

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE MISC. APPLN NO.081 OF 2021
ARISING FROM LDR 181 OF 2019.

BOG ST. MARY'S BUWENGEAPPLICANT

VERSUS

KAYINGO MOSES & 5 ORS RESPONDENT

BEFORE:

1. THE HON.AG. JUDGE, LINDA LILLIAN TUMUSHIME MUGISHA
PANELISTS

1. MS. ROSE GIDONGO

2. MS. ACIRO BEATRICE OKENY

3. MS. JACK RWOMUSHANA

RULING

This application is brought under section 82, 98 of the CPA, Section 33 of the Judicature Act, Order 46 Rule 1, 2 and 8, Order 52 rules 1 & 2 of the Civil procedure Rules SI 71-1 seeking orders inter alia that:

- a)The default judgment in civil suit No. 181 of 2019, arising out of Labour dispute No. 021 of 2018 be set aside
- b)That the said Labour Reference Dispute No. 181 of 2019 arising out of the Labour dispute No. 021 of 2018 be heard and determined inter-party.
- c)The Respondent's proposed a settlement which failed leading to the matter being fixed for hearing, but they were never served with notice.

d) That the Respondent further misled the Applicant that they had withdrawn their case whereas not.

e) That an order of enlargement of time to file a reply the Memorandum of claim in Labour dispute No. 181 of 2019 be granted upon such terms and conditions as the justice of the case requires.

f) Costs be provided for

The Applicant's case

The applicant's case as it is stated in the notice of Motion and the Affidavit in support which was deposed by Tasamba David (deceased), the Director of the Applicant, is summarized as follows:

a) That the applicant was never served with court process, thus she did not take part in the proceedings before this Court.

b) That the applicant is aggrieved with the default judgment of the court having not participated in the same.

c) That there is sufficient cause for extension of time and granting the applicants leave to reply to the Memorandum of claim.

d) That the applicant has a good defense to the Respondent's claim and shall suffer irreparable damage if the application is not granted.

e) That it is in the interest of justice that the default judgment and decree is set aside and the applicant is granted leave to file a reply to the memorandum of claim.

The Respondent's case

The Respondent's case as stated in the Affidavit in reply which was deposed by Kayingo Moses is summarised as follows:

- a) That the Applicant was duly served by this court and notified about the hearing date of Labour Dispute No. 021 of 2018 and she deliberately refused to participate in the proceedings.
- b) That the Respondent has never communicated about withdrawing their claim against the Applicant and in any case no default judgment has ever been entered by this Court.
- c) That the application for extension of time to file a memorandum in reply is untenable as the memorandum of reply is already filed before this Court by M/s Murungi, Kaira and Co. Advocates and no leave has been sought to amend the same memorandum of Claim.
- d) That this Application is intended to waste court's time, because the Applicant was duly served with Misc. Appln. No. 060/2021 as evidenced by Affidavit of service marked "D"
- e) That in the interest of justice the application should be dismissed with costs for being frivolous and vexatious in nature.

REPRESENTATION

The Applicant was represented by Mr. Humprey Hategeka of M/s Turingire & Co. Advocates and the Respondent was represented by Erina Kawalya of Platform for Labour Action.

SUBMISSIONS

We have carefully perused the Notice of Motion together with the affidavits in support and in opposition and the submissions of both Counsel and find as follows:

DECISION OF COURT

Order 9 rule 27 provides that:

“In any case in which a decree is passed *ex parte* against the defendant, he/she may apply to the court by which the decree was passed for an order to set aside; and if he/she satisfies the court that summons was not duly served, or that he/she was prevented by 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/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 as against such defendant only, it maybe set aside as against all or any of the other defendants also.”

It is the legal position that a court which delivered an *ex parte* judgment and decree can set it aside if the applicant satisfies the court that, the summons was not duly served or that he or she was prevented by sufficient cause from appearing when the suit was called on for hearing.

The meaning of the term sufficient cause as submitted by Counsel for the Respondent in the instant application, has received extensive adjudication a number of cases such as, *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others* quoted in *Gideon MosaOnchwatis Kenya Oil Co. Ltd and Another* [2017] eKLR which was cited in *Rwabunyoru Mugme David vs Kalule Simon King Misc. Case No. 45 of 2014*, and *Bishop Jacinto Kibuuka vs Uganda Catholic Lawyers Society and 2 others Misc. Application No. 2018* where court stated thus:

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant.”

In the Kenya case of *Gideon MosaOnchwatis*(*supra*) reliance was made on the supreme Court of India case of *Parimal vs Veena* which attempted to describe what was “Sufficient cause” when it was observed that: -

1. "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough" in as much as may be necessary to answer the purpose intended. Therefore, the word sufficient embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the fact and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whatever the court exercises discretion, it has to be exercised judiciously"

It is the Applicant's case that the summons for the hearing was not duly served on to her hence her failure to appear when the matter was called for hearing.

A perusal of the court record in the Labour Dispute Reference No. 181 of 2019 and established the following: -

On the 7th August 2019 a hearing notice for a pre-session hearing for 23rd September 2019 was issued. On the 14th August 2019, an Affidavit of service was filed on the record indicating that, the Court process server had served both parties on the same date.

Both parties were in attendance at the pre-session hearing with Ms. Kawalya Erina of Platform for Labour Action representing the Claimants. The Claimants were also present in court; and Counsel Kiyemba Grace was for the Respondent. The Respondent was also represented by several officers – Mary Mboline - Director of the School, Tasamba David Micheal - a Co – director, Misho Moses-

Chairperson of PTA and Lumonya Ivan -the school Bursar. The matter was adjourned to Friday 4 /10/2019 for hearing, in the presence of both parties.

On the eve of the hearing, on the 3rd October 2019, Court received a notice of change of Advocates of the Respondents from Mutalya and Co. Advocates who had taken over personal conduct of the matter. The same notice was also served on to Counsel for the Claimant, Platform for Labour Action, and received by their Clerk, one Wakume Christopher at 10:59am. Ms Kawalya attended court on 4/10/2019 and informed Court that, the Respondent's Previous Counsel had informed her that they were withdrawing from the case. None of the Respondent's /Applicant's officers or new Counsel appeared on 4/10/2019 which had been scheduled for hearing in the presence of both parties. The new lawyers wrote to the Registrar of the Court in a letter dated 3/10/2019, requesting for 1 month within which to settle the matter, they also noted in the same letter that their client had informed them that they were expected to appear in court on 4/10/2019. Both Counsel and the Officers of the Respondent /Applicant did not appear and no explanation was rendered for their absence. However, Counsel Kawlya informed Court that the laimant's were not ready to proceed and she prayed that in the interest of justice of the case adjourned to another date. It was then adjourned to the next convenient session in Jinja. The next session took place in December 2020 and pre-session hearing was scheduled for 14/12/2020. The Court process server was directed to render service on both parties which she did on 2/12/2020. Service onto the Respondent's council M/s Mutalya was received by a one Mitala Joshua one of the firm's lawyers. Although the stamp of the Firm was not inscribed on the hearing notice. Mitala Joshua one of the firm's lawyers received service by inscribing his signature and telephone number on the duplicate copy of the summons. The court was satisfied that Joshua Mitala being one of the lawyers of the firms was duly empowered to receive service therefore, proper service had been rendered on to the Respondent/Applicant and

the fact that the stamp of Mutalya & Co Advocates was not inscribed onto the copies did not render this service a nullity as counsel for the Applicant would like this court to believe.

We were satisfied that, the Applicant was duly served but they chose not to appear, hence granting leave to the Claimants to proceed *ex parte*, followed by the award which was delivered on 23/12/2020.

I. We respectfully do not subscribe to the submission by Counsel for the Applicant, that the Applicant was prevented from proceeding because of the death of the Director Tasamba David, because on 23/09/2012, when the matter came up for the first pre-session hearing, the Applicant was represented by more about 5 officers including a Co-director Mboira Mary. It is therefore misleading for Counsel to state that, the co-director had no knowledge of the dealings of the deceased Tasamba, yet she was present at the Pre-session hearing. She ought to have taken steps to follow up the matter with the Applicant's lawyers or to instruct new Counsel or come to Court in person to pursue the defense of the claim.

We respectfully disagree with the argument that, the Claimants should have served the Respondent/applicant in person yet M/s Mutalya had filed notice of instructions to them and to previous counsel M/s/Murungi Kairu & Co. Advocates as well. We are not convinced that M/s Mboira was not able to delegate one of the other officers to follow up the matter especially after the passing of the Director. It is unfortunate that, she only woke up when she was served with notice of execution proceedings, and that is when she instructed M/s Tuyiringire & Co. Advocates. In the absence of evidence of a withdrawal of the suit, the expectation is that the Respondent/Applicant should have followed up to ensure they defended her Case. We also do not believe the assertion that, the Applicant was under a mistaken believe that the Respondent's had withdrawn the claim without proof or a basis of this claim.

The Applicant in our considered opinion has not shown sufficient cause to warrant the setting aside of the ex parte Judgment. She had opportunity to participate in the proceedings of which she squandered.

Consequently, the application fails. No order as to costs is made.

Delivered and signed by:

THE HON. AG. JUDGE, LINDA LILLIAN TUMUSHIME MUGISHA



PANELISTS

1. MS. ROSE GIDONGO

2. MS. ACIRO BEATRICE OKENY

3. MR. JACK RWOMUSHANA

DATE: 30/08/2022

