

UGANDA / JUDGMENT

Kyenjojo District Local Government v
Mukondere and 12 Others
(Miscellaneous Application 57 of 2024)
[2024] UGHC 1043 (17 October 2024)

[2024] UGHC 1043

COURT

High Court of Uganda

BEFORE

Wagona, J

CASE / FILE NUMBER

Miscellaneous Application 57 of 2024

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| | THE REPUBLIC OF UGANDA |

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| | IN THE HIGH COURT OF UGANDA AT FORT PORTAL |

| 3 | MISC. APPLICATION NO. 0057 OF 2024 |

| | (ARISING FROM CIVIL SUIT NO. 034 OF 2024 |

| | KYENJOJO DISTRICT LOCAL GOVERNMENT ::::::::::: APPLICANT |

| 6 | VERSUS |

| | 1.
MUKONDERE B. K AGAPITO |

| | 2.
AHEBWA JOSEPH |

| 9 | 3.
ATUHAIRE JACKLINE |

| | 4.
AINEBYOONA VIVIAN |

| | 5.
NABUKERA SUSAN |

| 12 | 6.
MUJINYA MICHEAL |

| | 7.
BIRUNGI MARY |

| | 8.
KABAHENDA NAMARA FLORA |

| 15 | 9.
NALUGWA MAYIMUNA |

	10. KAAHWA AGNES
	11. KIIZA VIOLENT MBABAZI ROSEMARY
18	12. MUHINDO DAPHINE
	13. ASABA PATRICK:..... RESPONDENTS
	BEFORE: HON. JUSTICE VINCENT WAGONA
21	RULING

Introduction:

The by this application, the applicant sought the following orders that:

- 1. The default judgment entered in Civil Suit No. 38 of 2024, Makondere B. K Agapita & 13 others v Kyenjojo District Local Government be set 3 aside.
- 2. The applicant is granted leave to file her defense out of time in Civil Suit No. 38 of 2024.
- 6 3. The said suit be heard inter-parties between the parties.
- 4. The costs of taking out this motion be provided for.

Grounds of the Application:

- 9 The application is supported by the affidavit of Mr. Senku Samuel Kimuli, the applicant's Chief Administrative Officer who deposed as follows:
- (1)The summons in Civil Suit No. 38 of 2024 was served upon the applicant 12 and the documents were misplaced by Mr. Mugabe James, the Principal Human Resource Officer who misplaced the same. By the time the documents were retrieved, the applicant was unable to file her defense on 15 time since the time within which to do so had lapsed.
- (2)The respondents later obtained a default judgment against the applicant. The applicant is interested in defending Civil Suit No. 038 of 2024 and was 18 prevented by sufficient cause from filing the defense within the statutory time.
- (3)The allegations raised in the suit led to investigations from the Government 21 Investigative bodies like State House Anti – Corruption Unit, the Inspectorate of Government, Office of the President, and the Public Service Commission. The applicant has a plausible defense which merits trial by the 24 court.

- (4)The applicant will suffer substantial loss if the default judgment is not set aside and the respondents shall not be prejudiced by the grant of this 3 application.

- **Reply of the Respondents:**

The application was opposed through the affidavit of Mr. Makondere B. K Agapito with written authority of the 2nd and 14th 6 Respondents who made very lengthy averments which in brief are as follows:

- (1) Mr. Senku Samuel Kimuli was served with summons on 31st May 2024 that 9 was dully received. The process server deponed an affidavit of service confirming service upon the Chief Administrative Officer of the Applicant who directed that service be effected upon Mr. Mugabe James, the Principal 12 Human Resource Officer for endorsement of the same.
- (2) The allegation of misplacement of the plaint is false. The Chief Administrative Officer of the Applicant was fully aware of the documents 15 since the same were received on his behalf and on his instructions.
- (3) The applicant was fully served and there is no just cause presented by the applicant to account for the failure to serve the written statement of defense 18 on time.
- (4) The applicant has no viable defense to the claim by the respondents since their recruitment followed the due recruitment process, they assumed duty 21 and have been executing duties for the said position.
- (5) This application is premised on falsehood and as such it ought to be dismissed with costs.

Rejoinder of the Applicant:

In rejoinder Mr. Senku Samuel Kimuli stated as follows:

- 3 (1)The affidavit in reply is very argumentative and full of falsehoods thus bad in law.
- (2)The summons, the plaint and mediation summary were never served upon 6 the Chief Administrative Officer as rightly admitted by the Respondents.
- (3)The investigative bodies are still investigating the matter at hand and shall present a report after the same is done. The said investigations commenced 9 before the institution of this suit.
- (4)The Respondents are being remunerated for their current positions since they are employees of Kyenjojo District Local Government.
- 12 (5)The applicant shall suffer great prejudice if the default judgment is not set aside and no prejudice shall be incurred. It is in the interest of justice that the case is heard interparty.

15 Representation and Hearing:

Ms. Atumanyise Racheal, an Attorney in Attorney General's Chambers appeared for the applicant while *Mr. Byaruhanga Barigye Enock* holding brief for *Ingura*

18 *Francis* appeared for the Respondents. Both counsel filed written submissions.

Issues:

The pleadings and the submissions of both counsel raise the following as pertinent 21 issues for investigation by court thus:

1. **Whether the affidavit in support of the motion is incurably defective and liable to be struck out for being premised on falsehoods.**

- 2. **Whether there is sufficient cause to warrant setting aside the default judgment entered against the applicant in civil suit no. 38 of 2024.**
- 3 3. **What remedies are available to the parties?**

Issue No. 1: Whether the affidavit in support of the motion is incurably defective and liable to be struck out for being premised on falsehoods.

6 Submissions for the Respondents:

The affidavit by Mr. Senku Samuel Kimuli, the Deputy Chief Administrative Officer of the applicant is defective on account of being colored with material

- 9 falsehoods. In **Bitaitana v Kananura [1977] HCB 34** it was held that an application supported by a false affidavit is bound to fail because the applicant in such case does not go to court with clean hand and tell the truth.
- 12 In **Nalyoga Galdys v EDCO Ltd & 2 others, High Court Revision Cause No. 05 of 2012** it was emphasized that where an affidavit contains some falsehoods in one part, the whole becomes suspect and the application supported by such affidavit is
- 15 bound to fail.

The affidavit in support of the motion was defective and liable to be struck out for being premised on falsehoods. Whereas the deponent indicates that the documents

- 18 were misplaced by Mr. Mugabe James, the Principal Human Resource Officer and were thus not transmitted to the offices of the Attorney General on time to file the defense, these assertions were not supported by the said officer who misplaced the
- 21 said documents. The documents were received by the Principal Human Resource Officer who was required to hand them over to the Chief Administrative Officer. Annexures D, E & F duly confirm that the documents were received by Chief
- 24 Administrative Officer who acted upon the same by giving instruction to the Deputy Chief Administrative Officer on 5th June 2024. The averments regarding

misplacement of the documents, is naked falsehood which renders the affidavit defective and liable to be struck out.

3 Response of the Applicant:

In the affidavit in rejoinder, Mr. Senku clarified that whereas instructions were issued to him the Chief Administrative Officer the same were on the mediation 6 case summary since the plaint and summons could not be traced. As such there is no falsehood in the supporting affidavit. He added that the affidavit in reply is argumentative and ought to be struck out.

9 Decision:

Order 19 rule 3 of the Civil Procedure Rules provides that; "***Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to***

12 ***prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated*.**"

Therefore, an affidavit should not be premised on hearsay or falsehoods. A fact is

- 15 said to be false if it is found to be deliberate lies. What then is the consequential effect of a false statement in an affidavit on the competence and maintainability of such affidavit?
- 18 In the **Besigye Kiiza v Museveni Yoweri Kaguta and Another (Election Petition No.1 of 2001) [2001] UGSC 3 (21 April 2001)**, in the lead judgment by **Odoki JSC**, he guided that where an affidavit contains falsehoods, it does not invalidate
- 21 the same but the offending parts can be severed and the rest of the content can be relied upon. In **Yona Kanyomozi v Motor Mart (U) Ltd. Supreme Court Civil Application No. 6 of 1999, Mulenga, JSC** held that some parts of counsel's 24 affidavits were false and that those parts were irrelevant to the application and could be ignored. However, in **Rutuku Francis & 5 others v Eliphas Ndamagye,**

Court of Appeal Civil Appeal No. 111 of 2017, Barishaki Cheborion JCA observed that whereas the position in **Besigye Kiiza v Museveni (supra)** is to the effect that you can sever the offending parts, that where the said contents are severed and the remaining parts are incapable of supporting the application, the affidavit collapses.

- 6 In the affidavit in support of the application, Mr. Senku stated under paragraph 4 of the affidavit in support of the motion that; "***That I am informed by Mr. Mugabe James, the Principal Human Resource Officer of the applicant who received the***
- 9 ***court documents that the documents were misplaced and was unable to transmit the same in time to the Chief Administrative Officer*.**" In the affidavit in rejoinder, the same Mr. Senku stated under paragraph 4 that; "***That in specific reply to***

- 12 *paragraph 8,9 and 10, the Respondent's Affidavit in Reply, the instructions to me were written on the mediation summary since the Chief Administrative Officer was not presented with the plaint but the mediation summary only as clearly deponed by the 1st* 15 *Respondent under paragraph 11 of the affidavit in reply*."
- I find contradictions in the above statements. Mr. Senku stated that the court 18 documents were misplaced and could not be transmitted to the Chief Administrative Officer in time. He in the rejoinder states that the mediation summary was sent to Chief Administrative Officer. If indeed the documents were
- 21 misplaced by Mr. Mugabe James who received all of them, then the mediation summaries, being part of the said documents, could not have been transmitted to the Chief Administrative Officer. The situation is worsened by the fact that the said
- 24 Mugabe James did not swear an affidavit to clarify on the same. This makes the averment of Mr. Senku about the loss of the pleadings impermissible hearsay. I thus sever off paragraph 4 and the related paragraph 5 of affidavit in support of the

motion. After severing off the said paragraphs 4 and 5, I find that the remaining content is in position to support the prayers for the applicant since they relate to 3 sufficient cause that warrant setting aside the default judgment and have the case heard interparty especially in light of the allegation that the manner in which the respondents were recruited were contrary to the law. I thus validate the remaining 6 parts of the affidavit in support of the motion.

Moving on, the affidavit in reply was challenged for being argumentative and full 9 of falsehoods. Whereas as the applicant indicated that the affidavit in reply contained deliberate falsehoods, none was pointed at. I will thus take it that the affidavit in this regard is valid. Regarding the alleged argumentativeness of the 12 affidavit of the affidavit in reply, it is settled law that an affidavit need not be argumentative, repetitive and unnecessarily long. An affidavit should state facts as known to the deponent, in a descriptive manner, in a simple and straight forward

- 15 manner, and in a summarized way. It should not contain some sort of submissions in opposition to a narrative from the opposite party but merely offer an explanation to the same in a simple and straight forward manner without engaging in any form
- 18 of argument. *(See: Male Mabirizi vs Attorney General Supreme Court Misc. Application No. 7 of 2018; Black's Law Dictionary, 9th Edition at page 1331)*
- 21 I have carefully considered the affidavit in reply by the respondents and found it to be unnecessarily long and to contain paragraphs which are argumentative. For instance, paragraph 24 is very argumentative in stating thus: "...*I note the*

- 24 *applicant has no defense and are only making fanciful arguments in disregard of the binding legal opinions of the Hon. Learned Attorney General on the subject matter*." Paragraph 26, is also argumentative in stating that; "*That in*
- 27 *further reply to paragraph 11. Interest of 8% on salary arrears awarded in the*

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default judgment is far below 24% pleaded in the plaint." I also find paragraph 27 framed in form of submissions and not in the tone of an affidavit. I thus proceed to sever off paragraphs 24, 26 and 27 of the affidavit in reply and validate the remaining paragraphs.

- 6 In the result I validate both the affidavit in support of the motion and the one in reply, and I overrule the points of law raised by both the applicant and the respondents. This issue is thus terminated in the negative.
- 9

Issue No. 2: Whether there is sufficient cause to warrant setting aside the default judgment entered against the applicant in civil suit no. 38 of 2024.

Submissions for the Applicant:

- 15 The discretion under Order 9 rule 27 of the Civil Procedure Rules to set aside a decree passed ex-parte is exercised upon proof of sufficient cause which may relate to none service of summons or any cause that prevented a party from appearing 18 when the case was called for hearing on such terms court deems just. The primary
- consideration should be for courts to have the case heard and determined on the merits inter-party, and the plausibility of the defense advanced by a party that
- 21 seeks to have the decree set aside. (See: *Remco Ltd v MiistrayJadbra Ltd (2002) 1 E. A 233&Samsone Ltd v Zeenode Ltd, HCMA No. 0449 of 2023).*

Sufficient cause or good cause relates to the inability to take a particular step 24 within the time allowed under the law and this depends on the facts of each case. The overall objective being that the substance of the disputes should be investigated and decided on merits and that lapses and delays should not deny a

27 party pursuit of his rights. (See*: Re Christine Namatovu Tebajjukira (1991-1993) HCB 85, Florence Nabatanzi v Naome Binsobedde, SC. Civil Application No. 06*

***of 1987 and Rosette Kizito v Attorney General, SC. Civil Application No. 9 of 1986*).**

- 3 The defendant has a bona-fide defense to the claim by the respondents to wit; that the process through which they were recruited was illegal and irregular and contravened Establishment Circular No. 1 of 2022 and 1 of 2023 that halted 6 recruitment in public service without clearance from government. Further, the recruitment did not conform to Establishment Circular No. 1 of 2023 that required that all positions in the public service and local governments must be advertised, 9 interested applicants shortlisted, interviews conducted by the District Service
- Commission and a minute of appointment generated by the District Service Commission. All this was not done. As result, the recruitment of the respondents
- 12 was a subject of investigations by different investigative arms of government like the Inspector General of Government, State House Anti-Corruption Unit, the Public Service Commission and Office of the President. As such the
- 15 defendant/applicant has a viable defense which warrants a full trial of the case inter-party. Further, the documents were misplaced in due course thus the applicant was unable to file her written statement of defense within the 15 days provided for
- 18 under the law. Such mistake or lapse should not debar the applicant from being heard.

Submissions for the Respondents:

- 21 The process through which the Respondents were recruited followed the due process of the law. Whereas the applicant asserted that no interviews were conducted, the District Service Commission under the Public Service Standing
- 24 Orders retains the powers to designate the manner of recruitment and selection of staff. (*See Section A-g , paragraph 14 of the Public Service Standing Orders*

***2021 and chapter 8 of the Guidelines from the Public Service Commission to the District Service Commissions Revised Edition 2021*).**

- 3 Oral interviews are classified as one of the modes under which the District Service Commission may interview and recruit staff. In any case, the actions of the District Service Commission do bind the applicant and the respondents should not suffer
- 6 due to the fault of the applicant. Setting aside a default judgment requires the applicant raising a patent and bona-fide defense. In *Sserubiri Frank & 2 others v Salama & others, HCMA No. 205 of 2021* Sekaana J observed that: *"The court*

- 9 *should arrive at a reasoned assessment of the justice of the case and also form a provisional view of the probable outcome if judgment were to be set aside and the defense developed. It is not sufficient to raise an arguable defense, for the*
- 12 *defense must carry some degree of conviction. Therefore, according to the court, the applicant must establish more than a defense or issue which should be adjudicated; he must raise a defense which is likely to succeed at trial."*
- 15 There is no bona-fide defense put across by the applicant. The respondents proved that clearance was sought to recruit, funds were availed and there was an internal recruitment exercise that ended by 30th June 2023 in accordance with circulars 1 of
- 18 2022 and 2023. As such the applicant has no bona-fide defense that warrants setting aside the default judgment entered against her. Court should be pleased to strike out the applicant's motion with costs for being incompetent.
- 21 **Decision:**

Order 9 rule 27 of the Civil Procedure Rules provides that:

Setting aside decree ex parte against defendant.

"In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order* 3 *to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make* 6 *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 a day for proceeding with the suit; except that where the decree is of such* 9 *a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also."*

The position generated under Order 9 rule 27 is to effect that a decree entered ex-12 parte may be set aside upon an application by the defendant where it is proved (a) that there was none or ineffective service of court summons; (b) where summons were served but the applicant was prevented by sufficient cause to file a defense or 15 perform an act required by law within the time framed provided. The power to set

- aside the ex-parte decree remains discretionary to be exercised judiciously. The applicant asserts that she was prevented by *sufficient cause* from filing her
- 18 written statement of defense within the time provided for under the law. The phrase *'sufficient cause'* has no fixed meaning. In *The Registered Trustees of the Archdiocese of Dar es Salaam Vs The Chairman Bunju Village Government &*

- 21 *Others quoted in Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR* it was stated that: *"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should"
- 24 *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."* In

Hadondi Daniel vs Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003, court guided that: "...*sufficient cause must relate to the inability or failure to*

- 3 *take necessary step within the prescribed time*." In *Kyegegwa District Local Government v Aharikundira Margaret, HCMA No. 25 of 2022* I stated that: "*The case law appears to leave the meaning of "sufficient cause" to judicial discretion*
- 6 *and determination based on the facts, surrounding circumstances and the merits of each particular case and to ensure the ends of justice. The conduct of the parties, for example, whether or not, a party has been grossly negligent, careless,*
- 9 *reckless or palpably indifferent in prosecuting the case, would be a consideration. A delay that is beyond the full control of the party or due to occurrence of facts that could not be contemplated by the party, should favour*
- 12 *an extension of time in appropriate cases. Where the denial to grant an extension would occasion an injustice to the applicant or lead to multiplicity of suits or where justice can be better served after hearing from both sides, these*
- 15 *factors may favour an extension of time in appropriate cases*." In cases involving setting aside a decree of court, especially after proper service of summons, the applicant is required to demonstrate that he was prevented by
- 18 sufficient cause from filing a defense in time or doing an act required at law within the required time. Additionally the applicant should demonstrate that the intended defense has merits and would have a consequence on the decree entered, should
- 21 permission be granted to the defendant to defend the suit. The court must consider whether setting aside the default judgment and allowing the defendant to participate in the suit would be in the interest of justice and that the defendant has
- 24 some basis for defending the claim. The court should consider whether any useful purpose would be served if the default judgment is set aside and the case is heard

on the merits. The court is expected to determine whether the applicant will succeed at trial. In absence of any possible defence raised in the application, court

- 3 should not merely endorse a statement made by the applicants in their application that "the applicants have a plausible defence". *(See: Alpine Bulk Transport Inc v Saudi Eagle Shipping Co Inc [1986]2 Lloyd's Rep 221; Sserubiri Frank &*
- 6 *2others v SalamaJaques& 2others, HCMA No. 205 of 2021&Kabarole District Local Government v Kirungi Winnie Agamba, High Court Civil Appeal No. 22 of 2019)*. The court should arrive at a reasoned assessment of the justice of the case
- 9 and also form a provisional view of the probable outcome if judgment were to be set aside and the defence developed. It is not sufficient to raise an 'arguable defence' for the defence must carry some degree of conviction. The applicant must
- 12 establish more than a defence or issue which should be adjudicated: he must raise a defence which is likely to succeed at trial. (See *Alpine Bulk Transport Inc v Saudi Eagle Shipping Co Inc [1986]2 Lloyd's Rep 221)*. Therefore, the applicant must in
- 15 addition to proof that there was sufficient cause that caused the delay to file a defense on time, demonstrate that the said defense is plausible and has a prospect of success if the suit is to be heard interparty. Whereas court is not required to
- 18 delve into the merits of the suit at that stage, the defense should prima facie raise an arguable case on merit apart from being announced as a plausible one. (See: *Kabarole District Local Government v Kirungi Winnie Agamba, High Court*
- 21 *Civil Appeal No. 22 of 2019)*.

In this case, the applicant asserts that the pleadings got misplaced after service 24 upon a one Mugabe James, the Principal Human Resource Officer of the applicant. That as such she was unable to instruct her counsel on time. That by the time the documents were retrieved and forwarded to the Attorney General's Officer, the 15

days within which she was to file a defense had lapsed. That she has a bonafide defense to the claim by the respondents since they were illegally or irregularly 3 recruited. The respondents on the other hand contend that the delay was deliberate and the process through which they were recruited was legitimate.

- The summons was served on 31st May 2024 and this motion was filed on 27th 6 June 2024 not long after the lapse of the 15 days which demonstrates the applicant's interests to defend the suit. The applicant in the interests of justice should not be 9 denied a right to be heard on account of such delay.

- The claim of the Respondents in the main suit (Civil Suit No. 34 of 2024) is for 12 recovery of salary arrears. The respondents contend that they were properly recruited by the applicant but they were not paid salaries that accrue to the positions which they currently occupy. They thus sought to recover the difference 15 from the current pay and that for the positions they occupy.
- The applicant on the other hand averred that the process through which the 18 respondents were recruited was irregular. That there was no advert for the said position as required under Establishment Notice No. 1 of 2022 and 1 of 2023. No permission was sought to have the recruitment in issue, government having 21 imposed a ceiling or barn on recruitment. There was no shortlist and no interviews. That the irregular recruitment of the respondents attracted attention of several investigative arms of Government like the Inspector General of Government, State
- 24 House Anti Corruption Unit, the Public Service Commission and the Office of the President. The applicant attached annexure C, a letter by Public Service where it was noted that the recruitment of the respondents involved several irregularities to
- 27 wit; that the District Service Commission flouted the guidelines of the Public Service Commission that requires that all Job vacancies within the commission be

advertised in public gazette. That the Respondents were not interviewed; that the recruitment was done on 19th June 2023 when the CAO Nyakahuma was on

- 3 transfer and it was alleged that the jobs were given out on a pay in the range of 5,000,000 to 6,000,000/=. Te recruitment was carried out at the time when the Auditor General had halted recruitment because they were auditing the payroll
- 6 among other issues. The same findings are captured in annexure C2 a report to hhe Permanent Secretary Public Service Commission by the Permanent Secretary Officer of the President and annexure C2.
- 9 The respondents claim that they were regularly recruited and deserve to be paid, while the applicant asserts that the respondents were irregularly recruited. This is a matter that in the interests of justice, the court finds, cannot go uninvestigated, on
- 12 the basis of a default judgment being maintained. This issue can only be settled through a hearing where the respondents shall table evidence confirming the regularity of their recruitment and the applicant is also given chance to challenge
- 15 the same before a proper finding is made as to whether the respondents are entitled to the arrears they claim. I find that the interests of justice shall better be served after a full trial where each party is given an opportunity to present their case. I

- 18 find that the intended defense by the applicant is bona-fide and if it is to be considered, it would have an impact on the default judgment entered in favour of the respondents. This is because the process through which the respondents were
- 21 recruited is highly in question and so far, many different investigations have been ongoing over the same.

Consequently, this application is allowed with the following orders:

- **1. The default judgment entered against the applicant by the Deputy Registrar on 20th June 2024 in Civil Suit No.38 of 2024 by is hereby set 3 aside.**
- **2. The applicant is granted leave to file her Written Statement of Defense out of time within 15 days from the date of delivery of this ruling.**
- **6 3. The parties shall ensure that their respective trial bundles and all witness statements are prepared and filed in compliance with the prescribed format as per the Summons for Directions requirements, 9 before seeking a hearing date.**
- **4. The costs of this application shall abide the outcome of Civil Suit No. 34 of 2024.**
- **12 It is so ordered.**

15 Vincent Wagona High Court Judge FORTPORTAL 18 DATE: 17/10/2024

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