THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. APPLICATION NO. 205 OF 2021

(ARISING OUT OF CIVIL SUIT NO. 314 OF 2014)

1. **SSERUBIRI FRANK**
2. **HABIB MALIK**
3. **LUTAKOME HENRY::APPLICANTS**

VERSUS

1. **SALAMA JAQUES**
2. **SERAPIA SEMUHOZA ETIENNE**
3. **NYABATWARE NEMA::RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicants filed this application under section 98 of the Civil procedure Act, Order 9 Rule 12, and Order 52 Rules 1 and 3 of the Civil procedure Rules to set aside the default judgment entered on the 9th day of March 2021 as well as be granted leave to file a defense in civil suit of 2019. The judgment was entered under Order 9 Rule 6.

The application was supported by an affidavit sworn by Sserubiri Frank.

1. He stated that the applicants were sued vide Civil Suit No. 314 of 2019 and contend that they instructed Lawyers A. W. Bukenya & Co. Advocates to represent them in that matter and also handle all matters thereto and arising from the said suit.

2. That the advocates never filed a defense in the matter and instead filed a Notice of Withdrawal on the 1st day of February 2021 which they never brought to the attention of their former clients and subsequently a default judgment was entered against the applicants.

On the other hand, the respondents filed an affidavit in opposition sworn by Salama Jacques and contended that the application lacked merit and was an abuse of court process intended to delay the respondents from obtaining the fruits of their judgment. The respondents contended that the applicants were aware of the court matter.

The applicants were represented by *Joseph Luzige* while the respondents were represented by *Kunihira Winfred* & *Micheal Aboneka*.

The parties filed written submissions that were duly considered by the court.

Issue.
Whether or not the default judgment entered against the applicants in civil suit No. 314 of 2019 and the resultant decree should be set aside warranting the applicants to file their defence

The applicants contend that there was an inadvertent mistake of counsel which in law should not be visited on the applicants. It is indicated in the affidavit supporting the motion that the applicants instructed their former counsel M/s A. W. Bukenya & Co. Advocates to file a defense in the suit but they instead filed a Notice of Withdrawal on the 1st day of February 2021 which they never brought to the attention of their former clients and subsequently, a default judgment was entered against the applicants.

That the notice was filed on the same day the default judgment was entered and the applicants did not get the chance to instruct new lawyers to represent them. It is their contention that it was upon the realization that a default judgment was entered against them that they instructed new

lawyers of M/S Luzige, Kavuma & Co. Advocates to represent them in this application.

The respondents in reply stated that the applicants were well aware of the civil suit no. 314 of 2019 by service of summons twice and were also served with hearing notices but they chose to oust themselves out of the jurisdiction of this court by opting not to defend the suit. It was their contention that the applicants together with their former counsel saw no merit in filing a defense in that suit and chose to amicably settle the suit with the respondents.

That the applicants approached the respondents in a bid to settle the matter but lost interest along the way and gave up on the matter. The respondents further contend that the applicants knew about the withdrawal of their former counsel and are also bound by their actions since they had duly instructed them.

Analysis

In an application like this one, the applicant has to satisfy the court that there is good cause or sufficient reason why the judgment should be set aside. The applicants were served twice with the court process and they engaged the services of an advocate who appeared in court and was allowed to file a defence in the matter.

The defence counsel on instructions of the applicants attempted to settle this matter out of court and upon failure they opted to withdraw from the conducted on the date the matter was called for hearing.

It is a general principle that mistake of counsel is one of the reasons to warrant the grant of orders to set aside a judgment. In **Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001** it was held *that mistakes, faults, lapses, and dilatory conduct of counsel should not be visited on the litigant; and further that where there are serious issues to be tried, the court ought to grant the application.*

In ***Capt. Philip Ongom v. Catherine Nyero Owota, SC Civil Appeal No. 14 of***
2001, Mulenga, JSC held as follows: *"A litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the advocate due instructions."*

There are exceptions to the general principle that the litigant cannot be punished for the advocate's fault. In **Kananura v Kaijuka (Civil Reference 15 of 2016) [2017] UGSC 17 (30 March 2017)** the Supreme Court held; "*We note that whereas Kananura as a non-lawyer is a layman in as far as matters of Court processes are concerned, it is also true that the lawyer is only an agent of a litigant and/or intended appellant. It therefore follows that it is the duty of an intended appellant to follow up and inquire from his advocate on the status of his case. Following up of the applicant's case did not require him to be knowledgeable in Court processes. In the instant case, Kananura's conduct shows that he did not exercise any vigilance or diligence in pursuit of his intended appeal. Such conduct, in the circumstances amounted to dilatory conduct and negligence on his part."*

Therefore, for the applicants' to succeed on mistake of counsel, they ought to prove to the court the efforts they as litigants took in ensuring that their case was properly prosecuted. The applicants instructed their former advocates to handle civil suit no. 314 of 2019, they even proceeded to negotiate settlements with the respondents until they abandoned said negotiation.

They however did all this while did not establish whether counsel had filed a defense during that period. The civil suit was filed on 17th July 2019 and the default judgment was entered on 15th March 2021. There is no evidence on record showing that the applicants took any necessary steps to ensure that their defence was filed that they claim to have one during the extension period. Whether a judgment in default may be set aside depends on the nature of the error that resulted in the default.

The applicants, in this case, are guilty of dilatory conduct and cannot benefit from the principle that an advocate's default cannot be visited on the litigant. They should have been more vigilant to ensure that this plausible defense of theirs was on record while they engaged in the negotiations with the respondents that they also later abandoned. The applicants were only awakened to prosecute the matter after a default judgment was entered.

As judgment in default is an administrative outcome resulting from the defendant's non-compliance and is not a determination based on the merits, the court may revoke it in appropriate circumstances. Therefore, a regular judgment in default may be set aside if the defendant raises an argument or issue which ought to be adjudicated and the court is satisfied that any improprieties in his conduct of action should not bar him from pursuing his defence.

The default judgment is a primary mechanism which obliges the defendant to respond to the plaintiff's claim by way of filing a defence and avoids wastage of the court's and parties' resources by bringing uncontested proceedings to a conclusion. The court must consider whether setting aside the default judgment would be in the interest of justice and that the defendant has some basis for defending the claim.

The applicants in this matter do not mention their so called plausible defence even in this application. It is the duty of the court to in an application to set aside the default judgment to determine whether any useful purpose would be served if there were no possible defence to the action. The defence would guide the court on real prospect of success and it would mean that such a defence has some validity as opposed to being fanciful and unrealistic.

The court is expected to determine whether the applicant will succeed at trial. In absence of any possible defences raised in the application the court

should not merely endorse a statement made by the applicants in their application *"the applicants have a plausible defence"*.

The court should arrive at a reasoned assessment of the justice of the case and also form a provisional view of the probable outcome if judgment were to be set aside and the defence developed. It is not sufficient to raise an 'arguable defence' for the defence must carry some degree of conviction. Therefore, according to the court, the applicant must establish more than a defence or issue which should be adjudicated: he must raise a defence which is likely to succeed at trial. See ***Alpine Bulk Transport Inc v Saudi Eagle Shipping Co Inc [1986]2 Lloyd's Rep 221***

Not every procedural defect should be excused in favour of the substantive merits of a case. The question of whether non-compliance with procedure will affect a party's substantive rights must depend on the nature of the impropriety and the attitude of the defaulting party. The applicants failed to file a defence even when the court granted the extension and attempted a mediation or out of court settlement which they later abandoned. This is conduct of egregious breach of the rules and defeats their application to set aside the default judgment.

On that premise, the application does not disclose sufficient cause or prima facie defence to warrant the grant of the orders sought.

This application is dismissed with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
24th October 2022