THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.0855 OF 2022

(Arising from Civil Appeal No.73 of 2018)

(Arising out of Entebbe Chief Magistrates Court Civil Suit No.201 of 2011)

1. **KIGEMUZI DEO**
2. **SEKITENDE JOSEPH**
3. **BIRYINZI GRACE**
4. **JOHN BOSCO MULINDWA**
5. **SEMYALO PETER**
6. **MUSOKE RONALD::APPLICANTS**

VERSUS

1. **DEOGRATIOUS MANDE**
2. **BAGAMUHUNDA MATENDO PATRICK**
3. **BIRUNGI ANN BAGAMUHUNDA**
4. **JEREMIAH K. MUDDUKAKI MUSOKE**
5. **KIWALABYE FRED:::RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicants brought this application under the provisions of ***Section 33 of the Judicature Act cap. 13, Section 98 of the Civil Procedure Act cap.98 and Order 43 rule 18 of the Civil Procedure Rules SI 71-1,*** seeking

orders that the *ex-parte* judgment and decree in ***Civil Appeal No.73 of 2018*** be set aside and the appeal be reheard.

It also seeks that the costs of this 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. Semyalo Patrick,** the 5th applicant who stated *inter alia* that while the applicants were the successful parties in ***Civil Suit No.201 of 2011,*** they were never served with the memorandum of appeal or the directives of this court and that they only came to learn of the existence of the appeal when the area local chairperson was served with a taxation hearing notice.

That when the applicants' lawyers perused the court record, they discovered that the memorandum of appeal, directives and hearing notices were served on ***M/s Byamugisha Lubega Ochieng*** yet neither the firm nor Counsel Isiko Timothy, the applicants' former lawyer had instructions to represent the applicants in the said appeal.

That because the appeal was not communicated to the applicants, they were condemned unheard without being afforded a chance to be heard. That the judgment of this court has the effect of dispossessing the applicants of their property and that this court has powers to grant the prayers sought herein as long as the applicants satisfy court that they were prevented from attending court by sufficient cause.

Respondent's reply:

The 2nd respondent, Mr. Bagumuhunda Matendo Patrick opposed the application through his affidavit in reply wherein he states that the affidavit in support of the application is riddled with falsehoods.

That while it is true that the applicants were the victorious parties in ***Civil Suit No.201 of 2011,*** it is not true that they were never served with the memorandum of appeal, directives and hearing notices of the appeal because

they were served with the same on 7th August 2018 as per the affidavit of service on record.

That at all times during the pendency of ***Civil Suit No.201 of 2011*** the applicants were served with court process through ***M/s Byamugisha Lubega Ochieng,*** the applicants' lawyers on record and that at no time were the respondents notified of the fact that the firm ceased to have instructions in the matter.

In addition, the applicants' last known address was that of their lawyers that represented them in the trial court and there is nothing on record to show that ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** never had instructions to represent the applicants in the appeal since there is no notice of withdrawal or notice of change of advocates on record.

That because the applicants were served with a schedule to file submissions, they were given a fair hearing in ***Civil Appeal No.73 of 2018*** but they chose not to file submissions and that is why this court proceeded to pronounce its judgement on the merits of the appeal, and not because the applicants were not present during the hearing of the appeal.

In addition, that because the applicants do not own the suit property, they will not suffer any irreparable injury if this application is not granted since the respondents are the title owners of the suit land and that the procedure of setting aside the judgement of this court adopted by the applicants is inappropriate.

The only remedy available to the applicants is to apply for leave to file an appeal in the Court of Appeal out of time because they were requested to make submissions on the appeal but they either ignored the same or did not necessary to do the same through their lawyers.

Further, that while the affidavit of service on record proves that service was effected on ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** and court process was received by the law firm's front desk officer named Allen, the applicants also conceded that they received the notice of taxation in the appeal sometime in December 2021, but only filed this application almost 6

months later on 26th May, 2022 after learning of the judgement thus the applicants are guilty of inordinate delay and dilatory conduct.

That the applicants chose not to file submissions despite having received the schedules to file submissions and applicants who were aware of the appeal decided not to prosecute the same and that their lawyers decided not to notify court that they no longer had instructions in the matter and neither did the new lawyers inform court that they had instructions.

That the applicants have not shown any sufficient cause that prevented them from attending court when the appeal was called for hearing and that this court determined the appeal on its merits and passed a fair, comprehensive and well-reasoned judgment thus this application lacks merit and should be dismissed with costs.

In rejoinder, Mr. Semyalo Peter deponed that while the applicants' new lawyers did file a notice of instructions on 21st April, 2022 which was communicated to the appellant's lawyers, the affidavit of service attached to the affidavit in reply marked ***R1*** does not amount to service of process in law and that the said Allen that received court process on behalf of the applicant had no capacity under law to receive court process as the firm ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** did not have instructions to represent the applicants in ***Civil Appeal No.73 of 2018.***

That ***Annexures 'R2', 'R3', & 'R4'*** of the affidavit in reply have no evidential value because not only did the alleged Allen that received court process have no instructions to do so, but her job description is not known and neither is the name of the lawyer who allegedly acted for the applicants in the appeal known.

Additionally, that because there was no effective service, this application is properly before this court and that there is need for the appeal to be heard and determined on its merits inter party because the dispute concerns a *kibanja* from which the applicants derive sustenance.

That the affidavit in reply is incurably defective as there is no authority on record.

Representation.

The applicants were represented by ***M/s Kajeke, Maguru & Co. Advocates*** while the respondents were represented by ***M/s Pearl Advocates & Solicitors.*** Both counsel filed written submissions in support of their respective clients' cases.

Consideration by court.

I have carefully read and considered the evidence, and submissions of counsel, the details of which are on the court record.

The nature of application requires an applicant to demonstrate that he or she was not duly served with summons and/or to furnish sufficient cause to set aside the judgment of the court.

In the instant case, the ground set forth by the applicants seeking to set aside the judgment of this court is that they were never served with the memorandum of appeal and hearing notices and were therefore never made aware of the proceedings against them.

The applicants further aver by affidavit evidence that they were not served with either the memorandum of appeal or hearing notices and directives of this court owing to the fact that the firm ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** upon which service was effected no longer had instructions to represent the applicants.

The onus is on the advocate so instructed to take steps to make it known to all concerned that he/she has been duly instructed. The prudent advocate, in practice takes out a notice of instruction informing the court and opposite counsel of such instructions.

Where, there is a change in the instructions again a prudent advocates files a ***"Notice of change of Advocates."*** All this is aimed at avoiding a scenario like the current one- where instructions end up being challenged. ***See: Okodoi & Anor v Okello Miscellaneous Application No. 143 of 2016***

The respondents in their affidavit in reply opposed this application on grounds that there was no notice of withdraw of instructions or a notice of instructions on record informing court that ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** no longer had instructions to represent the applicants in the appeal.

The applicants in their affidavit in rejoinder did not object to this assertion. It is now settled law that where facts are sworn in an affidavit and these are not denied or rebutted by the opposite party, the presumption is that facts are accepted. ***(See: Massa –Vs- Achen [1978] HCB 297; Samwiri Mussa versus Rose Achen (1978) HCB 297)***

The judgement of this court sought to be set aside was delivered on 5th October 2020. The judgement of the trial court in ***Entebbe Chief Magistrates Court Civil Suit No.201 of 2011*** from which ***Civil Appeal No.73 of 2018*** arises was delivered on 24th April, 2018.

The notice of instruction the applicants allude to having filed was filed on 21st April, 2022, 4 years after the trial court's judgement was delivered. Additionally, this application was filed on 26th May 2022, 2 years after the judgement sought to be set aside was delivered, and 2 months after the applicants had appeared for the taxation hearing.

The applicants who had a right to appeal against the decision of this court did not pursue that line, chose instead to file this application without offering any reason as to why it took them years to file a notice of change of instructions.

Neither the respondents nor this court had any basis to believe that the firm ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** no longer had instructions to represent them at the time of filing the appeal.

The delay in filing this application is in the view of this court intended only to delay the course of justice and deny the respondents quick access to the benefits of their judgment.

For those reasons, I therefore decline to grant this application.

Costs awarded to the respondents.

I so order.

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Alexandra Nkonge Rugadya

Judge

11th October, 2023.

Delivered by email

11/10/2023