THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

MISCELLANEOUS APPLICATION NO. 95 OF 2010

(ARISING FROM CIVIL SUIT NO. 136 OF 2009)

ADMINISTRATOR GENERAL::APPLICANT/DEFENDANTS

VERSUS

1. **NSANGI HADIJA**
2. **KIYIMBA NUHU::RESPONDENTS/ PLAINTIFF**

BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO

RULING:

The applicant, the Administrator General of Uganda, brings the application under **section 98** of the Civil Procedure Act cap. 71 and **S.33** of the Judicature Act Cap.13, and **order 52 r 1 &3** of the Civil Procedure Rules S.I 71-1, for orders that:-

1. The ex-parte judgment and decree executed in Civil Suit No. 136 of 2009 be set aside.
2. The applicant be allowed to file a defense out of time.
3. Court be pleased to grant any other remedies it deems fit and necessary.
4. Costs of the application be provided for.

The application is supported by the affidavit of the Wagubi Aggrey dated 27th May, 2010.

The grounds of the application are as follows:-

1. That the applicant was by sufficient cause prevented from filing his defense in the main suit in time.
2. That the applicant did not unlawfully deny the respondent access to their father, grandfathers' estate but rather the applicant was by court order in Civil Suit No. 52 of

1996; High Court of Uganda, stopped from dealing with estate of the late Prince Badru Kakungulu until determination of the suit, which suit is still pending.

3. That the applicant's hands are tied by virtue of the aforementioned court order.
4. That the respondents' case will not be jeopardized in anyway if the exported judgment, order and decree is set aside.
5. That the applicant has a good defense to suit.

At the hearing of the application, the applicant was represented by Mr. Obiro Odoi and the respondents by Mr. Richard Nokrach.

The High Court has original unlimited jurisdiction in all matters. This is provided for under **Article 139(1)** of the Constitution **and Section 14** of the Judicature Act.

In the exercise of that jurisdiction, the High Court has powers to make such orders as are necessary in the interests of justice and to prevent the abuse of court process and in **section 33** of the Judicature Act, court can grant remedies absolutely as it thinks fit.

Counsel for the applicant submitted that, they were served with a summons to file a written statement of defense in the matter. That Counsel for the Respondent consented to the Plaintiff's late filing, and that had counsel for the respondent refused, he would have filed an application to file late.

Counsel submitted that the Respondents' counsel accepted and received service on 24/3/2010 of a letter asking him to agree to the Plaintiff's late filing. Further, that however on the next day, the Applicant learnt that court had proceeded on the matter ex-parte, and ruled on it.

Counsel for the applicant submitted that he was prevented by sufficient cause from filing a written statement of defense. He cited the case ***Gullam Hussein in CA No. 9 of 1993***, Supreme Court of Uganda, where court held that a mistake by an advocate should be considered sufficient cause for setting aside a judgment passed ex-parte.

Further, that it is not open to the court to consider the merits of the case.

Counsel submitted that the applicant relies on the inherent powers of the court under **section 98** of the Civil Procedure Act and **section 33** of the Judicature Act, to grant any other remedies it deems necessary, because there are parts of law the applicants wish the court to consider.

Mr. Nokrach counsel for the respondents opposed the application and prayed for dismissal of the application so that execution of the court orders proceeds in the interests of justice.

Counsel contended that, to allow the application would be a total abuse of court process and would be delaying and denying justice to the respondents who have a judgment in their favor which is only pending execution.

Mr. Nokrach submitted that the application is only an afterthought with wrong motives because the applicant was duly served with the court process in the suit. That he disregarded service of the court summons as evidenced by the court record, an affidavit of service on the Applicant attached to the court record.

Mr. Nokrach submitted that the Applicant had deliberately neglected to file a defense despite the fact that it has several lawyers in their office who would have normally responded to the summons on court record.

Further that the applicant/defendant deliberately neglected to file a defense and to make this even worse, even when they were issued with a summon, they did not appear in court, which shows that the applicant is taking court for a ride.

Mr. Nokrach argued that the Applicant's submission that the respondents consented to late filing is false. He added that if he had consented, the consent would have been on record. Counsel argued further that the applicant is only delaying the matter to the detriment of the beneficiaries to the estate of their late father and grandfather.

The Respondents' counsel submitted that the applicants have no defense to this matter for refusing to distribute the estate, according to the wish and will of the deceased.

Counsel submitted that, the allusion by the Applicant that their hands were tied by C.S. No. 526 of 1990; to file a written statement of defense is not true. That the applicant had already distributed the property prior to filing the suit and deliberately omitted the respondents who are suffering as a result of the applicants' omission.

Further, that there is no good and sufficient reason for the court to set aside the judgment especially as the applicant was aware and knew what was going on in court. Counsel argued that

it will be a total waste of court's time for it to set aside the judgment and decree which was properly and legally passed by the court.

The Respondents' counsel submitted that it would be a different case altogether if the applicant was to allege that he was not served at all. That in this case however, the applicant was dully served twice and there is no good reason why the applicant should deny the respondents the share of their deceased relatives.

Counsel contended that justice delayed is justice denied and the respondents have continued to suffer as a result of not getting their father's share in the estate of their late grandfather and one begins to wonder what interest the applicant has in the matter.
Counsel invited court to dismiss the application with costs and to allow execution of the decree to proceed in the interest of justice.

In the instant case, I have reviewed the parties' pleadings and counsels' submissions and my conclusion is that, the applicant was telling lies in his affidavit.
In the first instance, he was served with summons to file a defense and he admitted it, and yet did not file a written statement of defense because of 2 reasons;

1. The respondents' counsel assured them that they will accept late filing of the written statement of defense and this is why they delayed to file.
2. That they were prevented by the order in C.S. No. 526/1996 as the applicant had already distributed the estate.

In the first instance, there is no way the respondents could have accepted late filing when there is a procedure proposed in the law for late filing. Counsel for the applicant is a lawyer and knows the procedure for late filing. He should have therefore followed that procedure.

Secondly, they should not have accepted oral assurance and finally the written statement of defense they claim was filed looks fresh on the file as if it had been inserted this morning with no stamps of receipt.
He should have filed an affidavit of service and indicated that the respondents accepted late service.

Finally, the order in HCCS No. 520/1996 stopped the applicant from dealing in the estate but did not estope the applicant from filing a written statement of defense to the suit. The applicant had the responsibility to file a defense and appear in court for the hearing, but he refused/neglected to do so.

Now that the judgment/decree has been passed, the applicant is seeking for an excuse for not appearing in court. Even if they had a point of law to raise, they had the opportunity to appear when court passed its judgment and a right of appeal when the judgment was passed.

I do agree with the counsel for the respondents that, to allow this application would be for the court to condone an abuse of the court process, when the applicant is relying on/ telling lies in his affidavit and this court has held that, an application supported by an affidavit tainted with lies is bound to fail and I so find. This was set out in the case of ***Siransi Bitaitana & 4ors V Emmauel Kananura C.A No. 4 of 1976.***

Consequently, the application is disallowed. The respondent can proceed to execute the decree in HCCS No. 136 of 2009 and the applicants are to pay the costs of the application.

Margaret C. Oguli Oumo

JUDGE

4/10/2010

Present;

1. Mr. Obura Odoi for the Applicant (Administrator General)
2. Mr. Richard Nokrach foe the Respondents
3. Betty Lunkuse, Court clerk
4. Nantamu Oliver, Research assistant.