THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION SUIT NO. 2168 OF 2021

(Arising from Civil Suit No.12 of 2014)

1.KIWANUKA LUTAYA WILLY…….....…… APPLICANT

VS

1.SEKIMULI ANDREW

2.TIMOTHY MUWANGUZI KIGOZI……. RESPONDENTS

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

RULING

The Applicants brought this motion under section 96 and 98 of the Civil Procedure Act Cap 71, Order 9 rule 27 and O.52 rules1,2 & 3 Civil Procedure Rules S.I 71-1 seeking the orders that;

1. The declarations, decree, orders and default judgment of this Honourable Court in Civil Suit No.12 of 2014 be set aside.
2. Civil Suit No.12 of 2014 be set down for hearing inter parties.
3. Costs of this application be provided for.

GROUNDS FOR THE APPLICATION

Mr. Kiwanuka Lutaya Willy, the Applicant, in his affidavit in support of the application on the 15th of November 2021 stated as follows;

a. The Respondents instituted Civil Suit No.12 of 2014 against him for among others an eviction order, general damages for trespass, a permanent injunction, punitive damages and cost. A copy of the plaint was attached and marked “A”.

b. The Applicant instructed his lawyers M/s Bukenya Chemonges & Co. Advocates to represent him in the said suit following which they filed a defence. A copy of the written statement of defence was attached and marked “B”.

c. The Plaintiffs in the suit entered into a Consent Judgment with the 1st,4th, 5th and 7th Defendants and M/s Bukenya Chemonges & Co. Advocates was supposed to proceed with his defence.

d. The Applicant was never informed of the hearing dates in the suit by either his Counsel or by Court or by Counsel for the Respondents.

e. The Applicant was certain that his Counsel M/s Bukenya Chemonges & Co. Advocates was following the suit on his behalf therefore his non-appearance was due to their negligence.

f. The Applicant has been informed by his current lawyers M/s MOM Advocates that mistakes of Counsel should not be visited on the litigant who is not conversant with Court process.

g. The Applicant is desirous of defending Civil Suit No.12 of 2014 wherein with the help of his current lawyers he intends to raise a preliminary point of law on jurisdiction of this Honourable Court to hear the case.

h. Since the suit land is located in Mukono, the Court which has jurisdiction to hear the case was that of High Court of Uganda holden at Jinja therefore the proceedings in Civil Suit No.12 of 2014 were illegal and a nullity.

i. There is sufficient and just cause to warrant setting aside the decree and orders of this Honourable Court.

j. It is in the interests of justice that this application is allowed.

1ST RESPONDENT’S REPLY

Mr. Sekimuli Andrew, the 1st Respondent, in his affidavit in reply of the application on the 17th of March 2022 stated as follows;

a. Whereas the Notice of Motion refers to a one Dan Kiggundu as the Applicant and deponent of the affidavit in support of the application, the actual affidavit in support is sworn by Kiwanuka Lutaya Willy.

b. The Applicant clearly never revoked the instructions that he gave to M/s Bukenya, Chemonges & Co. Advocates to represent him during the trial.

c. The Court only made orders for the case to proceed in the absence of the Applicant after exhausting all available options of ensuring that the Applicant was notified about the case.

d. The allegations in the application are misplaced and do not arise and/or hold water in an application like this for setting aside a default judgment and that the only consideration for Court is whether there was sufficient cause for the non-attendance of the Applicant.

e. When the Applicant had engaged Counsel to represent him during the trial, it did not remove his duty to follow up his case independently and diligently as a party to Civil Suit No.12 of 2014.

f. All the time the Applicant was aware of the proceedings of Court as a Defendant in the suit and elected not to defend the suit upon which judgment was properly and rightfully entered.

g. The Applicant has not pleaded any disability that could have prevented him from appearing in Court during the period when the case was under hearing.

h. The Applicant has not attached any evidence from M/s Bukenya, Chemonges & Co. Advocates to confirm and/or corroborate any allegations he makes in this application.

i. The Applicant is guilty of dilatory conduct in that judgment in the matter was entered way back on the 28th day of November 2019, and he only filed an application to set aside the same after close of two years on the 15th of November 2021.

j. This Honourable Court should therefore not condone such practice as it amounts to an abuse of Court process meant to deny the Respondents to enjoy the fruits of their judgment against the Applicant.

k. The applicant has therefore not shown sufficient cause for his non-appearance in Court.

Representation

M/S MOM Advocates represented the Applicant while the 1st Respondent was represented by M/S JB Mudde Advocates.

Both Counsel filed submissions which have been duly considered.

ISSUE

1. Whether there is sufficient cause to set aside the ex parte judgment?

RESOLUTION

Issue 1

Whether there is sufficient cause to set aside the ex parte judgment?

I noted the counter points of law raised by both Counsel on the opposite party affidavits. For the Applicant it was argued that the affidavit in reply ought to be struck out since it was commissioned by an advocate without a valid practicing certificate. On the other hand, Counsel for the 1st Respondent argued that the notice of motion indicated that the affidavit in support would be deponed by a, 'Dan Kiggundu', a stranger to the application and yet it was deponed by the Applicant. The Applicant explained that the name, Dan Kiggundu, was a typing error and the 1st Respondent explained that he was unaware that the Commissioner for Oaths had no valid practicing certificate.

Recent developments in the law, have seen a trend toward a more liberal approach in handling of affidavit evidence. In **Male v Kayondo and Another (Election Petition Appeal 47 of 2021) [2022] UGCA 186 (19 July 2022);** the court held, that an innocent litigant ought to be allowed time under section 14 A of the Advocates' Act to rectify the defect to the affidavit arising out of commissioning by an advocate without a valid practicing certificate. And my holistic reading of the Applicant's motion, accompanied by his affidavit, makes it clear that the name 'Dan Kiggundu' was a typing error that is easily rectified, by replacing it with the Applicant's name.

With the foregoing considerations, both objections are hereby overruled.

Turning to the issue before this court, **Order 9 rule 27 of the Civil Procedure Rules** provides;

Setting aside decree ex parte against defendant.

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.

This application is also brought under **section 98 of the Civil Procedure Act Cap. 71** which provides as follows;

98. Savings of inherent powers of court

Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In summary below are the grounds the Applicant has raised to support the application to set aside this court's decree;

a. His advocates, M/s Bukenya Chemonges & Co. Advocates, were negligent and never informed him of the hearing dates in Civil Suit No.12 of 2014. According to the holding in the Supreme Court case of **Buso Foundation Vs Bob Mate Phillips and anor Civil Appeal No.40 of 2009,** mistake by an advocate, though negligent, may be accepted as a sufficient cause.

b. Once this application is granted, the Applicant intends to raise a preliminary objection challenging the territorial jurisdiction of this court to hear Civil Suit No.12 of 2014, to handle the matter whose subject matter was situated in Mukono District.

Ground (a)

Mistake by Counsel

In the matter of **Nicholas Roussos v Gulam Hussein Habib Virani, Nazmudin Habib Virani ((Civil App. No. 6 Of 1995)) [1996] UGSC 4 (3 March 1996);** the learned justices of the Supreme court held;

'As regards the principles upon which the discretion under r.24 may be exercised, the courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an advocate though negligent may be accepted as a sufficient cause. See: Shabin Din v. Ram Parkash Anand (1955) 22 EACA 48. Ignorance of procedure by an unrepresented defendant may amount to sufficient cause Zirabamuzaale v. Correct (1962) E.A. 694. Illness by a party may also constitute sufficient cause: Patel v. Star Mineral Water and Ice Factory (1961) E.A. 454. But failure to instruct an advocate is not sufficient cause: See Mitha v. Ladak (1960) E.A. 1054. It was also held in this case that it is not open for the court to consider the merits of the case when considering an application to set aside an ex parte judgement under this rule.'

Therefore, mistake by an advocate, though negligent, may be accepted as a sufficient cause. On the court record, is an affidavit of service dated 27th August 2020 and it demonstrates that M/S Bukenya, Chemonges & Co. Advocates were served with the hearing notice, which they received on the 20th July 2020. Upon looking at this affidavit of service on the 16th September 2020, the date of hearing, this court was satisfied that the Applicant was duly served through his advocates and proceeded with the hearing of the matter. He now avers that this hearing date was never communicated to him.

It is not true as the 1st Respondent avers, that this Court exhausted all avenues to ensure that the Applicant appeared in court. Neither was he served in person nor was he served by substituted service. This was because his Counsel had been effectively served. I am mindful that it has been two years since court delivered its ex parte judgment.

Nevertheless, I find no reason to disbelieve the Applicant when he avers that he was not notified of the date of hearing. Four out of the seven initial defendants in Civil Suit No. 12 of 2014 executed a consent with the plaintiffs in two separate agreements. The court endorsed the last consent on the 30th July 2018. And yet it was only on the 13th July 2020, almost two years later, that the plaintiffs appeared in court for directions regarding the hearing of the suit, with respect to the three remaining defendants, including the Applicant. Directions were given by this court on that date and the matter was fixed for hearing on the 16th September 2020. Counsel for the defendants did not appear on either of those dates.

I am satisfied that the Applicant's former advocate negligently failed to communicate the date of the hearing of this suit to him and this constitutes sufficient cause under Order 9 rule 27 of the CPR.

Ground (b)

Lack of jurisdiction of the court

According to paragraphs 10, 11 and 12, of the affidavit in support, the Applicant averred that his advocates informed him that the proceedings in Civil Suit No. 12 of 2014 were illegal and a nullity since the court did not have the '*power to listen and determine the case'.* This was owing to the fact the suit land is located in Mukono District.

Article 139(1) of the Constitution of the Republic of Uganda, 1995 as amended, the jurisdiction of this court is unlimited;

> *139. Jurisdiction of the High Court*
> *(1) The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.*

The jurisdiction of the High Court is reiterated under **section 14 of the Judicature Act Cap.13.** This ground is therefore utterly misconceived and devoid of merit under the law**.**

It is a fact however that over time, the Judiciary has continued to extend the operations of the High Court from Kampala City to the rest of the country in a bid to improve access

to justice by increasing the number of High Court Circuits nationwide. To this end, the Mukono High Court was launched on the 19th April 2018. And it is in the interests of justice that Civil Suit No. 12 of 2014, as reinstated be transferred to Mukono for hearing.

In conclusion, I allow this application and order as follows;

1. **Ex parte judgment and decree of this court in Civil Suit No. 12 of 2014 is set aside.**
2. **Civil Suit No. 12 of 2014 to be transferred to the Mukono High Court Circuit for hearing interparty.**
3. **Costs in the cause.**

Olive Kazaarwe Mukwaya

JUDGE

30th March 2023

Delivered by email to Counsel to the Parties.