THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 149 OF 2018

(ARISING FROM CIVIL SUIT NO. 281 OF 2014)

EDMOND SEBUGWAWO---------- APPLICANT

VERSUS

MUPERE ANTHONY…….. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application to set aside ex parte decree summary decree that was entered against the Applicant in HCCS No. 218 of 2014 brought under Order 9 rule 27 and Order 52 rule 1 & 3 of the Civil Procedure Rules.

The respondent filed a suit on 14th day of August 2014 and Summons to File a defence were issued on the same day for recovery of 134,600,000/=, General damages and with interest of 10%.

The applicant was served through his lawyers upon his own instructions that the court summons be served on M/s Lubega Mwebaza & Co Advocates. The said lawyers duly received the said summons and they confirmed to be the lawyers of the applicant. They received the summons on 19th August 2018.

The respondent's applied for judgment in default on 17th September 2014 and the court entered the judgment on 19th September 2014 in the following terms;

i) The defendant pays to the plaintiff a sum of 134,600,000/=

ii) The defendant further pays to the plaintiff a month interest of 10% on the sum in (i) above from 21st October 2013 until payment in full.

iii) General damages for breach of contract.

iv) Costs of the suit.

The matter be fixed for formal proof.

The applicant made an application to set aside ex parte judgment vide Miscellaneous Application No. 68 of 2015. This court heard the application and it was determined on 25th May 2015. The Learned judge in that application found that; there were no sufficient grounds, or any grounds to persuade the court to set aside the default judgment.

> "*Secondly, I have looked at the plaint and the written statement of defence. I find no triable issues since the applicant/defendant has admitted that he owes the money to the plaintiff. It appears as if he is trying to delay the proceedings in order to buy time for himself.*
>
> *This application is dismissed with costs to the respondent. This suit is set down for formal proof on 7th July 2015……Apart from the liquidated claim of shs. 134,000,000/= which is not disputed by the defendant, the rest shall go for formal proof.*"

The case came up for formal proof on 27th June 2017 and the respondent/plaintiff proved the rest of the claims that were part of the remedies sought in the plaint.

The court delivered its judgement on 14th September 2017 in the following terms;

1. This court upholds the award of the liquidated sum of shs. 134,600,000/= to the plaintiff by the Assistant registrar.

2. The defendant is to pay an interest of 10% per month on the principal sum in (1) from 21st October, 2013, until payment in full.

3. General damages of Shs. 30,000,000/= is hereby awarded to the plaintiff.

4. Interest at court rate on (3) above is hereby awarded to the plaintiff from the date of this judgment until payment in full.

5. The defendant is to pay the plaintiff's costs of this suit.

The applicant filed this application on 19th March 2018 to set aside Exparte judgement and decree in civil suit No. 281 of 2014: Civil suit No. 281 of 2014 filed at this Honourable Court be heard on merit.

The applicant without leave of the court filed another Amended application on 6th June 2018 and this is the application that is being determined by this court.

The applicant was represented by *Tukashaba Alex of M/s Lunar Advocates* and the respondent was represented by *Stuart Kamya* of *M/s Mbeeta, Kamya & Co Advocates*.

In the interest of time court directed the counsel for both parties to file written submissions.

The main grounds for this application are that the applicant has sufficient cause why the decree in civil suit No. 281 of 2014 should be set aside. Secondly, the mistake of counsel in personal conduct of Civil suit No. 281 of 2014 for the applicant should not be visited on the applicant. Thirdly the applicant should not be condemned unheard and the applicant has a good defence.

The respondent filed an affidavit in reply to this application and opposed the application by restating what had happened before after the default judgement was entered.

The respondent in his affidavit upon advise of his lawyer, contended that this matter is res judicata and it is an abuse of court process.

I have perused the court record but it appears that the original application to set aside default judgment vide Miscellaneous Application No. 68 of 2015 but the Ruling shows that; The court failed to see any sufficient grounds to set aside the default judgment.

It appears this same application is premised on the same grounds as the earlier application which was filed in court by the applicant in 2015. It is true that this matter is *res judicata*. The grounds for setting aside the default judgment are the same as the grounds and orders sought in this application. Res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgement on merits in a previous action involving the same parties and claims. See ***Begumisa and Others vs Tibebaga [2004] 2 EA 17***

The applicant never appealed against the ruling of the court in 2015 when it was dismissed with costs.

It would appear that this application is merely filed by the applicant with a view of delaying justice and this is an abuse of court process.

Abuse of Court Process was defined in Black's Law dictionary (6th Ed) as

> "***A malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words a perversion of it***."

Parties and their respective counsel should take the necessary steps to safeguard the integrity of the judiciary and to obviate actions likely to abuse its process. See ***Caneland Ltd & Others vs Delphis Bank Ltd Civil Application No. 344 of 1999 (Kenya Court of Appeal)***

Similarly, the Nigerian case is also very instructive on abuse of court process; **Benkay Nigeria Limited vs Cadbury Nigeria Limited No. 29 of 2006** (*Supreme Court of Nigeria*), Where their Lordships held:

> "*In Seraki vs Kotoye (1992) 9 NWLR (pt 264) 156 at 188, this court on abuse of court process held….the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial*

process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.

The Court further observed that;

"*….to constitute abuse of court process, the multiplicity of suits must have been instituted by one person against his opponent on the same set of facts*"

This application was made after the respondent had made an application for execution vide EMA No. 2741 of 2017 that was filed on 17th January 2018.

Since the first application by the applicant was dismissed 25th May 2015, he never appealed against the said ruling and is now bringing the same application seeking the same orders.

Therefore in the eyes of court, this application is an abuse of court process and the applicant's advocates should show cause why they should not be condemned to pay costs personally as a firm or the advocate with person conduct.

In the interest of justice and for completeness, I will consider the application on its merits in as much as it is res judicata and an abuse of court process.

The Court has the discretion to set aside the ex parte judgment. In the case of **Shah v Mbogo [1967] EA 116;**

Where it is established that the defendant was served, the court has unfettered discretion to set aside the ex parte judgment obtained in default of appearance provided that in so doing, no injustice is caused to either party. The discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist the person who deliberately sought, whether by evasion or otherwise obstruct or delay the course of justice. In considering whether or not to set aside the ex parte judgment, the court must be satisfied that the defendant has a good defence on merits.

This court in the exercise of such discretion has considered the facts and circumstances both prior and subsequent, and all material factors for entering the ex parte judgement. The discretionally power must be exercised judicially or in a selective manner depending on the circumstances of each particular case.

The applicant does not set out any merits for his application or defence to the claim. The several affidavits made in support of the application give different versions and are shifting at all times.

In the affidavit of 19th March 2018 paragraph 4 he states;

"*That I reached an out of court settlement with the respondent in Civil suit no. 281 of 2014 and even paid part of the claim by the respondent in addition to depositing security with him.*"

In the affidavit support of the Amended Notice of Motion which he called 'Supplementary affidavit' filed on 6th June 2018 he does not state anything like that but introduces a new ground for setting aside the judgement but does not refer to any defence to the claim.

The applicant in another affidavit filed on the same day-6th June 2018 in paragraph 6 he states,

" *I maintain that a certificate of title for land comprised in Block 439 Plot 1 of land at katabi was furnished to the respondent as security.*"

The applicant without leave of court filed an additional Supplementary affidavit on 18th June 2018 and his defence is set out in paragraphs 6,7 & 8;

" (6)*That on 21st August 2013, upon my arrest on the complaint of the respondent, I agreed to refund the respondent's money and paid a total of 30,000,000/= in presence of two police officers at katwe police Station on charges of obtaining money by false pretence a one Aguma and Another.*

(7) That I was coerced and forced into signing the agreement because of the fear imparted on me by the police and the same agreement is illegal This is even reflected in the discrepancy in the figures in the above agreement.

(8) That, without prejudice, I only owe the defendant 65,000,000/= as the principal with interest at court rate and should therefore be allowed to defend myself in the suit."

It is clear the applicant has no bonafide defence and is only bent at abusing court process and delaying justice. He claims he was at police when the agreement was made but said agreement was drawn by his own advocate and who also duly witnessed it. It was even drawn on the document paper of his advocates law firm.

Where there is no draft defence annexed to the application for setting aside *ex parte* judgment, the court is not expected to consider the nature of the defence involved and it is left in a situation where all he has to do is decide whether or not the Judgment has been regularly entered. See ***Gateway Insurance Coo Limited vs Mohammed Athman Mjahid [2003] 1 EA 74***

In this case the applicant has changed versions and it would appear that he is only trying to come up with a defence that would have the sole purpose of setting aside the judgment to delay justice. The said reasons that are now being advanced seem to be devoid of any merit and the applicant did not appeal against the ruling that dismissed the application to set aside the default judgment in 2015.

An application for setting aside ex parte judgement cannot succeed if no good defence or substantial reasons are given to justify setting aside. See ***Twiga Chemical Industries vs Bamusedde [2005] 2 EA 325*** & ***Departed Asians Property Custodian Board vs Issa Bukenya Civil Appeal No. 18 of 1991***

This matter proceeded on trial *ex parte* and the respondent formally proved the case through trial and the court entered judgement on the evidence produced in court on the basis of an agreement drawn by the applicant's then lawyers.

This application also fails on merit and is dismissed with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
2nd /07/2018

The costs of this application shall be determined after the applicant's firm and/or advocates have shown cause why they should not be condemned to pay costs personally on 6th July 2018 at 2:00 pm. By that date they should have filed an affidavit in defence of their conduct.