THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 464 OF 2020

(ARISING FROM CIVIL SUIT NO. 411 OF 2017)

JACQUELINE RUGASIRA :: APPLICANT

VERSUS

VINCENT RUBAREMA :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Order 9 Rule 27 and Order 52 Rules 1 and 2 of the Civil Procedure Rules seeking orders that;

a) The ex parte judgement and decree in HCS No. 411 of 2017 be set aside and the suit be heard inter partes.
b) The costs of the application be in the cause.

[2] The grounds of the application are summarized in the Notice of Motion and elaborated in two affidavits sworn in support of the application by **Jaqueline Rugasira**, the Applicant and **Chemisto Shuaib Kubai,** an advocate working in the firm representing the Applicant. Briefly, the grounds are that Civil Suit No. 411 of 2017 was first scheduled for hearing on 22nd October 2019 at 9:00am; on which date, Counsel for the Applicant appeared late at 9:50am due to unprecedented heavy traffic along the route Counsel used. The Respondent appeared in the absence of the Applicant and her advocate and was granted leave to proceed ex parte by filing his scheduling notes, trial bundle containing documents to be relied upon, his witness statement and submissions. The matter was set for judgment on 16th December 2019. The exparte judgement

was delivered online on the 29th day of April 2020 during the Covid-19 lock down leading to the decree that was passed against the Applicant.

[3] It is stated by the Applicant that Counsel for the Applicant learnt of the ex parte judgement on the 14th day of August 2020 upon perusal of the court file after being served with a bill of costs and a taxation hearing notice. The Applicant states that the hearing of the suit proceeded under a procedure that was unfair, unlawful and a nullity since the witness statement and the trial bundle were never tendered in as evidence in chief before being admitted in evidence. It is further stated that the applicant is interested and committed to defending the suit to its logical conclusion and had filed a written statement of defence in the matter. The Applicant concluded that it is in the interest of justice that the ex parte judgement and decree be set aside as prayed.

[4] The application was opposed by an affidavit in reply deposed by **Vincent Rubarema**, the Respondent, who stated that the instant application is without merit, made in bad faith and an abuse of court process intended to frustrate the Respondent through protracted litigation. The deponent stated that the Applicant has not demonstrated sufficient cause as to why she or her lawyer failed to appear when the matter came up for hearing. He stated that it was the second time the matter was fixed for hearing and the excuse of being caught in traffic jam is inconceivable as he could have taken the necessary steps of calling the court clerk or even opposite counsel. He further stated that having known on 23rd October 2019 that the suit had proceeded ex parte and an ex parte judgement was due to be delivered on 16th December 2019, the Applicant ought to have taken due diligence to seek audience before the court which she did not. The Respondent stated that the Judge ordered for filing of duly sworn witness statements hence there was no need to appear in court for purpose of tendering them in evidence. He concluded that the application discloses no good or sufficient reason to have the ex parte judgement and decree set aside

as they were issued in accordance with the law. It is in the interest of justice that the application is dismissed with costs.

Representation and Hearing

[5] In Court, the Applicant was represented by M/s Oasis Advocates while the Respondent was represented by M/s Kabayiza, Kavuma, Mugerwa & Ali Advocates. It was agreed that the hearing proceeds by way of written submissions which were duly filed and have been considered in the determination of this application.

Issue for Determination by the Court

[6] One issue is up for determination by the Court, namely; ***Whether the application discloses any grounds for setting aside the ex parte judgement passed in Civil Suit No. 411 of 2017?***

Determination by the Court

[7] Counsel for the Applicant raised an issue regarding the propriety of the proceedings leading to the ex parte judgment. Relying on the provision under Order XVIII rule 5A of the amended Civil Procedure Rules (CPR) 2019, Counsel for the Applicant submitted that the said rule guides the handling of witness statements by the court. Counsel argued that the said rule was not followed by the court which made the proceedings and the resultant judgment a nullity.

[8] In my view, although the above contention raises a matter of law, it is one that ought to have been preferred either on appeal or review. In an application for setting aside ex parte judgment or decree, such as this, the court is not seized with jurisdiction to sit in appeal or review of the proceedings and judgment of the same court. The grounds upon which an ex parte judgment and decree may be set aside are set out under the law and are distinct from those upon which this Court can review its own decision. In those

circumstances, I will confine myself to the grounds for setting aside the ex parte judgment and decree and ignore the other contentions over which the court's jurisdiction should not be extended in the present circumstances.

[9] Regarding the grounds for setting aside the ex parte proceedings, judgment and decree, it was stated by the Applicant that her Counsel intended to be present at the hearing when the order to proceed ex parte was passed but got held up in a huge traffic jam thereby arriving at the court at 9:50am instead of 9:00 am when the case was fixed and came up before the Court. It was argued for the Applicant that even if such was to be construed as negligence of counsel, the same should not be used against an innocent litigant. The Applicant's Counsel prayed that the Court finds that the Applicant has established sufficient cause for setting aside the ex parte judgment and decree.

[10] For the Respondent it was argued that such circumstances do not point to sufficient cause capable of causing the setting aside of the ex parte judgment and decree. It was argued by Counsel for the Respondent that neither the Applicant nor her counsel were diligent as their conduct had clearly indicated that they were not interested in having the matter heard and determined. Counsel argued that the reason of traffic jam on the part of the Applicant's Counsel does not constitute sufficient cause. Counsel also submitted that the Applicant's defence does not demonstrate any plausible ground that would require any hearing on the merits. Counsel concluded that the Applicant's intention is to delay and obstruct the plaintiff from benefitting from the fruits of his judgment which is not fair since the he has been in court since 2017. Counsel prayed that the application be dismissed with costs.

[11] The order to proceed ex parte in the subject suit was entered by the court pursuant to the failure by the defendant (now Applicant) to appear for hearing when the suit was fixed for hearing by the court. Prior to setting down the suit

for hearing, the Defendant had filed a written statement of defence. The order to proceed ex parte was therefore passed in line with the provision under Order 9 rule 20(1)(a) of the CPR. The ex parte judgment and decree may, therefore, be set aside under Order 9 rule 27 of the CPR.

[12] Order 9 rule 27 of the CPR provides –

"Setting aside decree ex parte against defendant*.*

In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also."

[13] In the present case, the Applicant states that her advocate was prevented by sufficient cause, being a heavy traffic jam, from appearing when the suit was called for hearing. In law, sufficient cause or reason depends on the circumstances of each case and must relate to inability or failure to take a particular step in time in a matter. See: ***Hikima Kyammanywa vs Sajjabi Chris, CACA No. 1 of 2006.*** In ***Nakiride v Hotel International Ltd [1987] HCB 85,*** the court held that while considering whether there was sufficient cause why counsel for the applicant did not appear in court on the date the application was dismissed, the test to be applied in cases of that nature was whether under the circumstances the party applying honestly intended to be present at the hearing and did his best to attend.

[14] In the present circumstances, Counsel for the Applicant indicated that he arrived late at 9:50am while the case had been fixed for hearing at 9:00am. Although the fact of the advocate's arrival at 9:50am is not verified by any independent evidence, it was not controverted by the Respondent. It is, therefore, taken as admitted. Believing that the advocate arrived 50 minutes late, I would agree that Counsel for the Applicant honestly intended to be present at the hearing and did his best to be present but was only delayed by the stated occurrence which was a heavy traffic jam. It is however questionable whether delay on account of traffic jam should be admitted by the Court as sufficient cause. Like it was submitted by the Respondent's Counsel, such an occurrence is a weak reason as the advocate had alternative options of communicating either to the court through the clerk or with the opposite Counsel. I would agree that in such circumstances, the occurrence of delay due to heavy traffic cannot by itself constitute sufficient cause. An advocate ought to improvise means of either reaching the court or communicating his/her delay.

[15] The failure by the advocate to apply due diligence in the matter would amount to negligent conduct on his part. It is an established principle of the law that negligence of counsel ought not be visited on an innocent litigant and that a litigant ought not to bear the consequences of default by an advocate unless the litigant is privy to the default or the default results from the failure on the part of the litigant to give the advocate due instructions. See: ***Zam Nalumansi v Sulaiman Lule, SCCA No. 2 of 1992; Mary Kyamulabi v Ahmed Zirondemu, CACA No. 41 of 1979*** and ***Andrew Bamanya vs Sham Sherali Zaver, CACA No. 70 of 2001***. The courts have expressed the opinion that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant and where there are serious issues to be tried, court ought to grant the application. In such cases, the court will generally consider

whether the delay is one that is explainable to the satisfaction of court in determining whether to set aside the ex parte judgment or not.

[16] On the facts of the present case, although the reason given for failure to appear in court does not amount to sufficient cause, the negligence or lapse on the part of the Applicant's advocate is capable of constituting sufficient cause. Further, I have considered the view expressed in ***National Enterprises Corporation vs Mukisa Foods, Court of Appeal Civil Appeal No. 42 of 1997,*** to the effect that denying a subject a hearing should be the last resort. In ***Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1,*** the Supreme Court held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits; and lapses or errors should not necessarily debar a litigant from pursuit of his rights.

[17] Taking all the above factors into consideration, I am of the considered finding that the Applicant deserves to be granted an opportunity to present her case for determination by the Court. In line with the provision under Order 9 rule 27 of the CPR, I will exercise discretion to set aside the ex parte judgement and decree albeit conditionally. The condition shall constitute an order for the Applicant to deposit a sum of UGX 60,000,000/= (Uganda Shillings Sixty Million only) into the security account of the Court as a pre-condition to being heard on the main suit. The other condition shall be that the costs of this application shall be payable by the Applicant in any event.

[18] In all, therefore, the application is allowed with orders that;

a) The ex parte judgment and decree in Civil Suit No. 411 of 2017 is set aside upon the condition that the Applicant deposits into the security account of the Court a sum of UGX 60,000,000/= (Uganda Shillings

Sixty Million only) within 45 (Forty-Five) days from the date of this Ruling.

b) Upon failure by the Applicant to meet the condition in (a) above, the Respondent will be at liberty to take out execution of the ex parte decree.
c) The costs of this application shall be met by the Applicant in any event.

It is so ordered.

Dated, signed and delivered by email this 26th day of May, 2023.

Boniface Wamala
JUDGE