IN THE HIGH COURT OF UGANDA

LAND DIVISION

MISCELLANEOUS APPLICATION NO 910 OF 2021

(ARISING FROM CIVIL SUIT NO 309 OF 2015)

KIGGWE PAUL

(Administrator of the estate of

the late Rosemary Nakityo)**.....APPLICANT**

VERSUS

1. **BARBRA HARRIET BABIRYE**
2. **FRANCIS NAMENYA.....RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

Introduction:

The applicant filed this application seeking orders that the *exparte* judgment /decree entered in ***Civil Suit No. 309 of 2015*** be set aside; and that the applicant be allowed to file a defence in the matter and the same be heard inter party; and for costs to be provided for.

Grounds of the application:

The grounds of the application are set out in detail in the affidavit in support of this application, filed by Mr. Kiggwe Paul.

Briefly, that the respondents filed the main seeking an a declaration that the entire land comprised in ***Kyadondo Block 245, plot 259 at Kiwuliriza*** (suit land) was illegally subdivided creating ***plots No. 494 and 495***; a declaration that the subdivision and registering of the suit land into the names of the applicant and one Ronald Dennis D'ujang, without the consent of the respondents was illegal; an order for cancellation of the titles; an eviction order; general damages; interest and costs. Judgment was made in favour of the respondents. The applicant's claim in this application is that failure by the respondents to serve them had denied them their right to be heard, contrary to the rules of natural justice.

Representation:

The applicant was represented by ***M/s Lukwago, Matovu and Co. Advocates.*** The respondents were represented by ***M/s Barnabas D.K Dyadi & Co. Advocates***.

Analysis of the law and evidence:

Order 9 rule 12 of the Civil Procedure Rules is to the effect that the court may set aside or vary an *ex-parte* judgment upon such terms as may be just.

Order 9 rule 27 of the Civil Procedure Rules:

> ***"...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 aside; and if he or she satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient means from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs***

Accordingly the applicant is required to demonstrate that he/she was not duly served with summons; and must furnish court with sufficient cause to justify the setting aside of the judgment of the court. ***(See: Lawrence Musiitwa Kyaze Vs Eunice Busingye SCCA No. 18 of 1990)***.

Arguments by the applicant:

In the instant application counsel for the applicant blamed the nonappearance largely on the mistake of and negligence of previous counsel; and cited the case of ***Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998***.

That a mistake, negligence oversight or error on the part of counsel should not be visited on the litigant. Such mistake or as case may be, constitutes *just cause,* entitling the trial judge to use his discretion so that the matter is considered on its merits.

He argued therefore that this court has wide discretionary powers under ***section 98 of the Civil Procedure Act, Cap. 71*** to make such orders as may be necessary for the ends of justice as well as under ***order 9 rule 27 of the CPR*** to set aside the *exparte* judgment/decree on sufficient cause having been shown for failure to attend when the suit was called.

In his affidavit in support however the applicant denied in *toto* that service was ever effected to him. He also claimed that his late mother Nakityo Rosemary had been registered proprietor and owner of land comprised in ***Kyadondo Block 245 plot 494, land at Kiwuliriza,*** and had been in possession since 29th January, 1996.

That suit land which is currently fully developed with a rental house was still registered in the names of the late Nakityo who died on 4th June, 2006 and was survived by only two children, the applicant and his sister Lunkuse Grace, neither of whom had been served with the court process.

He therefore denied any knowledge of John Tamale claimed by the respondents to be his brother whose number they had purportedly used to contact him for purpose of the court process. The affidavit of service was therefore according to him full of misleading information, falsehood and inconsistencies

He also claimed that they only learnt about the judgment and decree on 7th May, 2021 when the tenants on ***plot 494*** informed them about some people who came to visit the land as potential buyers. He also informed this court that the certificate of title has since been cancelled.

He later also learnt that the court bailiff was in the process of pursuing a warrant of vacant possession for the land, for purposes of selling it. That he immediately called his lawyers ***M/s Lukwago, Matovu Advocates*** whose advice to him was that the entering of the *exparte* judgment had been marred with serious illegalities that had rendered the same invalid since the person who was served was different from the applicant against whom the present suit had been filed.

That since the applicant and his sister had been in notorious use and occupation of the premises, their contacts could have been sought and obtained from the tenants of the applicants who are currently occupying the land.

According to him therefore, the issuance of orders in a suit which was barred by law having been filed out of time were irregular and intended to deny the applicant and his sister the right to be heard over their mother's land.

Furthermore, that the application has been brought without unreasonable delay and intended to avail the applicant who has a formidable defence and should be accorded the right to be heard.

Respondents' arguments in reply:

Ms Babra Harriet Babirye, the 1st respondent on her part file a reply, both on her behalf and that of sister, Francis Namenya (the 2nd respondent). The authority to do so was ***Annexture A.*** She claimed that the application was an abuse of court process since the applicant had been duly served, but deliberately refused/ignored the summons to file a defence and enter appearance. He also referred to a mix up in the Christian name as an obvious typo error made by this court.

In *paragraph 13* she averred that despite the fact that the certificate of title had been issued on 29th January, 1996 to the mother of the applicant, Rosemary Nakityo the applicant who had

been administering the estate since 12th September, 2017 never bothered to register himself as successor in title; and therefore had no genuine claim of beneficial interest.

That it is also apparent that the instant suit was instituted to challenge the defendants for fraudulently procuring the purported interest in the suit land. Following court decision, the commissioner for Land Registration who had been party to the suit had already effected the orders of court.

In submission, counsel referring to the decision in ***Joseph Mulenga vs Photo Focus(U) Ltd (1996) Vi KALR 19*** maintained that the application was full of falsehoods and ought to be disregarded as they rendered the entire affidavit suspect.

That since this application was brought in bad faith, had no merit and its objective was merely to delay and frustrate the respondents' right to the suit land it ought therefore to be dismissed with costs.

Counsel argued that should this court however be inclined to grant the order, security for due performance of the decree ought to be paid for the land whose value was estimated to be not less than ***Ugx 1,000,000,000/= (shillings one billion).***

Consideration of the issue:

I have carefully looked at the pleadings and the *annextures* filed by each side which I will not repeat here.

Duly noted by this court was the fact that summons to file a defence were sealed by this court on 30th April, 2015 and the question to be addressed was whether or not the applicant was served with the court documents to make him aware of the court process.

Order 5 rule 10 of the CPR stipulates that wherever practicable service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient.

It is also the settled position that that proper efforts must be made to effect personal service but if not possible it may be made to an agent or an advocate. ***(Ref. Dr. Byarugaba vs Kantarama HCMA No. 229 of 2019).*** Personal service would denote leaving a copy of the document served with a person upon whom the service is intended to be effected.

In ***Erukana Omuchilo vs Ayub Mudiiwa [1966] EA 229,*** court held that service on defendant's agent is also effective service but only if the agent is empowered to accept service. To that effect, ***Order 3 rule 4 of the CPR*** is very clear.

Any process served on the advocate as an agent of a party is considered to be duly communicated and made known to the party to whom the advocate represents and as effectual as if the process had been given to or served upon the party in person.

This court noted that the firm of ***M/s Luzige, Lubega, Kavuma & Co. Advocates*** had been served by the process server and the firm had duly acknowledged receipt of the mediation notices on 16th September, 2015.

In the submissions by counsel for the applicant the nonappearance was attributed to the former counsel's failure to take steps to act after learning about the case. The applicant in his affidavit did not specifically deny the assertion made by the respondents that he had been served with the mediation notices through his former counsel ***M/s Luzige, Lubega Kavuma & Co. Advocates.***

He did not deny the fact that the said firm had instructions at the material time to represent him in any of the earlier court processes. That therefore leads to the logical conclusion that the applicant could not deny that he got to learn about this case as early as 2015 when mediation notices were served to his counsel then but never took action.

In the case of ***Lucas Marisa Vs Uganda Breweries Ltd (1988-1990) HCB 131*** it was held that sufficient cause had to relate to failure by the applicant to take the necessary step at the right time.

The general principle indeed is that mistake of counsel should not be visited on the litigant and such mistake of counsel has in most cases been interpreted as sufficient cause, but with each case turning on its peculiar circumstances. (***See: Mary Kyomulabi V Ahmed Zirondemu Civil Appeal N0. 41/1979 and Zamu Nalumansi V Sulaiman Lule CA. N0 2 of 1992.***

In ***Nicholas Roussos Vs Gulamhussein Habib Virani & Anor, SCCA No.9 of 1993***, it was stated that mistake or negligence of counsel was one of the grounds that would warrant the setting aside of a judgment. The gist of all these cases is that it would be unfair and unjust to penalize the applicant because of the negligence of his advocate.

Furthermore, in the case ***of National Insurance Corporation v Mugenyi and Company Advocates [1987] HCB 28*** the Court of Appeal held that the main test for reinstatement of a suit is 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. Nonetheless as observed in ***Kiirya Grace Wanzala Vs Daudi Migereko & Anor,***

Election Reference Appeal No. 39 of 2012, there is clearly a limit to the extent at which litigants can benefit from this concept.

It only benefits the litigants if the mistake amounts to an error of judgment. In the circumstances, prudence would demand that even a litigant who has instructed a lawyer to defend him/her would inquire of or remind counsel about the case; should interest himself in the case and demand to know its progress but not just to sit passively. It is not only the duty of the advocate to show up in court but the litigant too who ought to demonstrate vigilance by following up on their cases.

Court expects such litigant to reasonably follow up the matter, (be it a suit or a defence) 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 do that. (***See: David Kato Luguza & Anor vs Evelyn Nakafeero & Anor Civil Appeal No.37 of 2011)***.

Equity is for the vigilant as the maxim goes. Courts have been wary of such excuses, where for instance a party knows about the case against him but sits back until the judgment has been read and passed against him/her; and that is when he comes to terms with what would be at stake; and years later as happened in this case, only wakes up to file an application to challenge the orders of court. With all due respect, litigation has to come to a close.

The main test for reinstatement of a suit becomes therefore whether the applicant honestly intended to attend the hearing and did his best to do so: (***National Insurance Corporation v Mugenyi and Company Advocates [1987] HCB 28.***

The applicant in *paragraph 7* of his rejoinder denied to have interacted with any court processes or anyone else over this matter. His counsel's argument which however did not tally with his, was that the applicant had actually been served through his former counsel. That was a paradigm shift from the issue as to whether or not there had been service to whether the service through the applicant's counsel had been effective. Service through counsel was indeed effective service as earlier concluded by this court.

It is also not in doubt as indeed admitted by the applicant in his rejoinder that the parties knew each other well and as such the respondents would know where to find him. It is always in the interest of a party who wishes to effect service to first establish the residence or work place of the party to whom service is to be made, for effective service.

It is not enough therefore nor would it serve any purpose for the receiving party to question how the respondents had found his home or who directed them to the home. What is important is for

the applicant to prove to court that the service was effected to the wrong residence or the wrong party, which however did not happen in this case.

As per the affidavit of service deponed by one Nuwamanya Alex Muhwezi, of ***M/s Kajeke, Maguru and Co. Advocates*** filed on 6th July, 2015, ***Annexture B'***, the applicant received the summons to file a defence together with the plaint on 30th April, 2015 for service to the applicant.

According to Nuwamanya, the applicant was with his brother one Tamale John whose number they had used to trace him, and whom the applicant had authorized to sign on the respondents' copy, claims which the applicant however refuted.

The applicant however had to do more to prove that he had no single interaction with any person for his due service, in respect to this case. He needed to rebut the claim in *paragraph 4* of the second affidavit of service, ***Annexture C'***, deponed by this court process server, Busuulwa Joseph, to the effect that the LC1 Chairman had endorsed the hearing notices for mediation presented to him for endorsement, after failing to access the applicant' premises. Failure to satisfy court on that crucial area of contention would only imply that his own affidavit contained falsehoods and therefore did not come to court with clean hands.

From the contents of the affidavit by Mr. Busuulwa Joseph, on 28th September, 2015 he had gone to the applicant's home in Makindye, but that they had refused to open for him. The process server affixed a copy of the hearing notices for ***M.E No. 410 of 2015 (***arising from this suit) at the applicant's gate.

As part of his affidavit evidence, he also presented pictures of himself in the process of effecting service, which were attached as ***Annexture A.*** That is exactly what was required of him by virtue of ***order 5 rule 15 of the CPR.***

The applicant did not deny that he was a resident in that area. Court also noted that the same papers received by the LC 1 Chairman were also endorsed by his former counsel on 16th September, 2015.

The conclusion is therefore inevitable that not only was the applicant served through his former counsel but also at his home through his LC1 chairman, neither of whom had he denied or disassociated himself from in his pleadings.

The 1st respondent claimed that she and her sister got registered on the title as per *Inst. No. KLA 97166 Dated 27th January, 1981* as joint tenants when both were still minors until 10th August, 1993 and 13th April, 1991 respectively. The applicant's mother on her part acquired her interest in 1996. In deliberately failing to file his defence he had closed himself out of the jurisdiction of this court.

The applicant who claims to have learnt about the judgment and decree on 7th May, 2021 still never filed a proposed WSD for this court to ascertain if there is any material evidence to sustain his claim that he has a formidable defence, with a likely chance of success. He forgot that this suit had been filed more than six years ago. His only available defence on record was what is claimed under the affidavit in support of this application.

In light of the above circumstances and also given the fact that the orders of this court had already been executed through cancellation of the title for ***plot 494***, it would be an order made in vain to set aside the *exparte* judgment/decree.

The application therefore fails.

Costs to the respondents.

Alexandra Nkonge Rugadya

Judge

11th May, 2022.

Delivered by email
11/5/2022.