THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISC APPLICATION No. 432 OF 2014

Arising Out Of Civil Suit No.378 Of 2014

PETER KATENDE t/a KATENDE STONE QUARY :::::::::::::::: APPLICANT

VERSUS

ALIFAT INVESTMENTS :: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The applicant brought this application by Notice of Motion under section 98 of the CPA, Order 9 rule 12, 27, Order 51 rule 1 & 3 of the CPR seeking orders that the default judgment entered on the 9th day of July 2014 against the applicant in Civil Suit No. 378 of 2014 be set aside, the respondent's bill of costs fixed for taxation hearing on the 18th day of July 2015 be stayed and costs of the application be provided for.

The grounds of the application are in the affidavit deposed by Peter Katende. They are briefly that;

The applicant was served with summons to file a defence on 4th July2014 but mistakenly acknowledged receipt by writing the date of 10th June 2014.

The deponent thought that since the summons had been issued on the 10th of June 2014 the acknowledgement date should be the same.

Upon that realization he approached the respondent's Counsel who accepted to change the dates on their copy. He was only shocked to find a default judgment already entered for not filing a defence.

Civil Suit No.378 of 2014 presents triable issues which warranty the matter to be heard on merits.

He has a good defence with a good chance of success and it is in the interest of justice that the case be heard.

In the affidavit in reply Oketcha Baranyanga Michael deposed that;

The applicant was served on the 10th June 2014 the summons to file a defence.

The applicant was sober and received the summons and therefore it is impossible that he acknowledged receipt on a date different from that where he received the summons.

The claim of receipt on a different date is an afterthought as the same has never been raised not even in the written statement of defence.

The applicant has never approached him to explain the mistake and he has never changed or accepted anything as there was no mistake.

Counsel for the applicant submitted that the issue before this court for determination is whether or not the applicant has sufficient cause and justified reason for the court to set aside the default judgment entered on 9th July 2014. Counsel added that this is a matter of discretion of court which was discussed in the Supreme Court decision of **Christine Namatovu Tebajjukira (IN RE) [1992-1993] HCB 85 87**. Counsel added that in the case of ***Trust Bank Vs Portway Stores Ltd [2000] EA 296*** court decided that the court in exercising discretion should consider why the default was committed, whether the applicant has a defence on merit and that a denial of hearing should be a last resort. Counsel argued that the application for the default judgment was written 8 days before the date of service. Counsel thus invited court to agree that the applicant has established sufficient cause and prayed that court exercises its discretion to set aside the default judgment and reinstate the main suit.

Counsel for the respondent submitted that the issue indeed before court is whether there is sufficient cause to set aside the default judgment. Counsel relied on the case of ***Franco Mugumya Vs Total (U) Ltd in Misc Appl. No.28 of 2013*** where court held that sufficient cause

must relate to the inability or failure to take a particular step in time. Counsel for the respondent argued further that the applicant had the opportunity to file the said defence and failed. Counsel therefore prayed that the application be dismissed with costs to the respondent. Counsel prayed that if the court is inclined to granting the same the applicant be ordered to deposit the decretal sum or security of equivalent value in court.

Decision of Court

I have read the pleadings and submissions of both Counsel. The applicant seeks to set aside a default judgment entered against him on the 9th day of July 2014 in Civil Suit No.378 of 2014.He also seeks to have the bill of costs taxation stayed as well as costs of the application to be provided for.

Order 9 rule 12 of the CPR gives the High Court unfettered discretion to set aside or vary an exparte judgment. (See ***Nicholas Roussos Vs Gulam Hussein Habib & another SCCA No. 9 of 1993). Order 9 rule 27 of the CPR*** on the other hand gives the court discretion to set aside decree exparte upon the applicant satisfying court that the defendant was not duly served or was prevented by sufficient cause.

Both Counsel agreed in their submissions that the main issue before this Court is whether or not the applicant has sufficient cause and justified reason for the Court to set aside the default judgment entered on 9th July 2014**.** They both have with authorities labored to define sufficient cause. In the case of ***Lucas Marisa Vs Uganda Breweries Ltd (1988-1990) HCB 131*** it was held that sufficient cause had to relate to failure by the applicant to take the necessary step at the right time.

The applicant alleges a mistake on dates of receipt of summons to file a defence. He alleged that instead of indicating the 4th of July 2014, he put the date of 10th June 2014 on the summons. Counsel for the applicant submitted that the letter of application by the respondent to enter the default judgment was written on 2nd of June 2014 which is eight days before the said service was done.

I have perused the documents on the file in their chronology. When you look at the summons served, there are two dates; one with 10th June 2014 which appears crossed out and the 4th of July scribbled underneath. The affidavit of service deposed by Noah Kasumaba was commissioned on the 12 of June 2014. The letter to the Registrar on record is dated 3rd of July 2014. I therefore find no mistake on record as alleged by the applicant. It is the practice that the date that appears on the summons is the date it is actually received. The affidavit of service shows 10th June as the date of service, which is also on the summons.

Section 102 of the Evidence Act places the onus to prove an alleged fact on he that alleges its existence. In my view, the applicant has not satisfactorily proved the existence of a sufficient cause to persuade court to have the default judgment set aside.

Accordingly, I dismiss the application and award costs of this application to the respondent.

My order of 15th June 2015 staying taxation is accordingly vacated.

I so order

B. Kainamura
Judge
19.07.2017