

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 918 OF 2010

(ARISING OUT OF CIVIL SUIT NO. 166 OF 1992)

1. MUGENZI PASCAL BYRON
2. M/S KYMPENGERE CO OPERATIVE SOCIETY LTD
3. THE CHIEF REGISTRAR OF TITLES.....APPLICANTS/DEFENDANTS

VERSUS

TEOPISTA MUGENZI.....RESPONDENT/PLAINTIFF

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application brought under Order 9 rule 27 and Order 51 rules 1,2 and 3 of the Civil Procedure Rules for orders that :-

1. The ex parte judgment and decree under Civil Suit No. 166 of 1992 be set aside.
2. The said Civil Suit No. 166 of 1992 be fixed for hearing *inter partes*.
3. Costs of this application abide the outcome of the main suit.

The application is supported by the affidavit of **Paskal Byron Mugenzi** the 1<sup>st</sup> Applicant and is based on the grounds set out in the said affidavit, which are, briefly, as follows:-

- (a) The 1<sup>st</sup> Applicant/Defendant was never notified of the date when Civil Suit No. 166 of 1992 was called for hearing.
- (b) The 1<sup>st</sup> Applicant has a good defence to the said civil suit.
- (c) If this application is not granted, the 1<sup>st</sup> Applicant will have been condemned unheard.
- (d) It is in the interests of justice that the *ex parte* proceedings and judgment and the said civil suit no. 166 of 1992 be fixed for hearing *inter partes*.

The Respondent did not file any affidavit in reply, despite court having earlier given her more time to file such affidavit. There is evidence on the court record that the Respondent's Counsel was served with the application, and the hearing date was fixed in the presence of Counsel Bwengye who was holding brief for the Respondent's Counsel on the day the application was first called for hearing. On the day of the hearing, the Respondent's Counsel appeared late when the hearing had already commenced following this court's ruling that the hearing proceeds *ex parte*.

In his submissions, learned Counsel for the Applicant, Anthony Wameli, relied on the evidence as deponed to in the affidavit in support by **Paskal Byron Mugenzi** the 1<sup>st</sup> Applicant. The 1<sup>st</sup> Applicant's evidence, as can be gathered from the said affidavit and its annexures, is that on 26<sup>th</sup> August 2009, he was served with notice to show cause why execution under civil suit no. 166 of 1992 should not issue. He then recalled having been earlier advised by his then Counsel M/S Matovu Kamugunda & Co Advocates that the said case file had been closed since the Plaintiff now respondent had not fixed the case for hearing for a long time. He however instructed his current lawyers M/S Wameli & Co Advocates to peruse the court file and advise him accordingly. The said lawyers then informed him that the said case proceeded *ex parte* and judgment and decree were entered and passed against all the Defendants on 22<sup>nd</sup> July 2003. When he was first served with summons in the said suit in 1992 he had instructed his then Counsel M/S Matovu Kamugunda & Co Advocates who had filed a Written Statement of Defence (WSD) on his behalf. He was never notified of the date when the said case came up for hearing. His lawyers applied to set aside the *ex parte* proceedings but were advised by a Judge to settle the matter out of court and were allowed to withdraw the application without costs. They however failed to get time to agree on any out of court settlement. On 7<sup>th</sup> December 2010 he was served with a notice to show cause why execution should not issue. He instructed his lawyers to file an application to set aside the *ex parte* judgment and decree. He believes he has a good defence.

Counsel Wameli cited the case of **Makerere University V St Mark Education Institute Ltd & Ors HCCS 378 of 1993 [1994] KALR 26**, a copy of which he availed court, to support his submission that the supporting affidavit is unchallenged. He also argued that the Applicant had shown good cause for setting aside the *ex parte* judgment and decree and fixing the case for hearing *inter partes*.

Order 9 rule 27 of the CPR under which this suit was filed empowers court to set aside a decree passed *ex parte* against the Defendant if satisfied 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***”. (emphasis mine). The 1<sup>st</sup> Applicant has deponed in paragraphs 5 and 6 of his affidavit that when he was first served with summons in the said suit in 1992 he had instructed his then Counsel M/S Matovu Kamugunda & Co Advocates who had filed a WSD on his behalf. He was never notified of the date when the said case came up for hearing. In paragraph 11 of the same affidavit, he avers that he has a good defence to the suit as indicated in his WSD to the said suit. This affidavit evidence stands unchallenged and uncontroverted. The findings of this court therefore are made from this position.

On the issue of not filing a defence, in this case an affidavit in reply to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that:-

*“Where the time allowed for filing a defence...has expired and the Defendant...has... failed to file his or her defence(s), the Plaintiff may set down the suit for hearing ex parte.”*

There are court decisions to the effect that in such circumstances, the Defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37**, court held that since the appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*.

Order 9 rule 10 of the CPR is to the effect that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations. See **Agard Didi V James Namakajjo HCCS No. 1230 of 1988**; **Tindimwebwa Narisi V Mutebi Salim HCT - 00 - CV - 0057 - 2007** unreported. In the instant application, the facts as stated on oath by the 1<sup>st</sup> Applicant have neither been denied nor rebutted by the Respondent. On the authority of **Samwiri Massa V Rose Achieng [1978] HCB 297**; **Makerere University V St Mark Education Institute Ltd & Ors HCCS 378 of 1993 [1994] KALR 26**; **Eridadi Ahimbisibwe V World Food Programme & Ors [1998] KALR 32**; **Nakityo Miriam & 4 Ors V Jackson Muleele & 7 Ors HCT -00 - CS - 0052 - 2008 [2009] UGHC 128**, the facts as adduced in the affidavit evidence of **Paskal Byron Mugenzi** the 1<sup>st</sup> Applicant which are neither denied nor rebutted are presumed to be admitted. The uncontroverted averments he has made are that he was never notified of the date when Civil Suit No. 166 of 1992 came up for hearing. This in effect means he was not duly served.

Secondly, in paragraph 11 of the 1<sup>st</sup> Applicant's supporting affidavit, the 1<sup>st</sup> Applicant/Defendant avers that he has a good defence to the case. I have looked at the plaint on the court record. The prayers sought by the Plaintiff/Respondent include cancellation of the 2<sup>nd</sup> Defendant's title on alleged fraud, and that she be jointly registered as proprietor with the 1<sup>st</sup> Defendant on grounds that she contributed to the property as a wife of the 1<sup>st</sup> Defendant. In his WSD, the 1<sup>st</sup> Defendant (now Applicant) admits that the Plaintiff was his wife but denies being party to any fraud or that the Plaintiff made any contribution as alleged. On the face of the said pleadings, without going to the intrinsic evidence or the merits of the case, there appears to be a good defence to the case.

In the premises and on the foregoing authorities, I am satisfied that the Applicant has proved the grounds of his application against the Respondent. I therefore allow the application for the following orders as prayed, that is, that:-

1. The *ex parte* judgment and decree under Civil Suit No. 166 of 1992 be set aside.

2. The said Civil Suit No. 166 of 1992 be fixed for hearing *inter partes*.
3. Costs of this application abide the outcome of the main suit.

I so order.

**Dated at Kampala** this 3<sup>rd</sup> Day of November 2011.

Percy Night Tuhaise

**JUDGE.**