THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

MISCELLANEOUS APPLICATION NO. 72 OF 2020

(ARISING FROM HIGH COURT CIVIL SUIT NO. 25 OF 2019)

VEGOL (U) LIMITED ::APPLICANT

VERSUS

GODFREY SENTONGO ::RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

RULING

1. The Applicant filed an application by motion under Articles 28 and 126 (2) (e) of the Constitution of the Republic of Uganda, 1995; section 33 of the Judicature Act, Cap. 13 and Order 9 rules 12 and 27 of the Civil Procedure Rules, S.I 71-1 seeking for orders that:

(a) the ex-parte judgment under Order 9 rule 6 of the Civil Procedure Rules entered against the Applicant be set aside;

(b) the judgment in default under Order 9 rules 8 & 9 of the Civil Procedure Rules entered against the Applicant be set aside;

(c) leave to file the Applicant's written statement of defence and counter claim out of time be granted;

(d) the filing of the written statement of defence and counter claim on the 13th March, 2019 be validated and summons for service on the counter Defendants be issued;

(e)costs of this application be in the cause.

Background

2. On 7th February, 2019, the Respondent/Plaintiff filed Civil Suit No. 25 of 2019, seeking for among others: - a declaration of ownership of the suit land; orders of compensation; special, general, aggravated and punitive damages, interest and costs of the suit. The record shows that summons to file defence was served on the Applicant/Defendant on 19th February, 2019. On the 11th March, 2019, the Respondent wrote to court praying for judgment for the liquidated demand to be entered under Order 9 rule 6 of the Civil Procedure Rules and judgment in default under Order 9 rules 8 & 9 of the Rules and the same were entered as prayed on 13th March, 2019.

3. The court record further indicates that the Applicant/Defendant filed written statements of defence and a counter claim on 13th March, 2019. The Applicant/Defendant subsequently on 3rd April, 2019, filed Miscellaneous Application No. 84 of 2019 praying for setting aside of the ex-parte decree, default judgment and further prayed for leave to file defence and counter claim out of time and for court to validate the defence and counter claim lately filed on 13th March, 2019.

4. On 24th February, 2020, Miscellaneous Application No. 84 of 2019 was dismissed for want of prosecution by Justice Batema N.D.A

where neither of the parties appeared in court when the case came up for hearing. The Applicant then on 9th March, 2020, filed this application vide Miscellaneous Application No. 72 of 2020 seeking for the same orders that were in the dismissed application.

5. At the hearing of the application, the Applicant was represented by Counsel Mohammed Mbabazi & Kyembe Ibrahim Kaggwa from M/s Nyanzi Kiboneka & Mbabazi Advocates. The Respondent appeared in person and prosecuted his case.

6. Order 9 rules 17 and 18 of the Civil Procedure Rules, S.I 71-1 which apply to both suits and applications provides thus:

> *"17. When neither party appears suit dismissed.*
>
> *Where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed.*
>
> *18. Plaintiff may bring fresh suit or court may restore suit to file.*
>
> *Where a suit is dismissed under rule 16 or 17 of this Order, the plaintiff may, subject to the law of limitation, bring a fresh suit or he or she may apply for an order to set the dismissal aside; and if he or she satisfies the court that there was sufficient cause for his or her not paying the court fee and charges, if any, required within the time fixed before the issue of the summons or for his or her nonappearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."*

7. The orders dated 22nd June, 2020, arising from the dismissal of Miscellaneous Application No. 84 of 2019 stated that when the matter came up for cross examination of the Applicant's witness, it was dismissed in the absence of both parties. This falls within the ambit of Order 9 rule 17 of the Civil Procedure Rules. Upon the said dismissal, the Applicant had two options to explore which are clearly set out under Order 9 rule 18 of the Rules, that is, to either bring a fresh application or apply for an order to set aside the dismissal. The Applicant in this application chose to file a fresh application which is the current application vide Miscellaneous Application No. 72 of 2020. This application is therefore valid before this court within the meaning of Order 17 rule 18 of the Civil Procedure Rules.

8. Before considering the merits of this application, this court will first address the Applicant's objection to the Respondent's affidavit in reply. The Applicant's counsel argued that the Respondent's affidavit in reply and opposition to the application is defective for being prolix, narrative, oppressive, argumentive and that it discusses matters of the law. That this does not conform to the tenents of a valid affidavit in law and cannot be cured by Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995. Counsel prayed that this court be pleased to have it struck off the court record on those grounds.

9. The Respondent's Affidavit in Reply had 17 paragraphs with various sub-paragraphs quoting both law and facts and full of arguments. For example paragraph (6) sub-paragraph (iv) refers to the Judicature (Court of Appeal) Rules which do not apply to this court. The Affidavit in Reply also has footnotes.

10. To begin with, there is a distinction between an affidavit which is defective and one which does not comply with the requirement of the law. The one which is defective is curable and one which does not comply with the law is incurable. For instance, an undated affidavit is defective and is curable by allowing the same to be dated as was held in the case of **Saggu v. Roadmaster Cycles (U) Ltd (2002) 1 EA 258.**

11. Order 19 rule 3 of the Civil Procedure Rules, S.I 71-1, states thus:

"3. Matters to which affidavits shall be confined.

(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit."

12. Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995 as amended provides as follows:

"(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles –

(a).....;

(b).....;

(c).....;

(d).....;

(e) Substantive justice shall be administered without undue regard to technicalities."

13. In the instant case, the Respondent did not have an advocate to represent him even when this court advised him to get one. It is therefore not surprising for him to file an affidavit in reply with a mixture of facts and law including footnotes. In **Sutton v. R [1957] E.A 812 at page 814 Rudd, Ag. CJ,** said

"It is the duty of a court to critically examine all the evidence before it, whether it is evidence by an expert or by another witness."

Being a preliminary application, I would apply article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995 and consider the Respondent's pleading despite its drafting imperfections. Access to justice should not be blocked through undue regard to technicalities especially where a litigant is unrepresented by an advocate.

14. The grounds of the application are briefly contained in the Notice of Motion but expounded in detail in the supporting affidavit deponed by Mr. Rajan Malde, the director of the Applicant's company dated 3rd March, 2020. In brief, the grounds were that:

(a) on the 27th February, 2019, the deponent instructed M/s Nyanzi, Kiboneka and Mbabazi Advocates to file a written statement of defence and counter claim in HCCS No. 25 of 2019;

(b) he was subsequently informed by the Applicant's lawyers that they erroneously assumed that service of summons was effected on the same day and therefore expected to file a written statement of defence and counter claim within fifteen (15) days from the date of receipt of instructions resulting in inaccurate computation of time;

(c) indeed on the 13th day of March, 2019, the Applicant counsel filed a written statement of defence and counter claim for the Defendant;

(d) upon filing the written statement of defence and counter claim, it was discovered that the Respondent/Plaintiff had on 11th March, 2019 applied for default judgment which was entered on 13th March, 2019;

(e)the judgment was obtained through misrepresentation and fraud as the claim was not for a liquidated sum in respect of which judgment could be entered under Order 9 rule 6 of the Civil Procedure Rules;

(f) the suit is for declarations and other orders and accordingly not suited to be dealt with under Order 9 rules 6 of the Civil Procedure Rules;

(g) the impugned judgment is illegal or unlawful, a nullity and an abuse of court process;

(h) the Applicant filed its written statement of defence and counter claim in which it advanced a strong argument claiming for the following:

(i) An order for mutation of Plot 743 and sub-division of the disputed portion of Plot 743;

(ii) An order for registration of the disputed portion sub-divided from Plot 743 into the names of the Applicant/Defendant/the 1st Counter Claimant as registered proprietor and owner;

(iii) A permanent injunction restraining, stopping, preventing the Respondent/Plaintiff/1st Counter Defendant from interfering, claiming interest or in any way dealing with the disputed portion sub-divided from Plot 743;

(iv) Alternatively, a determination of liability between the Counter Defendants as to who encroached on Plot 743 and accordingly liable.

(v) An order for indemnity of the Applicant/Defendant/Counter Claimant by whoever is found liable to have encroached on Plot 743;

(vi) An order that the Counter Defendants pay the costs of and incidental to the suit;

(vii) Any other orders that this honourable court may deem fit.

(i) the Applicant has a prima facie case in its written statement of defence and counter claim with all possibilities and likelihood of success for reasons that the Counter Defendants in the counter claim jointly or severally have primary liability as successors in title of the Applicant;

(j) there is sufficient cause to warrant court to set aside the decree;

(k) the failure to file the written statement of defence and counter claim in time by the Applicant was a result of an error in judgment or mistake by the Applicant's counsel who computed the days from 27th February, 2019 instead of 19th February, 2019, the date service was effected on the Applicant/Defendant company;

(l) That the error of judgment on the part of counsel cannot be visited on the litigant;

(m) That it is in the interest of justice that the ex-parte judgment and decree is set aside and the matter be heard on its merits;

(n) That on a balance of convenience, the Applicant shall suffer irreparable loss and damage than the Respondent who has neither equitable nor legal claim over the suit land if this application is not granted.

15. It was submitted for the Applicant that it was illegal or a nullity for the learned Registrar to grant an ex-parte judgment and judgment in default under Order 9 rules 6, 8 & 9 of the Civil Procedure Rules in a suit seeking declarations. That the learned trial Registrar erred when she entered judgment under a liquidated demand in favor of the Respondent yet the claim was not for a liquidated demand but rather for declarations and other orders concerning land. (Counsel referred to the cases of **Godfrey Muyonjo & Janet v. The Registered Trustees of Namirembe Diocese, Supreme Court Civil Appeal No. 33 of 1993 & Nicholas**

Roussos v. Gulam Hussein Habib & Nazimudin Habib Virani, Supreme Court Civil Appeal No. 9 of 1993).

16. The Applicant's counsel further argued that the suit which was instituted by the Respondent herein was not for pecuniary damages or one that involved an assessment of damages or goods that had to be dealt with under Order 9 rules 8 & 9 of the Civil Procedure Rules. That in the suit which was filed by the Respondent, where one did not file a defence, the court ought to have dealt with the suit as if the Defendant had filed a defence as espoused under Order 9 rule 10 of the Civil Procedure Rules

17. Counsel argued that since Civil Suit No. 25 of 2019 had to be dealt with under Order 9 rule 10 of the Civil Procedure Rules, the ex-parte judgment under Order 9 rule 6 and judgment in default under Order 9 rules 8 & 9 of the Civil Procedure Rules granted by the learned Registrar were illegal, a nullity and an abuse of court process.

18. Counsel added that an illegality once brought to the attention of court cannot be allowed to stand as held in the cases of **Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor [1982] HCB 11**. Learned counsel prayed that this honourable court be pleased to set aside the ex-parte judgment entered by the Registrar under Order 9 rule 6 of the Civil Procedure Rules and the judgment in default under Order 9 rules 8 & 9 of the Civil Procedure Rules.

19. Counsel further prayed that leave to file the Applicant/Defendant/Counter Claimant's written statement of defence and counter claim out of time be granted; the filing of the written statement of defence and counter claim be validated and summons for service on the counter Defendants be issued and costs of the application be in the cause.

20. The Applicant's counsel contended that there are issues of law and fact that this court is invited to adjudicate upon. That if this court does not set aside the ex-parte judgment and decree and grant leave to file and serve the written statement of defence and counter claim out of time and validate the same, it would have furthered an illegality, nullity and a bad precedent in civil practice. Besides, that the application is in the interest of justice so that Civil Suit No. 25 of 2019 is heard and determined on its merits once and for all hence finality in the matter.

21. It was further averred for the Applicant that negligence of counsel should not be visited on the litigant. That it is trite law that a delay to file a written statement of defence within time is excusable when such delay has not been caused or contributed to by dilatory conduct or negligence or want of due diligence or good faith on the part of the Applicant/Defendant. (see the case of **Narittam Bhatia & Anor v. Boutique Shazim Ltd, Court of Appeal Civil Application No. 3 of 2007 & Shanti v. Hindocha & Others [1973] EA 207 at 2019**).

22. Counsel argued that in the instant case the delay to file the written statement of defence in time which later led to the granting

of the ex-parte judgment and the resultant decree under Order 9 rules 6, 8 & 9 of the Civil Procedure Rules was not due to any dilatory conduct or want of diligence on the Applicant's part. (Refer to the case of **Florence Nabatanzi v. Naome Binsobedde** cited with approval in **Hikima Kyamanywa v. Sajjabi Chris CACA No. 1 of 1006**).

23. It is further submitted for the Applicant that the Applicant instructed its counsel to file its written statement of defence and counter claim as stipulated under the law and time required but counsel erroneously assumed that service of summons had been effected on the same day he had been given instructions whereas not. That upon service of summons, the Applicant took practical steps to file the written statement of defence and counter claim within the time frame set by the law but was only let down by his counsel.

24. That there is no evidence or allegation of negligence or misconduct of a gross kind by the Applicant. That rather, the evidence points to its diligence on instructing its lawyers on time to file its written statement of defence and counter claim on the 27th day of February, 2019. And that the Applicant cannot be deprived of the opportunity to lodge their defence and be heard. Counsel prayed that the Applicant's written statement of defence and counter claim that was filed on the 13th day of March, 2019 be validated and summons for service on the Counter Defendants be issued.

25. Counsel asserted that the legal effect of extending time for filing is therefore to validate or excuse the late filing of documents.

That the Applicant need not file fresh documents if those already filed are complete and in proper form. (see the case of **Crane Finance Co. Ltd v. Makerere Properties, Supreme Court Civil Miscellaneous Application No. 1 of 2001**). Further, that the Applicant has demonstrated to this honourable court that there is sufficient reason for the grant of this application and that administration of justice requires that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant of his rights.

26. The Respondent argued that the Applicant should have appealed or applied for review after dismissal of Miscellaneous Application No. 84 of 2019. It has been resolved in this ruling that this application is properly before this court as the Applicant reapplied under Order 9 rule 18 of the Civil Procedure Rules. The Respondent argued that the Applicant filed his defence outside time and the trial Registrar acted lawfully.

Issues

(1) Whether the ex-parte judgment and judgment in default entered against the Applicant in Civil Suit No. 25 of 2019 should be set aside.

(2) Whether the resultant decree should be set aside.

(3) Whether the Applicant can be allowed to file its defence.

27. For ease of reference I find it significant to reproduce the judgment entered by the learned trial Registrar on 13th March, 2019.

"Judgment for the liquidated demand is passed and entered as prayed for under Order 9 Rule 6 of the Civil

Procedure Rules in the amount of United States Dollars Ninety-two thousand four hundred (USD $ 92,400) or Shillings Three hundred forty-seven million four hundred twenty-four thousand (UShs. 347, 424,000) the equivalent in Uganda currency together with interest rate of 25% p.a in the plaint under paragraph 29 (vii) amounting to United States Dollars Ninety-two thousand four hundred (USD $ 1,925) or Shillings Seven Million two hundred thirty eight thousand (UShs. 7,238,000) the equivalent in Uganda currency totaling to United States Dollars Ninety-four thousand three hundred twenty-five ($ 94,325) or Shillings Three hundred fifty-four million six hundred sixty-two thousand (UShs. 354,662,000) the equivalent in Uganda currency this ..... day of ..... 2019 under my Hand and Seal of this Honourable Court.

.....

REGISTRAR

13/3/2019"

The judgment in default is as follows:

ORDER

Judgment in default is entered against the Defendant. Given under my hand and the seal of the court this ..... day of 2019

.....

REGISTRAR

13/3/2019."

28. In an application of this nature, the Applicant has to satisfy the court that there is good cause or sufficient reason why the judgments should be set aside. As submitted by the Applicant's counsel the two judgments were entered under Order 9 rules 6, 8 & 9 of the Civil Procedure Rules, S.I 71-1 which provide thus:

"6. Judgment upon a liquidated demand.

Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defence, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8 percent per year to the date of judgment and costs.

8. Assessment of damages.

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails or all defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the defendant or defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment.

9. Assessment where some defendants have filed a defence.

Where the plaint is drawn as is mentioned in rule 8 of this Order and there are several defendants of whom one or more files a defence, and another or others fail to file a defence, on or

before the day fixed in the summons, the court, subject to rule 5 of this Order, may assess the value of the goods and the damages or either of them, as the case may be, as against the defendant or defendants who have not filed a defence at the same time as the trial of the suit against the other defendant or defendants and may proceed to pass judgment in accordance with the assessment."

29. It is very clear from the court record that the Respondent brought Civil Suit No. 25 of 2019 by way of ordinary suit. He is seeking for a declaration of ownership of land comprised in Kyaggwe Block 115 Plot 743, land at Kyungu, Mukono. The Respondent also prayed for special damages being accumulated occupancy fees and interest thereon.

30. Civil Suit No. 25 of 2019 is neither a suit for liquidated demand to be governed by Order 9 rule 6 of the Civil Procedure Rules nor one which require assessment of pecuniary damages for Order 9 rules 8 & 9 of the Civil Procedure Rules to apply. Accordingly, the trial Registrar entered the said judgments and decree under the wrong provision of the law.

31. In my judgment, the proper procedure which the learned trial Registrar ought to have followed should have been Order 9 rules 10 & 11 (2) of the Civil Procedure Rules. They state thus:

"10. General rule where no defence filed.

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 a compliance with rule

5 of this Order, the suit may proceed as if that party had filed a defence.

11. Setting down suit for hearing.

(2) Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences has expired and the defendant or defendants, as the case may be, has or have failed to file his or her or their defences, the plaintiff may set down the suit for hearing ex parte."

32. Notwithstanding the above error by the learned trial Registrar, it is incumbent upon the Applicant who is the Defendant in the main suit to show sufficient cause for failure to file its defence within the required period of 15 days from the date of service of summons on it.

33. It is the Applicant's contention that on the 27th February, 2019, it instructed its lawyers M/s Nyanzi, Kiboneka and Mbabazi Advocates to file a written statement of defence and counter claim in HCCS No. 25 of 2019. The Applicant further argued that the said lawyers erroneously assumed that service of summons was effected on the Applicant on the same day of giving instruction and therefore expected to file a written statement of defence and counter claim within fifteen (15) days from that date resulting in inaccurate computation of time and leading to the filing of the same on the 13th March, 2019.

34. It is a general principle of law 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."*

35. Further, 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."*

36. However, there are exceptions to the general principle that the litigant cannot be punished for the advocate's fault, for instance where the litigant did not exercise due diligence to follow up on his or her case with the lawyers. In the case of **Kananura v. Kaijuka (Civil Reference 15 of 2016) [2017] UGSC 17 (30 March 2017)** the Supreme Court held that:

> *"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."

37. Therefore, for the Applicant to succeed on mistake of counsel, it ought to prove to the court the efforts it took as a litigant in ensuring that its case was properly prosecuted. The Applicant, in this application has proved to this court that it is not guilty of dilatory conduct. It has been vigilant enough in ensuring that it gives its lawyers instructions within the 15 days but only to be disappointed by the said lawyers.

38. This in my view is one of the cases where the Applicant can benefit from the principle that an advocate's default cannot be visited on the litigant. The Applicant's written statement of defence and counter claim which is on court record clearly raise arguments or issues which ought to be adjudicated and determined on merit.

39. Pursuant to the foregoing, this court finds that the justice of this case requires setting aside the ex-parte judgment, judgment in default and the decree or orders thereunder to enable the main case to be considered on its merits. Accordingly, this application is allowed with the following orders:

(a)judgment for the liquidated demand entered in Civil Suit No. 25 of 2019 under Order 9 rule 6 of the Civil Procedure

Rules, S.I 71-1 and the decree thereunder are hereby set aside;

(b) judgment in default in Civil Suit No. 25 of 2019 entered under Order 9 rules 8 & 9 of the Civil Procedure Rules, S.I 71-1 and the decree thereunder are hereby set aside;

(c) the Applicant is hereby granted leave to file its defence and counter claim out of time;

(d) the written statement of defence and counter claim already on court record are hereby validated;

(e) the Applicant is hereby directed to serve the Respondent and counter Defendants with the validated written statement defence and counter claim within 7 days from the date of this ruling;

(f) each party shall bear their own costs of this application.

I so rule and order accordingly.

This ruling is delivered this 9th day of Feb. 2023 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Kyembe Ibrahim Kaggwa from M/s Nyanzi, Kiboneka & Mbabazi Advocates, for the Applicant;

(2) Mr. Godfrey Sentongo, the Respondent;

(3) Ms. Pauline Nakavuma, the Court Clerk.