THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 2051 OF 2021

(Arising from Civil Suit No. 003 of 2016)

MUKABALANGA ESTHER.....APPLICANTS

VERSUS

MBARAGA EVEREST.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

Introduction:

This application seeks orders that the judgment and orders of this court delivered on 6th June 2021 against the applicants in ***Civil Suit No. 003 of 2016*** be set aside and that the main suit be reinstated and heard on its merits; and for costs to be provided for.

Grounds of the application:

The affidavits in support were filed by the applicants Ms Mukabalamba Esther and Ms Najjengo Josephine, respectively the 1st and the 3rd defendants under the main suit.

Briefly, they claimed that this court proceeded with the hearing without securing the attendance of the 1st applicant and did not participate in the hearing of the suit. That the applicants just learnt that judgment was entered against them without notice as she was never served with any court process to appear and defend the case.

Her contention was that misunderstandings between her and her counsel developed upon which he had stopped giving her information about the proceedings in court. That mistake of counsel should not be visited on her as a litigant.

Furthermore that the 2nd and 3rd defendants had been ordered by this court to establish the whereabouts of the 1st applicant for service of court papers, but that before they could do so and report to court, judgment was passed against all applicants/defendants.

The second affidavit in support was deponed by the 2nd applicant who on her part averred that shortly before the 2nd Covid period this court had directed the 2nd and 3rd defendants to trace the 1st applicant since the process server had failed to locate her.

They managed to locate her later in Mbale however that this was during the Covid period when movements were restricted. They expected to receive hearing notices upon which they were to furnish court with the said findings, but the respondent never served them with the summons, only to be served later with the judgment and taxation hearing for a case in which the 1st applicant was not heard.

That this application has been brought without unreasonable delay. That the defendants are therefore aggrieved by the orders of this court and that in the interest of substantive justice the application be allowed..

In response:

The respondent, Mr. Mbaraga Everest however in reply objected to the application on the ground that the application contained obvious falsehoods and that his lawyers would seek leave of court to cross examine the deponent. Since however the lawyers never sought leave of court or refer to this request in the submission it would appear that they had abandoned it.

It was also deponed that all parties had been duly served and their respective WDS filed in court having been duly represented by different law firms at the time. The matter had gone for mediation which according to the respondent was frustrated by the 1st applicant who on a number of occasions never attended in person but sent her counsel Ruhinda Ronald, upon which mediation had closed and file forwarded to the trial judge.

The applicants/defendants attended scheduling and the matter was fixed for hearing before the judge. On the date scheduled for hearing counsel Ruhinda for the 1st applicant however never attended but sent his assistant Julian Natukunda to seek an adjournment which was granted by court.

However on the date adjourned for heating neither counsel nor the 1st applicant turned up. However the lawyer for the respondent and the 2nd and 3rd defendants were all in court. In *paragraph 6* of her affidavit in support the 1st applicant concedes that she was in touch with her lawyer even though he received the hearing notices in protest, and still never attended court.

Counsel for the respondent therefore submitted that the application was frivolous and vexatious and bad in law and an abuse of court process and should be dismissed with costs. Counsel submitted that on many occasions the 1st applicant was summoned to attend mediation and for the hearing.

Thus in filing this application the applicants' objective was to frustrate the respondent from realizing the fruits of his judgment and (without prejudice) asked court to order the applicants to deposit security for costs equivalent to the general damages awarded in the judgment and taxed costs as per the decree and certificate of taxation; and costs of this application.

Representation:

The 1st applicant was initially represented by ***M/s R. M Ruhinda Advocates.*** The 2nd defendant, Tadeo Serumaga and the 3rd defendant/2nd applicant Najjengo Josephine were both represented by ***M/s Rugambwa, Gadala Advocates***.

In this application however, the two applicants were represented by ***M/s Kaweesa & Co. Advocates.*** The respondent on the other hand was represented by ***M/s Ochieng Associated Advocates & Solicitors,*** the same firm that represented him during the trial.

Consideration of the issue:

Counsel for the respondent raised an objection that he had been served out of time, and without leave of court. The details of his arguments are as laid out in his submissions. I will therefore not repeat them here.

Suffice to state that initially directives were made on 17th December, 2021 for the service of the application and submissions. These for some reason were not served to the respondent; and upon request to court another schedule was issued requiring the applicants to serve by 25th February, 2022; the reply by 4th March 2022 and a rejoinder by 7th March, 2022, which directives were duly complied with. The objection by the respondent therefore that he was served out of time, and without leave of court does not hold merit.

Now for the merits of this application.

The issue to be resolved is whether the application merits the prayers sought. The applicants' claim is that they are all aggrieved by the decree of court. The 2nd defendant however was not a party to this application and there is nothing from the record to show that he had authorized any of the applicants to file this application. I therefore chose to disregard their claim that they were representing him as well.

But secondly and more importantly, the 2nd and 3rd defendants were at all material times duly represented by their counsel. They were availed a chance to file their defence, and attended the hearing at all material times. They also attended the *locus* visit.

The prayers to have the judgment set aside and reinstate the main suit on account of failure to effect service would therefore not be applicable to them. The record also indicates that they were fully aware of the 1st applicant's whereabouts and even had her number.

In the course of the proceedings attempts had been made in the presence of court to reach out to her on her known number but these attempts had failed thus prompting court to come to the conclusion that the 1st applicant who often through counsel had been fully aware of the case against her had since become elusive. The matter was heard in her absence but in the presence of the 2nd and 3rd defendants.

Judgment was delivered on 16th June, 2021 and indeed court takes judicial notice of the fact that the Covid restrictions on movement were relaxed on 31st July, 2021. It was not until 2nd November, 2021 that this application was filed.

The 2nd applicant herself attended the hearing which meant that at the time there were no such restrictions to the movements or at the time when court conducted the visit at the *locus* to prevent anyone from attending court.

Order 9 rule 27 of the Civil Procedure Rules provides:

> ***In any case in which a decree is passed exparte against a defendant, he/she may apply to the court which passed the same for an order to set it aside ; and if she satisfies court that the summons was not duly served, or that she was prevented by sufficient cause from appearing when the suit was called for hearing, the court shall do so ...upon such terms as to cost, and shall appoint a day for proceeding with the suit ... and the same may be set aside against all defendants if it is impossible to do so against one defendant.***

Sufficient cause or reason must relate to inability or failure to take any particular step in time. ***(Rosette Kizito vs Administrator General and others: SCCA No. 9 of 1986).*** The facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion, and to do so judiciously: (***Bishop Jacinto Kibuuka vs Uganda catholic lawyers Society and Anor MA No.696 2018).***

It was the applicants' contention that the evidence of the 1st applicant formed an essential part of the suit as would assist court in disposing of the matter without prejudice to the applicants. That the respondent had not attached proof that on several occasions the court directed service of court process to the 1st applicant's known advocates and that it was done, apart from the attached hearing notices and its corresponding affidavit of service by the process server, Mr. Isaac Muwanga. Muwanga deponed that the counsel 1st applicant received the hearing notices in protest on the grounds that he had lost touch with his client.

The 1st applicant however disputed this claim maintaining that she was in touch with her counsel who however had stopped informing her of any proceedings after a misunderstanding arose between them; and that mistake of her former counsel should not be visited on her. That even when her counsel

was served with the hearing notice dated 10th May, 2019 to appear for her case on 26th June, 2019 at 12.00pm he never informed her.

This court however finds this argument rather self-defeating. By her own admission she kept in touch with her counsel, suggesting therefore that the non- appearance for the hearing fixed on 26th June, 2019 was not because the 1st applicant had not been served but rather that her counsel through whom she received service of court papers had failed to relay that information to her following misunderstandings on what course of action to be taken in her defence.

When a litigant rejects the professional advice by his or her counsel, to this court that is a cue to take the next best course of action: to withdraw instructions from counsel, follow up the case or engage another counsel, but not to sit back and wait to be attended to as the 1st applicant did in this case.

As admitted by her, at no point did she lose touch with her counsel. She never withdrew instructions from him after the disagreement between them; and never took responsibility to make any follow up on her defence in a case that she knew had been filed against her as early as 2016. She only woke up upon realizing that judgment had been passed against her.

The rules under ***order 3 rule 2 of the CPR*** are clear that service through an advocate as an authorized agent is deemed to be effective service. It is therefore the conclusion by this court that the 1st applicant was duly served through her former counsel and cannot attribute her shortcomings or her failure to see eye to eye with her counsel, to the respondent, as that is information which was not within the knowledge of the respondent.

Between counsel and his client misunderstandings are always bound to happen and in the view of this court, where professional advice is rendered (without evidence on record that it was done in bad faith), refusal by a client to take it or failure to agree on a particular aspect of the case or course of action to take would not be sufficient cause to justify the setting aside of an *exparte* judgment under ***order 9 rule 27 of the CPR***.

For those reasons therefore, this court is inclined to reject this application.

Costs to the respondent.

Delivered by email

Alexandra Nkonge Rugadya

Judge

8th August, 2022

09/8/2022