

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**  
**MISC.APPLICATION NO. 021 OF 2022**  
(Arising Out Of Civil Suit No.62 of 2017)

**DEPARTED ASIAN CUSTODIAN BOARD :::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**JESSE KASAIJA & 254 OTHERS :::::::::::::::::::::::::::::: RESPONDENTS**

**Before: Hon. Justice Byaruhanga Jesse Rugyema**

**RULING**

- [1] This is an application made under **O.9 r.12 & O.52 rr 1& 3 CPR** and **S.98 CPA** for orders that the interlocutory judgment entered by the learned Registrar on the 29<sup>th</sup> day of Nov.2018 in respect of the Respondent's counterclaim in **Civil Suit No.62 of 2017** be set aside, that the Applicant be granted leave to file and serve Written Statement of Defence out of time and that costs of this application be in the cause.
- [2] The application is premised on the grounds contained in the affidavit of **Bizibu George William**, the Executive Secretary of the Applicant Board which briefly are;
1. That upon this matter being brought to his attention in 2019 he instructed the legal department to file a defence which they failed to do.
  2. That at all material time, they have been willing to appear and defend the main suit hence the present formal application.
  3. That the Applicant sold the suit land to the 1<sup>st</sup> defendant (counter defendant) and it is in the interest of justice that the Applicant gives evidence to enable court investigate and determine all issues arising out of the said transaction.
  4. That unless the said interlocutory judgment on the counter claim is set aside, court will not investigate the matter to its logical conclusion.

5. That the Respondent will not be prejudiced if this Application is granted.
6. That it is in the interest of justice that the main suit together with the counter claim be heard on their merits and be disposed off inter parties.

- [3] In the affidavit in reply by a one **Buhanga Paddy**, one of the defendants in **C.S No.62 of 2017**, the relevant and brief grounds are that the Applicant has at all material times since 2017 been aware of this case when it was variously served with court process as per the affidavits of service on record but the Applicant which has a legal department, failed to timely respond until 3/2/2022 to file the present application.
- [4] That the Applicant do not have a meritorious defence because the attachments thereto prove an illegal and fraudulent transaction between the Applicant Board and the 1<sup>st</sup> Counter defendant.
- [5] Lastly, that there has been an inordinate delay to file a defence in time, an application for extension of time or an application to set aside the interlocutory judgment but had to wait until 2022, five years down the road.

### **Background of the Application**

- [6] In the main suit, **C.S No.62 of 2017**, the plaintiff **Kabakumba Labwoni Masiko** sued the Respondents for various orders, declarations and reliefs to wit; that the plaintiff is the lawful owner of the suit premises comprised in **FRV 12, Folio 12, land situated at Bujenje Estate, Masindi District**, a permanent injunction restraining the defendants or their authorized servants and/or agents from interfering in the plaintiff's ownership, possession, use, occupation and enjoyment of the suit land and then trespass.
- [7] The Respondents filed a defence and counterclaim adding the Applicant and the Registrar of titles. The Applicant and the Registrar of titles failed to file a defence to the counter claim suit thus leading to interlocutory judgment entered by the Registrar of this court dated 29<sup>th</sup> Nov.2018. The Applicant is now seeking to set aside the interlocutory judgment and be allowed to file and serve a defence out of time.

- [8] The main ground raised by the Applicant to have the interlocutory judgment set aside is that it is irregular, illegal and unenforceable in law for it was entered under **O.9 r.8 CPR** yet the Respondents' counter claim is not a claim for **pecuniary damages only**, or for **detention of goods with or without a claim for pecuniary damages**.

### **Counsel legal representation**

- [9] The Applicant was represented by **Mr. Bizibu George**, the Executive Secretary of **Departed Asian Custodian Board** while the Respondents were represented by **Mr. Waiswa Julius Ceaser** of **M/s Ngobi & Co Advocates, Kampala**. They both filed their respective submissions for consideration by this court.

### **Determination**

- [10] In his submissions, counsel for the Respondents **Mr. Waiswa Ceaser** conceded that the interlocutory judgment against the Applicant and the Registrar of titles was indeed entered wrongly for the Respondents' claim was not for either pecuniary damages or detention of goods with or without a claim for pecuniary damages. The proper procedure upon which the Registrar ought to have proceeded on is provided under **O.9 r.10 CPR**, by court to proceed with the suit as if the defendants had filed a defence, that is, by setting down the suit for hearing *ex parte* under **O.9 r.11 CPR**.

- [11] **O.9 r.10 CPR provides** thus:

*"In all suits not by the rules of this Order otherwise specifically provided for, in case the party does not file a defence on or before the day fixed therein and upon compliance with rule 5 of this order, the suit may proceed as if that party had filed a defence."*

- [12] It therefore follows that wrongly entering the *ex parte* judgment under **O.9 r.8 CPR** is a proper ground for setting it aside but not a good ground for leave to file and serve the Written Statement of Defence (WSD) out of time. Court would set aside the interlocutory judgment and proceed as though the defendants filed a defence and set down the suit for hearing under **O.9 r.11 (2) CPR** because a party who has been served

with summons to file a defence and fails to do would have locked himself or herself outside the jurisdiction of court.

[13] In the premises, I proceed under **S.98 CPA** and set aside the interlocutory judgment that was illegally or irregularly entered against the Counter defendants/Applicant in the counter claim. Under **S.33 of the Judicature Act**, I proceed to consider whether the Applicant/counter defendant was prevented by just cause from filing a defence.

[14] In the case of **Banco Arabe Espanol Vs Bank of Uganda (1999) 2 E.A 22**, the Supreme court of Uganda held inter alia that;

1. 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 merit.
2. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily deter a litigant from pursuit of his rights.

[15] In the instant case, the Applicant through its present Executive Secretary **Mr. Bizibu George William** admit that the summons to file a defence was brought to his attention in 2019. Indeed, there has been inordinate delay to file the present application by the Applicant. It is the Applicant's contention however that he brought it to the attention of the legal department of the Applicant to make a timely reply but this was not done. In my view, this was gross negligence on the part of the Applicant, the said **Bizibu George William** ought to have followed up his instructions to the Applicant legal department, then ensure and ascertain compliance. I would in the premises, not find this gross negligence to constitute just cause entitling the Applicant grant for leave to file and serve the W.S.D out of time.

[16] However, **S.33 of the Judicature Act** which provides that;

*“The High Court shall in the exercise of the jurisdiction vested in it by the Constitution, any written law or enactment, grant absolutely or on such terms and conditions as it thinks just, all such remedies whatsoever as any of the parties to a cause or matter is entitled to in respect of any legal or equitable*

*claim properly brought before it, so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicities of legal proceedings concerning any of those matter avoided” (emphasis),*

vests this court with power to entertain this application and consider the reliefs sought by the Applicant.

- [17] In the instant case, it is not in dispute that the Applicant sold the suit property to the plaintiff/1<sup>st</sup> Counter defendant. The Counter claimant’s position is that the sale was void, illegal and or fraudulent. In my view, this is an issue worth trial on merit. It is the Respondent who sued the Applicant by way of counter claim thereby desiring the applicant to defend itself against the allegations in the counter claim. It is therefore in the interests of justice that the Applicant is allowed to file a W.S.D and give evidence in respect of the suit property, and how the property was sold to enable this court to investigate and come to a logical conclusion on all issues involved, i.e, so that as much as possible all matters in controversy between the parties may be completely and finally determined. The main focus here is ensuring justice by making sure that all remedies whether legal or equitable and all matters that are in controversy are completely and finally determined.
- [18] Counsel for the Respondents complained that allowing this application would be greatly prejudicial to the Respondents because they will be put to an extra cost of having to accommodate the Applicant after 5 years whereas they had prepared their case against the plaintiff/1<sup>st</sup> Counter defendant only.
- [19] I definitely appreciate the inconvenience the Respondents may go through if this application is granted. It is however a fact that the hearing of the main suit has not commenced. Delay *per se* is not the overriding fact when considering whether or not to grant leave to file and serve W.S.D out of time. The court has to look at the justice of the case as well; **Abel Balesesa Vs Yeseru Mugenyi H.C.M.A No. 126 of 2019 [2021] UGHCCD 108**. The alleged extra costs of accommodating the Applicant can be catered by an award of costs in this application. The ends of justice require that the case be determined on merit so that the sale transaction between the Applicant and the plaintiff/1<sup>st</sup> Counter defendant is fully investigated and the rightful owner of the suit land

is determined in a fair trial where each party is given an opportunity to present their case. I however found on record submissions by counsel of the Registrar of titles. The Registrar of titles was however not a party to this application. I have therefore in the premises not considered those submissions.

- [20] For the above reason, I allow the application with the following orders;
- a) The interlocutory judgment entered by the learned Registrar on the 29<sup>th</sup> day of November 2018 in respect of the Respondent's counter claim in **C.S No.62 of 2017** is set aside.
  - b) The Applicant is granted leave to file and serve Written Statement of Defence out of time.
  - c) The Applicant to file the W.S.D within **15 days** from the date of this ruling and accordingly serve it upon the Respondent.
  - d) The costs of this Application are awarded to the Respondents since the Applicant was in default to file a defence and or the relevant applications in time.

I so order.

Signed, dated and delivered at Masindi this **26<sup>th</sup>** day of **August, 2022**.

**Byaruhanga Jesse Ruyema**  
**JUDGE.**