THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.284 OF 2022

(Arising out of Civil Suit No.005 of 2017)

ABUBAKARI SSEBAGALA:::APPLICANT

VERSUS

LYDIA LUKIA NAMAKULA SSEBAGALA::RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

Introduction:

The applicant through his lawyers ***M/s Kalyango & Partners Advocates*** brought this application under the provisions of ***Sections 82 & 98 of the Civil Procedure Act Cap. 71, Section 33 of the Judicature Act Cap.13, and Order 46 & order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1*** seeking orders that:

1. ***Judgement obtained ex-parte in High Court Civil Suit No.005 of 2017 be reviewed and set aside;***
2. ***High Court Civil Suit No.005 of 2017 be heard de novo, on its merits inter parties;***
3. ***Taxation of costs in High Court Civil Suit No.005 of 2017 be set aside;***
4. ***Any execution commenced in the said High Court Civil Suit No.005 of 2017 be stayed;***
5. ***Costs of the application be provided for.***

Grounds of the application:

The grounds upon which this application is premised are contained in the affidavit in support of **Mr. Abubakari Ssebagala,** wherein he stated *inter alia* that the respondent who is his wife filed ***High Court Civil Suit No.5 of 2017*** for breach of an oral contract in respect of ownership land comprised in ***Kibuga Block 16 plot 907 at Kabuusu village Rubaga Division, Kampala;*** a declaration that she is a co-owner of the property; and that the

property be registered in their joint names; an order of accountability; injunctions, and general damages.

That through his former lawyers ***M/s Lumonya Bushara & Co. Advocates,*** the applicant filed a defense which was at all times on court record and that when the matter came up for scheduling conference, the issues were agreed upon and the parties were directed to file their respective trial bundles as well as witness statements, all of which were filed and are on record.

That the matter was adjourned for hearing but on the said day, neither Mr. Andrew Lumonya, the applicant's lawyer who had personal conduct of the matter nor the applicant attended court and court then proceeded *ex-parte* and judgement was subsequently entered.

That it was an error on the part of court to strike out the applicant's written statement of defence which was not only considered but also informed the scheduling conference and that it was also an error for court to take the property as matrimonial property, distribute the same to persons that were not parties to the suit and distribute the property that was not in either litigant's names. In addition, that the mistake of counsel should not be visited on the litigant.

The respondent through her lawyers ***M/s Makeera & Co. Advocates*** filed an affidavit in reply opposing the application on grounds that it was not only filed out of time, but is also an afterthought and that the applicant is guilty of dilatory conduct in this matter for filing the application to set aside the *ex-parte* proceedings 3 years after the proceedings without any clear justification whatsoever.

That the application lacks merit as the applicant has not shown in any way why either his lawyers or himself did not take steps to file the application to set aside the *ex-parte* proceedings since 19th February, 2019 since the suit was even fixed for hearing in the presence of the applicant's lawyers at the time and that while it is true that the applicant filed his defence, the same had been filed out of time without leave to file out of time since he had been served on 26th January, 2017. However the defence was filed 7 months later on 7th June, 2017.

That the applicant who has never been serious with the main suit has together with his former lawyers always disobeyed court directives and have been in the habit of not attending court on several occasions despite being served with directives as well as hearing notices and that the applicant is just using this application to delay justice and continue being in possession of as well as collect rent from the suit property to the respondent's detriment.

That even after obtaining the *ex-parte* judgment, the applicant was served with the bill of costs through his lawyers thus he is not entitled to the orders sought herein as he has not shown any sufficient reason as to why either him or his lawyers did not attend court when

the matter came up for hearing nor did he demonstrate why he did not apply to have the *ex-parte* proceedings set aside since 19th February, 2019 when they missed court but waited for judgement and taxation which they kept dodging despite having been served on several occasions until the respondent filed for execution.

In addition, that the applicant is guilty of laches and/or reasonable delay and is only deliberately prolonging litigation in a bid to circumvent the orders of this court thereby denying the respondent and their children the fruits of the judgement and that the applicant is using delaying tactics, which is an abuse of court process.

Further, that should this court be inclined to grant this application, the applicant ought to deposit to court the decretal sum of ***Ug. Shs. 140,000,000/=*** as rent irregularly received between 2013 and July 2019, ***Ug. Shs. 14,020,000/=*** being the interest of 10%, ***Ug. Shs. 30,000,000/=*** being damages, ***Ug. Shs. 75,000,000/=*** being rent collected after judgement, ***Ug. Shs. 7,560,000/=*** and ***Ug. Shs. 56, 874,508/=*** as a condition for setting aside the *ex-parte* proceedings and that he should also forfeit the collection of rent from the suit property in favor of the respondent in respect of her share and that of the children if the matter is to proceed interparty.

The respondent maintained that the applicant is just using delaying tactics to continue collecting rent from the suit property to the exclusion of the respondent and her children as he has been doing since 2013 therefore he should be directed to deposit the decretal sums, costs, damages, interest, as well as the certificate of title for the suit land in court for ease of access by the successful party.

That if this matter is to proceed interparty, the applicant should also deposit in court money for the respondent and children's air tickets as well as all travel expenses every time the case comes up for hearing considering it is very expensive and costly for her to travel from Denmark as and when the matter comes up and she has to travel with the children, one of him is ill.

Consideration by court.

The law

Section 82 of the Civil Procedure Act provides that;

> ***"Any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit."***

Order 46 of the Civil Procedure Rules provides;

> ***"1. Application for review of judgment:-***

(1) Any person considering himself or herself aggrieved;

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate Court the case on which he or she applies for the review.

The grounds for review were enunciated in the case of ***FX Mubuuke Vs UEB High Court Misc. Application No.98 of 2005*** to be;

a. ***That there is a mistake or manifest mistake or error apparent on the face of the record.***
b. ***That there is discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.***
c. ***That any other sufficient reason exists.***

The applicant herein seeks for the review of this court's orders in ***Civil Suit No.5 of 2017***, majorly citing the inability of his counsel as well as his own to enter appearance on the day the matter was set for hearing which prompted court to proceed *ex-parte*.

Thus the entire contention in the application revolves around the issue as to whether the applicant has demonstrated sufficient cause to warrant the grant of the prayers sought.

Was there sufficient cause to merit the application?

The law does not define "sufficient reason", but often the expression is used as being analogous to "good cause". ***Black's Law Dictionary 8th Edition, at page 235***, defines "good cause" to mean legally sufficient reason. Good cause is the legal burden place upon a litigant, usually by court, to show why a particular request should be granted or an action or omission excused. As applicable to the instant case, the Applicant has to demonstrate good reason for his nonattendance of court

In the case of ***Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993*** it was decided that a mistake by an advocate, though negligent,

may be accepted as a sufficient cause. Further, ignorance of procedure by an unrepresented defendant may also amount to sufficient cause, illness by a party may constitute sufficient cause as well.

However, according to the case of ***Capt Phillip Ongom vs Catherine Nyero Owota SCCA No. 14 of 2001,*** court held that:

> ***" it would be absurd or ridiculous that every time an advocate takes a wrong step, thereby losing a case, his client would seek to be exonerated. This is not what litigation is all about.***

In the case of ***National Insurance Corporation v Mugenyi and Company Advocates [1987] HCB 28*** the Court of Appeal which was the apex court in Uganda at the time held that;

> ***"The main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a prima facie defence to that case...."***

In another case, ***Kiirya Grace Wanzala Vs Daudi Migereko & Anor, Election Reference Appeal No. 39 of 2012***, it was stated that:

> ***"Clearly there is a limit to the extent to which litigants can benefit from the many decisions of the Supreme Court and this court that a litigant should not be penalized by mistake of his counsel. This only benefits litigants if the mistake of counsel amounts to an error if judgment.....".***

In the circumstances, prudence would demand that even a litigant who has instructed a lawyer to defend him/her would inquire or remind him/her about the case, or demand to know its progress, and not just to sit passively.

The litigant ought to be reasonably expected to follow the case up with his lawyer to make him/her swing into action or wake from his/her slumber. It would not be speculative to expect a prudent litigant to follow up his/her case. ***See Justice Percy Tuhaise in David Kato Luguza & Anor vs Evelyn Nakafeero & Anor Civil Appeal No.37 of 2011.***

Failure to instruct an advocate is not sufficient cause. In absence of any information about the former lawyer's conduct of the case and failure to lead any evidence as stated in the affidavit leaves this court without cogent evidence to prove the negligence of counsel.

Was the applicant vigilant?

As the maxim states, equity aids the vigilant. It is not only the duty of the advocate to show up in court but the litigant too. If the applicant had been vigilant in pursuing the matter, he would have contacted his advocate while out of the country or immediately before or after the date of hearing to establish what had happened.

The applicant was further notified of the fact that the matter had been concluded when he was served a bill of costs through his lawyers to acknowledged receipt of the same.

Was there inordinate delay?

Applications of this nature will not be granted if there is inordinate delay in filing it ***(see for example Rossette Kizito v. Administrator General and others, S.C. Civil Application No. 9 of 1986 [1993]5 KALR 4).***

In the case of ***Combine Services Ltd –Vs- Attorney General HCMA no. 200 of 2009,*** it was held that an application for review must be brought without unreasonable delay. Again the court considered the period of 8 months to be unreasonable delay.

In the instant application where the application was filed in court after 3 years, without any explanation given as to why the applicant never applied for review shortly after the delivery of the judgment on 19th February, 2019, I am inclined to agree with the respondent that a period of two years and 9 months is the extreme exercise and manifestation of dilatory conduct.

The applicant was served with the bill of costs through his lawyers who acknowledged receipt of the same on 5th November, 2020. The applicant is therefore guilty of dilatory conduct by his failure to take up the matter himself after he was made aware of the proceedings in court.

From the facts of the case and from the above quoted authority, I find that not only was there inordinate delay but that the applicant is also guilty of inordinate delay in filing this application. In such circumstances, the application ought to be struck out with costs. In consequence therefore, there is no sufficient cause to merit the prayers sought in this application.

It is accordingly dismissed with costs to the respondent.

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Alexandra Nkonge Rugadya
Judge
6th September, 2022.

Delivered by email
6/9/2022