THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 065 OF 2022

ARISING OUT OF NAKAWA CIVIL SUIT NO.117 OF 2009

NDIWALANA FRED;;;;;::::::::::::::::::::::::::::::::::::;;;;;;;;;;;;;;;;:::::::::::::::::: APPLICANT

VERSUS

1. **NAKIMWERO STEPHANIA**
2. **COMMISIONER LAND REGISTRATION::::::::::;;;;;;;;:::::::::;;;;;;::::: RESPONDENT**

BEFORE: HON. MR JUSTICE TADEO ASIIMWE

RULING.

The Applicant brought this application under section 98 OF THE CIVIL PROCEEDURE Act, 9rr 12&27 and order 52rr1&3 of the civil procedure rules t against the respondents seeking orders that;

(a) the ex parte judgment and decree in HCCS No. 117 of 2009 be set aside

(b) that the applicant /Defendant be allowed to file his defence and the matter heard interparty

(c) costs of this application be provided for.

The application was brought on the following grounds;

1. That the applicant has at all material times been the legal owner and registered proprietor of land comprised in Busiro Block 314 plot 633 land at Buroba measuring approximately 1.46 Hectares vide instrument No. KLA 99420 of 3rd August 1981.

2. That the applicant discovered that his tittle for Busiro Block 314 plot 633 land at Buroba measuring approximately 1.46 Hectares was missing and failed to get it with diligent search.

3. That the applicant decided to apply for a special certificate of tittle, but was surprised to learn on the 9th November 2021 that his name had been removed from the proprietorship page by the 2nd respondent and replaced by that of the 1st respondent on the 26th day of October 2021.

4. That the applicant came to learn of a suit filed an exparte judgement had been passed against him with an order that his name be removed from the proprietorship page of tittle.

5. That the applicant did not know of the suit at all and had never been served with summons to file a Defence in respect of Nakawa High court Civil suit No. 117 of 2009 neither of the notice of cancellation of certificate of tittle dated 14th April,2016 issued by the 2nd Respondent.

6. That the applicant has a known residential address at Najjanankubi and has at all material times been employed at Mengo hospital as a medical director.

7. That the judgement and the applicants certificate of tittle was passed/cancelled without him being given an opportunity to be heard.

8. The applicant has a strong defence against the 1st Respondents claim against him.

9. That the applicant is affected by the said judgement and the decision of the 2nd respondent, as such a setting aside order if granted will serve the interest of justice.

The application is supported by the affidavit sworn by the Applicant, NDIWALANA FRED.

This application was heard exparte against the 1st respondent who declined to acknowledge service as per the affidavit of service and did not appear when the application was called for hearing. The 2nd respondent intimated that he does not oppose the application

At the hearing, the applicant was represented by Counsel John Muwaya while the 2nd respondent was represented by Arinaitwe Sharon.

Counsel for the applicant adopted written submissions on record and the 2nd respondent responded orally that he does not oppose the application.

Counsel for the applicant submitted that an exparte judgement was entered against the applicant in civil suit no. 117 of 2009 on the 18th June 2015. That however he summons to file a defence were issued on 26th September 2017. That his client has never been aware nor served with summons to file a defence. That indeed there was no basis for exparte proceedings. That the 1st respondent is full

aware that he is an employee of mengo hospital where he has been a medical practitioner for 10 years and that there was excuse for failure to serve him thus had no basis for applying to proceed exparte. That in the judgement in issue the learned judge stated that the applicant was served by way of substituted service. That this court does not have a record of the same, no application for substituted service, no order, no advert, no affidavit of service. He final prayed that this court finds that the applicant was not served with sermons to file a defence.

RESSOLUSION

For court to resolve applications of this nature, the following questions must be answered.

1: Whether there was effective service of summons on the Applicant.

2. Whether the Applicant has shown sufficient cause to warrant setting aside of the ex parte judgment.

I shall therefore proceed to resolve the above questions.

1: Whether there was effective service of summons on the Applicant.

To begin with this application was not opposed and by law the presumption is that the facts in the applicant's affidavit are true as stated. I shall however proceed to examine the record and the law in the interest of justice.

Order 9 r. 12 CPR which provides for setting aside of *ex parte* judgments states as follows;

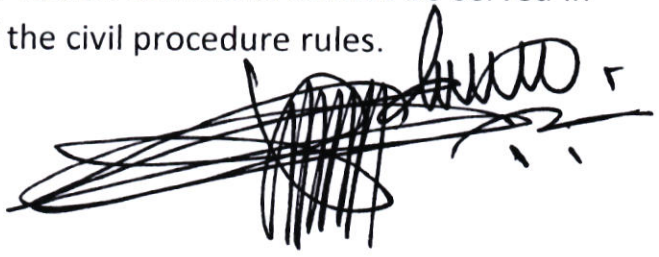
"Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just."

Further, rule 27 (supra) which provides for setting aside *ex parte* decrees against the defendants states as follows;

"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 gist of the applicant's case is that he was never served with sermons to file a defiance. However the judge in civil suit no. noted that the applicant had been served by substituted service.

Ideally substituted service is not the first option of service. It may be adopted when the Court is satisfied that the defendant is keeping out of the way for the purpose of evading service or for any other reason summons cannot be served in the ordinary ways as per Order 5 rule 18 of the civil procedure rules.



Order 5 of the CPR s rule 10 of the civil procedure act is to the effect that service wherever practicable shall be on the defendant in person or his agent.

It is only when personal service fails that substituted service comes in play. From the record, there is no affidavit of service to show that there was a futile attempt to serve the applicant personally.

Further even if there was evidence of a futile attempt to serve the applicant, substituted service is not as of right. And application for substituted service must be made and an order for the same granted.

However in this case, apart from the learned judge mentioning it in his judgement, there is no evidence of an application for substituted service, there is no order issued for the same, there is no affidavit of service to that effect and worse still no evidence of substituted service itself.

Therefore this court has no basis to believe that there was effective service of summons on the Applicant

Issue No. 2: Whether the Applicant has shown sufficient cause to warrant setting aside of the ex parte judgment.

In the case of ***S. Kyobe Senyange vs. Naks Ltd (1980) HCB 31***, Odoki J (as he then was) held that;

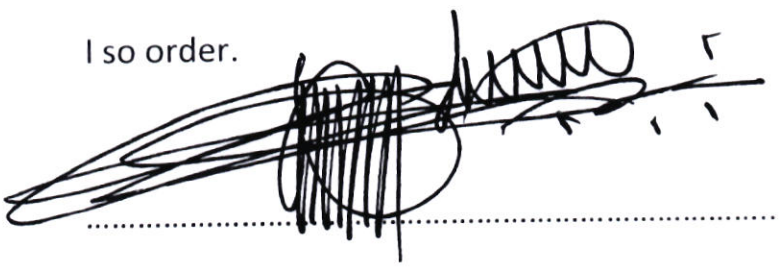
> ***"...before setting aside an ex parte judgment the court has to be satisfied that not only that the defendant had some reasonable excuse for failing to appear but also that there is merit in the defence case."***

As already found above, the applicant was not served with sermons which is a reasonable excuse for failing to appear.

Having found that there is no evidence on record to show that the applicant was not duly served and that the applicant has shown sufficient cause to warrant setting aside of the ex parte judgment, this application is here by allowed with the following orders;-

1. The ex parte judgment and decree in HCCS No. 117 of 2009 is here by set aside
2. That the applicant /Defendant is allowed to file his defence within 7 days and the matter shall be heard interparty
3. Costs shall be in the cause.

I so order.



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TADEO ASIIMWE

JUDGE

13/10/2022