**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**MISCELLANEOUS APPLICATION NO. 1089 OF 2021**

**ARISING OUT OF CIVIL SUIT NO. 986 OF 2018**

**1. GLADYS SENKUBUGE:::::::::::::::::::::::::::: APPLICANTS**
**2. LUTWAMA MATIA**

**VERSUS**

**KIBIRANGO JOYCE:::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON. MR JUSTICE TADEO ASIIMWE**

**RULING.**

The Applicant brought this application under section 98 of the civil procedure Act and order 52 of the civil procedure rules against the respondent seeking orders that;

(a) The Default judgement entered in HCCS No. 986 of 2019 be set aside.
(b) That the applicant be granted leave to file a WSD out of time
(c) Make that provision for costs of this application.

The application was based on the following grounds;

1. That the respondents filed C.S NO. 986 of 2018 against the applicants
2. That the respondent also filed ma NO. 1920 of 2018 seeking for a permanent injunction against the applicants.
3. That the respondent was served with summons to file a defence in December 2018 as well as chamber summons in MA no. 1920 of 2018.

4. That the applicants' previous lawyers entered appearance on 4th April 2019 but had mistakenly failed to file a defence with in the required 25 days hence a default judgement against the applicants.
5. That the applicants' failure to file WSD in the prescribed time in law is attributable to the previous lawyers which should not be visited on them as innocent litigants not well versed with legal processes.
6. That the applicants have a strong plausible defence against the respondents claim and filed this application in time.
7. That the applicants have strong interest in the property and seek to be heard.
8. That it is just and in the interest of justice and equity that this application is allowed.

The application is supported by the affidavit sworn by the 2nd Applicant dated 7th June, 2021. The gist of the said affidavit is that the applicant was denied a right to be heard due to his previous advocate's mistake which should not be visited on him. He attached a copy of his intended defence and counterclaim.

The Respondent opposed application basing on the affidavit in reply sworn by the respondent dated 1st February 2022.

At the hearing, the applicant was represented by Counsel Opio Moses while the respondent by Counsel Wamimbi Samson. Both counsel file written submissions which I will consider in this ruling.

In his submission, Counsel for the Applicants relied on the Applicant's depositions arguing that applicants relied on their previous lawyers file a WSD which was not done.

That this was entirely a mistake of counsel, which should not be visited on the applicants. He cited a host of Court decisions to support his argument.

In reply, counsel for the Respondent submitted that raised a preliminary objection arguing that the affidavit in support of the application was sworn on behalf of the 1st applicant without authority and as such inherently defective and renders the whole application defective.

He further submitted that the affidavit in rejoinder was sworn by a none party to the case and therefore should be struck out accordingly with costs.

**RESSOLUSION**

Before I delve in to the merits of this application, I wish to deal preliminary objection raised by the respondents counsel as regards an affidavits in support of the application.

I am aware that one must have authority to swear an affidavit on behalf of another. However in this case the authority was attached on on an affidavit in rejoinder. To begin with, the applicants were jointly sued and instructed the same lawyer. They were not sued independently. It is quite to imagine that they are defending the suit independent of each other unless there is such evidence. The rules governing swearing of affidavits have rationales. And the one on authority is to avoid advancing a defence or an argument or facts that the person the affidavit is sworn on his behalf does not turn around to deny the said contents.

In this case the 2nd respondent confirmed her authority in the affidavit in rejoinder. Although the rejoinder an error in the name of the deponent, she duly signed it. And the authority there to was equally signed. Paying attention to the error if putting a wrong name in an affidavit would be paying undue regard to technicalities.

Besides in this particular applications, having been sued jointly I would not strike out the respondent's affidavit for lack of authority. My decision however would be different if they were sued independently.

Therefore this preliminary objection is overruled.

I shall therefore proceed to resolve the merits of this application.

The provisions of **order 9 r. 12 CPR** are couched in general terms. When a judgement has been entered in default under order 9 rule 6, the court may set aside or vary such judgement upon such terms as may be just.

The applicant's basis in this application is that there is sufficient reason to warrant the setting aside of the default judgement because of mistake of counsel. Therefore the question for court to answer is whether the Applicant has shown sufficient cause to warrant setting aside of the default judgment.

Court in the case of **Bishop Jacinta kibuuka vrs the Uganda catholic lawyer's society and others** defined sufficient cause to mean *a legally sufficient reason. It was held that; it is difficult to attempt to define the meaning of words sufficient cause. It is generally accepted however, the words should receive a liberal construction in order to advance substantial justice when no negligence or want of banafides is imputed to the appellant.*

As already stated the applicants stated that there lawyer forgot to file a defence with in time and that their counsel's mistake should not be visited on them.

Court in the case of **MISCELLANEOUS CIVIL CAUSE No. 0008 OF 2017, THE REGISTERED TRUSTEES OF KER BWOBO & anor VERSUS NWOYA DISTRICT LAND BOARD**

Court was very clear on mistakes that bind the litigant. Court held that "However, there is a distinction between mistakes, faults, lapses or dilatory conduct of Counsel and errors of judgment of counsel. Acts of un-skillfulness, carelessness or lack of knowledge have long been distinguished from errors of judgment. Whereas the former are a result of factors such as inadvertence, negligence and sheer incompetence, i.e. a failure to act with the competence reasonably to be expected of ordinary members of the profession, the latter is the product of the deliberate application one's mind to the complex tasks of assessing probabilities and predicting values in directing one's choices during the imponderables and uncertainties of litigation, where unfortunately it turns out that the wrong or more disadvantageous choice was made. Whereas the former may not be visited on a litigant, a litigant is bound by the latter since in choosing legal representation, a litigant relies not only on the assumed skillfulness of the advocate but also largely on that advocate's capacity at judgment and making rational decisions.

Further court in **Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001,** where it was held that;

(a) .....

(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.

(c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.

(d) Unless the applicant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.

(e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law

I entirely agree with the above decisions and wish to add that apart from the errors of judgement of counsel that don't bound his clients, the client is bound by counsel's mistake if guilty of dilatory conduct .

I also agree with the position that indeed matters belong to litigants who must be vigilant enough to follow up their matters. However, the question is how long the litigant holds on to his counsel's mistake. This was held in the case of **MUTABA BARISA KWETERANA LTD VS BAZIRAKYE YEREMIYA CACA NO. 158 OF 2014** that mistake or negligence of an advocate should not be visited on the litigant, the question is on how long should a litigant hold on to the mistake of his or her advocate. Is it for one month, two months, six months or one year? In my humble view there has to be a limit with in which a litigant can be excused due to the mistake of his or her advocate. It would be understandable if the delay was say between one to six months.

In this case, the applicant duly instructed his counsel in time and he failed to file a defence with in time. However, the applicants took the initiative to instruct other lawyers to file this application within 60 days from the date of Judgement. Only this made the applicant lucky before this court, otherwise if this application was filed along period, the applicant although not bound by his advocate's inadvertence, would have been guilty of dilatory conduct.

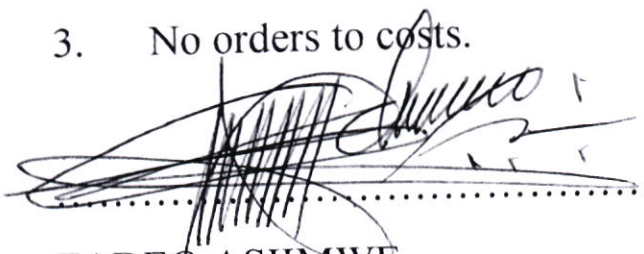
Be that as it may, I find that the applicant showed court that there exists a sufficient reason to set aside the default judgement in HCCS No.986 of 2018.

Consequently I find merit in this application and it is here by allowed with the following orders;-

1. The default Judgement in **HCCS No.986 of 2019** is set aside and the applicant is allowed to defend himself by filing a WSD.

2. The applicants are here by allowed to file their defence within 7 days from today to avoid further delays.

3. No orders to costs.



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TADEO ASIIMWE

JUDGE

17/11/2022