THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 89 OF 2012

ARISING OUT OF CIVIL SUIT NO 467 OF 2011

KIYIMBA EDDIE KALEMA LWEMBAWOO} ..... APPLICANT

VERSUS

DOOBA ENTERPRISES LTD}..... RESPONDENT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicants application is made under order 9 rules 12 and 27 order 51 rule 6, order 52 rules 1 and 3 of the Civil Procedure Rules and section 98 of the Civil Procedure Act. It is for orders that the ex parte judgment and decree in High Court civil suit number 467 of 2011 be set aside; that execution of the decree be stayed; that the time be enlarged for filing a defence and the Applicant files a defence out of time to the main suit for the matter to be heard on merit and inter parties and for costs of the application be provided for.

The grounds of the application set out in the notice of motion is that by the time the Applicant was served with summons to file a defence he was preparing to fly out of the country for an urgent business trip. The Applicant instructed his Business Assistant to take the Court process to his lawyers but he inadvertently forgot to do so. That the Applicant has a plausible and strong defence to the main suit and the application had been filed without undue delay and that it is in the interest of justice that the application is allowed. The affidavit in support of the application is sworn by the Applicant himself and avers that by the time the Applicant received the summons in HCCS No. 467 of 2011 he was in the process of flying out of the country for an urgent business trip to the United States of

America. The Applicant immediately instructed his business assistant to deliver Court process to his lawyers to prepare and file a defence for him but the said assistant inadvertently forgot to take them there. When he returned from abroad he found Court documents still in his office and immediately contacted and delivered them to his lawyers who made a search of the Court file. The lawyers established and informed the Applicant that the Respondent had already applied and obtained an ex parte judgment. The Respondent also filed a bill of costs for taxation and is in the process of applying for execution of the ex parte judgment/degree to the detriment of the Applicant. The Applicant avers that he has a very strong and plausible defence to the Respondents claim in the main suit on the merits and attaches a copy of the draft written statement of defence. He avers that the crux of his defence to the Respondents claim in the main suit is that the contract was frustrated by the actions of Government and National Environmental Management Authority when they declined to accept the development plans of the suit land which was obviously beyond his control. On the basis of information from his lawyers he avers that the defence of frustration in cases of breach of contract is a very strong and plausible defence and it is in the interest of justice given the fact that the claim is over 300,000,000/= that the suit should be determined on merits after hearing inter partes.

The affidavit in opposition to the application is deposed to by Bosco Bukoma a director in the Respondent company. He avers on information from the Plaintiffs lawyers that the Applicant had ample time to personally instruct his lawyers from the date of 19th December 2011 till his departure on the 27th of January 2012 for a business trip. Secondly that the Applicant has no plausible defence to the suit and in specific reply the Applicant undertook to refund the purchase price in case the suit land was not developed owing to Government or National Environmental Management Authority refusing or rejecting the proposed developments thereon.

That the Applicant has not shown any interest in the suit and the miscellaneous application is only intended to frustrate or delay the Respondents from recovering monies paid to the Applicant without any interest. The Applicant has not shown sufficient cause for grant of the application as service of summons in HCCS No. 467 of 2011 was properly effected on him personally and the Applicant

had ample time personally to call his lawyers and inform them of the summons or follow up as to whether they had received his instructions an option he chose to ignore.

At the hearing learned counsel Magellan Kazibwe represented the Applicant while learned counsel Kenneth Akampurira represented the Respondent.

Learned counsel for the Applicant summarised the grounds in the motion and affidavit in support. He argued that the main issue was the plausible defence that the contract for the sale of land was frustrated by the acts of the Government and National Environmental Management Authority when they declined to accept the development plans which were proposed to be done on the suit land obviously beyond the control of the Applicant. The Applicant is not an official of Government neither is he employed by the National Environmental Management Authority.

Counsel contended that the Applicant was served with summons but because it was planning to fly out of the country and being a busy person instructed a business assistant to assist him to forward the documents to his counsels. The business assistant inadvertently forgot to do so. It was only upon his return that he learnt that the documents were still lying in his office and had not been transmitted to his advocates to file a defence. In support of the contention that the Applicant was a busy person and had travelling plans and had actually travelled learned counsel referred to the annexure to the affidavit. The annexure are pages of the passport of the Applicant indicating the dates when he travelled.

Learned counsel for the Applicant submitted that the defence of frustration is very strong defence to an action for breach of contract. Clause 5 of the agreement inter alia provides that if the National Environmental Management Authority or any other Government body refuses or rejects the developments thereon, the vendor would refund the price or give the purchaser an alternative plot. The crux of the Applicant's case is that the parties had in contemplation the possibility that consent could be withheld.

He contended that the default judgment should be set aside because the Applicant is saying that he has not refused to pay. The reason why the purchaser did not get the land was the frustration by National Environmental Management Authority. Consequently if the Applicant is given an opportunity to defend himself, he will be able to look at all alternatives provided for in the contract. Learned counsel submitted that it would be grossly unfair to close the Applicant out. If the Applicant is allowed to come on-board he might even come up with a settlement. The other reasons are that in the plaint there are prayers for other reliefs such as general damages, interest and so on. Learned counsel further submitted that the application was filed without undue delay.

As far as particular facts are concerned the documents annexed to the affidavit shows that on 27 January 2012 the Applicant was exiting Heathrow airport. The Applicant was served with summons on 19 December 2011. From 19 December 2011 he was already planning to leave. On 27 January 2012 was when he was making arrangements and that he instructed his business colleague to pass over the documents to his counsel. When he returned some time again in January he was able to instruct his counsel and the application was filed without undue delay on 28 February 2012.

As far as the law is concerned learned counsel submitted that under order 9 rule 12 of the Civil Procedure Rules, this honourable Court has a very wide discretion to set it aside or vary a default order of the registrar upon such terms as this honourable Court may deem fit. In the circumstances of the case submitted above learned counsel contended that it is fair and just that the Applicant is given an opportunity to file a defence by setting aside the interlocutory judgment. Secondly under order 51 rules 6 on the extension of time, the Court has power to enlarge time as the justice of the case may require. Enlargement of time may be ordered at any time after the expiration of the time for filing any matter in Court. He contended that this is a proper case for the Applicant to file a defence out of time which expired when the Applicant was abroad. Lastly learned counsel referred to the attached draft copy of the draft written statement of defence and prayed that the Court peruses it before coming up with a ruling on this matter. Because of the magnitude of the claim; that is the claim of 300,000,000/= shillings

it would be very unfair and unjust if the Applicant is condemned to pay this money without an opportunity to come on-board and defend himself.

In reply learned counsel for the Respondent relied on the affidavit in reply paragraphs 2, 3, 4. These paragraphs dwell on the service on the Applicant and the Applicant being out of jurisdiction. Learned counsel submitted that service of the summons and the plaint was on 19 December 2011. The Defendant was required to file his defence within 15 days which lapsed on 3 January 2012. Learned counsel for the Respondent referred to paragraph 2 of the affidavit in support and annexure group "A" in that the Applicant avers that after service he was in the process of flying out of the country for an urgent business trip to the United States. Learned counsel contended that from the passport the Applicant had three visas which he did not use. That the Applicant got in at Heathrow on 27 January 2012. This was an entry and not an exit. The Applicant got to the US on the 28 January 2012. It therefore wrong to say that he had not time to follow up on instructions given to associate and secondly to call his own advocate while in the United States to confirm if instructions had been received. Learned counsel contended that the Applicant had ample time to file a defence, to instruct counsel and even the responsibility under the rules is on the Defendant and not on his associates to instruct counsel.

As far as the defence of frustration of the contract, this cannot be a defence since it was envisaged by the parties. Learned counsel submitted that from the 22nd of March, 2010 to date, there has been no mitigating factor taken up by the Applicant/Defendant. Learned counsel submitted that the Applicant had been approached for payment and a demand made but he maintained a silence on his part. Learned counsel further contended that the default judgment was not inclusive of other prayers as submitted by counsel for the Applicant. No such prayers were sought. Even stamp duty of one per cent which was special damages was omitted.

Learned counsel contended that paragraph 5 of the agreement in dispute is very clear in that the vendor warranted to the purchaser that in case the land is not developed owing to the fact that National Environmental Management Authority

or any other Government body refuses or rejects the development plans, the vendor would refund the purchase price or provide an alternative plot agreeable to the Plaintiff.

No attempts have been made even after a demand for the money to sort possible ways of paying or even having a repayment schedule. The Respondent is a business enterprise. Up to today they are even willing to give up the interest and be paid their 300,000,000/= this would enable them recapitalise and avoid issues of inflation. The agreement speaks for itself and though the suit falls under the provisions of order 36 of the Civil Procedure Rules the Plaintiff chose to proceed by way of an ordinary plaint just in case the Defendant had a plausible defence.

The Respondent's position is that if the Applicant could pay back the principal sum, they would abandon general damages.

As far as the law is concerned, learned counsel for the Respondent submitted that in an application made under order 9 rules 12 and 27 of the Civil Procedure Rules, an Applicant has to demonstrate sufficient cause for the application to be granted. What was sufficient cause has been summarised by the Supreme Court in Captain Philip Ongom vs. Catherine Nyero owota Supreme Court civil appeal number 14 of 2001 where Odoki CJ summarised at page 7:

1. A mistake by an advocate though negligent may be accepted as sufficient cause.
2. Ignorance of procedure by an unrepresented Defendant may be sufficient cause.
3. Illness by a party may amount to sufficient cause.
4. Failure to instruct an advocate is not sufficient cause for a litigant.

The Defendant falls in the category of litigants who fail to instruct counsel and it is only an afterthought for him to bring this application. He prayed that the application is dismissed with costs against the Defendant.

In rejoinder learned counsel for the Applicant submitted that the authorities cited by his learned colleague should be distinguished from the instant case. This is because it mainly relies on the last ground of failure to instruct counsel. He

reiterated his submission that the Applicant instructed his assistant to take documents to his counsel. Therefore the Applicant did not completely fail to take any steps. He further contended that the assistant may not have power to instruct but would have delivered the message so he was not instructing counsel by delivering a message to the Applicants lawyers. The Applicant had indeed attempted to have a defence filed as a person rushing for a business trip.

Learned counsel contended that his client was not admitting the whole claim of Uganda shillings 300,000,000/= and this can be demonstrated from the proposed written statement of defence. Thirdly an interlocutory judgment is not a judgment on the merits. Lastly section 98 of the Civil Procedure Act gives the Court wide inherent powers in all circumstances to make such orders as may be just in the interest of justice. His colleague had not touched on order 51 rules 6 which give the Court wide power to enlarge time and grant an opportunity to file a defence. He prayed that the application be allowed as earlier submitted.

Ruling

I have read the Applicants application and reply thereto and also taken into account the verbal submissions of learned counsels for both Applicant and the Respondent.

The Plaintiff filed this suit on 8 December 2011 and summonses were issued on the same day. The copy of the summons returned to Court shows that the Applicant received summons or was served with summons on 19 December 2011.

Order 9 rules 12 of the Civil Procedure Rules allows the Court to set aside or vary the judgment passed pursuant to any of the preceding rules to rule 12 of the order upon such terms as may be just. The preceding rules provide for judgment in three kinds of situations. The first is where the plaint is drawn claiming a liquidated demand and the Defendant fails to file a defence under order 9 rules 6 of the CPR. In the second scenario where the plaint is drawn claiming a liquidated demand and there are several Defendants one or more of whom file a defence while another or more do not. In the above case scenarios the Court proceeds to enter judgment for the liquidated demand in default of filing a defence. Thirdly,

where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and the Defendant fails or all Defendants if more than one fail to file a defence, the Court may enter interlocutory judgment against the Defendant has failed to file a defence and said this was done for assessment of the value of the goods and damages or the damages only as the case may be under order 9 rule 8 of the CPR. In other cases where a plaint is drawn and there are several Defendants one or more of files a defence and another one or more fails to file a defence, the Court may assess the value of the goods and damages against those Defendants who have not filed a defence under order 9 rules 9 of the CPR. In any other case not specifically provided for the suit may be fixed for hearing as if the Defendant has filed a defence under rule 10 of order 9. Lastly where the time for filing the defence expires and the Defendant or Defendants as the case may be have failed to file their defences or defence, the Plaintiff may set down the suit for hearing ex parte under order 9 rules 11. In the orders made pursuant to the above described the rules it may be set aside or varied under order 9 rule 12 of the Civil Procedure Rules.

On the other hand rule 27 of order 9 is wider provides for any case in which a decree is passed ex parte against the Defendant. This may include cases where a defence is filed but eventually proceeds ex parte against the Defendant. For instance under order nine rule 20 where the Plaintiff appears on the date fixed for hearing and the Defendant does not appear, the Court may make an order that the suit proceeds for hearing ex parte. In the circumstances of this case and pursuant to evaluation of the submissions of Counsels for both parties, the question for determination is whether sufficient cause has being shown by the Applicant to set aside the default judgment entered by the registrar. Before that is done it is material to establish under which rule of order 9 the default judgment was entered. The default judgment sought to be set aside was made pursuant to order 9 rule 6 of the Civil Procedure Rules. The applicable rule in the circumstances is order 9 rules 12 of the Civil Procedure Rules. The discretionary power given by the rule is to set aside or vary the terms of the default order. The

order is attached as annexure "B" to the Applicant's affidavit in support of the application and reads as follows:

> "Upon being satisfied that summons was duly served unto the Defendant and having failed to file a defence within 15 days from the date of service, judgment is hereby entered for the Plaintiff as prayed in the plaint together with interest at– per annum to the date of judgment and costs of the suit save for general damages that has been expressly dispensed with as prayed above."

Under order 9 rule 6 where interest is not specified in the plaint, judgment will be entered on the liquidated demand and that the interest of 8% per year to the date of judgment and costs. Judgment was entered pursuant to the letter of the Plaintiff's counsel dated 31st of January 2012 and filed on Court record on 1 February 2012. The order of the Court is dated 2nd of February 2012. The letter applying for judgment in default of a defence reads in part:

> "... in the premises therefore, we dispensed with the prayer for general damages and pray that judgment be entered for the Plaintiff as prayed in the plaint under order 9 rules 6 CPR…"

Judgment was therefore entered for a liquidated amount under order 9 rules 6 of the CPR and the submissions of the Applicants counsel that the Plaintiff would obtain general damages or interest if the default judgment is not set aside has no factual basis and is therefore irrelevant. The second major point to make is that there is an acknowledgement in the application that the parties signed a contract which contract is attached as annexure "D" to the Applicant's affidavit in support of the application. In the agreement the Applicant acknowledged payment of some sums of money by the Respondent.

The agreement:

The agreement between the parties was executed on the 22nd of March 2010 for the sale of land comprised in plot 83 Mpanga Close Bugolobi Kyadondo measuring 0.182 ha. Clause 1 provides that the consideration was Uganda shillings 300,000,000/= and the purchaser has paid Uganda shillings 230,000,000/= in cash

which the vendor acknowledged. Additionally there was a DFCU bank cheque of Uganda shillings 20,000,000/= payable on the 24th day of April 2010 which the vendor also acknowledged. The balance of Uganda shillings 50,000,000/= was to be paid thereafter after one months period. The other clauses of the agreement provide as follows:

"

2. The Vendor warrants to the purchaser that he has a good unchallenged and unencumbered title to the above land transferred in his favour by the registered owner.

3. The vendor has signed the transfer forms for the purchaser and handed the same to the petitioner who is to effect the transfers to the purchaser's names.

4. The Purchaser has agreed to pay for all the legal costs involved in the sale transaction, re - transferring of the title into his names and other incidental costs thereafter.

5. The vendor hereby warrants the purchaser that indicates the above described the land is not developed owing to the fact that National Environmental Management Authority or any other government body/rejects the developments thereon, the vendor has agreed to refund the above price and or give the purchaser an alternative place allowable for development purposes to the purchaser."

Looking beyond the question of whether there was any sufficient cause not to file a defence within time, the main ground of the application is that the Applicant has a plausible defence to the Respondents claim in the plaint. Specifically the affidavit in support avers that the Applicant has a plausible defence to the Respondents claim in the main suit on the merits. The crux of the defence is that the Respondents claim in the main suit is that the contract was frustrated by the actions of Government and National Environmental Management Authority when they declined to accept the development plans of the suit land a factor which was beyond the Applicant's control.

In the proposed written statement of defence the Applicant avers in paragraph 4 thereof that at all material times the parties knew and agreed that in case the suit land is not developed owing to the National Environmental Management Authority's or Governments restrictions, refusal, actions and related matters the contract would be frustrated. Secondly the proposed defence avers that the Defendant tried his best to cause National Environmental Management Authority and Government to allow the development of the suit land by the Plaintiff but the said authorities totally refused thereby frustrating the contract.

In paragraph 5 of the proposed WSD the Defendant avers that after the execution of the contract, the Defendant advised the Plaintiff to wait for National Environmental Management Authority clearance before obtaining any loan or spending any money on the transfer thereof but the Plaintiff refused to heed the advice. Additionally in paragraph 6 thereof the proposed defence pleads that the Defendant has never failed or refused to offer an alternative land or absconded from refunding the consideration and the Plaintiff shall be subjected to rigorous proof thereof at the trial. Last but not least in paragraph 7 thereof the proposed written statement of defence is that the Defendant denies breach of contract and shall rely on the doctrine of frustration of contract and is not liable to pay any damages, interests and costs to the Plaintiff at all.

I have carefully considered the submissions of both counsels. The first factual point is that the contract clearly indicates that the Applicant received 250,000,000/= from the Respondent upon execution of the contract in 2010. Secondly both counsels addressed me on clause 5 of the agreement under which the vendor warranted the purchaser that he would refund the money of the purchaser/Respondent if the National Environmental Management Authority or any other Government body refused or rejected the development plans of the purchaser/Respondent. The covenant to refund the money is based on the frustration by rejection of the Respondent's development plans for the land. The Applicant avers that the National Environmental Management Authority rejected the plans. It is not in dispute neither is it permissible to vary the terms of the contract by any oral variation. Section 91 of the Evidence Act bars any evidence of any oral variation of the agreement of the parties. It reads as follows:

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.
>
> When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The agreement is relied upon by the Applicant in support of the Applicant's application and for the contention that the Applicant has a plausible defence to the Plaintiffs claim. A perusal of the proposed written statement of defence paragraph 7 thereof shows exactly the extent of the defence that the Applicant proposes. It reads:

> "The Defendant denies breach of contract and shall rely on the doctrine of frustration of contract that he is not liable to pay any damages, interests and costs of the Plaintiff at all."

Paragraph 6 further crystallises the point on the extent of the proposed defence. It provides as follows:

> "The Defendant further contends in reply to the above paragraphs, that he has never failed or refused to offer an alternative land or absconded from refunding the consideration and the Plaintiff shall be subjected to rigorous proof thereof at the trial."

In terms of order 8 rules 3 of the Applicant is deemed to have admitted the liquidated demand for refund under the contract where the option for refund is pursued. Order 8 rule 3 of the Civil Procedure Rules provides as follows:

> "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the

opposite party, shall be taken to be admitted, except as against a person under disability; but the Court may in its discretion require any facts so admitted to be proved otherwise than by that admission."

The Applicant and therefore relies on paragraph 5 of the agreement in question. As indicated above paragraph 5 gives the Applicant two options that is either to refund the money or to give the Respondent an alternative plot. I have carefully considered this clause in the agreement. It gives the undertaking of the Applicant to the Respondent. It is upon the Respondent to either seek a plot of land for a refund of its money. In the application, the Applicant has not denied the Respondents assertion that it demanded for its money but the Applicant refused to pay. Coupled with paragraph 6 of the proposed written statement of defence, the conclusion is that the Applicant does not deny his liability to refund the money should the Respondent seek this remedy under clause 5 of the agreement.

It has been admitted in the Applicants application and pursuant to the agreement relied upon that at least 250,000,000/= Uganda shillings was paid by the purchaser/Respondent to the Applicant pursuant to the agreement annexure "D". Because the Respondent abandoned the claim for general damages and interest in its application for default judgment, the proposed defence would lead to no possible good except in the narrow sense that the sum of Uganda shillings 50,000,000/= is not indicated as having been paid by the documents relied upon. 50,000,000/= was supposed to be paid within one month from the execution of the sale agreement. Secondly, the Applicant seeks to defend himself against the claim for interest and damages which claim the Respondent had dispensed with in the application for judgment in default of a defence. To set aside or vary the default judgment would automatically resurrect the previous claim giving the Respondent a fresh chance whether it would like to dispense with the claim for damages or interest. In his submissions, learned counsel for the Respondent submitted that his client was willing to forego a claim for interest or damages if the Applicant could pay it the principal sum of Uganda shillings 300,000,000/=. In other words the condition for the Respondent to forego the claim of interest or damages is the payment of the entire principal sum set out in the plaint.

Having considered the above facts, the Court is seized with jurisdiction to make such orders as would meet the ends of justice. In his submissions learned counsel for the Respondent did not address Court on the question of whether the name should be enlarged to enable the Applicant filed a written statement of defence out of time under order 51 rules 6 of the Civil Procedure Rules. However time may only be enlarged where there is no judgment. In this case the judgment had already been entered unless set aside time cannot be enlarged.

In the Kenyan Commercial Court case of **Dhillon and Another versus Dhillon [2006] 1 EA** page 66 – 67 the High Court held that:

> "The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules…"

The facts as to why the Applicant did not file a defence are not easy to verify and even the pages of the passport leaves attached are not legible. I am inclined to give the Applicant the benefit of doubt as he has demonstrated a strong desire to defend himself on the merits of the case. The only question is what the merits of the case are. It is my conclusion that the merits of the case only relate to the part of the Plaintiffs claim which is not admitted expressly or by implication.

In the premises, the order of the registrar is varied by substituting therefore the following orders:

1. The Applicant shall pay the Plaintiff a sum of **Uganda shillings 250,000,000/=** with interest at 8% from up to the date of judgment in terms of order 9 rule 6 of the Civil Procedure Rules with costs.

2. Leave is granted to the Applicant to file a defence with respect to the sum of Uganda shillings 50,000,000/=.

3. The Applicant shall pay interest on SHS 250,000,000/= at a rate to be determined after trial of the suit from the date of judgment till payment in full.

4. The dispensation of the Respondent resulting in an abandonment of its claim for damages and interest is set aside and the same shall become an issue for trial.

5. Time is enlarged for the Applicant to file his defence within 15 days from the date of this judgment.

6. Costs of the remainder of this suit to abide the outcome of the suit.

Dated at Kampala this 27th day of April 2012.

Hon. Justice Christopher Madrama

Ruling delivered in the presence of:

Ojambo Makoha Court Clerk

Hon. Justice Christopher Madrama

27th day of April 2012