THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AR KAMPALA

(CIVIL DIVISION)

MISC. APPLICATION N0. 0293 OF 2023

(ARISING OUT OF CIVIL SUIT NO. 115 OF 2022)

UGANDA FUNERAL SERVICE LIMITED …….. APPLICANT

VERSUS

HIRANI MANJI KANJI ……. RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application to set aside the ex-parte judgment and decree issued by this court in Civil Suit No. 115 of 2023. The application is brought by way of Notice of Motion under Order 9 rule 27 and Order 52 rules 1 and 3 of the Civil Procedure Rules S.I 71-1, as well as Section 98 of the Civil Procedure Act Cap 71 and Section 33 of the Judicature Act Cap 13. The applicant is seeking for orders that;

1. *The ex-parte judgment and orders granted therein against the applicant in Civil Suit No. 115 of 2022 be set aside.*
2. *Execution against the applicant be stayed pending hearing and final disposal of this application.*
3. *Civil Suit No. 115 of 2022 be heard inter-party and determined on its merits.*
4. *Costs of this application be provided for.*

The application was brought on grounds set out in the affidavit of Nsubuga Peter Mugongo, a Director of the applicant which shall be read and relied upon but briefly, that this Honorable Court proceeded to hear and determine Civil Suit No. 115 of 2022 in the absence of the Applicant on the 31st May 2023, where this Honorable Court subsequently went ahead and entered an ex-parte judgment against the Applicant. The applicant further avers that it was prevented by sufficient cause from appearing in Court for the hearing of Civil Suit No. 115/2022 and that the Applicant only learnt that the matter had been proceeded ex-parte when they received a copy of the judgment through a third party due to the Applicant's lawyer's neglect to make an appearance in court on the day the matter was called on for hearing and neither did he inform the Applicant of the same.

The Applicant further avers that it has a plausible defense to Civil Suit No. 115/2022 and is therefore committed to defending the matter before Court to its logical conclusion and should not be condemned unheard as this claim involves colossal sums of money awarded against it and that the faults and mistakes of the Applicant's counsel should not be visited on the Applicant.

The respondent Mr. HIRANI MANJI KANJI filed an affidavit in reply opposing the application wherein he stated that the applicant's motor vehicle registration no. UAY 513Y knocked him and he suffered grave injuries and that he was admitted at various medical facilities and he incurred damages to fund his treatment. He further stated that the applicant was duly served with Court Process and that the applicant engaged Counsel who filed a defense on its behalf and attended court for the Conferencing the suit and on the hearing date Counsel for the Applicant despite

being aware of the same did not appear and the matter proceeded ex-parte against the applicant and judgment was entered against the applicant.

The applicant was represented by *Nankya Lillian and Edward Ssekamatte* of M/s Kiwuuwa & Co. Advocates while *Isaac Walukagga* of M/s MMAKS Advocates represented the respondent.

When the application came for hearing, the following issues were raised for determination;

1. *Whether there is sufficient cause to set aside the judgment and Decree against the Applicant?*
2. *Whether, in the event that the Application is granted, the Applicant should deposit security?*
3. *What remedies are the parties entitled to?*

Both parties filed written submissions that have been considered by this Court.

Determination

Whether there is sufficient cause to set aside the judgment and Decree against the Applicant?

The applicant's counsel submitted that he had made the application to set aside the ex-parte decree under ***0.9 r. 27 of the Civil Procedure Rules*** which provides that: *in any case in which a decree is passed ex-parte against a defendant, he or she may apply to court by which the decree was passed for an order to set aside; and if he or she satisfies court that ... he or she was prevented by sufficient cause from appearing when the suit came up for hearing. The court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into*

court, or otherwise as it thinks fit, and shall appoint the date for processing with the suit.

Counsel for the applicant, submitted that Courts have attempted to lay down the principles upon which discretion may be exercised to set aside an ex-parte judgment and some of the circumstances that may amount to sufficient cause. He further submitted that according to ***Rosette Kizito v Administrator General & Others, SCCA No. 9 of 1986***, "*sufficient reason (cause) relates to some inability or failure of the Applicant to take a particular step in time*." He submitted that mistake by an advocate though negligent may be accepted as a sufficient cause.

He submitted that the Applicant's failure to appear for the hearing of Civil Suit No. 115 of 2022 is clearly attributable to the Applicant's former lawyer. He submitted that whereas the Applicant duly instructed it's then Counsel Mr. Badru Bwango to defend against Civil Suit No. 115 of 2022, he did not appear for hearing of the case and he failed to inform the Applicant of the hearing date which is the ultimate and direct reason why the matter came to judgment ex-parte. He submitted that the Applicant only came to learn of this default when a copy of the judgment was forwarded to one of the Directors and it was discovered that indeed the former Counsel attended the preliminary stages of the court proceedings, however, he failed/ neglected to appear in court for hearing of the case.

Counsel further submitted that courts have pronounced themselves on negligence of counsel in handling clients' matters. He relied on the case of A***.G v Lutaaya SCCA No. 12 of 2007,*** where ***Katureebe, JSC (as he then was***), held that the litigant's interests should not be defeated by the mistakes and lapses of his counsel. He cited the case of ***Fred Kyewalabye v Richard Ssevume & 2 Others Civil Appeal No. 01 of***

2004, wherein ***Justice Rubby Awere Opio*** further held that "*it is trite law that mistake of counsel should not be visited on the litigants. The mistake in that case was that counsel had entered a wrong time for the hearing of the case in his diary and that is why the two came to court late. Therefore such negligence should not have been visited on an innocent litigant."*

He submitted that Court ought to take cognizance of the fact that all information regarding the court process and progress thereof was privy to former counsel as officer of court. He further submitted that counsel was properly instructed by the Applicant and it was incumbent upon him to furnish this information with regard to the case especially the gearing date to the Applicant and he failed and / or neglected to do so. He relied on ***Regulation 5 of the Advocates (Professional Conduct) Regulations SI 267 -2*** that's emphasizes the duty of an Advocate to appear in court personally on behalf of his/her client. He continued to submit that counsel was negligent hence his failure to appear in court for hearing of the case as well as notifying the Applicant of the hearing date.

Counsel for the applicant further submitted that the Applicant does not have the professional competences to supervise the counsel in the court of his work. He relied on the case of ***Joel Kato & Another v Nuulu Nalwoga (Misc. Application No. 04 of 2012),*** where ***Tumwesigye JSC*** held: "*I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the Applicants found it necessary to engage new lawyers.*" He continued in his submission that it would be unfair to

lay blame on a client who knows little or nothing about court processes for the failure of his/her counsel. And that the inadvertence on the part of the Applicant's former counsel was his failure to comply with court/s procedures and the Applicant should not be blamed for it.

He continued to submit that there is no other reasonable explanation for the non-appearance of the Applicant in a matter with far reaching consequences other than the negligence of former counsel in conducting the case and his negligence in not appearing in court on the date the case was fixed for hearing directly led to the suit being heard ex-parte and it would be unjust for the Court to penalize the Applicant for the mistakes of its former counsel when they duly instructed him.

The Applicant's counsel submitted that the Applicant's attitude and conduct exhibited is not to delay or defeat justice and that the proactive steps taken by the Applicant in promptly filing this Application as soon as the ex-parte judgment was brought to the Applicant's notice would indicate that the Applicant is acting in the interest of justice for all parties. He further submitted that the Applicant immediately sought services of its current legal representatives having been disappointed by former representation to demonstrate the willingness and interest to have the matter heard to its logical conclusion. He further submitted that the respondent has not shown any sufficient evidence that he will be prejudiced if the suit is ordered to be re-tried inter-parties on its merits.

He submitted that when considering Applications of this nature, the court ought to be mindful of the cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties and it is for that very reason that the Applicant is

entitled to a fair hearing. He further submitted that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. He relied on ***Article 28 (1) of the Constitution of the Republic of Uganda, 1995*** which guarantees the right to a fair hearing. He continued to submit that the overriding objective thereunder is that courts should deal with cases justly, in a way that is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party, and that to deny a litigant a hearing should be the last resort of court and to do so in this case would render the Respondent a beneficiary of the former lawyer's negligence. Counsel for the Applicant also relied on ***Banco Arabe Espanol v Bank of Uganda (1999),*** wherein the 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 that errors or lapse should not necessarily debar a litigant from the pursuit of his rights unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered*."

Counsel for the respondent, in reply submitted that this Application is supported by the Affidavit of one Nsubuga Peter Mugongo who states to be a director in the Applicant who in his affidavit averred in paragraphs 4 and 5 of the Affidavit in support of the Application that while the Applicant instructed Counsel to attend the hearing of the matter and the said Counsel neglected to appear in Court and did not notify the Applicant. He further submitted that the only ground that the Application is premised on is the purported negligence and/or mistake of Counsel.

Counsel for the Respondent submitted that in ***Sserubiri Frank & Others v Salama Jaques & Others Misc. Application No. 205 of 2021 (unreported)***, the Applicant filed an Application to set aside an ex-parte judgment and it was held that, "*for Applicants to succeed on mistake of Counsel, they ought to prove to the court the efforts they as litigants took in ensuring that their case was properly prosecuted*." He further submitted that the Affidavit in support of the Application to set aside the judgment does not state anywhere what efforts were made by the Applicant to ensure that they are represented in Court on the date when the suit came up for hearing. That it is not indicated why the Applicant did nothing to follow up with their lawyer which date the suit had been given for hearing so that they arrange to attend Court on the date that the matter had been allocated.

The Respondent's counsel further submitted that while the Applicant contend that it is as a result of mistake of Counsel that they did not appear in Court on the date the matter came up for hearing, there is no evidence in the Affidavit in support of the Application that the Applicant took any necessary steps to ensure that their case is properly prosecuted by their Counsel. He relied on the case of ***Lubowa Mukasa Patrick v Ssali Grace (Misc. Application No. 662 of 2019 (unreported)*** where the Applicant sought to set aside a judgment of Court on the basis of negligence and mistake of Counsel, and it was held that "*this Application is premised on negligence and mistake of Counsel but the evidence adduced is not cogent enough to satisfy this Court about the failure to attend Court and efforts the applicant as a litigant took in ensuring that this case is properly prosecuted. How often did he try to find out about the progress of the suit or he opted to keep away from the advocates for over two years and only learnt of the case while at taxation*

of the bills of costs. The Applicant has failed to demonstrate that he has good cause to have the judgment and decree set aside…"

Counsel for the respondent further submitted that it is not sufficient to simply change Counsel and contend that mistake or negligence was on the part of previous Counsel. He relied on ***Lubowa Mukasa Patrick v Ssali Grace (Supra)*** wherein it was held that "*the Applicant has not shown why former counsel did not attend court since there is no affidavit from them. Where they still under instructions and was it the applicant in obligations towards the former or he avoided counsel for over two years and only resurfaced after judgment*."

He further submitted that in ***Sserubiri Frank (Supra)***, the Applicant sought to set aside judgment and all was stated in the Affidavit in support of the Application was that it had a plausible defense to the Respondent's claim, it was held that; "*the Applicants in this matter do not mention their so called plausible defense even in this application. It is the duty of court in an application to set aside the default judgment to determine whether any useful purpose if there were no possible defense to the action. The defense would guide court on the real prospect of success and it would mean that such a defense has some validity as opposed to being fanciful and unrealistic.*"

It is therefore the Respondent's case that there is no sufficient cause to set aside the judgment of court in this underlying suit.

Analysis

Applications like this one, it has been established that, the applicant has to satisfy the court that there is good cause or sufficient reason why the judgment should be set aside. The applicant did not appear in court for hearing and nor did Counsel for

the plaintiff and the matter was heard ex-parte and judgment was delivered. It is a general principle that mistake of counsel is one of the reasons to warrant the grant of orders to set aside a judgment. In ***Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001*** it was held that mistakes, faults, lapses, and dilatory conduct of counsel should not be visited on the litigant; and further that where there are serious issues to be tried, the court ought to grant the application.

In ***Capt. Philip Ongom v. Catherine Nyero Owota, SC Civil Appeal No. 14 of 2001, Mulenga, JSC*** held as follows: "*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 to the advocate due instructions.*"

There are exceptions to the general principle that the litigant cannot be punished for the advocate's fault. In ***Kananura v Kaijuka (Civil Reference 15 of 2016) [2017] UGSC 17 (30 March 2017)*** the ***Supreme Court*** held; "*We note that whereas Kananura as a non-lawyer is a layman in as far as matters of Court processes are concerned, it is also true that the lawyer is only an agent of a litigant and/or intended appellant. It therefore follows that it is the duty of an intended appellant to follow up and inquire from his advocate on the status of his case. Following up of the applicant's case did not require him to be knowledgeable in Court processes. In the instant case, Kananura's conduct shows that he did not exercise any vigilance or diligence in pursuit of his intended appeal. Such conduct in the circumstances amounted to dilatory conduct and negligence on his part*." Therefore, for the applicants' to succeed on mistake of counsel, they ought to prove to the court the efforts they as litigants took in ensuring that their

case was properly prosecuted. The applicants instructed their former advocates to handle civil suit no. 115 of 2022, the matter was scheduled for hearing and the matter was determined in the absence of the Applicant.

The applicant's in this case failed to exhibit interest and vigilance in the sensitive suit against them. They instructed counsel and did not follow up to know the status of their case. Attending Court to be present during the hearing of the matter is not complex that requires to be done by only Counsel. To know a litigant's seriousness in the matter depends on the attitude exhibited, the applicant after giving instructions left everything to Counsel and did not bother to check on what is the status of the case. To me that is lack of seriousness and taking matters lightly. Litigants should not use negligence or mistake of counsel as a weapon but rather it should be invoked to shield a poor litigant who falls victim of their Counsel's negligence or mistake.

I agree with the respondent's counsel that it is not sufficient to handover a matter to Counsel and stop at that. Therefore, for the applicant to succeed on negligence or mistake of counsel, they ought to prove to the court the efforts they as litigants took in ensuring that their case was properly prosecuted. The applicant instructed their former advocates to handle civil suit no. 115 of 2022, they did not take any steps to know how their matter was being handled and that is conduct that should not be condoned. The matter had been fixed for hearing the same date and it inconceivable that the applicant's counsel never informed the parties to present their witnesses.

The matter came up the scheduling conference on 6th March 2023 which the applicant's counsel duly attended and the parties were directed to file their trial

bundles and their witness statements within one month by 6th April 2023 and the matter was to be heard on 27th April 2023. The applicant's counsel never filed any witness statement in the matter as directed by court and this could also point to the fact that the applicant's counsel never had any intentions of proceeding with the matter on the slated date for hearing. The plaintiff's counsel further during scheduling conference never mentioned any particular witness he intended to bring to court and rather vaguely stated he will bring employees of the applicant without any specifics.

The Applicant has not disclosed any plausible defense to Civil Suit No. 115 of 2022 and Court cannot pronounce itself on claims that are not supported by evidence. Section 101 of the Evidence Act, it is the duty of the one alleging to prove their allegations before Court and without proof it is just a fanciful allegation and a scheme to abuse Court Process. The applicant's defence as set out in the written statement of defence did not disclose any defence and it was an evasive defence without particular facts.

The court will set aside a judgment passed ex-parte and order a retrial where the latter party in whose favour the judgment subsists would not be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable. The respondent in this matter was seriously injured in the accident and is still undergoing treatment as a result of the accident. Setting aside the judgment will prejudice the applicant who is now on clutches and walking with disability.

This court found the applicant liable because their driver/employee was driving their vehicle on the opposite side of the road which is illegal and contrary to the

traffic regulations. The applicant's case is manifestly unsupportable in law and would be a wastage of courts time to rehear the applicant whose defence does not even disclose any plausible defence or answer to the plaintiff's claim. The applicant had a duty to show this court that he has a genuine defence to the plaintiff's suit and not merely to blame the former counsel for non-attendance or appearance in court on the day for hearing.

I shall determine this issue in the negative that there isn't sufficient cause to set aside the judgment and decree against the Applicant.

For the reasons herein above, I am unable to agree with the Applicant that he has demonstrated sufficient reasons or good cause for which I should exercise my discretion under Order 9 rule 27 of the Civil Procedure Rules to set aside the judgment. Since the non-attendance or appearance of counsel on the day of hearing was a ***'mistake of counsel'***, then the applicant can sue her former counsel for professional indemnity or report the conduct of her former counsel to the Disciplinary Committee of the Law Council for professional misconduct instead of burdening the court system re-litigating a matter heard on merit.

This application stands dismissed with costs to the respondent.

I so Order.

Ssekaana Musa
Judge
30th November 2023