THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 0652 OF 2020

(Arising out of DIVORCE CAUSE NO. 0103 of 2017)

NANTALE JUSTINE HARRIET:::::::::::::::::::::::::: APPLICANT

VERSUS

WILHELM JOSEF HENDRIX:::::::::::::::::::::::::: RESPONDENT

Before: Lady Justice Ketrah Kitariisibwa Katunguka.

Ruling

Introduction:

1. Nantale Justine Harriet (the applicant) sues Wilhelm Josef Hendrix(the respondent), seeking orders that; the exparte judgment delivered in Civil Suit No. 103 of 2017 be set aside; Civil Suit No. 103 of 2017 be heard inter party.

2. The grounds are in the Notice of Motion and the affidavit in support deposed by the applicant and briefly that; the Applicant was not served with the summons to answer the Petition and is not ordinarily resident in Uganda ; was not effectively served with hearing notices yet she has a full defence to the Petition; the hearing and judgment in the Petition was founded on a Petition which ought to have been dismissed without notice for ineffective service of summons; the judgment has and continues to cause undue hardship and injustice to her as it included properties that were not matrimonial property and not in her names; she made an earlier application which was struck out, she had to find time to come to Uganda to depone the affidavits to avoid suffering the same fate; this Application has been

brought without undue delay; it is just and equitable that it be allowed so that the Civil Suit No. 103 of 2017 can be heard on merit and inter party;

The Application is supported by a copy of a letter marked "SEK ", and An advert in the Daily Monitor dated 1st August 2019;

3. The Application was opposed by the Respondent who filed an Affidavit in reply deposed by Munawa Rogers with written authority from the Respondent and briefly that; this Application is misconceived, incompetent, vexatious, frivolous, a waste of court's time as its incurably defective, improperly filed before this honourable court; the affidavit in support is full of falsehoods; it was served out of time and the Respondent at the earliest opportunity possible shall raise a preliminary objection that the same be dismissed with costs;

4. The Applicant is a Ugandan who celebrated the impugned marriage with the Respondent here in Uganda and since the misunderstandings between her and the Respondent that led to the filing of the head divorce cause, the applicant has been in Uganda; at the filing of the head divorce cause, both the Applicant and the Respondent were domiciled in Uganda before and after the filing, and summons to file a reply to answer the Petition was served effectively on the Applicant;

5. The Applicant has never filed Divorce Cause No. 105 of 2021 to the best of his knowledge he filed Divorce Cause No. 103 of 2017 upon which the court pronounced itself; the applicant was among the people who were invited on the 26th day of October 2017 by the State House; it is not true that the Applicant was not aware of the divorce cause because when she complained to State House against the Respondent, the state house held a meeting both at the State House and in Masaka and the lawyer reminded the applicant of the pendency of divorce and the New Vision reported the same;

6. At all material times the applicant has been aware of the pendency of the head suit because her former lawyers always informed her; it is not true that since 2017 the Applicant has not been in Uganda because on 24th May 2018 arising from Civil Suit No. 143 of 2018 and in her particulars therein she stated that she is a female adult Ugandan and now she cannot say that she is not Ugandan; in answer to paragraphs 6 and 7 of the affidavit in support the Applicant is not aware of the allegations therein;

7. The summons to answer the Petition was served on Serwadda Muhereza & Co. Advocates who had full instructions to represent the applicant as they used to

appear in most of the meetings with her; the writing of the letter alluded to was an afterthought and attempt to circumvent service which had been well made and in any case the same letter was never copied and served on the Respondent personally or his advocates; it is true the former lawyers received the Petition and the applicant refused to file an answer;, several hearing notices were served on her but she stubbornly refused to honour them until court was left with no choice apart from granting and order of substituted service;

8. Substituted service was effected through the Daily Monitor Newspaper of 1st August 2019; the applicant has never notified him that she is not a resident of Uganda because she has always been known as a Ugandan; on the 1st October 2019 up to 13th November 2019 during the running of the hearing notice in the Newspaper, the Applicant was in Uganda as she confirmed the same in her affidavit; it was not irregular to allow service by way of substituted service since the Applicant was in Uganda; that this honourable court provided justice by holding that the Petitioner and the Respondent should divide the matrimonial properties equally;

9. The Applicant is a total liar, dishonest, and uses very many law firms with the intention to deliberately confuse service, whereas she has stated in her affidavit that her former lawyers were Serwadda Muhereza & Co. Advocates and Rutebemberwa & Co. Advocates she is stating that it was Rutebemberwa & Co. Advocates who filed the application to set aside the dismissed application yet the application indicates that it was drawn and filed by M/s Stratten Advocates; the Applicant is putting the court on trial to waste its time as the former Application was dismissed for being incompetent;

10. The present application is also incompetent for being served out of time; the Applicant filed a notice of Appeal on 17th June 2022 and has never pursued the same appeal and she has turned this Honourable court into a playground; the court exercise its discretion and the Respondent simply tendered his evidence; the interest of justice requires the dismissal of this application because it is competent like past applications and the subsequent filing of the Appeal puts the Respondent on tenterhook to frustrate execution; the filing of this application is in bad faith intended to quench the Respondent's little money and that she has at all material times frustrated the execution of the judgment to the extent that the Respondent through his lawyers complained to the Head Judge Family Division as to why the file disappears upon the application for execution coming up, only to appear when the applicant files any application;

11. The applicant is not seeking to have the order to proceed exparte vacated; it would be irregular and improper to allow this application when there is an uncontested court order; the Respondent prays that this Application be dismissed with exemplary and punitive costs to the Respondent;

12. In her affidavit in rejoinder the Applicant maintains that she has lived, worked and resided in Germany and as such could not have been served as though she was ordinarily living in Uganda; the Applicant has had an opportunity to revisit her passport and travel documents and acknowledges that she was in Uganda in 2017 but by 26th October 2017 the summons to answer the Petition had not yet been extracted, the Applicant left Uganda on the 8th of September 2017 she could not have attended the mediation on the 26th of October 2017 as alleged as she had already flown back to Germany by then so the mediation report marked annexure B is false; the New Vision Article is about the 2018 meeting and this had nothing to do with the Divorce Petition but with other matters filed in Masaka High Court by the Respondent;

13. The Applicant denies that she was ever informed of the Divorce Petition which the Respondent had kept a secret; the Applicant has never instructed M/s Serwadda Muhereza and Co. Advocates to represent her in the Petition and that was clearly stated in their letter of 28th November 2017 to the court which was also served onto M/s Nyanzi and Nyanzi the Respondent's lawyers; the allegations that hearing notices were served on the applicant are false as she resides in Germany; the service ought to have been effected out of jurisdiction and not as though the Applicant was ordinarily resident in Uganda; the applicant came to Uganda on 1st October and flew back to Germany on 15th October; the Respondent was served as soon as it was retrieved from the court; the Applicant was not aware that her former lawyers M/s. Stratten Advocates had filed a Notice of Appeal, they never informed her she learnt of it from the attachment to the Affidavit in reply and has since intimated to them to withdraw it.

14. **Representation;**

The Applicant is represented by Counsel Sekabanja Edward while the Respondent is represented by Counsel Akakimpa Godfrey. Both Counsel filed written submissions which I have considered.

Preliminary objections raised by counsel for the respondent.

Counsel for the respondent argues that:

15. Service of the notice of motion upon him was outside the 21 days required by O5 r. 1(2) of the Civil Procedure Rules; he cited Twinomuriisa Jordan vs Samuel Mugume MA 837/2021 and argued that the only cure would have been an application for extension of time otherwise the application is incompetent;

16. The affidavit in support of the notice of motion deposed by the applicant is defective and should be expunged for not being notarised because it states at paragraph 2 that Nantale Harriet is *'... a permanent resident of Kleve North Rhine Westphalia Federal Republic of Germany where I have lived and worked since 2003..'* yet it does not bear the seal of the notary public; meaning that it was drafted in Germany and sent to Uganda yet the law requires that the deponent appears before the commissioner for oaths according to section 6 of the Oaths Act he cited Mohammed Majyambere vs Bhakresa Khalil and Kakooza John Baptist vs Electoral Commission Election Petition No. 11/2007; thirdly that the affidavit in rejoinder deposed by Kateregga Kata is defective for not disclosing the source of information;

17. In reply to the points of objections counsel for the applicant contends that although the application was filed on 18/07/2022 it was not given a hearing date till 11/10/2022 and the respondent was promptly served on 12th October 2022; that the affidavit in support was sworn by the applicant when she was in Uganda; and finally that Kateregga Kata is a lawful attorney for the applicant so he knows all her affairs;

18. I appreciate the case law provided by counsel; I have considered the submissions by counsel that the application was filed on 18th July 2022 but the date given on 11/10/2022; the practice indeed is that the registrar receives the application and endorses it but service can not be effected because unless it has a date there is nothing to serve or notify the other party on, for the notice of motion is incomplete without a date; its only where it can be proved that the notice had a date earlier and was not served that its time runs from endorsement; I have not found that that is the case here. I therefore agree with counsel for the applicant that the service was made as soon as the notice of motion was complete.

19. On the issue of the un notarised affidavit in support at paragraph 3 of the affidavit in support she states that and I quote: *'I occasionally come to Uganda and spend 3-4 weeks.';* at paragraph vi. and vii. of the notice of motion it is stated as follows:

Paragraph *vi. ' The applicant made an earlier application which was struck out;'*

Paragraph *vii.The Applicant had to find time to come to Uganda to depone to the affidavits to avoid suffering the same fate;'*

20. The respondent did not adduce evidence that the applicant could not have been in Uganda at the time; he wishes to be believed so he must prove,(see sections 101 and 103 of the Evidence Act); I want to believe that permanent residence does not mean unbroken residence. I believe counsel for the applicant when he states that at the time the affidavit was deposed the applicant was in Uganda so it was properly commissioned.

21. On whether the affidavit in rejoinder is invalid for failure to state the source of information counsel for the applicant states that Kateregga Kata is the lawful attorney of the respondent so he is knowledgeable in her affairs; Kateregga Kata at paragraph 1 of the affidavit in rejoinder states and I quote: *'That I am a male adult Ugandan and the lawful Attorney of the Applicant well conversant with the matters pertaining this case in which capacity I depone this affidavit.';*
Black's Law Dictionary defines an attorney as *'One who is appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated'*.

22. If the deponent of the affidavit in rejoinder swears in the capacity of a delegate then he has the knowledge as that of the agent/ applicant as if she was the one swearing. I therefore find that this preliminary objection, like the rest above, without merit.

I shall go ahead to consider the merits of the application.

The issue framed by counsel for the applicant is
Whether the exparte judgment made in divorce Cause No. 103/2017 should be set aside.

23. 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." ;

24. 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:

Determination

Whether the applicant was duly served with summons?

25. The applicant contends that she was not served with the petition so she was not aware of it and so could not have filed a reply and participated in the hearing; that the summons issued to Ms Sserwadda Muhereza & Co Advocates was not effective as the said Sserwadda had no instructions to represent the applicant and this was brought to the attention of court; that by the time the applicant knew about the petition it had lapsed; that if the respondent contends claims that the applicant resides in Uganda, which is not true, he ought to have served her personally; counsel cited Obura & Anor vs Equity Bank MA No. 809/2015 and o5 rule 2.

26. Counsel submitted that the applicant in her affidavit in support states that she is a permanent resident of Kleve North Rhine Westphalia Federal Republic of Germany where she has lived and worked since 2003; she occasionally comes to Uganda but in 2017 she did not come to Uganda; this is contradicted by the affidavit in rejoinder at paragraph 4 where it is stated that the applicant was in Uganda and left on 8th September 2017; proof of international travel is not by air tickets only but should be by presenting passports/ travel documents where entry and exit is indicated and stamped accordingly;

27. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the

matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case.

28. In the case at hand the presence of the applicant in Uganda at the time the summons to answer petition issued and substituted service was made is key; just because someone presents a ticket and not a boarding Pass is in itself not proof that someone actually travelled in or out of the country! It is my considered view that a boarding pass coupled with proof of entry and exit in the Passport is the best proof.

29. There is a letter from the office of the Deputy Resident City Commissioner Kampala Makindye Division-showing that the applicant reported to the office on 20th September 2017 that her husband the respondent had taken up her house; that he convened a meeting on 26th September where both the applicant and the respondent were present; this is stated to be false in the affidavit in rejoinder at paragraph 4; I have however not found reason to believe that the letter from office of the Deputy Resident City Commissioner is fake especially considering the contraction in the affidavit in support of the petition and the affidavit in rejoinder; at paragraph 5 it is contended that the 2018 meeting referred to in the new Vision article has nothing to do with this petition;

30. In my view it is related if it can point to the fact that the applicant was in the country and actually knew of the petition for divorce. In fact the article in the New Vision of 30th July 2018 attributes a statement to a one Akakimpa that *'....Nantale has made it difficult for court to serve her until the summons expired...we have embarked on processing fresh summons to serve her';* the same article refers to a meeting held on 25/7/2018 which the applicant is stated to have attended.

31. Counsel for the respondent contends that the letter written by Serwaadda Muhereza & Co. Advocates to the Registrar Family Division to the effect that they do not represent the applicant was never copied to her yet she has a copy; therefore she knows them and so was aware of the petition;

32. I find that while counsel Serwadda could have known the applicant if he did not represent her in the petition but in an other matter, he could not have effectively received service on her behalf;

33. Having stated the above however I have not seen an affidavit of service showing that the applicant had made it difficult to be served ;although I am not

convinced that she was not in the country and may not have seen the notice in the Monitor News paper;

34. It is submitted that even substituted service by publishing the notice to file a reply to the petition in the Monitor News paper did not apply to the applicant; and that if they could not serve her in the ordinary way they should have applied to serve her out of jurisdiction; which they did not, so there was no effective service on her; counsel cited Geoffrey Gatete and Angela maria Nakigonya vs William Kyobe SCCA No. 7 of 2005 where Mulenga JSC held that effective service means having the desired effect of making the defendant aware of the summons;

35. If according to the respondents, the applicant was in the country as they claim, they may not have found reason to apply for service out of jurisdiction yet if it is not disputed that the respondent resides in Germany that would have been the best option.

36. Like I have stated above I am not convinced that the applicant may not have been in Uganda and might therefore have missed the notice in the News papers; however there is no proof that she was actually in Uganda at the time and or refused service; in the absence of an affidavit of service to the effect that she made it difficult for service to be effected upon her I find that there was no effective service.

Whether sufficient cause exists to set aside the exparte proceedings of court?

37. I n *Florence Nabatanzi versus Naome Zinsobedde Supreme Court Civil application No.. 5 of 1997 citing with approval Hikima Kyamanywa vs Sajjabi Chris CACA NO.1/2006 and Buso Foundation Ltd vs Bob Mate Philips & Anor*, CA No. 40/2009) all also cited by counsel for the applicant, 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*".

38. 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); The applicant states in her affidavit that she was not served with the petition; she has filed this application without unreasonable delay and she has a defence. I have already decided that the application was filed and served in time when I was considering the preliminary objections;

39.

40. While cases must be filed and brought to attention of all parties concerned for purposes of filing their defence and within specific timelines; in my humble view at the end of the day what is important is that disputes are as much as possible investigated, not only to avoid multiplicity of suits but also to ensure that there is closure to specific disputes and always in the interest of justice; denying a party the right to be heard will not take the dispute away and should be the last resort; always depending on the facts of each case; family disputes if not resolved may culminate into other hideous crimes which could have been avoided by affording parties audience without undue regard to technicalities subject to the law; 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;(see articles 28 and 126 of the Constitution of Uganda and Engineering TradeLinks Ltd vs DFCU Bank Ltd M.A 337/2014); also cited by counsel for the applicant.

In the premises I find that sufficient cause exists to set aside the exparte judgment in DC. No. 103/2017.

1.The application is granted.

2.Judgment in Divorce Cause No.103 of 2017 is hereby set aside.

3. Divorce Cause No. 103/2017 shall be heard inter parte.

4. Costs shall stay in the cause.

It is so ordered.

Ketrah Kitariisibwa Katunguka

Judge

5/01/2023.

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