

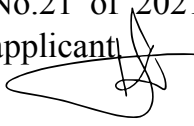
THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
MISCELLANEOUS APPLICATION NO.897 OF 2022
(ARISING FROM DIVORCE CAUSE NO.21 OF 2021)
MARTIN KAYANJA :::::::::::::::::::::::::::::::::::APPLICANT
VERSUS
BEATRICE KAYANJA ::::::::::::::::::::::::::::::::::: RESPONDENT

Before: Lady Justice Ketrah Kitariisibwa Katunguka.

Ruling.

Introduction:

1. By way of Notice of Motion under section 98 of the Civil Procedure Act Cap.71; Order 9 rule 20, Order 52 rules 1&2 of the Civil Procedure Rules S.I 71-1., Martin Kayanja (‘the applicant’) filed this application against Beatrice Kayanja (‘the respondent’) seeking orders that; the ex parte proceedings in Divorce Cause No.21 of 2021 be set aside; and the suit be heard inter parte; leave be granted to the applicant to cross examine the respondent who is a sole witness; the costs of the application be provided for;
2. The grounds of the application are in the notice of motion and the affidavits of Martin Kayanja the applicant and counsel for the applicant (Chemisto Shuab K.); and briefly that: on 24/8/2022, the respondent was granted leave in Divorce Cause No.21 of 2021 to proceed exparte and she duly proceeded exparte; her witness statement admitted in court as a sole witness; the petitioner (respondent herein)’s case was closed and she filed submissions;
3. On the day when court granted leave to the respondent to proceed exparte, counsel for the applicant had mistakenly forgotten that the matter was fixed for 24/8/2022;but was also amidst Uganda Law Society campaigns for presidency where he was a candidate; it is in the interest of justice that the exparte proceedings be set aside and Divorce Cause No.21 of 2021 be heard inter parte as failure to appear was due to no fault of the applicant



4. The respondent strongly opposes the application and charges that; court proceeded ex parte upon being satisfied that the respondent was duly served on 30/6/2022 and on 16/8/2022; the applicant's lawyer had sufficient time to organize and plan for the hearing of the divorce cause since he runs a practice with other partners with whom he ought to have arranged to attend court on 24/8/2022 on his behalf; the applicant has not pleaded any sufficient cause as to why he did not attend court on 24/8/2022; the application should be dismissed.

The applicant filed an affidavit in rejoinder reiterating his earlier position in the affidavit in support.

5. **Representation:**

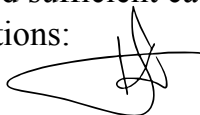
Counsel Chemisto Shuaib Kubai of M/s Oasis Advocates represented the Applicant; the respondent is represented by counsel Innocent Ngobi Ndiko of M/s Ngobi Ndiko Advocates.

Both counsel filed written submissions which I have considered.

The issue for determination is:

Whether the applicant has adduced sufficient evidence to warrant the setting aside of ex parte proceedings in the Divorce Cause No.21 of 2021 for the suit to be heard interparty?

6. This application was filed under Order 9 rule 20 of the Civil Procedure Rules; but the correct law is Order 9 rule 27 of the Civil Procedure Rules; so this ruling shall be guided by O 9 rule 27 of the rules(**Saggu Vrs Road Master Cycles (U) Ltd (2002) 1 EA 258**);
7. Order 9 rule 27 of the Civil Procedure Rules; which provides that: -
“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.” ;
8. The conditions in an application of this nature are: the applicant was not duly served with summons and has furnished sufficient cause to set aside the judgment of the court. I shall consider each of the conditions:



a) Whether the applicant was duly served with summons?

9. The *ex parte* order was made under O. 9 r. 20 of the Civil Procedure Rules reproduced hereunder:

‘(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing—

(a) if the court is satisfied that the summons or notice of hearing was duly served, it may proceed *ex parte*;

(b) if the court is not satisfied that the summons or notice of hearing was duly served, it shall direct a second summons or notice to be issued and served on the defendant; and

(c) if the court is satisfied that the summons or notice of hearing was served on the defendant, but not in sufficient time to enable him or her to appear and answer on the day fixed, or that the defendant was for other sufficient cause unable to appear in person or cause appearance to be made on his or her behalf, it shall postpone the hearing of the suit to a future day to be fixed by the court and shall direct notice of that day to be given to the defendant.

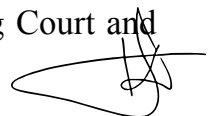
(2) Where it is owing to the plaintiff’s default that the summons or notice of hearing was not duly served or was not served in sufficient time, the court may order the plaintiff to pay the costs occasioned by postponement.

10. In *David Ssesanga Vs Greenland Bank Ltd (In liquidation) HCMA No.406 of 2006* it was held that effective service must produce the desired effect, which is to make the defendant aware of the suit.

Evidence shows that hearing notices dated 27/7/2022 and 15/8/2022 were served on counsel for the respondents notifying him of the hearing date of 24/8/2022 in Divorce Cause No.21 of 2021; both hearing notices were received as shown by the counsel for the applicant’s receipt stamp endorsed on the notices; an affidavit of service by this court’s process server dated 22/8/2022 shows that service was duly effected on the applicant’s counsel; and this is not denied; Court finds that the applicant was duly served and was aware of the date when the matter was coming up on 24/8/2022.

b) Whether sufficient cause exists to set aside the *ex parte* proceedings of court?

11. In *Florence Nabatanzi versus Naome Zinsobedde Civil application no. 5 of 1997*, it was held that; “Sufficient cause depends on the circumstances of each case and must relate to the inability or failure to take a particular step in time”. Sufficient cause is demonstrated by the Applicant showing that he or she had an honest intention of attending Court and



was diligent in applying for the reinstatement. (see: Crown Beverages Ltd versus Stanbic Bank of Uganda Ltd HCMA No. 0181 of 2005);

12. Counsel for the applicant states that he was contesting for the position of President in Uganda Law Society campaigns; that he honestly forgot that the matter was fixed for 24/8/2022; and he had not noted the date in his diary; in his submissions, counsel states he did not turn up despite service and that this neglect should not be visited on the applicant. The applicant deposes that; his lawyers undertook to inform him of the date of hearing for presentation of his evidence in reply to the petition, so that he may travel from United Kingdom and appear in court which his counsel did not do ; he is interested and committed in pursuing the case on its merits; he filed the scheduling memorandum, trial bundle and witness statement on 4th of April 2022; he prays that the mistake of his lawyer should not be visited on him.
13. Counsel for the applicant has not demonstrated any justifiable reason why he did not attend or why he did not inform his client in time; participation in Law Society elections while noble should not deny a client his right to representation in court; having been served with two hearing notices reminding him of the hearing date;
14. I agree with counsel for the respondent's submission that the counsel for the applicant having known his busy schedule as a candidate in the Uganda Law Society presidential race ought to have made other arrangements; between 30/6/2022 and 16/8/2022.
15. However, courts have severally decided that mistake and negligence of counsel should not be visited on the litigant as a lay person; (see: ***Fred Kyewalabye vs Richard Ssevume & 2 others Civil Appeal No. 01 of 2004***); in ***AG vs. AKPM Lutaaya SCCA No. 12 of 2007***, Katureebe, JSC (as he then was), held that the litigant's interests should not be defeated by the mistakes and lapses of his counsel. In ***Sipiriya Kyaturesire V. Justine Bakachulike Bagambe CA No.20 of 1995***; court noted that, where a litigant instructed his 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
16. In this case the applicant states he was in United Kingdom and was not informed by his counsel about the hearing date to enable him travel to Uganda for court hearing on 24/8/2022;but he is interested in pursuing his case in divorce cause No.21 of 2021;
17. Litigants are not expected to be hands off their cases just because they have instructed counsel, so they themselves must check on the progress of their cases; they can not ride on being protected simply because the actions of their counsel should not be attributed to them; the line is thin between genuine mistake and calculated delay and each case in my view must be considered on its unique facts; so that any resultant delays are genuine;(see ***Matovu v Lukwata (Miscellaneous Application 40 of 2017) [2017] UGHCCD 149 (27***



July 2017); in this case I note that counsel has on previous occasions attended court – on 3/12/2021 and 4/4/2021 save for 24/8/2022 when the matter proceeded exparte;

18. Having said that however in this case by the nature of the impact of divorce to all concerned, leave alone the parties themselves, it is prudent that opportunity is given for the parties to give as much information as is available so that court makes an informed decision;

It is in my view that this is a proper case where the negligence of the applicant's counsel should not work to his detriment. But since the respondent incurred costs not by her fault, the applicant shall bear them.

In the result, I find that there exists sufficient cause for the setting aside of exparte proceedings in Divorce Cause No.21 of 2021.

This application is allowed;

- 1) The order that proceedings in Divorce Cause No.21 of 2021 proceed exparte is hereby set aside;
- 2) Divorce Cause No. 21 of 2021 shall proceed inter parte;
- 3) The applicant shall meet the cost of this application.

It is so ordered.



Ketrah Kitariisibwa Katunguka

Judge

5/01/2023

Delivered by email to:chemisto2000@gmail.com,innocentndiko@yahoo.com