

UGANDA / JUDGMENT

Mukasa v Mukasa (Miscellaneous Application 3232 of 2023) [2024] UGHCLD 98 (3 April 2024)

[2024] UGHCLD 98

COURT

HC: Land Division (Uganda)

BEFORE

Nkonge, J

CASE / FILE NUMBER

Miscellaneous Application 3232 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.3232 OF 2023

(Arising out of Civil Suit No.419 of 2016)

ABBAS MUKASA KAAWAASE:.....

VERSUS

SAFINA NALWEYISO MUKASA.....

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

This application brought by motion under the provisions of Section 83 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act cap. 71, and Order 9 rule 17, 24, & 27, Order 42 rule 1 (a), & 2, & Order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1 seeks orders that the ex-parte judgment and decree of this court in Civil Suit No. 419 of 2016 be reviewed, set aside, and the suit be heard inter-parte, and that the taxation proceedings arising therefrom be stayed pending the determination of the suit. It also seeks that costs of the application be in the cause.

Grounds of the application.

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20 The grounds upon which this application is premised are contained in the affidavit in support thereof deposed by Mr. Abbas Kaawaase Mukasa but briefly, that the applicant was not aware of the hearing date in the main suit in which he was sued jointly with a one Moses Kalule (now deceased), Abbasa Kabogo, and Kasule Ishaka as the 1st, 2nd, & 3rd defendants respectively since neither this court nor the applicant's lawyers at the time notified him of the same and that he only became aware of the matter on Sunday, 8th October 2023 when he received a taxation hearing notice via his WhatsApp number to wit 0752757339 from 0701462761 informing

That when the applicant appeared for the taxation hearing before His Worship 30 Okumu Jude Muwone, the matter was at the applicant's request adjourned to 23rd

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him of a hearing for 16th October 2023.

October 2023 so as to allow him to get a lawyer and that the applicant then instructed *m/s M. A. Kajubi & Co. Advocates* who on 19th October 2023 informed the applicant that they had upon perusal of the court record established that judgement was entered against the applicant on 29th March 2023, and decree issued on 25th May 2023.

That while the 1st defendant in the main suit passed on in 13th January 2020, the applicant was informed by his lawyers that there is an error apparent on the record because the matter proceeded inspite of notice of the deceased's passing, and nonservice of summons on the applicant, who immediately instructed his lawyers to have

10 the ex-parte judgement set aside, and taxation proceedings stayed to enable the applicant protect his interest in the suit property.

That while the suit involves valuable property, the applicant's lawyers at the time to wit; M/s Lubega & Co. Advocates had notice of the hearing date but did not enter appearance to conduct the matter thus the applicant should not be condemned unheard, and that while the applicant has a good defence, he had no notice of this court's directions to file a joint scheduling notes, or witness statements.

That because the *ex-parte* proceedings and judgement are a nullity that led to a miscarriage of justice and that applicant is not only interested but also committed to defending **Civil Suit No. 419 of 2016** to its logical conclusion so as to enable court investigate all matters in controversy, all the proceedings arising out of the \$ex\$ -parte judgment should be stayed so as to allow the applicant to pursue his interests in the main suit.

That it is in the interest of justice, fairness, and equity that this application is allowed.

25 Respondent's reply.

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The respondent opposed the application through her affidavit in reply wherein she stated inter alia that because the applicant was served through his known address of service as indicated in his written statement of defence dated 19th August, 2016 to wit *m/s Lubega & Co. Advocates* who were his lawyers, and who were duly served with all court process but neither the applicant nor his lawyers attended court, and , that because no application was ever made to have the \$1^{st}\$ defendant's name struck from the record and a one Tugumikiriza Innocent was appointed as the 1st defendant's legal representative, there is no error on the record of court.

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That the applicant has not proved any grounds for setting aside the \$ex\$ - \$ parte judgement of this court, or staying the taxation proceedings.

Applicant's rejoinder.

In rejoinder to the averments set out in the affidavit in reply, the applicant filed an affidavit wherein he stated that there is no affidavit of service indicating that either \$\mathsf{S}\$ the applicant or his lawyers were served with the hearing notices for the day when the matter proceeded \$ex\$ - \$ parte and that while there is no evidence on record indicating that Tugumikiriza Innocent was familiar with the facts and matters in controversy so as to justify his being a representative of the interests of the Late Kalule Moses, there are no letters of administration granted to the said Tugumikiriza 10 Innocent nor is there any consent given by the deceased, estate allowing him to represent the deceased's interest.

That while this court gave a judgement date that the applicant was not aware of so as to enable him prepare his submissions and defend himself, the applicant is referred to as the respondent's husband yet he has never married her, or had children thus he did not participate in any fraud as he has never owned any matrimonial property with the respondent and that because the matter in controversy involves serious allegations against the applicant regarding matters of land, matrimonial property, children and marriage, the applicant ought to be heard so that this court can inquire into the range of facts from both parties. 20

In addition, that while no application was made by the applicant to proceed *ex parte* against applicant while no application was made by any of the beneficiaries of the estate of the late Kalule Moses to be added as a legal representative of the estate for purposes of conducting the suit.

- That because the applicant also had no notice from *m/s Lubega & Co. Advocates* 25 who were in conduct of the matter or this court for that matter, he was not given the opportunity to challenge the case against him and that while the respondent knew the applicant's address, she did not bother to inform him of the matter even when she noticed his absence and that of his lawyers but only contacted the applicant in respect of taxation of the bill of costs. 30
- That since there is an error on the record of court, the applicant's application discloses the necessary grounds with merit thus necessitating the stay of

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proceedings and that the *ex parte* proceedings and judgment of this court were a miscarriage of justice.

That because the applicant's reasonable defence discloses triable issues, his input is necessary for the proper adjudication of this matter and that the applicant was prevented by sufficient cause from attending court on the day when the matter came up for was fixed for hearing as he lacked knowledge of the hearing date.

That the applicant will suffer injustice, hardship and prejudice if this application is not granted as he has no other remedy and that because he has no deliberate conduct or intention to obstruct or delay justice, it is in the interest of justice,

10 fairness and equity that this application is allowed since he was condemned unheard.

Representation.

The applicant was represented by **m/s M. A. Kajubi & Co. Advocates**, while the respondent was represented by *m/s Mwebesa Richard Advocates*. Both counsel filed written submissions in support of their respective clients' cases as directed by

this court.

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Consideration by court.

I have carefully read the pleadings, and submissions of both counsel, the details of which are on court record, and which I have taken into consideration in determining whether or not this application warrants the grant of the prayers sought.

Order 9 rule 27 of the Civil Procedure Rules SI 71-1 provides that a decree passed *ex parte* against a defendant may be set aside upon his or her application on proof that he or she was prevented by any sufficient cause from appearing when the suit was called for hearing. This is done upon terms as Court may deem fit.

- 25 In the case of *Mumello Vs Bank of Tanzania* (Civil Appeal No. 12 of 2002) [2006] TZCA 12 addressing the issue of what amounts to sufficient cause, the court of appeal quoted the decision of a single Judge of the court in *Tanga cement Company Limited Vs Jumanne D. Masangwa and Amos A. Mwalwanda* Civil Application No.6 of 2001 (unreported) where Nsekela J A had this to say;
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"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence

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of any or valid explanation for the delay; lack of diligence on the part of the applicant."

The applicant in the case before me raises issues of non-service. He avers that he was never made aware of the hearing dates in the main suit, and that his lawyers at the time did not notify him of the dates when the matter came up for hearing.

In addition, that he only found out about the judgement and earlier proceedings before this court when he was served with a taxation hearing notice via WhatsApp.

It is now settled law that the main test for reinstatement of a suit is whether the applicant honestly intended to attend the hearing and did his best to do so. (See:

10 *Nakiridde v. Hotel International* (1987) HCB 85)

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From the record, the applicant filed a written statement of defence but never appeared in court which implies that the applicant was aware of the suit against him.

In the case of **Eternal Church of God versus Kasoke Miscellaneous Application No.001 of 2016**, court observed that it is not only the duty of the advocate to as

- 15 show up in court but the litigant too, and that litigants ought to be vigilant, and follow up on their cases. It is important for a litigant to show diligence in his suit. See: National Insurance Corporation V Mugenyi and Company Advocates [1987] HCB 28.
- The applicant alleges that he was never made aware of the hearing dates fixed by 20 this court owing to the fact that his lawyers at the time did not bring the same to his attention.

It is noteworthy that the applicant was fully aware of proceedings against him but opted not to enter appearance or follow up on the same until after judgement had been entered by this court almost eight years after the suit had been filed, and the applicant had filed his defence.

This court is disinclined to agree with the applicant's assertion that he was prevented to come to court because his lawyers did not make him aware of the hearing dates.

Accordingly, it is the finding of this court that this application does not disclose sufficient cause warranting the setting aside the judgement and orders of this court.

This application is hereby denied on the ground that its objective is to cause further delay to the respondent's enjoyment of the fruits of her judgment.

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It is accordingly dismissed.

Miscellaneous Application No. 452 of 2024 and Miscellaneous Application No. **454 of 2024** seeking orders for stay of execution pending the determination of this application are hereby overtaken by events.

$\$S$ Each party to bear its own costs.

I so order.

Alexandra Nkonge Rugadya

10 Judge

3rd April, 2024.

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