THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISC. APPL. NO. 1663 OF 2021

(ARISING OUT OF CIVIL SUIT NO. 213 OF 2008

APIO JANE SIMALY:: APPLICANT

VERSUS

SEKALUVU KALONGO HENRY:: RESPONDENT

Introduction:

This application is brought under ***Order 9 rule 27*** and ***Order 52 rule 1, 2, 3 of Civil Procedure Rules and section 98 of the Civil Procedure Act Cap, 71***, seeking orders that: The judgment and orders in ***Civil Suit No. 213 of 2008*** be set aside and for the applicant be allowed to present her defence on the merits; and costs of this application provided for.

Grounds of the application:

The grounds of this application are contained in detail in the affividavit in support of the application.

It is the applicant's argument that the hearing notices were not duly served upon her; that her former lawyer did not inform her of any of the hearing dates; was not privy to the setting aside of the dismissed order; and was not aware of any proceedings that led to the default judgment.

The respondent Mr. Sekaluvu Kalongo Henry filed an affidavit objecting to the application as an abuse of court process which ought to be struck off. That the applicant claimed on the one hand that she was the registered proprietor of the land comprised in ***plot 38 block 76, Kyadondo*** and was in possession thereof.

In *para 23* however, she averred that she had sold the land to one Beatrice Adongo to whom she who had taken over possession of the land in 2007 and made developments thereon even before this suit was filed. this was a major contradiction which rendered the whole affidavit defective.

That it would be unjust to reopen the 13 year old case two years after the judgment was passed yet part of the delay was attributed to the applicant's own dilatory conduct and lack of vigilance. According to him the application did not meet the conditions of the orders sought.

In rejoinder, the applicant stated that it had just come to her attention that the respondent got registered on the title on 2nd August, 2021, during the time she had filed this application challenging the suit.

She claimed to be a *bona fide* purchaser, and reiterated her claim that on many occasions her lawyers never brought the hearing notices to her attention; and that the respondent's lawyers also failed to serve her in person as requested by her former lawyer.

The law:

The issue to be addressed by court is whether or not this application meets the conditions for setting aside an *exparte* judgment.

The law governing the setting aside of *exparte* judgments is provided for under ***Order 9 Rule 27 of the Civil Procedure Rules.***

It is settled law that in application of this nature, the applicant has to prove that the court summons were not duly served upon him/ her; or that she was prevented by *any sufficient cause* from appearing when the suit was called for hearing.

Order 5 Rule 10, provides that service can be effected onto the party or through his agent. The applicant claims that she had been represented by counsel Kalera Jared as per ***annexture AJS 5.***

The applicant invited court to refer to the series of hearing notices attached on this application as ***AJS9*** her point being that service was done onto the then lawyer who at a several occasions denounced instructions and told the respondent to serve the applicant in person, which they never did. The applicant clearly states that her lawyers informed her about the hearing dates and the hearing notices that were served upon him yet he had her telephone contacts, knew her residence and her whereabouts. All events concerning hearing of this suit were concealed away from her yet was a party and had interest in the same suit.

It was a duty of the respondents to personally serve the applicant of the hearing notices and not continuously serve her lawyer who had denounced the instructions.

Her prayer in the alternative, but without prejudice was that should court be inclined to believe that the applicant was served, then she had sufficient reasons for her nonattendance as a result of the negligence of her then lawyer, Counsel Kalera Jared.

Effective service as defined by ***Mulenga JSC (RIP) in Geofrey Gatete and Angela Maria Nakigonya Vs William Kyobe, SC, CA, No. 7 of 2005***, means having the desired effect of making the defendant aware of the summons.

A court handling an application for setting aside a decree has a duty to investigate and make a finding as to whether summons was or was not duly served. Further submission was that it is not enough that there is an affidavit of service on record because such an affidavit could be false and court ought to investigate whether there was effective service of the hearing notices on to the applicant.

Court in this present application however noted that initially the suit had been dismissed on 9th March, 2011 under o***rder 9 rule 22 of the CPR.***

16 rule 6 of the CPR. The plaintiff however turned up in court subsequently: on 22nd May, 2015, 25th May, 2015 and 21st March, 2016 and subsequently, on 23rd March, 2016. On 22nd November, 2016, a consent was entered between ***M/S Ayigihugu & Co. Advocates*** for the plaintiff ***and Shwekyerera , Kalera & Co. Advocates*** for the applicant herein as the 1st defendant.

Both sides agreed to proceed with the hearing of the case. This court endorsed the said consent which was never challenged/discharged or set aside, at least not until this application was filed, some ten years later.

Court notes further that on 9th May, 2017, next date fixed for hearing, counsel for the plaintiff, Dennis Kwizera and Gerald Kalera representing the 1st defendant/applicant then, were in court to attend to the scheduling. The 1st defendant was also in court.

Court proceeded *exparte* against the 2nd defendant Patrick Kasulu, who had failed to enter appearance. There is no proof that counsel that had at that point or the time when the matter proceeded *exparte* had lost contact with the applicant.

It would be misleading and pointless to suggest that when the suit was initially dismissed in 2011, the applicant as a defendant had been duly represented but that when the suit was reinstated by consent entered by her counsel in November, 2016 and thereafter when the hearing took off, he was not representing her since he had failed to contact her about the proceedings in court.

As a matter of fact the documents relied on by the applicant to prove that the former counsel had lost contact with her were documents all dated between 2014 to 2016, yet on 9th May, 2017, counsel Kalera was in court, duly representing the applicant.

Between 9th May, 2017 and 5th July, 2019 when judgment was delivered, there is nothing to prove that counsel had stopped representing the applicant. As duly noted by counsel for the respondents, some vital pages of the court proceedings, *pages 6 and 7* were conspicuously missing. They had been omitted, and the sole objective was to prove their point that the applicant had not been served to her.

There was besides no way of establishing from the court record that counsel's instructions were withdrawn by the applicant and if so, at what point. It was not until the present counsel filed the notice of instructions on 1st September, 2021 that it became known to court that she had engaged new counsel. By that time of course judgment had already been passed and the orders executed.

What amounts to *sufficient* reason or cause for setting aside an exparte decree under ***0.9 r 27 of CPR*** as stated by the Supreme Court depends on the circumstances of each case and must relate to inability or failure to take a particular step in time.

Under *Order 9 rule 27 of the CPR,* an *exparte* decree can be set aside where the summons was not duly served or other sufficient cause which may include mistake, omission, negligence of counsel.

The applicant argued that a mistake by an advocate though negligent may be accepted as a *sufficient cause* to set aside an *exparte* judgment. *(Ref:* ***Nicholas Roussons Vs Gulamu Hussein Habib Virani & Others, SCCA no.9 of 1993)***.

I have carefully examined the circumstances as brought out by the applicant in this case. There is no way of establishing that when the suit was reinstated the counsel for the applicant had failed to inform his client; or in consenting to its reinstatement he had acted outside the scope of his authority as counsel, so as to warrant the prayers sought by the applicant in relation to this application. I therefore find that the cases as cited could not serve any purpose in this present case.

With all due respect, this is a matter which was filed in 2008; orders were issued by this court on 5th July, 2019 and executed two years later. The application was filed two years after the judgment was filed.

It would also be incorrect to state that the application was filed before the respondent's name was registered onto the title, (in execution of the orders of this court). To be precise, the

respondent got registered on the title on 2nd August, 2021. The application was only filed on 17th September, 2021, and that is when she woke up to pursue her perceived rights on the land on which, by her own admission, she had not been in physical occupation from 2007 when she disposed of it to one Beatrice Adong. She no longer had legal possession after the change of proprietorship by court order. In short therefore, she had no *locus* to file this application.

The above circumstances as outlined provide court with sufficient cause *not* to grant the application.

Costs to the respondent.

Alexandra Nkonge Rugadya

Judge

14th March, 2021

Delivered by email

17/3/2022