UGANDA / JUDGMENT

Oijuke & Anor v Tayebwa (Miscellaneous Application No. 1194 of 2013) [2014] UGHCLD 104 (16 June 2014)

[2014] UGHCLD 104

COURT
HC: Land Division (Uganda)

BEFORE
Luswata, J

CASE / FILE NUMBER
Miscellaneous Application No. 1194 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 1194 OF 2013

(ARISING OUT OF CIVIL SUIT NO. 406 OF 2013)

1. **MOSES OIJUKE**
2. **AGABA EDGAR ..... APPLICANTS/DEFENDANTS**

VERSUS

STEPHEN TAYEBWA..... RESPONDENT/PLAINTIFF

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

The applicants brought this application by Notice of Motion under the provisions of Order 9 rule 12 &26, Order 52 rules, 6 & 3 CPR of and Section 98 CPR seeking for orders that:-

1. The default judgment and decree in Civil Suit no. 406 of 2013 be set aside for good cause.
2. Execution of the decree in Civil Suit No. 406 of 2013 be set aside or stayed.
3. Costs of this application be provided for.

The main ground relied on by the applicant in both the application and affidavit in support is that although served with both the summons and plaint, he and the 2nd applicant were prevented from filing a defence due to his illness for which he was admitted for treatment at the Kireka Medical Centre for a period of one month. That after his discharge, he contacted his lawyers who filed a defence albeit out of time. He in addition stated in an affidavit in rejoinder that that the respondent is still the registered proprietor of the land comprised in Block 380 Plot 140 (hereinafter called the suit land) which was sold to him by the applicants in 2008. That if the default judgment is not set aside, the respondent will unjustly gain from the decree because he actually still owns the suit land.

The application was opposed on the grounds stated in the affidavit in reply sworn by Stephen Tayebwa the respondent. He contested the fact that the 1st applicant was admitted in hospital for one month since the medical forms relied on showed that he was merely visiting the clinic for periodic review. It was also argued that there is no evidence to show that the 1st applicant only went to his lawyers after discharge from hospital. It was also contended that the applicants have no good defence and breached clause 8 and 9 of the sale agreement when they failed to disclose to the respondent that there was CS No. 85 of 2005 (Patrick Lwanga vs. Edward Zimula and Commissioner for Land Registration) under which an adverse claim was being laid against the suit land and the certificate of title of Busiro Block 380 Plot 140 (being a subsequent subdivision out of Busiro Block 380) Plot which was cancelled by the High Court.

The 2nd applicant though a party to this application never filed any affidavit in support of the application and was not represented. The parties were directed to file written submissions but only the 1st applicant complied.

Counsel for the 1st applicant in his submissions raised a point of law that judgment was wrongly entered for the respondent in CS No. 406 of 2013 as the plaintiff's claim was not only for a liquidated demand. He contended that Order 9 Rule 6 presupposes that judgment will be entered where the plaint is drawn claiming a liquidated demand. Order 9 Rule 6 provides as follows:-

Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defence, the court may, subject to t rule 5 of this order, pass judgment for any sum not exceeding the sum claimed in the plaint together with the interest at the rate specified, if any or if no rate is specified, at the rate of 8 percent per year to the date of judgment and costs.

On perusal of the record, I have confirmed that the plaintiff/respondent in CS No. 406 of 2013 in his plaint prayed for orders for the recovery/ refund of the purchase price of UGX 11,000,000/=, interest on the above at a rate of 28% from the date of signing the agreement until payment in full, general damages for the inconvenience suffered, interest on the general damages at a rate of 28% from the date of judgment until payment in full, punitive/aggravated damages and costs of the suit. Applicant's counsel argued that a plaint of this nature is not for a liquidated demand only and the respondent could therefore not apply for judgment under **Order 9 rule 6** except if he had specifically abandoned the prayer for general, punitive and aggravated damages which required proof by evidence. That the correct procedure would have been for the respondent to proceed

under Order 9 rules 10 to hear the case *exparte*.

The above argument is only partly true. Order 9 rule 6 permits a party who makes a liquidated demand to receive judgment but did not preclude a party who has a claim for both liquidated and other claim to proceed under that same rule. The only restriction would be that the court would enter a final judgment on the liquidated sum, and under rule 8 enter an interlocutory judgment on the claim for pecuniary damages. The court would then be required to proceed by setting down the suit for hearing on the claims for damages that would required formal proof.

When faced with similar facts my brother Justice Christopher Madrama held in the case of **National Social Security Fund vs. Kisubi High School HCCS No. 440 of 2011** that:

> *"*In cases where a plaintiff's action includes a liquidated demand as well as a claim for pecuniary damages and the defendant does not file a defence to the action, the plaintiff would be entitled to final judgment under Order 9 rule 6 of the Civil Procedure Rules with respect to the liquidated demand and interlocutory judgment with respect to the claim for pecuniary damages…a final judgment may be obtained on the liquidated demand in the same suit where there is a claim for pecuniary damages. Therefore a final judgment is entered for the liquidated demand and an interlocutory judgment is entered for the pecuniary damages which would then be set down for formal proof. He was in agreement with, and I also concur with the judgment of Evershed LJ, in the case of* ***Abbey Panel & Sheet Metal Co Ltd vs. Barson Products (a firm) [1947]2 All ER 809*** **at page 810; who ruled that;**

"The intended scope and purpose of RSC, Ord. 13 rr.3-7 inclusive, appear to me to be reasonably plain. They provide that where a plaintiff has in his writ made a claim against a defendant for one or more of the following, viz, (a) a debt or liquidated demand, (b) detinue and (c) pecuniary damages, and such defendant, though properly served, does not choose to appear to the writ, then the plaintiff may, without having to take any further steps against that defendant, obtain judgment against him for his claim-in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover.'…The rule does not restrict a plaint to a claim for liquidated demand only for it to be applicable".

Judge Madrama then concluded that a liquidated demand even if coupled with other claims in the plaint, may attract rule 6 for a final judgment to be entered without prejudice to the other claims in the same plaint.

Therefore, in agreement with the above two judgments I find that the judgment under **Order 9 rule 6 CPR was** rightly entered in favour of the respondent with respect to the liquidated claim alone. However, it was wrong for the Registrar to have failed to set down the suit for formal proof after entering an interlocutory judgment in favour of the respondent with respect to the other prayers. I thus set aside the interlocutory judgment for the claim for general damages, interest on the general damages at a rate of 28% from the date of judgment until payment in full, punitive/ aggravated damages and costs of the suit.

The above notwithstanding, I am still bound to investigate whether sufficient grounds have been presented to set aside the judgment with respect to the liquidated claim. The reasons advanced for the 1st applicant was that he was prevented from taking appropriate action because of illness and for the 2ndapplicant that he was never served with court process. For both applicants, it was stated that they would suffer great loss and inconvenience and irreparable damage if the application is not granted.

I am permitted under Order 9 rules 12 and 27 to set aside an *exparte* judgment where there is proof that the defendant was not served with court process or where he was for sufficient cause prevented from appearing in court. In his affidavit, the applicant admits that he was served with court process but no mention was made of service upon the 2nd applicant. In their response, the respondents claim that both applicants were served but no proof is furnished to show that the 2nd applicant was actually served. I therefore believe that the 2nd applicant was not served with court process at the time when the 1st applicant was served or at any other time.

It has been held by various courts that sufficient reason must relate to the inability or failure to take a particular step in time. See for example; **Rosette Kizito Vs. Administrator General and others SCC Application No. 9 of 1986 or KALR Vol 5 of 1993 at page 4.** It was also held in the case of **Nicholas Roussos Vs. Gulam Hussein Habib Virani & Another SCCA No. 9 of 1993** that some of the grounds or circumstances which may amount to sufficient cause include mistake by an advocate though negligence, ignorance of procedure by an unrepresented defendant and illness by a party.

The 1st applicant stated in the affidavit supporting the application that after he received the plaint and summons to file a defence and before he could instruct his lawyers, he was admitted in Kireka Medical Centre for a period of one month. He attached medical forms to prove the same. A close scrutiny of the medical forms shows that the 1st applicant started treatment on 13/9/13 (just four days after receiving court process) until 12/10/13. It cannot be discerned from the medical forms whether he was admitted or on outpatient-treatment as claimed by the respondent. What is clear though is that, he managed to file his defence on 10/10/13 before he concluded his treatment but ten days late of the statutory period. Thus by the time the default judgment was entered, the 1st applicant had already filed his defence though out of time. In view of the evidence provided, I am convinced on a balance of probabilities that owing to his illness, the 1stapplicant failed to file his defence in time but did so as soon he regained good health. The 1st applicant thus showed that he had interest in defending the suit despite having failed to comply with the rule of filing a defence within the statutory period of 15 days after service of the summons. Whether or not the 1st applicant has a good defence to the claim will be a matter to be conversed during hearing of the main suit.

Secondly, counsel for the 1st applicant submitted that the suit land is still registered in the respondent's names and that his title has never been cancelled. He argued that lit would therefore be a double loss for the applicant if judgment was enforced against him for refund of the purchase price, interest and costs all for the benefit of the respondent who is duly still the owner of the suit land that he purchased from the applicants. He attached a statement of search

as at 12/3/14 from the Registry Lands on his affidavit in rejoinder which showed that the registered proprietor of land comprised at Makandwa and Nakandwa Busiro Block 380 Plot 140 measuring 0.0620hectares is registered in the names of Stephen Tayebwa (the respondent herein).

He also submitted that he had obtained information that the judgment in HCCS no.85 of 2005 upon which the respondent's claim is based was referred to the Constitutional Court and is now pending hearing under Constitutional Reference No.27 of 2012. The implication of this reference is that there is a high likelihood of overturning the decision of the High court as it affects people who were not party to the suit. That the petitioners in the constructional reference are transferees just like the respondent herein. That a decision in that case will have a direct bearing on the respondent's rights over the suit land.

Unfortunately, counsel did not furnish any proof to substantiate his arguments with respect to HCCS No.85 of 2005 or Constitutional reference No.27 of 2012 and at best, his is evidence from the bar. However, it is evident that the respondent is still the registered proprietor of the suit land and should the applicants be condemned unheard the respondent may reap double relief to their detriment and loss. Also, I have already found that the 2nd applicant was not served with court process and the 1st applicant was for sufficient reasons prevented from filing his defense in time.

Although the applicant sought an order of stay of execution of the decree in HCCS No.406 of 2013, no evidence or arguments were presented in support thereof. I likewise made no finding on that prayer.

This application therefore succeeds, the judgment entered against the applicants on 16/10/13 is set aside. Each party shall bear their costs of this application.

I so order.

EVA K. LUSWATA

JUDGE

16/6/14

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