THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 758 OF 2020

ARISING FROM HCCS NO.108 OF 2016

1. **ATTORNEY GENERAL**
2. **UGANDA LAND COMMISSION:::::::::::::::::::::::::::: APPLICANTS**
3. **UGANDA INVESTMENT AUTHORITY**
4. **COMMISSIONER LAND REGISTRATION**

VERSUS

TAJ EXPORTS (U) LTD :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

RULING

29/2/21

This application arises from Civil Suit No.108 of 2016 where the Applicants brought an application against the Respondent for an EX-PARTE judgment entered on the 19th day of May, 2016 vide Civil Suit No.108 of 2016 be set aside, this Honorable Court be pleased to extend time within which to file the Applicants' Written Statement of Defence in Civil Suit No. 108 of 2016 and an order for costs of this Application to be made.

On 19th May 2016, an ex-parte judgement was entered against the Applicants vide Civil Suit No. 108 of 2016 because the Applicants did not file a Written Statement of Defence and the Respondent applied for a judgement in default hence this Application.

This Application was brought under Order 9 r.12 & 27 Civil Procedure Rules S. I 71-1, Rule 6 of the Government Proceedings (Civil Procedure) Rules S. I 77-1. The Application is supported by the affidavit of Mwesigye Militon for the 1st Applicants, Opio Robert for the 4th Applicants, Hamza Galiwanga for the 3rd Applicants and Benon Kikenyi for the 2nd and the grounds of the application briefly are that:

a) The Applicants were unable to file a written statement defence in Civil Suit No. 120 of 2016 on time for a sufficient cause.
b) The Respondent applied for judgment in default without first seeking leave as required under the Government Proceedings (Civil Procedure) Rules.
c) The Applicants were not given an opportunity to be heard.
d) It is just and equitable in the circumstances that this Application be allowed and the main suit is determined on its merits.
e) The Respondent shall not be prejudiced if this Application is allowed.

The issues for determination before court were;

1. Whether the Application is competent, legal and factually tenable
2. Whether the Orders in HCS No. 108 of 2016, Taj Exports Vs the Attorney General, Uganda Land Commission, Uganda Investment Authority & Commissioner Land Registration can be set aside.
3. Whether the Applicants were accorded a fair hearing
4. What remedies are available to the parties.

29/10/21

RESOLUTION

Issue 1: Whether the Application is competent, legal and factually tenable

The Applicants submitted that the Respondent (TAJ Exports Ltd) was served with the Application on 12th October 2021 and at service they received in protest and

stated that the competency of the Application would be contested. The Application was filed in court on 14th July 2020 and the Registrar signed and sealed the Application on 2nd October 2020.The Application was served to the Applicants ten days after the signing of the Registrar as prescribed under Order 5 of the CPR. The Applicants further contend that the dismissal of Misc. Application No. 838 of 2016 on a preliminary point does not bar the Applicants from refiling the Application.

The Applicants in their respective affidavits in support of the Application stated that they were never informed by their lawyers that there was an ongoing case in the court of Law against them.

In reply, counsel for the Respondent submitted that the Application is moot and that factually and legally untenable, incompetent, lacks merit and is an afterthought calculated to waste court's valuable time. Issuing a court Order in this Application setting aside a judgment which was duly effected by the 2nd, 3rd and 4th Applicants amounts to engaging court in moot proceedings which have an effect of court issuing a court order in vein.

That the Application is moot as the judgment and decree that the Applicants seek to set aside has since been executed to completion and the 2nd, 3rd and 4th Applicants as agencies of government of Uganda represented by the 1st Applicants effected the decree, issued the Respondent with a grant of a full term lease of 99 Years and accepted all the requisite payments by the Respondent and issued a title to the Respondent for a full term.

That the efforts of the Applicants by filing this current Application seeking to set aside the judgment and decree which is already executed to completion are futile and relied on ***SCMA No. 20 of 2014 Miriam Kuteesa V Edith Nantumbwe & 3 others.***

It is trite law that court Orders should not be issued in vein and court should not adjudicate a matter that is moot. *See* ***HCMA NO. 1424 OF 2017 Mitanda Bakale Masso David Versus Uganda Revenue Authority.***

That since 2017, all the Applicants were fully aware of the existence of the judgment in HCCS No. 108/2016. Refer to paragraph 6 of the affidavit in support of the Application sworn by Mwesigwa Milton and paragraph 8 of the affidavit in support of the application sworn by Hamza Galiwango all being represented by the Applicants.

He also submitted that the knowledge of the existence of the Judgment in HCCS No. 108 of 2016 by the Applicants is evident since the Applicants represented by the 1st Applicants filed an application similar in nature as this Application, vide HCMA No. 938 of 2016 but failed to pursue it and instead filed a fresh suit vide HCCS 901 of 2017, Attorney General Versus Taj Exports Limited for recovery of the same suit land from the Respondent, which suit is still pending in this honorable court.

That upon realizing the futility of their suit, the Applicants revived their Application for setting aside HCCMA No. 108 of 2016. The same was heard and dismissed on a preliminary point of law which rendered it incompetent before this honorable Court. The Order of dismissal is attached to paragraph 11(ii) of the affidavit in reply as annexure 'I'

Further that the 2nd, 3rd and 4th Applicants unconditionally effected the decree and judgment. However, it is evident that is only some individuals within the offices of the 2nd, 3rd and 4th Applicants with the help of the 1st Applicants, especially the

deponents of the affidavits in support, who appear to be aggrieved with legally authorized decisions of the responsible Officers at the time, and who are instigating this superfluous Application.

The Respondent's counsel also submitted that the Application offends the legal principles of approbation and reprobation as the 2nd, 3rd and 4th Applicants are the very entities that relied on and implemented the terms of the decree and therefore cannot now purport to challenge the same decree and seek to set it aside. That it is a known principle of law that "a man or woman" cannot adopt two inconsistent attitudes towards another. He or She must elect between them and having elected to adopt one stance cannot thereafter be permitted to go back and adopt an inconsistent stance. See ***HCCS No.2139 of 2016 Administrators of the estate of the late Sir Edward Muteesa // and 3 others Versus Dr.Muhammad Buwule Kasasa and Another.***

Requirement of leave to proceed Ex- parte under Rule 6 of the Civil Procedure (government Proceedings) Rules the requirement of law that leave of court must be sought before proceeding ex-parte against Government is no longer Mandatory but directory.

That the trial Judge in his final judgment vide HCCS No. 108 of 2016 which the Applicants herein seek to set aside, at page 2 fully considered and rested the issue of Rule 6 of the Civil Procedure (government Proceedings) Rules when he relied on Article 21(1) of the 1995 constitution of the republic of Uganda prohibits any form of discrimination under the law and Civil Appeal No. 28 Of 2011 Kabandize & others versus KCCA, wherein it stated that;

"in view of article 21(1) of the constitution, a law cannot impose a condition on one party and exempt the other from the same and still be in conformity with article 21(1)"

This Court adopts the submissions of the Respondent and find that Application is incompetent, illegal and not factually tenable because the Application is moot as the judgment and decree that the Applicants seek to set aside has since been executed to completion and the 2nd, 3rd and 4th Applicants as agencies of government of Uganda represented by the 1st Applicants effected the decree, issued the Respondent with a grant of a full term lease of 99 Years and accepted all the requisite payments by the Respondent and issued a title to the Respondent for a full term.

It is trite law that court orders should not be issued in vein and court should not adjudicate a matter that is moot and therefor this ground fails.

Issue 2: Whether the Orders in HCS No. 108 of 2016, Taj Exports Vs the Attorney General, Uganda Land Commission, Uganda Investment Authority & Commissioner Land Registration can be set aside.

The Applicants stated that they discovered that there was an ex-parte judgment on 22nd December 2017 when the interim order of injunction in Civil Suit No.901 of 2017 was fixed for hearing before the Asst. Registrar Her Worship Akankawasa.

Applicants further submitted that under Order 9 r.27 CPR, the court will set aside the ex-parte judgment where it is proved that there has been no proper service. *See* ***Waminiv*** ***Kirima (1969) E. A. 172; Korutaro Mukairu (1978) HCB 215*** and secondly, the defendant must demonstrate; not only that he or she was prevented by

sufficient cause from filing a defence within the requisite period, but also that there is merit in the defence to the case. See; ***S. Kyobe Senyange v. Naks Ltd [1980] HCB***; ***Nicholas Roussos v. Gulam H.H Viran, S.C. Civil Appeal No.3 of1993; Nasaka Farmers & Producers Ltd v. Aloysius Tamale [1992-1993] HCB 203.***

In addition to the above, a defendant who wishes to have the ex parte judgment set aside should act reasonably and promptly, and in event of delay in making the application, he or she should explain the reasons for such delay. ***See Nicholas Roussos v. Gulam H.H. Viran (supra)***.

a) Proper Service

The Application is supported by the affidavits of Mwesigye Militon, the Principal Assistant Secretary Ministry of Trade, Industry and Cooperatives; Mr. Opio Robert, Ag Commissioner Land Registration, Hamza Galiwango, the Director Industrial Parks Development Division filed on 14th July 2020 and the final affidavit of Benon Kigenyi, Ag Secretary Uganda Land Commission filed on 15th December 2020. Paragraph 3 of the affidavit of Mwesigye Militon informs court that Ministry of Trade represented by the Attorney General were not aware of a court case and in paragraph 4 sought advice on 30th November 2017 when they found out that the Plaintiff (Taj Exports) was constructing in their land as per annexure "B"

In the affidavit of Hamza Galiwango states that On 17th December 2015, a Notice of Intention to sue was received. The copy of the judgment at page 2 Hon. Justice Godfrey Namundi states that the defendants were served but does not state when. That the Judge disregarded Rule 6 on the fact that it is no longer mandatory to file an application to show cause under the Government proceeding rules.

In reply, the Respondent's counsel submitted that under paragraph 9, which makes reference to annexure "D" contains the affidavits of service and all its attachments showing acknowledgement of receipt of service by the Applicants and that the 3rd Applicants confirms the receipt of summons to file a defence under paragraph 7 of the affidavit I support of the application sworn by Hamza Galiwango when he refers to the letter attached and marked as "C". Effective service of the Applicants.

From the evidence on record, the court finds that the it is no longer mandatory to file an application to show cause under the Government Processing Proceeding Rules and thus t**he defendant must demonstrate; not only that he or she was prevented by sufficient cause from filing a defence within the requisite period, but also that there is merit in the defence to the case.**

Counsel for the Applicants submitted that the affidavit Milton Mwesigye, shows that they only became aware after the judgment. The affidavit of Hamza Galiwango,3rd Respondent shows in paragraph 5,7,8 states that he was surprised to hear that an ex parte judgment was entered. In a letter dated March 24th 2016 attached as annexure "C" shows how the Executive Director of Uganda Investment Authority forwarded the summons for the defence to Attorney General's chambers and annexure "D" in a letter dated 1st August 2016, shows how the client was surprised that an ex-parte was entered. Paragraph 12 and 13 sate that counsel was negligent and denied them a right to be heard.

In reply, counsel for the Respondent submitted that

b) Sufficient Cause

That Applicants submitted that in the case of ***The Registered Trustees of the Archdiocese of Dar es Salaam Vs the Chairman Bunju Village Government & Others*** quoted in ***Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another (2017) eKLR*** discussing what constitutes sufficient cause had this to say: -

> *"It is difficult to attempt to define the meaning of the words, sufficient cause*
>
> *"... It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."*

That in the same Kenyan authority of ***Gideon Mosa Onchwati (supra)*** reliance was made on the Supreme Court of India case of ***Parimal vs Veena*** which attempted to describe what was "Sufficient cause" when it observed that: -

> *"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive."*

That the evidence attached to the application indicates that the client engaged Attorney General however the Counsel in conduct at the time failed to file a written statement of defence. Negligence of counsel should not be visited on the client. The

case of ***Nankanja-vs-Yafesi Wamala & Kulaba David and Benedict,HCt- 14-LD N0.069 OF 2018*** at page 3, cited the case of ***Nicholas RoussoS Vs Gulamhussein Habib Virann and Anor SCCA No.9 of 1993(unreported)*** wherein Court noted that,

"The Courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an Advocate though negligent may be accepted as a sufficient cause."

The case of ***Bishop Jacinto Kibuka Vs-Uganda Catholic Lawyers & 2 Ors*** at page 4 quotes the cases of ***Florence Nabatanzi vs. Naome Binsobodde SC Civil Application No. 6 of 1987*** and ***Sipiriya Kyaturesire vs. Justine Bakachulike Bagambe CA No.20/1995*** both courts noted that;

a) First and foremost, the application must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. The general requirement not withstanding each case must be decided on facts. ***See Mugo vs. Wanjiru (Supra).***

b) The administration of justice normally requires that substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights— see ***Essaji vs. Solanki (supra).***

c) Whilst mistakes of counsel sometimes may amount to an error of judgment but not inordinate delay negligence to observe or ascertain plain requirements of the law. ***Attorney General vs. Oriental Construction Limited(supra).***

d) Where an Applicants instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law.

e) A vigilant Applicants should not be penalized for the fault of his counsel on whose actions he has no control."

Counsel submitted that the evidence above in the affidavits explains the how the client followed up on his case especially in the affidavit of Hamza Galiwango of Uganda Investment Authority, the 3rd Applicants and prayed that the above case becomes the guiding principle in this case.

Court therefore finds that since the Applicants were effectively served with the summons and still did not file their defence, they have failed to prove just cause as to why they did not file their defence and thus the judgement against them remains valid.

c) **Merit in the defence**

Counsel submitted that the Applicants have attached the written statement of defence as annexure "A" to the Affidavit in support of Milton Mwesigye under paragraph 9. He added that this is a case where the suit land was owned by Uganda Investment Authority however Uganda Land Commission was registered on the title and held it in trust. Uganda Investment Authority was registered on the suit land on 18th December 2015. Uganda land commission was registered on the title on 21st November 2016. Ministry of Trade paid 216,780,000/= (Two Hundred Sixteen Million Seven Hundred Eighty Thousand Shillings) only for the lease of this suit land as it was a presidential pledge to the Jua kali.

Uganda Land Commission illegally leased the suit land to the plaintiff when there was a running lease with Ministry of Trade. It is the Applicants submission that they have a plausible defence and they are questions to be considered by this Honorable Court.

In reply, counsel submitted that, the 2nd, 3rd and 4th Applicants by filing this application have already offended the principles of approbation and reprobation by unconditionally affecting a lawful decree passed by court and at the same time seeking to challenge the same.

The 2nd, 3rd and 4th Applicants have already filed a fresh suit vide HCCS No. 901 of 2017 Attorney General Versus Taj Exports Limited for recovery of the same suit land from the Respondent, which suit is still pending in this honorable court thereby rendering this application and all its annexure an abuse of court process for which the Applicants should jointly be penalized. That it is the Applicants' submission that the Applicants have not come to court with clean hands meriting consideration by this honorable court.

Undue delay

The Applicants' counsel submitted that Judgment was given on 19th May 2016 and the first application to set aside the judgment was filed on 27th July 2016. There was no undue delay because the application was filed a week after the clients got to know about the judgement. It is the Applicants submission that there was no undue delay to take action after the judgment came to their knowledge.

Right to a hearing

Counsel for the Applicants submitted that in the case of **Nwoya District Local Government vs John Paul Onyee, Civil Application No. 31 of 2019** at page 3, Hon. Justice Stephen Mubiru stated that;

> *"The right to a fair trial guaranteed by article 28 (1) of The Constitution of the Republic of Uganda, 1995 subsists until final execution of the decree. It*

guarantees the right of participation by both parties and to be heard at all stages of the proceedings, except where the parties prevent themselves from exercising that right. Implicit in that guarantee is the fact that nothing should get onto the court record in violation of any of the party's right to be heard. Decisions taken on basis of material that goes to the merit of the case placed before court without giving an opportunity to the opposite party to be heard, or in violation of the principles of natural justice, once brought to the attention of court, will be set aside."

That it is a 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. It follows therefore as a rule of thumb that all judicial proceedings should be conducted inter-parties save where the law expressly states otherwise or where the other party after having been duly notified, prevents himself or herself from exercising that right. It is the Applicants submission that this is a case that should be heard on its merits as per the facts.

29/2/24

In reply the counsel for the Respondent stated that by the time court fixed the matter to precede ex-parte, it was satisfied that the Applicants were not interested in the case. That the Applicants were all served with court process at their respective offices and proof of service by affidavit is well on court record. Refer to Paragraph 9(i) of the affidavit in Reply and Annexure 'D' thereto and even after the judgment.

That the Respondent subsequently filed an application for consequential orders, to execute the terms of the decree vide HCMA No.720 of 2017 and an application for a certificate of urgency vide HCMA 721 of 2016 to have the application for consequential orders heard and the Applicants were duly served with the same but

they did not object or oppose the applications. Proof of service is on court record attached to paragraph 10(iv & v) as annexure "F".

It is a well-grounded principle of justice, equity and good conscience that there must be an end to litigation. The court could not wait for the Applicants who appeared not interested in the matter to render justice to the Respondent. That the Applicants put themselves out of court's jurisdiction and that the trial court properly proceeded ex-parte.

Issue 3: Remedies

It is the Applicants' prayer that this Honorable court grants the following orders;

a) That the ex-parte judgement entered vide Civil Suit No. 108 of 2016 be set aside.
b) That the Applicants file their written statement of defence in Civil Suit No. 153 of 2016 within 3 days after the judgment

In reply counsel for the Applicant prayed that the application be dismissed since the Respondent will be greatly prejudiced because the decree was long executed and it has fully developed the suit land the subject of the original suit.

He also submitted that it is trite law that cost follow an event and relied on section 27 CPA and the case of ***Francis Butagira v Deborah Namukasa (1992-1993) HCB 98*** and stated that in order to be granted the reliefs sought, the only burden required to be discharged by Respondent under the circumstances of this case is to lead evidence legally justifying the prayers and sufficient to prove the Respondent's case contained in the pleadings, which we have extensively done in our submissions above.

From the analysis of the submissions and evidence on record, it is to the satisfaction this honorable Court that the Applicants failed to prove that they were prevented by sufficient cause from filing a defence within the requisite period and that there is merit in the defence to the case. There is sufficient evidence on record that the Defendants/Applicants were effectively served with the summons but excluded themselves from the jurisdiction of this court by not filing a Defence and thus denying themselves a fair hearing. Therefore, that being the case, this Application is dismissed with costs to the Respondent.

It is so ordered.

CORNELIA KAKOOZA SABIITI
JUDGE

Date: 29th October 2021