THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 104 OF 2018

(ARISING FROM CIVIL SUIT NO. 078 OF 2016)

JACKSON KIMBUGWE---------- APPLICANT

VERSUS

BATTE GERALD…….. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application to set aside ex parte summary decree that was entered against the Applicant in HCCS No. 78 of 2016 brought under Order 9 rule 27 and Order 36 rule 11 of the Civil Procedure Rules.

The respondent filed a summary suit on 8th day of April 2016 and Summons in Summary Suit on plaint were issued on the same day for recovery of 154,000,000/=.

The applicant filed an application for leave to appear and defend the suit on the 2nd day of May 2016 vide Miscellaneous Application No. 481 of 2016 and the same was fixed for hearing on 29th November 2016.

The court dismissed the application for want of prosecution and summary judgment was accordingly entered on the summary suit as prayed for in the specially endorsed plaint.

The applicant filed this application to set aside summary judgment on 28th May 2018 after about a year after their application had been dismissed on 19th June 2017.

The applicant was represented by *Rukundo Seth* and the respondent was represented by *Kyeyune Albert Collins*. In the interest of time court directed the counsel for both parties to file written submissions. However, the applicant's lawyers without leave of court filed another set of supplementary submissions on 19th June 2018. I find this very outrageous and in breach of the court directives made on 4-June 2018. The applicant was only allowed to file a rejoinder to the respondent's submissions on 18th June 2018. I accordingly expunge them from the record of court and will not consider them in this ruling.

The main ground for this application is that counsel for the applicant Kiyemba, Matovu Advocates neglected its duty to neither attend court nor inform the applicant about the proceedings before the court. Upon which the applicant contends that it was negligent of counsel not himself to be blamed and that is sufficient cause. I will ignore the rest of the submissions since they are not intended or should not be argued in an application of this nature.

The respondent filed an affidavit in reply to this application but equally did not explain much as to what happened on that day the application for leave to appear and defend was dismissed for want of prosecution. It appears the respondent fell in trap of replying to the applicant's affidavit which appeared to be very diversionary.

I have perused the court record for that application for leave to appear and defend and the proceedings show that;

This application was first fixed for hearing on 29th October 2016, then 28th February 2017 and then on 27th April 2017 and that the applicant's lawyers only came twice on the earlier mentioned dates. "but today's date was fixed in their presence"(the date was 19th June 2017). The court dismissed the application for want of prosecution.

In light of what had happened on the day the application for hearing was made, I believe the court was right in invoking the powers of the court to strike out the application for leave to appear and defend.

The argument of Counsel for the applicant that is a violation of the right to be heard is not tenable. When you take yourself out of the jurisdiction of the court through non-appearance you cannot be claim that your right to be heard has been violated. Should it mean that a court shall never determine a matter in absence of any of the parties for fear of violation of their right to a hearing?

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. And because the discretionally power must be exercised judicially or in a selective manner depending on the circumstances of each particular case.

In the exercise of court's discretion the application shall be heard on its merits as it stood before the court at the time of its dismissal and to bring an end to the litigation.

This application is allowed and the Ex parte Summary judgment is set aside and Miscellaneous application No. 481 of 2016 shall be heard on its merits.

The applicant is directed to file & serve his submissions within 7 days (28th June 2018) and the respondent shall file and serve within 6 days (3rd July 2018) and the applicant may file a rejoinder by 6th July 2018. The ruling shall be delivered on the 13th day of July 2018 at 12:00.

The costs of this application shall be in the cause.

It is so ordered.

SSEKAANA MUSA
JUDGE
21st /06/2018