THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCILLENOUS APPLICATION NO. 619 OF 2015

(Arising From High Court Miscellaneous Cause No.6 of 2011; and High Court Miscellaneous Application No. 859 of 2012; and High Court Execution Miscellaneous Application No. 2089 of 2014)

COMMISSIONER FOR LAND REGISTRATION::::::::::::::::::::::::::APPLICANT

VERSUS

1. **JAMES HAM SSALI**
2. **GEORGE KASEDDE MUKASA::RESPONDENTS**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING

This application was brought under Section 98 of the Civil Procedure Act (CPA); Order 9 r. 27 and Order 52 rr. 1 and 3 of the Civil Procedure Rules (CPR) seeking orders that the *ex parte* orders in ***HCMC No. 6 of 2011,*** and ***HCMA No. 859 of 2012*** be set aside, and the applications be set down for hearing *inter partes* and costs be provided for.

The grounds of the application are briefly set out in the notice of motion but amplified in the affidavit of Ms. Sarah Kulata Basangwa, the Commissioner for Land Registration in the Ministry of Lands, Housing & Urban Development. In the main, they are that the Applicant was never served with the respective applications, and only learnt about the rulings and orders therein when the Respondents' lawyers requested the Applicant to register and/ or note the re - entry of the

Respondents on the title comprised in Kyaggwe Block 295 Plot 2 land at Njeru *(hereinafter the "suit land").* Further, that she was denied of the right to be heard before the court when the Respondents failed or defaulted to effectively serve her with the court process.

The Applicant further states that the Government of Uganda established an extensive and well developed demonstration farm, well stocked with cattle through Ministry of Agriculture, Animal Industries & Fisheries on the suit land. That the Applicant has good or plausible grounds against the allegations in the Respondents' respective applications. That it is in the interest of justice that the orders in the respective applications be set aside and the applications be set down for hearing *inter partes*.

The 1st Respondent filed an affidavit in reply opposing the application. He mainly contends that the present application is untenable and brought in bad faith, and that it is frivolous and vexatious. Further, that the Applicant was duly served with court process in all the relevant applications and that she duly acknowledged receipt of the same. Further, that the Applicant and/or her officials have on a number of times been appearing to defend the applications when the matter was called for hearing at the Execution Division of the High Court. That as indicated in one of the court proceedings the Applicant even filed an affidavit opposing the application.

The 1st Respondent further states that the Applicant on the several occasions attended court upon being summoned to show cause why she could not note the lease re-entry in favor of the Respondents, and that on each of the occasions she gave different reasons from the ones she is now advancing in this application. That the Applicant has not shown any tangible evidence of what vested interest she has for her to deny the Respondents their entitlement to the remedy of re – entry, or how the same would affect her or any Government Department as alleged. The 1st

Respondent further states that they have already re - entered the suit land, surveyed it off and held discussions with the very may families, individuals and private institutions. The Respondent opines that in bringing the instant application, the Applicant is over staying her mandate and should be estopped from doing so.

The following are the issues for determination;

1. ***Whether the Applicant was duly served with the applications in HCMC No. 6 of 2011; and HCMA No. 596 of 2012.***
2. ***Whether the Applicant was prevented by any sufficient cause from appearing in both applications.***

Counsel for the parties filed written submissions to argue the application. I have taken them into account in the resolving the issues and coming to the decision in this matter.

Resolution of the issues:

Issue No.1: Whether the Applicant was duly served with the applications in HCMC No. 6 of 2011; and HCMA No. 596 of 2012.

Order 9 r.27 CPR which governs setting aside *ex parte* orders/decrees 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."

The clear position of the law is that where it is proved to the satisfaction of court by an applicant 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 the costs as it may make.

A cursory perusal of ***HCMC No. 6 of 2011*** filed on 24th January, 2011 easily shows that the Respondent therein (who is the Applicant in the instant application) never filed any affidavit in reply despite having been served with a hearing notice on 21st February, 2011. Her office acknowledged receipt of service on the same date by stamping on the notice. An affidavit of service to that effect was duly filed on court record on 7th March, 2011. The court made a ruling delivered on 7th July, 2011, and at page 1, it was held that;

"The respondent did not file an affidavit in reply though he/she was served with a copy of the application, which he/she acknowledged. An affidavit of service to that effect was filed in this court. The respondent did not appear when this suit was called for hearing. The hearing proceeded ex parte."

Also, ***HCMA No. 859 of 2012*** was filed on 25th September, 2012. The Respondent therein (the Applicant herein) was duly served with the hearing notice and her office duly acknowledged receipt with the received stamp. There is also proof of service contained in the respective affidavits of service filed on 20th June, 2013, 31st October, 2013, 6th February, 2014, 25thFebruary, 2014, and 20th August, 2014. Still the Applicant now, who was the Respondent

then, did not file any affidavit in reply. In the ruling delivered on 11th July, 2013, at page 2, the court observed as follows;

> ***"When this matter was called for hearing on 25th June 2013, the respondent was absent. The applicants' counsel applied to proceed ex parte against the respondent. This court allowed counsel to proceed ex parte on being satisfied that the respondent was duly served. This was on the basis of an affidavit of service on the court record indicating that the respondent was served with the hearing notice and his/her secretary did endorse the same, but he/she neither appeared in court nor explained his/her absence when this matter came up for hearing…On the issue of not filing a defence, in this case, an affidavit in reply to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that where the time allowed to filing a defence has expired and the defendant has failed to file a defence, the plaintiff may set down the suit for hearing ex parte. In such circumstances, the defendant will not be allowed to participate in the proceedings though he/she may be present in court…this is the reason why the instant application was allowed to proceed ex parte…"***

The above quoted extracts leave no shadow of any doubt that the Applicant herein was duly served with ***HCMC No.6 of 2011*** and ***HCMA No. 859 of 2012.*** There was, therefore, effective service upon her with the respective hearing notices of which she duly acknowledged service. The Applicant has not demonstrated any sufficient cause that prevented her from appearing in court on the dates when the applications were called on for hearing. It is in no doubt that this application is brought in bad faith and it lacks merits and it is dismissed with costs to the Respondents.

BASHAIJA K. ANDREW

JUDGE

31/01/2017

Mr. Muhammad Matovu Counsel for the 1st Respondent present.

1st Respondent present.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: Ruling read in open Court.

BASHAIJA K. ANDREW

JUDGE

31/01/2017