

UGANDA / JUDGMENT

Kitaka v Harshad (Miscellaneous Application 581 of 2024) [2024] UGHCLD 157 (6 June 2024)

[2024] UGHCLD 157

COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Miscellaneous Application 581 of 2024

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****[LAND DIVISION]****MISCELLANEOUS APPLICATION NO. 0581OF 2024.*****(ARISING FROM CIVIL SUIT NO. 097 OF 2022)*****MOHAMMED KITAKA :::::::::::::::::::: APPLICANT VERSUS****HARSHAD BAROT :::::::::::::::::::: RESPONDENT****BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA RULING.*****Introduction:***

- 1. This was an application by notice of motion brought under Section 98 of the Civil Procedure Act, Order 9 rule 12, Order 52 rules 1, 2 & 3 of the Civil Procedure Rules (CPR) for orders that:
 - i) The Exparte judgment against the Applicant in Civil Suit No. 097 of 2022 be set aside and matter be heard inter parties.
 - ii) Costs of the application be provided for.

Background;

- 2. That Respondent filed Civil Suit No. 097 of 2022 against the applicant seeking orders inter alia;
- i) A declaration that the 1st defendant breached the contracts dated 27th May 2011, 31st August 2011 and 8th November 2012 respectively in respect of sale of land comprised in Block 65 Plot 263 at Mbalwa, Kyadondo in Wakiso district.
- ii) A declaration that the 1st defendant acquired the suit land fraudulently.
- iii) An order directing the 2nd defendant to cancel the name of the 1st defendant from the certificate of title of the suit property and restore the plaintiff.
- iv) General damages for inconvenience, psychological and mental anguish caused by the defendants to the plaintiff.
- v) Interest on all the sums above at a rate of 25% per annum from the date the cause of action arose until payment in full and costs for the suit.
- 3. The Applicant filed a defence with a counter claim through his then Lawyers of M/s Kajeke Maguru & Co. Advocates. That due to the 1st defendant's (now applicant) failure to attend Court, the matter proceeded Exparte against him and an Exparte

judgement was delivered on 31st January 2024 with orders and declarations that;

- vi) The 1st defendant breached the contract dated 27th May 2011, 31st August 2011 and 8th November 2012 respectively in respect of sale of land comprised in Block 65 Plot 263 land at Mbalwa Kyadondo, Wakiso District.
- vii) It was declared that the 1st defendant acquired the suit land fraudulently.
- viii) Compensation of USD 37,916 with interest at 20% per annum from 8th December 2012 until payment in full.
- ix) General damages of Ug shs 50,000,000/= and costs of the suit.
- 4. The Applicant being dissatisfied with the said judgement, he has since filed two applications that is, stay of execution pending the application for setting aside the Exparte judgement vide MA No. 0617 of 2024 and MA No.0581 of 2024 respectively.
- 5. This Court however only deems it fit to pronounce itself on MA No. 0581 of 2021 which is this application to set aside the Exparte judgement as it has a huge bearing on MA No. 0617 of 2024 which arises from the same.

Applicants' Evidence;

- 6. The grounds of the application are contained in the affidavit in support of the application deposited by **MOHAMMED KITAKA** the Applicant and are briefly that:

- i) That I gave instructions to my lawyers of M/s Kajeke, Maguru & Co Advocates to handle Civil Suit No. 097 of 2022, they filed a written statement of defence and counter claim in the said suit.
- ii) That my lawyers of M/s Kajeke Maguru & Co. Advocates at all material times when I inquired about the status of the case, they informed me that the matter was never given a hearing date and at no any one moment did they inform me that the matter had been fixed for hearing a reason I did not attend Court at the hearing and I was surprised to get information from another person known to me as Hood that there was a judgement passed against me and indeed it was true when I checked for myself with the registry.
- iii) That through my lawyers of M/s Kajeke, Maguru & Co. Advocates I lodged a counter claim against Harshad Barot and his company Tirupati Development (U) Ltd for a permanent injunction, a declaration that the applicant is not indebted to the Respondent, an order directing the

removal of the caveat lodged on land comprised in Kyadondo Block 65 Plot 263 at Mbalwa, General damages and costs for the counter claim.

- iv) That I and Harshad Barot & Tirupati Development (U) Ltd entered into both an agreement and memorandum of understanding on 15th /7/2011 & 1st/2/2011 respectively for which they never paid to me the money for all services offered to them.
- v) That given the business relationship between me and my company and Hashard Barot and his company Tirupati Development (U) ltd, we agreed that the debt of Ug shs 75,000,000 (Uganda shillings Seventy-Five Million) be set off the debt of Ug shs 84,000,000 (Uganda shillings Eighty-Four million).
- vi) That I have since sold off the suit land to Matsiko Moses whose transfer has been delayed by the caveat lodged on the suit land by Harshad Barot.
- vii) That I am still interested in defending myself and still wish to pursue my counter claim against Harshad Barot and his Company Tirupati Development (U) Ltd, I have a good defence to CS No. 097 of 2022 and my counter claim has

a likelihood of success and this application has been brought without undue delay.

viii) That I have sufficient/ good cause for not attending Court proceedings as I had given instructions to my lawyers of M/s Kajeke Maguru & Co advocates to represent me in the matter and never gave me dates of the Court proceedings.

Respondent's evidence;

- 7. The application is responded to by an affidavit in reply deposed by **HARSHAD BAROT**, the Respondent and are briefly that:

- i) The Applicant was given many chances to be heard but he deliberately chose to absent himself and his lawyer however much they were fully aware about the case proceedings.
- ii) That as much as a client hires a lawyer, a client bears the ultimate responsibility to follow up on the case since the courts of law are always open to the public for necessary inquiries.
- iii) The averments in relation to paragraph 7 of the affidavit in support are pure lies since Annexure C attached to the Applicant's Affidavit in support is between Tirupati Development (u) ltd and Moha Construction ltd thus it has

no relationship whatsoever with the issues relating to Civil Suit No. 097/2022.

- iv) A company is a separate legal entity which can sue and be sued in its own name. the applicant seeks to be heard basing on the documents between the two companies that weren't privy to the transaction involving the applicant and myself.
- v) That the judgment in Civil Suit No. 97/2022 is premised on agreements entered into between the applicant and myself therefore the allegations made by the applicant are fabricated lies.
- vi) That the agreements I entered into with the Applicant are the only agreements that led to Civil Suit No. 097/2022 between myself and the applicant that thereafter culminated into the judgment the applicant is setting aside.
- vii) That the purported sale to Matsiko Moses was illegal and in contravention with the memorandum of understanding between myself and the Applicant that required the applicant to return the land in case he failed to pay.
- viii) That the orders under Civil Suit No. 097/2022 did not require the return of the land it instead required to pay me my

balance of USD 37,916 with 20% interest until payment in full, damages of 50,000,000/= and the cost of this suit.

- ix) That the land is still registered in the Applicant's names with my caveats.
- x) The applicant does not deserve a right to be heard because the defence he intends to rely on are not between me and the Applicant but rather between the two companies that were not parties to the suit between myself and the Applicant.
- xi) That the counterclaim is a separate matter which only Moha Construction ltd can pursue against Tirupati Development (U) ltd should she wish so but not the Applicant.

Representation;

8. The Applicant was represented by Mr. Ronald Ewalu of M/s Geoffrey Nangumya & Co. Advocates whereas the Respondent was represented by Mr. Pamba Egan of M/s Opwonya & Co. Advocates. The parties filed their respective affidavits and proceeded by way of written submissions which I have considered during the determination of this Application.

Issues for determination;

- i) Whether there is sufficient cause to set aside the Exparte Judgement and decree in Civil Suit No. 097 of 2022.

Resolution and determination of the issue;**Whether there is sufficient cause to set aside the exparte judgement and decree in Civil Suit No. 097 of 2022.**

- 10. The Applicant raised an objection to strike out the Respondent's affidavit in reply on grounds that the same had been filed out of time. That the application was served onto the Respondent on 17th April 2024 but the applicants filed their affidavit in reply on 03rd May 2024 which was out of the 15 days statutorily provided for under Order 12 rule 3 (2) of the Civil Procedure Rules.
- 11. Counsel for the Respondent in response stated that Order 50 rule 8 of the Civil Procedure rules provides that in any case in which any particular number of days not expressed to be clear days is prescribed under these rules or by an order or direction of the Court, the days shall be reckoned exclusively of the first day and inclusively of the last day. On that basis the affidavit was filed within time.

- 12. Order 12 rule 3 (2) provides that service of an interlocutory application to the opposite party shall be made within fifteen days from the filing of the application, and reply to the application by the opposite party shall be filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filling of the reply.
- 13. It is quite clear that the Respondent's affidavit in reply was filed out of time however this Court shall exercise its inherent powers bestowed onto it under Section 98 of the Civil Procedure Act to validate the same so as to meet the ends of justice.

Analysis

- 14. Section 98 of the Civil Procedure Act empowers Court to make such orders as may be necessary for the ends of justice.

- 15. Order 9 rule 12 of the Civil Procedure Rules SI 71-1 vests Court with powers to set aside an exparte judgment and the same provides as follows; *Setting aside ex parte judgment;*

Where judgement has been passed pursuant to any of the preceding rules of this order, or where judgement has been entered by the Registrar in cases under Order L of these rules,

the Court may set aside or vary the judgement upon such terms as may be just.

- 16. The Applicant in his submissions alludes to the fact that he has brought this application without any undue/ unreasonable delay and has sufficient cause as to why the exparte judgment should be set aside.
- 17. Counsel for the Applicant relies on the authorities of **Buto foundation Ltd v Bob Mate Phillip & anor SCCA No. 6 of 1987** while citing Florence Nabatanzi v Naome Binsobedde (cited with approval in Hikima Kyamanywa v Sajjabi Chris CACA no. 1 of 2006) that sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time.
- 18. Its worth noting that Order 9 rule 12 of the Civil Procedure Rules SI 71-1 bestows onto Court wide discretion to set aside an exparte judgement but in so doing, the Court must be satisfied that to do so would meet the ends of justice given the circumstances of the case*. (See; Zikampata v Uganda Libyan Trading Co. Ltd 1979 hcb 32 cited Tweheyo V Barurengyera HCCA No. 11 of 2010[2013]).*
- 19. The circumstances of the case at hand are that the Applicant was found to have breached not only one but three contracts that is a sale agreement and memorandums of understanding executed between the Applicant and the Respondent on 27th May 2011, 31st August 2011 and 8th November 2012 respectively. The most crucial among them was the sale agreement in which he not only breached the terms of payment but also transferred the certificate of title to the suit land into his names before clearing the outstanding balance contrary to the initial agreement.
- 20. The Applicant in his defence to the breach of the contracts, stated that they had agreed to set off the debts as both the Respondent and the Applicant have companies in which they do business together where the Applicant states that the Respondent's company (Tirupati Development (U) Ltd is indebted to his (Moha Construction ltd).
- 21. The Applicant sought to enforce the said payment by bringing a counter claim in Civil Suit No. 097 of 2022. However, this Court takes note of the fact that the land transaction subject to this suit was between the applicant and the Respondent in their personal capacities and not company business.
- 22. As rightly cited by Counsel for the Respondent, the authority of **Salomon v Salomon & Co. Ltd [1896] UKHL 1, [1897] AC 22**, a company is a separate legal entity capable, thus the Applicant could not use company money to offset a personal debt which makes the chances of the counterclaim succeeding

minimal.

- 23. That notwithstanding, the Applicant in his Affidavit in support and in rejoinder does not show any reason as to why his former Lawyers did not attend Court. He only states that his Lawyers kept informing him that the matter had not been fixed which did not give him the leeway to sit back since 2022 up to 2024 when judgement was delivered and he did not find it necessary to inquire from the Court registry to follow up on his case owing to the fact that he also had a counter claim to prosecute.
- 24. The litigant just as his advocate needs to know the hearing dates of his case, Equity aids the vigilant as the maxim states. It is not only the duty of the advocate to show up in Court but the litigant too. Litigants ought to be vigilant and follow up their cases. *(See; Eternal Church of God v Kasoke HCT-01-CV-MA-001 OF 2016)*
- 25. In the final result, it is to the finding of this court that this application lacks merit as the applicant has not given this court sufficient reasons to set aside the Exparte Judgement.
- 10. Therefore, this application is hereby dismissed with no order as to costs.
- 11. Before I take leave of this matter, I take note of the fact that the applicant filed Misc. Application No.617 of 2024 for stay of execution pending the determination of the instant application, however the determination of the instant application by this honorable court automatically overtakes the application for stay of execution. That means Misc. Application No.617 of 2024 stands overtaken by events.

I SO ORDER.

NALUZZE AISHA BATALA

JUDGE

06/06/2024

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