THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 015 OF 2023

(ARISING FROM CIVIL SUIT NO. 003 OF 2023)

1. KOMAX MOTOR VEHICLE COMPANY LIMITED
2. MICHAEL ORYEM *alias*
MICHAEL ORYEM TERENSIO ABUDWAYA
3. KILAMA POPE PAUL.....APPLICANTS

VERSUS

IDHA MICHAEL.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Introduction

The Applicants by Motion launched under Order 9 rules 12 and 27, and Order 52 rules 1 and 2 of the CPR, and sections 98 and 96 of the CPA, seek to set aside the order of this court. Court had ordered that Civil Suit No. 003 of 2023 lodged by the Respondent, proceeds ex parte against the Applicants, they having not filed Written Statement of Defence. The Applicants also pray that, time be enlarged for filing of their Written Statement of Defence in the head suit. The Applicants also pray for costs of the Application.

In the head suit, the Respondent's case is founded on contract breach. He avers he entered into an arrangement for the Applicants to import for him an Isuzu Elf Truck (from Japan). He paid Ugx 59,500,000 to cover the whole cost until the vehicle reaches and is registered in Uganda in the name of the Respondent. The vehicle was indeed imported but the Applicants instead choose to re-export it to South Sudan. They had it registered in that country in the name of the 1st Applicant Company. The Respondent followed up the matter with the authorities in South Sudan which resulted into some legal steps being taken in that country. At the end of the process, the Applicants agreed to have the vehicle driven back to Uganda. This was done. Apparently, the vehicle is currently in the 1st Applicant's custody in Uganda. In the suit, the Respondent seeks for a declaration that the Applicants breached the contract. He also seeks for an order that the Applicants register the vehicle in Uganda and transfer into the Respondent's name, before handing over to the Respondent. The Respondent also prays for general damages, mesne profits, interest, and costs of the head suit.

Grounds of the Application

The Applicants' case is predicated on the averment that they were prevented by sufficient cause from filing their Written Statement of Defence in time. They allege negligence and or misguidance of their then counsel who failed to file Defence in time. The Applicants aver the

Respondent will not be prejudiced if the application is allowed. They raise additional ground that, the head suit having been founded on contract, the Applicants would suffer substantial loss if the head suit is not heard inter-party and on merit.

The Application is supported by an affidavit deposed by the 3rd Applicant. He swore the affidavit on his own behalf and on behalf of the co-applicants. The 2nd and 3rd Applicants are directors in the first applicant company. The Applicants detail how they instructed former counsel, a one Kinyera David to file Defence. They aver they paid instruction fees but were let down by counsel who never acted on the instruction.

Response

The Application is opposed. In his affidavit, the Respondent doubts that instruction was ever given by the Applicants to their alleged former counsel. The Respondent, however, deposes, what court takes to be an alternative rebuttal, that, if any instruction was given, then it was so given after the time for filing the Defence had expired, and so, the Applicants were dilatory in their conduct and cannot be heard to blame their former counsel.

Representation

Mr. Silver Oyet- Okeny represented the Applicants who were absent during the hearing, while the Respondent was present and was represented by Mr. Okot Michael Obalo. Both learned counsel addressed court orally. Court has taken both submissions into account, and is grateful.

Issues

The main issues for resolution are;

i) Whether the Applicants have demonstrated a basis for setting aside the order of court allowing Civil Suit No. 003 of 2023 to proceed ex parte?

ii) Whether time ought to be enlarged for the Applicants to file their Written Statement of Defence?

iii) What remedies are available to the parties?

Determination

The first two issues will be considered together as the resolution of the first will naturally have a bearing on the second issue.

The Order of this Court sought to be set aside, was made pursuant to Order 9 rule 11 (2) of the CPR, which provides:

"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."

When the head suit was fixed for hearing on 10th July, 2023, there was no defence on court record. An affidavit of service was on record. However, to satisfy itself that due service of the summons had been effected on the Applicants, court directed that a hearing notice be served on the Applicants nonetheless. The Applicants were duly served by the clerk of court. They appeared in Court on 10th July, 2023, without counsel. Court allowed the Applicants to confirm whether they had been duly served with summons. They answered in the affirmative. They said they were served on 29th March, 2023, the day the summons was issued. The 2nd and the 3rd Applicants told court they had lost a relative on 9th April, 2023, so, they could not file defences within 15 days from the date of service. Learned Counsel for the Respondent orally applied under Order 9 rule 11 (2) of the CPR that the case is heard ex parte. Court allowed the application and ordered ex parte hearing. Court proceeded with the scheduling ex parte and framed issues. Court had in mind the settled law that a Defendant who has not filed Written Statement of Defence cannot be heard. See:

Agadi Didi Vs. James Namakaso, HCCS No.1230 of 1988 (Ntabgoba, PJ); **Kanji Devji Vs. Damodar Jinabhai & Co. (1934) 1 EACA 87**; **Sengendo Vs. Attorney General (1972) E.A 140**.

The Respondent then filed witness statement, which was admitted as evidence in chief. He opened and closed his case. Court directed the Respondent to file submission, which was done. The suit was set for Judgment on 4th September, 2023.

The Applicants lodged the instant application on 13th July, 2023, three days after court allowed the ex parte hearing. The instant Application was fixed for hearing on 4th September, 2023, the date set for judgment. Given the present application, this Court could not proceed to write Judgment until the application is disposed of.

During the hearing of the present application, having realized that the Application was neither premised on O.9 rule 12 or rule 27 of the CPR, Mr. Silver Oyet orally sought to amend the Motion to include both rules. Although this request was strange to court, as court shall amplify, because no objection was taken by learned counsel for the Respondent, Court allowed the oral application for amendment, in line with order 6 rule 19 of the CPR and the legal principle in **D.D Bawa Limited Vs. G.S Didar Singh [1961] E.A 282** where Sir Audley McKisack, C.J held that, oral application

for amendment of a pleading may be allowed in the course of a hearing. This being a simple amendment to insert what counsel felt were wrongly omitted, court found the oral application proper.

In his address on the merit of the application, Counsel Oyet Silver Okeny did not specifically address the applicability of the two rules yet, in court's view, the principles applicable thereunder differ. Order 9 rule 12 provides for setting aside of ex parte judgment. It states:

"Where judgment has been passed pursuant to any of the preceding rules of this order, or where judgment has been entered by the Registrar in cases under Order 50 of these rules the court may set aside or vary the judgment on such terms as may be just."

This rule has been interpreted by the Supreme Court to apply to cases where judgment was passed under Order 9 rules 6 and 7 (for liquidated sum), rule 8 (interlocutory judgment where pecuniary damages is claimed or claim relates to detention of goods) and Order 50 (where registrar enters judgment in uncontested cases and where parties consent) of the CPR, respectively. See: **Nicholos Roussos Vs. Gulamhussein Habib Virani & another, Civil Appeal No. 9 of 1993 (SCU), digested in [1993] 2 KALR 104**.

In this case no judgment was given under any of the provisions cited. Rather, what happened is that, court proceeded ex parte, pursuant to O.9 rule 11 (2) of the CPR. The Judgment of this court, which would be delivered ex parte under the general provision on delivery of judgments (O.21 Rule 1 CPR) is pending disposal of this application, one way or the other. Thus the provision of Order 9 rules 12 of the CPR, which learned counsel cited, is not applicable, given the facts and the circumstances giving rise to the instant application.

I next proceed to consider the provision of O.9 rule 27 of the CPR. It provides:

" 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."

Whereas both rules 12 and 27 of Order 9 CPR govern setting aside of ex parte judgments, the two rules are quite distinct. Under rule 12, the discretion for court in setting aside ex parte judgment is unlimited, save for setting aside consents which is covered under rule 12 that is, consent judgment entered by Registrar under Order 50 rule 2 CPR. Court has wider powers under rule 12 to set aside ex parte judgment entered pursuant to the rules preceding rule 12, which are rules 6, 7 and 8 discussed herein before. As noted, whereas rule 12 covers setting aside consent judgments as well, the court's powers is limited with respect to setting aside consent judgments. This clarity was given by the Supreme Court of Uganda in **Attorney General & Uganda Land Commission Vs. James Mark Kamoga and James Kemala, Civil Appeal No. 8 of 2004 (Mulenga, JSC)** with whom the other Justices concurred.

However whereas court powers regarding setting aside ex parte judgments under rules 6, 7 and 8 of Order 9 is unlimited, court's act judicially, depending on the facts, circumstances and merit of each case. Comparing the foregoing with Order 9 rule 27, under the latter provision, the discretion of court is limited to proving sufficient cause. Therefore, the principles applicable to O.9 rule 12 and rule 27, are quite different.

In **Patel Vs. E.A Cargo Handling Services [1974] E.A 75**, the then Court of Appeal for East Africa interpreted the then provision of the Kenyan Civil Procedure Rules which was in *parimateria* with O.9 rules 12 and 27 of the CPR, although the Kenyan CPR has since been amended so that its then equivalent of our rule 27 now is identical to our rule 12. Regarding the application of the Ugandan equivalent of rule 12 of O.9 CPR, **Duffus, P.**, stated in his Judgment:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just."

Similarly regarding the scope of the then equivalent of O.9 rule 12 CPR as contrasted with 0.9 rule 27 (then 24), **Sheridan, J.,** put it succinctly in **Sebei District Administration Vs. Gashai [1968] E.A 300**, thus:

"It (rule 12) gives the court wide discretion and is to be contrasted with Order 9 rule 24 (now 27) where an applicant has to show sufficient cause for not appearing."

See also: **Kimani Vs Mcconnell [1966] E.A 547** which further discusses the distinction.

So in my view, any issue to the effect that an Applicant was not duly served with summons or was prevented by sufficient cause from appearing when the suit was called on for hearing, mirrors the elements of rule 27 of O.9 unlike rule 12 which is silent on the considerations a court should take into account before setting aside ex parte judgment entered under rules 6, 7 and 8 of Order 9 CPR. Of course, courts have laid down their own tests, as shall be considered shortly.

The test that guides a court confronted with an application premised on O.9 rule 12 was formulated by Harris, J., in **Kimani Vs Mcconnell [1966] E.A 547** where he stated (at p. 555)

"Whether in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary on such terms to be imposed."

These test was referenced and accepted by the then Court of Appeal for East Africa in **Mbogo Vs. Shah [1968] E.A 93**, and **Patel Vs. E.A Cargo Handling Services [1974] E.A** where Duffus, P., had this to say, at page 76:

"I also agree with this broad statement of principle to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

It is thus abundantly clear that O.9 rule 12 applies to a situation where the Defendant has not filed a defence and Judgment is entered in its absence, pursuant to any of the rules preceding rule 12 or where a Registrar of court has entered Judgment under Order 50 rule 2 CPR in uncontested cases, or where parties consent. And under rule 27, a defendant must show that ex parte decree was passed, when summons was not duly served on it, or that it was prevented from appearing by sufficient cause when the suit was called for hearing. Appearance under rule 27 means court appearance by a Defendant. However, in light of modern innovations in the Ugandan Judiciary where the use of technology is now embraced in hearing of some matters, especially where it is sought for by a party, appearance by a defendant under rule 27 should now encompass virtual appearance, as the applicable rules may permit.

Therefore, in closing, whereas the principles applicable to rules 12 and 27 of O.9 CPR are distinct, the similarity lies in the fact that both provisions, as noted, cover the setting aside of ex parte judgments. However, regarding what amounts to 'sufficient cause" as used in O.9 rule 27, courts have

expounded the circumstances or grounds that may amount to sufficient cause. For example, mistake by counsel, though negligent, have been accepted as constituting sufficient cause. See: **Shabin Din Vs. Ram Parkesh Anand (1955) EACA 48**. But failure to instruct counsel does not amount to sufficient cause. See: **Mitha Vs. Ladak [1960] E.A 1054**. Ignorance of procedure by a self-representing lay litigant may amount to sufficient cause. See: **Zirabamuzaale Vs. Correct [1962] E.A 694**. Illness by a party may also constitute sufficient cause. See: **Patel Vs. Star Mineral Water and Ice Factory [1961] E.A 454.**

The above circumstances qualifying as 'sufficient cause' were adopted by the Supreme Court of Uganda in **Capt. Philip Ongom Vs. Catherine Nyero Owota, Civil Appeal No. 14 of 2001**, while paying deference to its earlier decision in **Nicholos Roussos Vs. Gulamhussein Habib Virani & another Civil Appeal No. 9 of 1993 (SCU), digested in [1993] 2 KALR 104** (*supra*).

Having set out the premise on which this case should proceed, and having disqualified the relevance of O.9 rule 12 and 27 CPR, given the facts and circumstances of this court's order, I proceed to consider the law I deem more apposite.

The Applicants equally anchored their case on section 98 of the Civil Procedure Act Cap 71 (CPA). Section 98 of the CPA provides:

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

The section provides for a reserve of powers of this court to make such orders to meet the ends of justice, inter alia. The Supreme Court of Uganda has had the occasion to consider the application of section 98 of the CPA in a plethora of cases, holding that, section 98 of the CPA, may be invoked in a given circumstances, in the exercise of court's discretion, which should be exercised judicially. See: **Suleiman Vs. Salim Kabambalo, Civil Appeal No. 32 of 1995 (SCU); National Union of Clerical Commercial Professional and Technical Employees Vs. National Insurance Corporation, Civil Appeal No. 17 of 1993; Rawal Vs. Mombasa Hardware Ltd (1968); Adonia Vs. Mutekanga (1970) E.A 429**

In the instant case, therefore, the applicants stated that, they instructed Counsel Kinyera David to represent them. He was to file Defence in the head suit. They deposited Ugx 470,000 via mobile money on 12th April, 2023 at 01:19 Pm, through Atim Susan who was an agent of Mr. Kinyera. The Applicants further deposited Ugx 550,000 at 3: 29 Pm, the same day,

through Atim Susan. The receiving telephone number of Ms. Atim is stated in the affidavit in support of the Motion. According to the telephone print out, the reason stated for both transactions is "fee".

In his response, the Respondent vehemently denies that Atim Susan was an agent of Counsel Kinyera. In fact learned counsel for the Respondent submitted that, there is no proof that Ms. Atim was an agent of Mr. Kinyera. Counsel contended that, in any case, the purported instruction to Mr. Kinyera was not given within the time allowed for the filing of the defence. I think this contention was because, the Applicants adduced evidence of further payments made directly to Mr. Kinyera David. For instance, the payment of Ugx 120, 0000 made on 4th May, 2023, and received on Mr. Kinyera's cellphone. The reason for this transaction was stated to be "Court". A further payment of Ugx 200,000 was made on 27th May, 2023 to Mr. Kinyera's telephone number, and the reason for sending the money by the sender, was stated as being "fee".

In his submission, Counsel Michael Okot Obalo further argued that, these payments made directly to Mr. Kineyra were in respect of another matter in which Mr. Kinyera was representing the Applicant in the Chief Magistrates Court of Gulu. Counsel quotes Civil Suit No. 69 of 2022: Akello Florence Kilama & another Vs. Micheal Terensio Abudwa Oryem & Komax Motorvehicle Co. Ltd, to support his assertion. With respect, learned

counsel for the Respondent gives no basis for this assertion. Counsel was not privy to the arrangements between the Applicants and Mr. Kinyera David. In my view, in the absence of evidence from Mr. Kinyera or Ms. Atim, denying the purpose for which these payments were made by the Applicants, the Respondent and counsel have no basis for attributing their imagined reasons. This Court has noted that, the firm of advocates representing the present Respondent, represented the Plaintiffs in C.S No. 69 of 2022 which learned Counsel Quoted. It is thus very likely that, the Respondent's counsel purport to rely on information from an earlier case where their firm represented an adversary against the present applicants, yet counsel, unfortunately is barred from acting as a witness for the Respondent and as counsel, at the same time.

In the circumstances, I find that the Applicants have led evidence on the balance of probability to prove they gave instructions to Mr. Kinyera David, to represent them in the head suit, but learned counsel did not lodge Written Statement of Defence. The instruction was given timeously, evidenced by payment of the first set of fees, through Atim Susan. The subsequent payments which were made after the 15 days for filing the Defence had elapsed, in my view, did not affect the fact that due instruction had been given to counsel Kinyera timeously. Learned counsel Okot Michael Obalo denied that Mr. Kinyera David was instructed by the Applicants. I think, with respect, he who denies lack of proper instruction

has the burden of proving it. See: **Eva Kyowala Vs. Lakeri Naluwoza, HCCS No.518 of 1995, digested in [1996] 3 KALR 17**; **Navichandra Kakubhai Radia Vs. Kukubhai Kalidas & Co. Ltd, Civil Appeal No. 10 of 1994 (SCU)**; **United Assurance Co Ltd Vs. AG, Civil Appeal No. 1 of 1986**. Here, counsel has not proved lack of instruction.

Learned counsel for the Respondent also argued that, the Applicants lied to this court because when they appeared without counsel on 10th July, 2023, they said the reason for their not filing the Defence is because, they had lost a relative. Learned Counsel submitted, in their affidavit in support of the present application, the Applicants have not advanced the reason they had earlier told court. Learned counsel is correct, only to the extent that, that is what the Applicants told court on 10th July, 2023. However, to infer that the Applicants lied at the time, simply because they have not advanced the same reason now, is incorrect. The Applicants were unrepresented when they first appeared in court. It is possible they thought the reason they gave court, albeit honestly, constituted 'sufficient cause' to be indulged by this court. I think when they instructed the present counsel, they saw no weight in pressing the same. Court cannot, therefore, hold against the Applicants that, they lied, simply because they did not predicate the present application on the earlier verbal ground they presented when they appeared unrepresented. Once they instructed the

present counsel, I think it was open to the Applicants to pursue strong ground in an application of this nature.

Last but not the least, this court notes that, the Applicants only woke up on 13th July 2023 to lodge the present application. It seems they did not take the issue of timelines seriously. Having known that Mr. Kinyera had failed them, they should have instructed another counsel immediately, and not wait until July, 2023, to act. In this case, having been served with summons and the Plaint on 29th March, 2023, the Applicants had up to 12th April, 2023, to file their Defence. It is thus not clear why they waited for three months before taking the essential step. It is possible that, being lay persons, they did not appreciate the procedure for moving court, that is why they earlier appeared and made verbal request to file Defence outside time.

Considering the matter in totality, I find that, the justice of the matter dictates that, court indulges the Applicants. Since O.9 rules 12 and 27 are inapplicable in this case, the Application succeeds under section 98 and section 96 of the CPA, respectively. I should add that, section 98 of the CPA does not necessarily proceed on proof of "sufficient cause" but under it, court considers circumstances of the case and may make such orders so as to meet the ends of substantive justice. This is the case instant, where the Applicants should not be allowed to suffer because of the

inaction by their then counsel. In the circumstances, the application is allowed, and court makes the following orders;

i) The Order of this Court given on 10th July, 2023, allowing civil suit No. 003 of 2023 to proceed ex parte, is hereby set aside under section 98 of the CPA.

ii) The ex parte proceedings in Civil Suit No. 003 of 2023, between the parties herein, is consequently set aside.

iii) Time is hereby enlarged pursuant to section 96 of the CPA, to enable the Applicants lodge their Written Statement of Defence in Civil Suit No. 003 of 2023.

iv) The Applicants shall file Written Statement of Defence within 10 (ten days) from the date of this Ruling.

v) The Respondent may lodge its response to the Applicants' Defence/ pleading, within 15 days from the date of service.

vi) The Applicants shall pay costs of this Application being thrown away costs, and costs associated with the ex parte proceedings, under section 27 of the CPA, to the Respondent.

It is so ordered.

Delivered, dated and signed in Court this 12th September, 2023.

12/9/2023

George Okello
JUDGE HIGH COURT

Ruling read in Court

12:05pm

12th September, 2023

Attendance

Ms. Grace Avola, Court Clerk.

Mr. Oyet Silver Okeny, Counsel for the Applicants.

Mr. Michael Okot Obalo, Counsel for the Respondent.

Mr. Kilama Pope Paul (3rd Applicant) absent (sick).

Mr. Michael Oryem Terensio Abudwaya (2nd Applicant) in court, in his capacity and as Director of the 1st Applicant Company.

Respondent in court.

12/9/2023

George Okello
JUDGE HIGH COURT