THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CA -0022 OF 2019

(ARISING FROM FPT MISC. APPLICATION NO. 86 OF 2019)

(0RIGINATING FROM FPT – 00 – CV – CS – 0314 OF 2019)

KABAROLE DISTRICT LOCALGOVERNMENT :::::::::: APPELLANT

VERSUS

KIRUNGI WINNIE AGAMBA :::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The Appellant being aggrieved with the ruling of His Worship, Kaggwa John Francis in Misc. Application No. 86 of 2019 delivered on 18th December 2019 appealed to this Court seeking an order to set aside the said ruling.

Background:

On 19th January 2004, the Respondent was appointed as an Education Asst. II (Gr. III teacher) by Kabarole District Local Government on probation. On 20th April 2009, she was confirmed in service as G.III teacher and admitted to the Pensionable Establishment of the Public Service from the date of appointment. Subsequently, in 2011, it appears the Respondent fell sick and attempted to obtain sick leave which was denied and the fate of her plea is not clear from the record. Subsequently, she

was removed from the payroll from the period between 2012 to 2016 till she was re-deployed by the Appellant. It is also deducible from the record, that even after she was re-deployed by the Appellant's Chief Administrative Officer in 2016, she was not re-instated to the payroll.

The Appellant made her claims to the Chief Administrative Officer of the Appellant for her unpaid salary arrears for the financial years 2012, 2013, 2014, 2015, 2016 and 2017 which were to the tune of shs 25,491,204/=. The claims were forwarded by the Chief Administrative Officer to the Permanent Secretary Ministry of Finance. The Permanent Secretary/Secretary to the Treasury, the late Keith Muhanizi approved the payment of those who had salary arrears including the Respondent and money was released to the Appellant. It appears a committee in charge of salaries declined to pay the Respondent claiming she had absconded for five years and nine months and had been reinstated on 01/12/2017. They noted that the time the Ministry of Finance cleared the payment, the Respondent was not rendering any service to the Appellant.

The Appellant being aggrieved filed a claim in the court of law seeking to recover her unpaid salary arrears which had been approved and money released by Ministry of Finance to the Appellant who had declined to pay. The Appellant was served with the summons to file a defense on 12th September 2019 per the affidavit of service deponed by Mr. Mwanguhya Christoper and filed a written statement of defense on 2nd October 2019. On the same date, a default judgment was entered on 2nd October 2019 upon a letter by the Respondent's lawyer dated 1/10/2019 that the Appellant had failed to file a defense within the requisite time.

The Appellant being aggrieved with the same filed Misc. Application No. 086 of 2019 on 3rd October 2019 seeking an order to set aside the default judgment and for leave to file a written statement of defense and defend the suit on merits. The application was dismissed by the Chief Magistrate on 18th December 2019 where he found that the Appellants failed to prove that there were triable issues. After dismissing the said application, on 19th June 2020, the learned Chief Magistrate went ahead and heard the case exparte and entered judgment in favour of the Respondent when the Appellants had appealed against his ruling in Misc. Application No. 86 of 2019 which was lodged on 30/12/2019.

Grounds of appeal:

The Appellant framed two grounds for determination by this court thus;

(1) The learned trial Magistrate erred in law and fact when he held that there were no triable issues to be tried by the Court.

(2) That the learned trial Magistrate erred in law and fact when he declined to set aside the default judgment on account of the triable issues.

Representation and hearing:

Atumanyise Racheal a state Attorney in Attorney General's Chambers Fort Portal appeared for the Appellant while ***Mr. Cosma A. Kateeba*** appeared for the Respondent. On the 16th of November 2023, both counsel agreed to a schedule to file written submissions and only learned counsel for the Appellant complied.

Submissions for the Appellant:

Ground 1:

The learned Chief Magistrate erred in finding that there was no triable issue. A plausible defense was attached to the application to set aside the default judgment where it was contended that the Respondent was not rendering any service to the Government of the Republic of Uganda for the last five years (between 2011 to 2016) where the Appellant within her mandate struck her off from the payroll.

The Appellant also presented minutes of Kabarole District Service Commission to confirm that the Respondent had not been re-instated since she had absconded from duty and was teaching at Tooro Parents Education Centre and St Pauls Senior Secondary School.

In ***Senyonjo v Bunjo (Civil Suit No. 180 of 2021)[2013] UGHCCD 127 (24 september 2012) Bashaija J*** observed in relation to a triable issue that; ***"an issue that only arises when a material proposition of law or facts is affirmed by the one party and denied by the other party."*** At that stage, court is not required to investigate the merits of the triable issue. (See: ***Asea George v Housing Finance Bank, Misc. Application No. 952 of 2020).*** Once it is established that there are triable issues, then court should grant the applicant a right to file his or her defense so that the matter can be heard on merits, (See: ***Lydia Naiga v Ask Services Lmited, HCMA No. 482 of 2020).***

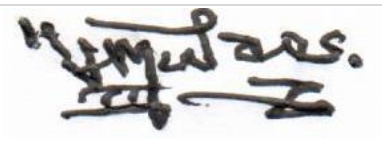
The Appellant tendered in documents during consideration of Misc. Application No. 86 of 2019 proving that the Respondent was employed in a private institution.Therefore, her claim for arrears was baseless since she absconded from duty. As such there were triable issues which warranted setting aside the default judgment entered against the Appellant and have the suit heard on merits interparty.

Ground 2:

Order 9 rule 12 of the Civil Procedure Rules is to the effect that where a judgment is passed pursuant to the preceding rules of the order, court may set it aside or vary the judgment upon such terms as may be just. The rationale being that an exparte judgment is not a judgment on merits and where the interests of justice are such that the defaulting party should be heard, then the party should be given a hearing by a court of law. (See: ***Kiko Investments Ltd & others v Imperial Bank (U) Ltd, HCMA No. 193 of 2015).***Further, an exparte judgment or interlocutory judgment can be set aside upon proof by a party at default that he or she was prevented by sufficient cause from appearing when the suit was called for hearing. Where such is proved, court shall make an order setting aside the decree upon such terms as to costs, payment into court or as otherwise directed by Court. (See: ***Peter Jogo Tabu T/aAyume, Jogo, Tabu& Co. Advocates v The Registered Trustees of the Church of the Province of Uganda, Civil Appeal No. 0016 of 2017).***

The terms sufficient cause relate to good cause which is the inability or failure to take a particular step in time. This depends on the circumstances of each case. (See***: Florence Nabatanzi v Naome Binsobede, SC Civil Application No. 06 of 1987).*** In the present suit, the Appellant was prevented by sufficient cause in filing a defense on time since upon service she had to make several consultations to be able to defend the matter effectively. The delay in remitting the necessary information caused the applicant to run out of time for filing the defense within time. That the interest of justice thus demanded that the Appellant is granted leave to file her defense out of time and for the default judgment to be set aside so that the case is heard on merits. She contended that the learned Magistrate erred in declining to grant the application and prayed that the appeal be allowed.

<u>Duty of this Court:</u>



This being a first appeal, my duty as a first appellate court under section 80 of the Civil Procedure Act is to subject the evidence of the lower court to a fresh and exhaustive scrutiny and draw fresh and independent inferences and conclusions. In doing so, I will apply the law strictly and consider the evidence adduced in the lower court. I will bear in mind the fact that I did not have the opportunity to see the witnesses testify and I will therefore make the necessary due allowance in that regard. ***(See Panday Vs R (1967) E.A 336 and Narsensio Begumisa & 3 others Vs. Eric Kibebaga, SCCA NO. 17 of 2002***.

CONSIDERATION BY COURT:

I will consider both grounds concurrently since they concern the legality of the decision by the chief Magistrate to decline setting aside a default judgment on account that there were no triable issues presented by the applicant to warrant the same.

Order 9 rule 11(1) & (2) and 12 of the Civil Procedure Rules provides thus:

11. Setting down suit for hearing.

(1) At any time after the defence or, in a suit in which there is more than one defendant, the last of the defences has been filed, the plaintiff may, upon giving notice to the defendant or defendants, as the case may be, set down the suit for hearing.

(2) Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences has expired and the defendant or defendants, as the case may be,

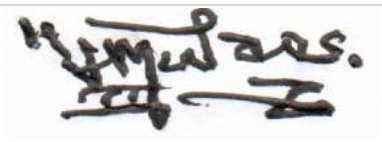
has or have failed to file his or her or their defences, the plaintiff may set down the suit for hearing ex parte.

12. Setting aside ex parte judgment.

Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.

It is discernable from Order 9 rule 11(2), that where a defendant fails to file a defense, court enters a default judgment and sets down the suit for formal proof. However, where sufficient cause is demonstrated by a defendant to a default judgment in an application to have it set aside, Court ***may*** set aside or vary the same on terms it deems fit.

The court must consider whether setting aside the default judgment and allowing the defendant to participate in the suit would be in the interest of justice and that the defendant has some basis for defending the claim. Court is duty bound in an application to set aside the default judgment to determine whether any useful purpose would be served if the default is set aside and the case is heard on merits. In doing so, it must examine the prospect of success of the defense pleaded by the defendant. The defence would act as a guide the court on real prospect of success and it would mean that such a defence has some validity as opposed to being fanciful and unrealistic. The court is expected to determine whether the applicant will succeed at trial. In absence of any possible defences raised in the application, then court should not merely endorse a statement made by the applicants in their application "the applicants have a plausible defence". ***(See: Alpine Bulk Transport***



Inc v Saudi Eagle Shipping Co Inc [1986]2 Lloyd's Rep 221; Ssrubiri Frank & 2others v Salama Jaques& 2others, HCMA No. 205 of 2021).

The court should arrive at a reasoned assessment of the justice of the case and also form a provisional view of the probable outcome if judgment were to be set aside and the defence developed. It is not sufficient to raise an 'arguable defence' for the defence must carry some degree of conviction. Therefore, according to the court, the applicant must establish more than a defence or issue which should be adjudicated: he must raise a defence which is likely to succeed at trial. (See ***Alpine Bulk Transport Inc v Saudi Eagle Shipping Co Inc [1986]2 Lloyd's Rep 221).***

Therefore the applicant must in addition to proof that there was sufficient cause that caused the delay to file a defense on time, demonstrate that the said defense is plausible and has a prospect of success if the suit is to be heard interparty. Whereas court is not required to delve into the merits of the suit at that stage, the defense should primafacie raise an arguable case on merit apart from being announced as a plausible one.

In the current appeal, the Respondent filed Civil Suit No. 314 of 2019 seeking to recover her salary arrears which were disbursed to the Appellant who in due course failed to remit the same to her. The summons were served and the Appellant filed the defense late. A default judgment was entered setting down the Respondent's claim for formal proof. The applicant later filed Misc. Application No. 086 of 2019 seeking an order to set aside the default judgment entered by court on 2nd December 2019. In the defense, the Appellant contended that the Respondent was not entitled to the salary arrears because she had absconded from duty from 2012 till 2016 June

when she was re-instated on the payroll. The Learned Chief Magistrate found that the defense presented was not plausible and did not raise any triable issue.

What is not in dispute is that the Respondent was an employee of the Appellant. It is also not disputed by the Appellant that the Respondent was not paid salary for the period between 2012 to 2017. She went ahead and lodged her claim for unpaid salary arrears for the said period through the Chief Administrative Officer of the Appellant who is the accounting officer of the Appellant. The claims were recommended by the head teacher where the Respondent was teaching in 2017. The Chief Administrative Officer of the Appellant Mr. Alfred Malinga, submitted the Appellant's claim of salary arrears on 4th June 2018 to the Permanent Secretary Ministry of Finance, Planning and Economic Development. The Permanent Secretary/Secretary to the Treasury, the late Keith Muhakanizi in a letter dated 11th July 2019, addressed to all accounting officers of Central and Local Governments verified the claims and indicated that the money had been released to them. In the said letter, the late Muhakanizi stated under item (i) that;

> "***Forward the attached annexure A1 and A2 for salary, Pension and Gratuity arrears respectively clearly indicating the names of the claimants and their corresponding amounts following your verification to guide you in making payments. You are therefore urged TO ONLY pay claimants whose names appear on those schedules attached and their corresponding amounts."***

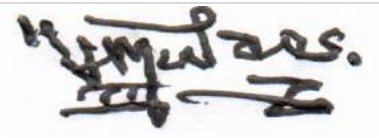
On annexure 1 titled; "VERIFIED SALARY ARREARS FOR FY 2019/20 CLEAR FOR PAYMENT" the name of the Respondent was indicated as those who had unpaid salary arrears of shs 25,491,204/=. Notably, the instructions in the letter by

the Permanent Secretary Finance were meant for the accounting officers to pay to the people whose names had already been verified.

The Appellant contends that a committee sat and declined to approve payment of salary arrears to the Respondent on the grounds that she had absconded from duty. I find this to be untenable. The Respondent's claims were verified by the Chief Administrative Officer of the Appellant who is the accounting officer and the technical person. It was on that basis that the money was approved by the Ministry of Finance. I do not understand the capacity under which the said committee sat and declined to approve payments yet the instructions to pay were to the accounting officer who is the Chief Administrative Officer and not the committee.

Further, whereas it is alleged by the Appellant that the Respondent had absconded, there is no evidence of any disciplinary proceedings or processes that were taken or undertaken under the relevant laws and procedures for cases of alleged abscondment or abandonment of duty. There was no evidence that the impugned committee referred to by the Appellant had any legal mandate to withhold a payment due to the Respondent which had been previously verified by the accounting officer of the Appellant and the Permanent Secretary Ministry of Finance. There is no record that the Respondent was subjected to a disciplinary procedure for absconding or abandoning duty. The letter referred to by the Appellant that the District Service Commission had instructed the Respondent to submit evidence to prove sickness from Mulago hospital did not in any way stop the accounting officer from paying the salary arrears due to the Respondent.

I therefore agree with the finding of the learned Chief Magistrate that the Appellant did not plead a plausible defense to merit setting aside the default judgment.

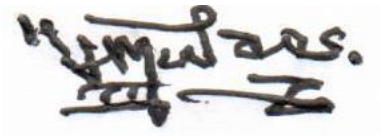


Allowing the Appellant to file a defense would have had no effect on the judgment to be delivered since the defense in my view had no prospects of success but was peddled by the Appellant to deny the Respondent's claim.

Consequently the grounds of appeal fail. The appeal is consequently dismissed with the following orders:

1. **The Respondent is awarded half of the taxed costs since her advocate did not file the written submissions as agreed in Court.**
2. **The lower court file should be forwarded by the Deputy Registrar back to the trial court to allow the Respondent proceed with execution.**

I so order.



Vincent Wagona

High Court Judge

FORTPORTAL

DATE: 05/04/2024