted in Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR*** discussing what constitutes sufficient cause had this to say:-

"*It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when* ***no negligence****, or* ***inaction or*** ***want of bona fides****, is* ***imputed to the appellant***." ***Emphasis mine***.

In the instant case, the Respondents instituted Civil Suit No. 30 of 2018 against the Applicant by ordinary plaint on the 22nd day of June, 2018, summons were issued on the 29th day of August 2018 and the Applicant was served on the 29th day of August, 2018 which service was duly acknowledged as per the affidavit of service filed on the 10th of October 2018 deponed by Taremwa Edmund.

The Applicant did not file a defense and as such, the Respondents filed Misc. Application No. 162 of 2018 on the 10th day of October, 2018 under rule 6 of the Government

Proceedings (Civil Procedure) Rules seeking orders that a default judgment be entered against the Respondent/Applicant herein and the suit be fixed for formal proof.

Two affidavits of service for Misc. Application No. 162 of 2018 are on record filed on the 20th day of November, 2018 and 24th September, 2018, showing that the Respondent/Applicant herein was served with the application and the hearing notice respectively.

When the matter came up for hearing on the 24th day of January 2019, court adjourned to 13th March, 2019 since there was no proof of service. On the 13th day of March, 2019, when the matter came up for hearing, the Respondent/Applicant herein was represented by Josephine Kiyingi and court adjourned the matter to the 4th day of April 2019, to enable the Applicant/Defendant file its defence.

A Written Statement of Defence was filed on the 20th day of March, 2019 and it is on the court file.

When the matter came for hearing on the 24th day of September, 2019, the Applicant herein did not enter appearance and having been effectively served, the court entered a default judgment and the matter was fixed for formal proof on the 13th day of April, 2020.

On the 8th day of October, 2019, the Applicant wrote to Counsel for the Respondent herein requesting for consent to the late filing of the Written Statement of Defence to which Counsel responded that judgment had already been entered and filing the defence served no purpose.

I have observed that the Written Statement of Defense was filed on the 13th day of March, 2019 before the default judgment was entered on the 24th day of September, 2019. There is no explanation why this defense was not considered by the court prior to entering the default judgment considering that the trial judge mentioned that there was no defense on the record.

Rule 6 of the Government Proceedings Rules allows for the court to make orders to proceed ex parte as against the government/AG. In the instant case, the Respondents made the application for a default judgment and the trial Judge entered the default judgment then proceeded to set the suit down for formal proof. This was improper as the suit should have proceeded ex parte in consideration of the Written Statement of Defence that had been filed.

Nevertheless, this application is for setting aside the default judgment and I will proceed to address the grounds relied on by the Applicant.

The Applicant contends that the non-appearance and failure to file a defence was negligence of counsel which should not be visited on the Applicant, Masaka Regional Hospital.

Section 10 of the Government Proceedings Act provides that all Civil proceedings by or against the Government shall be instituted by or against the Attorney General. This makes the Attorney General both a Party and Counsel although the proceedings are prosecuted by the different state Attorneys in the Attorney General's chambers.

In the instant case, the Applicant was effectively served with not just summons but also hearing notices in CS No. 30 of 2018 and Miscellaneous Application No. 162 of 2018. One of the Applicant's State Attorney in personal conduct of the matter at the time, a one Josephine Kiyingi entered appearance before the court on the 13th day of March, 2019 at which the trial Judge granted an adjournment to enable the Applicant file a defence. This shows that the Applicant has at all times been aware of the instant matter and the failure to enter appearance was negligent on its part.

This court believes that trying to take advantage of the legal principles in this case, advancing the argument that mistake of counsel should not be visited on the client, and assuming that the client in the instant case would be Masaka Regional Hospital and not the Applicant is simply an afterthought and a ploy employed by the Applicant to defeat the ends of justice and abuse the court process.

The Applicant was effectively made aware of the suit, the application for the exparte proceedings and despite being given time to file a defense and enter appearance, there was no appearance which was negligent. The matter was mishandled and the client/Masaka Regional Hospital did not diligently follow up to ensure proper handling of the same.

The Supreme Court in ***Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998*** 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 so that the matter is considered on its merits*."

In ***Joel Kato & Anor v Nuulu Nalwoga (Misc. Application No 04 Of 2012) [2012] UGSC 2 (26 June 2012);*** the Supreme Court held "*I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the applicants found it necessary to engage new lawyers to deal with them."*

In the instant case, the Attorney General was the party and the Attorney General's chambers were in conduct of the matter. The deponent in his affidavit states that Masaka Regional Hospital should not be condemned for the negligence of its counsel. The deponent further equates Masaka General Hospital to a lay person in support of this assertion. I have to state clearly that the Attorney General (chambers) was not simply counsel but also party to the suit. The moment the Applicant received the summons to file a defence, it had the obligation to defend the suit.

I therefore find that there was negligence on the Applicant's part both as counsel and as a party and the deponent's institution was also negligent is following up to ensure that the matter be handled diligently.

The Applicant further states that there was no delay in filing this application. The default judgment was entered on the 24th day of September 2019 and the matter was fixed for formal proof on the 13th day of April, 2020, and this application was filed on the 20th day

of October, 2020. The Applicant was made aware that a default judgment had been entered against it on the 10th day of October, 2019 by the Respondent's lawyers. This application was filed a year later. This, in my opinion, amounts to dilatory conduct.

The Applicant was at all-time aware of the suit against it and despite several hearing notices issued and adjournments to enable the Applicant to be heard, the Applicant and its lawyers either deliberately or negligently failed to enter appearance on several appearances.

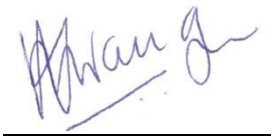
I have also observed from the instant application that the Applicant is not appraised with the record of the case considering that there is a defence on file which they did not make mention of. This further shows how the Applicant has been negligent in handling and defending the suit at the expense of the Respondent who diligently prosecuted the suit. It is indeed true that the Applicant has a right to be heard and this right was granted when they were duly served and constantly granted adjournments to accommodate them. This right was however abused and justice is being delayed at the expense of the Respondent.

In the result, the Applicant has failed to adduce sufficient cause for the grant of this application. The matter will proceed for formal proof as ordered by the trial Judge.

This application is hereby dismissed with costs.

I so order.

Dated at Masaka this 5th day of November, 2021

Signed; 

VICTORIA NAKINTU NKWANGA KATAMBA

JUDGE