

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 807 OF 2017
(ARISING FROM REVISION CAUSE NO. 12 OF 2017)
SEGONGA GODWIN T/A PLATUNUM ASSOCIATES ::::::::::: APPLICANT
VERSUS
JOHNSON KATEBALIRWE ::::::::::: RESPONDENT
BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 83(d) of the Civil Procedure Act, Order 9 rules 12 & 27, and Order 52 rules 1 & 3 of the Civil Procedure Rules seeking orders that;

- a) The Ruling and order arising out of Revision Cause No. 12 of 2017 be set aside.
- b) The costs of the application be provided for.

[2] The grounds of the application are contained in the Notice of Motion and in an affidavit deposed by **Segonga Godwin**, the Applicant, in which he states that on instructions of the Respondent's land lord, the deponent applied for distress for rent against the Respondent at Nakawa Chief Magistrates Court; which application was allowed. The deponent stated that he followed the right procedure of clearing the distress certificate, filed an inventory and valuation report in the trial court which then issued a sale order against the distressed property. The Respondent then filed an application for revision of which he was duly served. The deponent instructed his former lawyers Kawooya Junju & Co. Advocates to file his affidavit in opposition to the Respondent's application. The deponent averred that he often followed up and was informed that they had filed his affidavit in opposition. However, on the day of the hearing, the deponent discovered that his affidavit in opposition was neither signed by him as the deponent nor commissioned by a commissioner for oaths. He averred

that as a result of his former lawyer's gross mistake and negligence leading to the filing of a defective affidavit, the affidavit was struck out and the revision application proceeded ex parte against the deponent. He concluded that he is very much interested in having the revision cause heard and determined interparty on its merits and is ready to file a proper and competent affidavit in reply; and the Respondent will not be prejudiced if the ruling and order is set aside.

[3] The application was opposed by an affidavit in reply deposed by **Katebalirwe Johnson**, the Respondent. He stated that the affidavit in reply purported to have been on record was incompetent and the trial judge had discretion to disregard it; that the matter did not proceed in default but rather exparte as the applicant did not appear in court yet he had been served. The Respondent averred that the Applicant has not come to court with clean hands having applied and distressed property worth UGX 300,000,000/= on fictitious arrears of not more than UGX 7,000,000/=, proceeded ex parte, distressed and sold off property which was a small factory and now comes to court seeking equity and justice.

Representation and Hearing

[4] At the hearing, the Applicant was represented by **Mr. Nakueira Musa** from M/s LMN Advocates. Neither the Respondent nor his lawyers appeared at the hearing despite service of court process. The matter proceeded by way of written submissions and the Court gave directions which were served upon the Respondent's counsel who were indicated on record as having instructions in the matter. While Counsel for the Applicant filed their submissions, none were filed for the Respondent. I have taken the submissions into consideration in the course of determining this matter.

[5] One issue is up for determination by the Court, namely; **Whether the application raises any grounds for setting aside the ex parte ruling and orders in Revision Cause No. 12 of 2017?**

Submissions by Counsel for the Applicant

[6] Counsel for the Applicant cited the provisions of Order 9 rule 27 of the CPR to the effect that an exparte decision passed against a defendant upon application by the plaintiff may be set aside on ground that he or she was prevented by any sufficient cause from appearing when the suit was called for hearing. Counsel also cited the case of *Banco Arabe Espanol v Bank of Uganda* [1999] 2 EA 22 to the effect that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and *Capt Phillip Ongom v Catherine Nyero Owota SCCA No.14 of 2001* to the effect that a litigant ought not to bear the consequences of the advocate's default unless the litigant is privy to the default or the default results from failure on the part of the litigant to give the advocate due instructions. Counsel submitted that the cause of the Applicant's non-appearance when the revision cause was called for hearing was that his former advocates filed a defective affidavit in reply in form of a written statement of defence which was signed by the Applicant's former lawyer instead of the Applicant. Counsel further submitted that although the Applicant's affidavit in reply was fatally defective and the court was right to expunge it, the court was not right to proceed ex parte against the then respondent. Counsel argued that the Applicant would have been given an opportunity to correct the defective affidavit in reply and proceed to hear the revision application inter partes.

Determination by the Court

[7] In Revision Cause No. 12 of 2017, the present Respondent sought for revision of the ruling and orders of the Magistrate Grade One at Nakawa Chief Magistrates Court on account of the court having acted without jurisdiction,

illegally exercised jurisdiction and/or acted with material irregularity or injustice. The respondent (now Applicant) through his lawyers filed what was intended to be an affidavit in reply but which was in the form of a written statement of defence and was signed by the lawyer instead of the deponent and a commissioner for oaths. The purported affidavit was struck out by the trial Judge and the hearing proceeded ex parte. According to the proceedings of the court on 5th June 2017, the respondent then (now Applicant) had been served with process and he neither appeared nor was he represented. No explanation was also furnished for his absence or that of his advocate. Counsel for the Applicant therefore prayed to proceed ex parte under Order 9 rule 22 of the CPR; which the court allowed. The correct rule, however, would have been Order 9 rule 20(1)(a) of the CPR. Counsel for the then applicant was allowed to file written submissions and the court delivered a ruling allowing the application with orders setting aside the decision of the trial court and the process of distress that had been undertaken by the present Applicant (then respondent).

[8] By this application, the Applicant thus seeks to set aside the said ruling and orders under Order 9 rule 27 CPR on account of existence of sufficient cause and particularly on the ground of mistake of counsel. Order 9 rule 27 of the CPR provides that;

“In any case in which a decree is passed ex parte 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 or she satisfies the court that summons was not duly served, or that he 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 against him or her upon such terms as to costs ...”

[9] In law, what amounts to sufficient cause has been a subject of consideration by the courts in a number of decided cases. In the case of *Kyobe*

Senyange v Naks Ltd [1980] HCB 31, it was stated that for sufficient cause to be disclosed, the court should be satisfied not only that the applicant had a reasonable excuse for failing to appear but also that there is merit in his or her defence to the case. In *Captain Phillip Ongom v Catherine Nyero Owoto SCCA No. 14 of 2001*, it was held that what amounts to sufficient cause may include a mistake by an advocate, illness of a party or advocate and ignorance of filing procedure by the party or their advocate. In such cases, the court will generally consider whether the delay is one that is explainable to the satisfaction of the court when granting leave or not.

[10] On the case before me, it was averred by the Applicant that he discovered on the day of the hearing that his affidavit in opposition was neither signed by him as the deponent nor commissioned by a commissioner for oaths despite having given his instructions to his former lawyers. The Applicant averred that he often followed up with his lawyers who told him that they had filed his affidavit in opposition. The Applicant however does not explain why neither his lawyers nor himself appeared in court on the day the matter came up for hearing. Failure to file a proper reply to the application would not preclude the party from appearing at the hearing.

[11] Be that as it may, the Applicant has heavily relied on the ground of mistake by his advocate as constituting sufficient cause for his failure to take the essential steps in the matter. It is apparent that the Applicant duly instructed counsel to handle his matter. The advocate drafted an affidavit in reply but made it in the form of a written statement of defence, signed it off as such and filed it. The advocate made no appearance on the day of hearing. This was grossly negligent conduct on the part of the advocate. Since the Applicant had duly instructed the advocate, he had executed his responsibility in the matter. He cannot be blamed for the professional negligence of his advocate. I am also of the view that where a party has relied on the advocate's skill and

diligence, non-appearance by the party on the day of hearing is excusable. As such, on account of mistake and negligence of counsel as shown above, the Applicant has established that he was prevented by sufficient cause from taking the steps that were essential to his participation in the matter. This is sufficient to move the court to set aside the ex parte proceedings, ruling and orders of the court.

[12] I have thus considered it necessary to allow the matter in Revision Cause No. 12 of 2017 to be heard inter partes on its merits. In *National Enterprises Corporation v Mukisa Foods*, Court of Appeal Civil Appeal No. 42 of 1997, the Court held that denying a subject a hearing should be the last resort. In *Banco Arabe Espanol v Bank of Uganda*, SCCA No. 23 of 1999 [2000] UGSC 3 (19 April 2000), the Supreme Court held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and lapses or errors should not necessarily debar a litigant from pursuit of his rights.

[13] In light of the foregoing, this application is allowed with orders that;

- a) The ex parte proceedings, ruling and orders in Revision Cause No. 12 of 2017 are set aside and the application shall be heard on its merits inter partes. The application be fixed for hearing accordingly.
- b) The costs of this application shall abide the outcome of Revision Cause No. 12 of 2017.

It is so ordered.

Dated, signed and delivered by email this 15th day of July, 2024.



Boniface Wamala

JUDGE