THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISC. APPLN. NO. 041 OF 2021
[ARISING FROM LDC NO. 239 OF 2017]

BETWEEN

SECUREX AGENCIES (U) LTD.....CLAIMANT

VERSUS

ODIKIRIA SAMUEL BAKER.....RESPONDENT

BEFORE
1. Hon.Chief Judge Ruhinda Asaph Ntengye.....
2. Hon. Lady Judge Linda Lillian Tumusiime Mugisha.....

PANELISTS
1. Mr. Rwomushana Reuben Jack.....
2. Ms. Rose Gidongo.....
3. Ms. Beatrice Aciro Okeny.....

RULING

This is an application by notice of motion seeking to set aside an Award of this court heard and delivered in labour dispute reference 139/2017 exparte against the applicant.

The background of the application is that the respondent filed LDR 139/2017 for unlawful dismissal against the respondent and the matter was fixed for hearing on 9/3/2020. This was on 16/09/2019 in the presence of Mr. Gregory Byamukama as counsel for the respondent and Ms. Naima Bukenya as counsel for the claimant.On 9/3/2020 no one appeared for the respondent and Ms Bukenya applied to proceed exparte and given that there was no reason for the absence of the respondent and counsel, this court allowed the application and proceeded to

hear the claimant and subsequently delivered an exparte Award, the subject of this application.

Representations

The applicant was represented by Mr. Derick Magezi of M/s. Muhumuza-Kiiza, Advocates & Legal Consultants, while the respondent was represented by Ms. Bukenya Neyma of Platform for Labour Action.

Submissions

It was submitted for the applicant that the applicant had an inviolable right to be heard especially because they had diligently and dutifully participated in the proceedings until 9/3/2020. Counsel argued that the non-appearance of counsel was a mistake by counsel which ought not be visited onto the applicant.

In reply counsel for the respondent insisted that the appellant did not have any verifiable, justifiable and sufficient cause to set aside the Award of the court. She argued that the applicants were aware of the hearing date and that the previous counsel in personal conduct of the case ought to have briefed Mr. Onesmus Arinda who took over the matter, counsel in personal conduct having changed his professional address in October 2019.

Decision of court

We have carefully considered the written submissions of both counsel. We have at the same time perused and carefully considered the contents of the Notice of Motion together with the affidavits in support of the motion and in opposition.

We have no doubt that in applications of this nature, the applicant must convince the court that there was sufficient reason why she/he or his/her lawyer did not attend the court when the matter came up for hearing. Thus **Order 9 rule 27 of the Civil Procedure Rules provides;**

> **"In any case in which a decree is passed exparte 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/she satisfies the court that 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."

It is true and we agree with the submission of counsel for the applicant that a mistake or an omission or error or a misunderstanding of an applicant's legal advisor, though negligent may not be visited on to a litigant and it may be acceptable as sufficient cause of reason for the court to exercise its discretion in allowing a litigant to do what would otherwise not be allowed. This is the essence of the decisions in **Nicholus Roussos VsGulamu Hussein Habib Viran & Others SCCA 9/1993, Cpt. Philip Ongom Vs Catherine Nyero Owota SCCA 14/2001 and Sepinya Kyamulesire Vs Justine Bakanchurika Baguma School, Civil Appeal 20/1995.**

We must emphasize, however, that where the litigant contributes towards the negligence or omission or error of his advocate amounting to dialatory conduct on his/her part, the court may not favor the litigant.

Thus in **Appliance World Limited Vs Ochwo John Michael M.A 179/2018 (rising from Labour dispute ref. 327/2015** this court had this to say;

> **"The principle is not meant to give a blank cheque to counsel to be negligent in the belief that after all his or her client will not be blamed or penalized for negligence. Neither is it meant to give the same blank cheque for the parties to exhibit non-vigilance in their cases in the belief that their advocates are in charge and they will not be liable for the mistakes of their advocates."**

The Hon. Justice of Mulenga JSC (as he then was) in **Cpt. Philip Ongom Vs Catherine Nyero Owota SCCA 14/2001** at page 9 had this to say;

"It is an elementary principle of our legal system, that the acts and omissions of the advocates in the course of the representation bind a litigant who is represented by an advocate. However, in applying that principle, the court must exercise care to avoid abuse of the systems and/or unjust or ridiculous results. To my Mind, a proper guide in applying the principle is its premise, namely that the advocate's conduct is in pursuit of and within the scope of what the advocate was engaged to do."

It follows that not every negligent act or every error made by counsel will not be visited onto the litigant. Depending on the circumstances of each case, a given error or a given negligent act by counsel may or may not be binding on the litigant.

In the instant case and by affidavit in support of this application, counsel for the applicant states that he represented the applicant in LDC 139/2017 having taken over from one Greg Byamukama who was formerly in personal conduct o the case before he left the firm in October 2019 and who never notified him about the status of the case (before he left). After becoming aware on 20th March 2019 that the case had proceeded exparte, he wrote a letter to this court requesting for a hearing date to allow the respondent to be heard.

The proper procedure that counsel was expected to have followed was for him to make a formal application to set aside the order of the court that granted an exparte hearing to the respondent. Counsel honestly and professionally believed that having written a letter to this court asking to be heard, this court would ignore its own exparte order and proceed to hear the respondent's case. Unfortunately this was not to be.

As the case of **Hanondi Daniel Vs Yolamu Egondi court of Appeal, Civil appeal 67/2003** discussed the duty of counsel, the case agreed with the trial Judge in his comparison with the English System which

the court stated was in Harlsbury's 4th edition, Vol. 3 (1) paragraph 518 as:

> **"Counsel has with regard to all matters that properly relate to the conduct of the case, unlimited authority to do whatever he considers best for the interest of his client. This authority extends to all matters relating to the actions including the calling and cross examination of witnesses, challenging a juror, deciding what points to take, choosing which of two inconsistent defenses to put forward and even agreeing to a compromise of the action or to a verdict, order or judgement."**

Following the above decision, this court in **Nile Breweries Ltd Vs Isabirye David, M.A. 130/2020 (arising from Njeru Municipal Labour Complaint 44/2018),** rejected a submission of counsel for the applicant that it was a mistake or error of counsel to have applied to a labour officer for review of a decision of a fellow labour officer and that such error should not be visited onto the litigant.

The court rejected the submission on the ground that the method applied by counsel on behalf of his client was the method that counsel believed would produce the desired result of setting aside the Award.

In the same way, and in the instant case, counsel for the applicant opted to file a letter to request for a hearing rather than file a formal application at the time he knew that court had granted the respondent an order to proceed exparte. It is our position that counsel was exercising his authority within the precincts of what the court of Appeal in **Hanondi Daniel Vs Yolamu Egondi (supra)** referred to when it relied on Hurlbury's 4th Edition Vol. 3(1) Paragraph 518 as mentioned above. Hon Justice A.E.N. Mpagi Bahigeine J. A. (as the then was) in the above case said:

> **"It is enough for me to say that the appellant put himself in the hands of the advocate. In the process the advocate was doing his very best to discharge that mandate. He however, took a wrong course of action. It**

was a wrong decision. The appellant was thereby lock, stick and barred bound. It would indeed be absurd or ridiculous that every time an advocate takes a wrong step, thereby losing the case, his client could seek to be exonerated. This is not what litigation is all about...."

Under paragraph 6 of the affidavit in support of this application, the deponent states

"6. That, on the assumption that court would take the above request into consideration, I did not take further efforts or steps to lodge a formal application to move this Honorable Court to set aside the order granting the respondent/claimant to proceed exparte."

Under paragraph 8 the same deponent states

When the lockdown was lifted, I did not immediately follow upon the matter and as a result it lost position."

Surely, as the above case stipulates it would be an absurdity if given the above paragraphs in the affidavit, this court was to exonerate the claimant, his advocate having deliberately chosen to take a wrong step leading to maintaining exparte proceedings as a result of which he lost the case. Consequently, we have not found any sufficient cause to set aside our exparte Award. The application is dismissed with no orders as to costs.

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye.....
2. Hon.Lady Judge Linda Lillian Tumusiime Mugisha.....

PANELISTS

1. Mr. Rwomushana Reuben Jack .....
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Dated: 3rd September 2021