THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 741 OF 2015

(ARISING FROM CIVIL SUIT NO. 458 OF 2013)

MULONDO KENNETH ---------- APPLICANT/ DEFENDANT

VS

FRED KIRENGA ---------- RESPONDENT / PLAINTIFF

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This Application was made under 0.9 r 12, 0.36 r 11, 0.52 rr 1, 2, and 3 C.P.R seeking for orders to set aside the decree in Civil Suit 458/13, and the execution of the decree. Costs of the application were also applied for.

The application is based on eight grounds to wit:-

1) The Applicant was never served with summons to file a defence and only got to know about the case through a verbal exchange with the Respondent.

2) The Applicant was granted leave to appear and defend in Miscellenous Application 751/13 which was heard on 02.04.14, however, the parties had on 25.09.13 entered into a memorandum of understanding where it was agreed that the Applicant owed the Respondent Shs. 90,000,000/-.

   The Respondent orally agreed to withdraw the suit upon security by way of cheques signed by the Applicant.

3) By the time the Applicant was committed to Civil Prison on 23.03.15, he had already paid a total of Ug. Shs. 67,000,000/- pursuant to the memorandum of understanding and was only indebted to the Respondent to the sum of Shs. 23,000,000/-.

4) The Applicant's lawyer was negligent in as far as he inadvertently failed to follow up the withdrawal of the suit or even endeavor or file a written statement of defence within the

fifteen days directed by court. But that the conduct of the lawyer should not be visited on the Applicant who was a bonafide litigant.

5) While the Applicant is ignorant of the technical procedures of this court, as a result of which default judgment was entered against him, he has a good defence to the suit with a likelihood of success.

6) The Applicant will suffer irreparable damage if execution is allowed to proceed on the disputed claim.

7) On a balance of convenience, the Applicant shall suffer a miscarriage of justice if the decree and execution are not set aside so that the matter is heard on merit.

The application is supported by the affidavit of the Applicant.

There is an affidavit in reply deponed by the Respondent, whereby he admits that the memorandum of understanding was entered into with the Applicant and it was agreed that the Applicant pays Shs. 90,000,000/- by the schedule of payment in the memorandum. Payment was to be completed by 25.06.14; however, the Applicant breached the agreement.

Since the Respondent's lawyers had not been informed about the memorandum of understanding, they were not aware that the debt had been reduced from Shs. 101,800,000/- to Shs. 90,000,000/-.

That out of the agreed sum of Shs. 90,000,000/-, the Applicant only made a total payment of Shs. 25,000,000/- which the Respondent acknowledges receiving.

The sum of Shs. 42,000,000/- was never paid and the Applicant does not show that it was paid to make the alleged total of money paid Shs. 67,000,000/-.

The originals of the cheques where moneys have not been paid have been retained by the Respondent – Annexture A_{1-5}.

All the said cheques were banked but were dishonored.

The other cheques issued on 25.09.13 issued alongside the five cheques referred to above add up to Shs. 40,000,000/- - Annexture $B_{1-3.}$

Cheque No. 0007 for Shs. 20,000,000/- dated 25.11.13, and banked on 29.11.13 was given to the Applicant on the understanding that he would pay the Shs. 20,000,000/- but the Applicant only paid Shs. 5,000,000/- and yet retained the original cheque.

When Shs. 10,000,000/- for cheque No. 00009 was received, the recipient acknowledged receipt of Shs. 5,000,000/- twice that is on 05.03.14 and 04.04.14, and signed to indicate that cheque No. 00009 had been returned to the Applicant because Shs. 10,000,000/- covered by the cheque had been fully paid. – Annetures C 1 and 2.

The Shs. 5,000,000/- had been acknowledged before March 2014, as part payment of Shs. 20,000,000/- but the balance of Shs. 15,000,000/- has never been paid.

It is not true therefore, that the Applicant is only indebted to the Respondent in the sum of Shs. 23,000,000/- but rather owes the Respondent Shs.65,000,000/-.

The Applicant has not shown that he has a bonafide defence to the claim of Shs.65,000,000/-.

That if the Applicant is to be granted the remedy he seeks from court, he should be directed to deposit Shs. 65,000,000/- plus the costs taxed by court amounting to Shs. 5,000,000/-.

The Applicant was served with the summons as evidenced by Annexture A to the supporting affidavit in Miscellenous Application 751/13 but only failed to defend himself.

It is admitted by both parties that when the Applicant failed to file a defence, the Respondent applied for default judgment in the sums of Shs. 101,800,000/-together with interest at the rate of 24% and costs of the suit. The Respondent applied for execution which was granted and the Applicant was committed to Civil Prison on 02.03.15.

Thereafter the Applicant filed this application to challenge the exparte proceedings and attendant decree.

The issue for court to determine are:-

- **Whether the default judgment, and attendant decreeshould be set aside and execution stayed.**

Default Judgment Decree:

It was submitted for the Applicant that the claim of Shs. 101,8000,000/- on which default judgment was entered and decree issued is contested by the Applicant.

That the parties agreed on the payment of Shs. 90,000,000/=- on 25.09.13- Annexture "C". The Applicant paid a total of Shs. 67,000,000/- as per Annexture F. The agreement between the parties was entered into before officers of the Criminal Investigation Directorate at Kibuli to the effect that the Applicant would sign cheques worth Shs. 10,000,000/- each as collateral for the schedule of payment.

It was asserted that, the application discloses triable issues as the decretal sum was misrepresented and the actual claim was Shs. 90,000,000/- and not Shs. 101,800,000/- by the time the decree was issued.

The memorandum of understanding – Annexture "C" was signed by both parties and the Respondent concedes in paragraphs 4 and 5 of the affidavit in reply, which confirms that the decretal sum was based on an illegal claim.

The case of **Mugisha Florence vs. Babirye and Another HCCS No. 20/14** by Lady Justice Eva Luswata where court held that ***"any court order issued based on illegality cannot stand",*** was cited in support.

And Counsel insisted that courts have held that ***"if courts investigate and a single defence is identified, then leave ought to be given."*** – **Bunjo Jonathan vs. KCB Bank (U) Ltd HCMA 172/14.**

Further that, ***"at this point in time, court should not investigate the triable issues; it is sufficient that they are disclosed and unconditional leave to defend is then granted."*** – **Uganda Telecom Ltd vs. Airtel (U) Ltd HCMA 452/2010.**

And that since the decree was premised on a fraudulent claim, it cannot stand. The admitted indebtedness of the Applicant is Shs. 23,000,000/- and he should therefore be given opportunity to be heard in defence – referring to the grounds of the application and paragraphs of the affidavit in support.

In reply, it was submitted for the Respondent that he admits to have agreed with the Applicant to be paid Shs. 90,000,000/- instead of Shs. 101,800,000/-. This was done at Police where the matter had been lodged and the Respondent never informed his lawyers of the memorandum of understanding which full payment was to be completed by 25.06.14.

Both parties accept the memorandum of understanding and which was agreed upon under 0.25 r 6 C.P.R and court has inherent powers to recognize the agreement of both parties.

Replying on S.98 CPA which provides for ***"inherent powers of court to prevent abuse of court process"***, Counsel stated that the court should find that the agreement reached in respect of the amount payable was not an illegality.

He pointed out that the Applicant sought and was granted leave to defend the suit, but he failed to file a defence within the prescribed time and judgment was entered for the whole sum. Court was referred to paragraphs 3,4,5,6 and 7 of the affidavit in reply.

Counsel insisted that according to the records available, out of the total sum of Shs. 90,000,000/- agreed upon by the parties, a total of Shs. 25,000,000/- which the Respondent acknowledges receiving was paid. And that there is nothing to show that another Shs. 42,000,000/- was paid to make the alleged total of Shs. 67,000,000/-.

The original cheques retained by the Respondent were not paid and when they were banked, they were dishonored- paragraphs 8 and 9 of the affidavit in reply. – Annexture $A_{1-5.}$

Referring to paragraphs 10,11, 12 , 13 and 14 of the affidavit all other cheques issued were mentioned and the moneys received by the Respondent's son one Isaac indicated. But Counsel asserts that the Applicant still owes the Respondent Shs. 65,000,000/- and not 23,000,000/- as claimed and that there is no bonafide claim to the defence of Shs. 65,000,000/-.

In rejoinder, it was submitted that the Respondent's admission of reducing the claim from Shs. 101,800,000/- to Shs. 90,000,000/- is a complete departure from the claim in the main suit and therefore raises triable issues that ought to be investigated.

It was also the contention of Counsel that in the memorandum of understanding, it was agreed that the cheques issued by the Applicant to the Response were not to be presented to the Bank but to act as collateral for the scheduled payments within the memorandum of understanding.

It was agreed to return the cheques whenever the Applicant made a cash payment to the Respondent equivalent to the value of the cheque although at times the Respondent would refuse to surrender the cheques paid against and hence the decision to issue payment vouchers as well.

It was reiterated that the Applicant had so far paid a total of Shs. 67,000,000/- pursuant to the memorandum of understanding by the time he was arrested in execution of the court decree and the balance remaining to be paid was Shs. 23,000,000/-.

Having carefully gone through the submissions of both Counsel and the rules applicable. It is apparent that the claim against the Applicant was a liquidated demand of Shs. 90,000,000/-

which had been agreed upon in the memorandum of understanding from the original sum of Shs. 101,800,000/-.

A schedule of payment was agreed upon which the Respondent claims the Applicant failed to fulfill and Respondent's lawyers were instructed to file a suit. Not being aware of the memorandum of understanding, the lawyers filed a suit seeking to recover the original sum. The Applicant failed to file a defence, although he claims he was never served with summons, and judgment was entered against him for the original sum. But the record indicates that he filed an application for leave to defend the suit but he failed to file the defence. Under 0.9r6 C.P.R, ***"where a plaint is drawn claiming a liquidated demand and the Defendant fails to file a defence, the court may subject to r 5 of the order pass judgment for any sum not exceeding the sum claimed in plaint, together with interest at the rate specified if any…."***

However, where judgment has been passed pursuant to the above rule the court is empowered to set aside or vary judgment upon such terms as may be just- 0.9 r12 C.P.R.

What the Applicant must show in cases of this nature is that the discretion to set aside should be exercised in his favor. The primary consideration being **whether there is merit to which the court should pay heed.**

If merits are shown, the court will not prima facie desire to let judgment pass on when there has been no proper adjudication. – **National Enterprises Corporation vs. Mukisa Foods Ltd EF CACA 42/1997.**

In the present case, the Applicant contends that he instructed his Counsel to follow up on the promised withdrawal of the suit and filing a defence as directed by court and that the conduct of Counsel should not be visited upon him. He strongly relied upon the Respondent's oral agreement to withdraw the suit.

Decided cases have established that ***"an error on the part of Counsel in the form of a mistaken belief should not be visited on the Applicant and it would amount to sufficient cause for setting aside dismissal of the suit."*** – **Banco Arabe Espanol vs. Bank of Uganda SCCA 08/1996**.

In this case for setting aside the exparte judgment and allowing the Applicant a chance to be heard.

It has also been established that ***"unless court has pronounced a judgment upon the merits or by consent, it has power to revoke the expression of its coercive power where it has only been***

obtained by failure to follow any of the rules of procedure." – **National Enterprise Corporation vs. Mukisa Foods Ltd (Supra)** where the case of **Evans vs. Barton [1937] AC 473 at 480** was relied upon.

The Applicant in the present case failed to file defence within fifteen days due to the negligence of his Counsel (which is not disputed) and upon reliance on the Respondent's word that the suit would be withdrawn.

This court therefore finds that the Applicant has shown sufficient cause to set aside exparte judgment.

Secondly, since the parties had entered into a memorandum of understanding reducing the sums claimed from 101,800,000/- to Shs. 90,000,000/- it was unfair for the Respondent to instruct his lawyers to file a suit to recover the original sum of Shs. 101,800,000/-.

Court agrees that if exparte judgment is not set aside and the Applicant given a chance to defend himself and execution is not stayed, The Applicant will suffer a miscarriage of justice.

The Respondent in paragraph 16 of his affidavit also stated that if the application is to be granted, as the court has discretion to set aside exparte judgment on such terms as it thinks fit, then the Applicant should deposit Shs. 65,000,000/- the Respondent claims remaining due and owing together with Shs. 5,000,000/- the costs of the suit.

But since this sum of Shs. 65,000,000/- is disputed by the Applicant who claims to have a balance of Shs. 23,000,000/-, the disputed sum of money would be Shs. 42,000,000/-.

The application will be allowed on condition that the Applicant deposits the Shs. 23,000,000/- in court as security for payment of the debt within two weeks from the date of this ruling.

The default judgment is hereby set aside and execution stayed so that the Applicant can file a defence within fifteen days from this ruling.

The costs will abide the outcome of the main suit.

FLAVIA SENOGA ANGLIN
JUDGE
21.02.17