THE REPUBLIC OF UGANDA

INTHE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION N0. 188 OF 2019

(ARISING FROM CIVIL SUIT NO. 015/2019)

AND

WARIS ALI FADHUL::
APPLICANT

VERSUS

KIRUNDA MUBARAK::
RESPONDENT

RULING

BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA

Introduction and brief facts

The applicant represented by M/s Crane Associated Advocates, proceeded by motion under O. 9 rr 12, O. 36 rr 11, and O. 52 rr 1 CPR to seek orders to set aside a default judgment and execution of the decree in HCCS No. 15/2019 (hereinafter the main suit) and for costs.

The grounds advanced are that on 15/5/2019, by consent, the parties agreed that an earlier default judgment and decree in the main suit be set aside and the applicant Fadhul was permitted to file his written statement of defence out of time. That despite the fact that Fadhul complied with the terms of that consent, Kirunda the respondent applied for and obtained a default judgment, which Fadhul considers illegal and void.

Fadhul continued that he has a complete and strong defence to the main suit which should be heard on merit. M/s Ngobi & Co., Advocates defended the application. Both counsel filed written submissions as directed.

Warris Ali Fadhul deposed the affidavit in support of his application. In brief he stated that the consent order by which the default judgment was executed on 15/5/2019, and that he filed his defence on 30/5/2019 within the 15 days agreed. He contended that the interests of the parties can only be finally determined if his defence is determined. A summary of his intended defence is as follows:-

a) He has never entered into, signed or thumb printed a contract to borrow or, entered into a loan agreement/memorandum of understanding with Kirunda. That the one presented by the latter is a forgery, and thus not binding upon him and cannot be enforced by Court
b) He has never received or borrowed any money from Kirunda as alleged in the main suit
c) He has never pledged or handed over certificates of title in respect of property at Plots 31, 33 and 35 Nile Crescent Jinja (hereinafter the suit land) to Kirunda as security for repayment of any loan

In his affidavit in reply, Kirunda strongly objected to the application which he considers an illegality. He contends in particular that the consent order, which is a binding contract between the parties, was entered on 15/5/2019, and took effect on the same day. He concludes therefore that the days within which Fadhul was to file his defence lapsed on 29/5/2019, an indication that the defence which was filed on 30/5/2019 is time barred, and therefore not a defence on merit and ought to be struck out with costs. He argued further that Fadhul had no defence to the suit since he borrowed and then received Shs. 248,000,000 from him and pledged the suit property as collateral. He continued that this application has been overtaken by events since the judgment and decree which was regularly obtained, has already been executed by the

attachment and sale of Plot 31 Nile Crescent, Jinja Municipality to one Kalakasa Musa, in whom it is now vested.

Asiku Adinani an advocate of the Courts of Judicature affirmed a supplementary affidavit in support of Kirunda's defence. He deposed that he drafted and witnessed the memorandum of understanding dated 12/11/2018 by which Fadhul received the above loan and pledged the suit property as collateral. In addition, Kamaga Samuel a bailiff of Court deposed an affidavit in reply stating that since no defence was filed by 29/5/2019, the judgment and decree was legally and regularly obtained. He continued that subsequent to that decree, he was issued with a warrant of attachment which he proceeded to advertise and then execute by a sale of Plot 31 Nile Crescent Jinja to Kalakasa on 22/7/2019, and a return filed in court on 23/7/2019. He concluded that the valid sale closed the matter and there was nothing for the Court to stay. In brief rejoinder, Fadhul deposed that the Registrar of this Court stayed execution proceedings on 24/7/2019 and since the lease for Plot 31 Jinja Crescent had expired, there was nothing to attach and therefore that, the vesting order for the same by the same Court was illegal and a nullity.

My decision

In their submissions, Kirunda's counsel appear to have raised an objection against the application on grounds that it was brought under the wrong law. I would agree with their argument that once the first default judgment was set aside and Fadhul allowed to file his defence, the action ceased to be a summary suit and became governed by Order 9 and not Order 36 CPR. I conceive however that under either provision, the power of the Court is to set aside a default judgment if sufficient cause is shown. That discretion will not be fettered simply by a party using the wrong law, as this would be a technicality that does not go to the root of the relief sought. I am persuaded that it is the type that Article 126 (2)(e) of the Constitution was meant to correct. The Court of Appeal decision in **Saggu Vrs Road Master Cycles (U) Ltd (2002) 1 EA 258** is clear

that *".....where an application cites no law or the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted".*

It is not in contest that the main action was first filed as a summary suit. The Learned Registrar entered the second default judgment on 30/5/2019 under Order 9 rr 6 CPR. It was thus prudent for Fadhul's counsel to quote both Order 9 and 36 CPR. Order 9 is the correct law in the circumstances and being one of the laws quoted in the motion, I would consider the objection reactionary and unnecessary. It is accordingly overruled.

The provisions of Order 9 rr 12 CPR are couched in general terms. When a judgment has been entered in default under Order 9 rr 6 CPR (*inter alia*), the Court may set aside or vary such judgment upon such terms as may be just. I would agree with Fadhul's counsel that this is a discretion that can only be exercised if good/ lawful/sufficient cause is shown, which term is defined in Black's Law Dictionary 10th Edition to be *"a legally sufficient reason".* The definition of the term given in **Bishop Jacinta Kibuuka Vrs the Uganda Catholic Lawyers Society & Ors HCMA No. 696/2018** would be instructive. It was held that:

"It is *difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however the words should receive a liberal construction in order to advance substantial justice when no negligence or want of bona fides, is imputed to the appellant"*

The facts in contention are simple. Fadhur being the defendant in the main suit, failed to file his defence within the statutory ten days and a default judgment was entered against him. That default judgment was by consent set aside on 15/5/2019 and he was allowed to file a defence within 15 days. He claims he did so, which fact is opposed by Kirunda who then states that he went ahead to obtain a second default judgment, which was properly executed, and the matter should be considered closed. Having considered the lengthy evidence and submissions given by each side, I deduce that the

time of 15 days agreed upon by the parties is not in contention. The dispute revolves around when the days begun to run against Fadhul.

For better understanding of the Learned Registrar's order of 15/5/2019 (and sealed on 20/5/2019), in M/A 092/2019, I will reproduce it here. He stated inter alia that:

*"**the applicant to accordingly file written statement of defence within 15 days from to-date."*** **Emphasis of this Court.**

It is argued for Fadhul that irrespective of the order of Court, the provisions of Order 51 rr 8 CPR apply so that the days begun to run against him on 16/5/2019. Conversely, it is argued for Kirunda that computation of the time within which to file the defence should be from the actual date of the consent order, which would have allowed him only up to 29/5/2019 within which to file his defence. It is argued further that where the order is clear, then the provisions of Order 51 CPR should not apply.

It is provided in Order 51 rr 8 CPR that:-

"...in any case in which any particular number of days not expressed to be clear days is prescribed under these rules or by any order or direction of the Court, the days shall be reckoned exclusively of the first day and inclusive of the last day". Emphasis of this Court.

The Learned Magistrate's order which permitted Fadhul to file his defence out of time, was the result of an agreement/consent between the parties. Ordinarily a consent order having been arrived by consensus with or without court's intervention is binding upon the parties. See for example, **Excel Secondary School Mukono Ltd vrs Imperial Bank (U) Ltd M/A 575/2015** following **Saroj Gandesha Vrs Transroad SCCA No. 13/2009**. However, once that consent is endorsed by Court by inclusion of the Court seal (as was the case here), it becomes an order of the Court and would fall within the exceptions given by Order 51 rr 8 CPR. Specifically, the order did not state that the defence was to be filed within a certain number of "clear days". It was

ordered that Fadhul was to file *"...within 15 days from 15/5/2019".* The days agreed upon by the parties, and endorsed by Court, were neither expressed to be "clear days', nor were they days prescribed under the Rules.

Thus the consent notwithstanding, I would deduce then that the 15 days was a duration "*by order or direction of the Court"* as envisaged by Order 51 rr. 8. CPR. That being the case, my interpretation would be in favour of Fadhur's arguments that the date the order was made should be excluded from the 15 days given. The days begun running against him on 16/3/2019 and ended on 30/5/2019, the date he filed his defence.

I have read and agree with the decision of Judge Obura (as she then was) in **Pinnacle Projects Ltd Vrs Business in Motion Consultants Ltd HCMA No. 362/2010.** However the facts there are distinguishable from this case. In that case, the issue was whether the defendant had complied with the days specified in the summons to apply for leave to appear and defend the suit. The Judge then was clear that the days for filing the application were clearly specified in the summons. That type of summons is specifically provided for under O. 36 rr 3(1) and Form 4: Appendix A to the Rules and allows 10 days within which to file an application to defend the claim. I believe Order 51 rr 8 CPR is in place to cure ambiguity where an order is made by the Court within its jurisdiction, but outside ambit of the Rules, as was the case here. It follows therefore that Fadhul filed his defence within time and it was wrong for the Learned Registrar to have entered a second default judgment against him and then issued a warrant for execution of the decree.

Stemming from decision above, I would agree with Fadhul's counsel that all proceedings and processes following the impugned default decree are void and cannot stand. There being a defence on record, the Learned Registrar was wrong to have issued a warrant of attachment and sale. Thus, irrespective of the evidence that a return was filed with the Court on 23/7/19, the sale to Kalakasa a third party, cannot

stand, and is set aside. The merits or lack of it of Fadhil's defence, is of no relevance at this point. It is enough that he flagged his intention to defend the claim and even filed proceedings to that effect. That will be a matter for the Court to consider once the main suit is called to hearing. The protracted evidence and submissions on that particular matter are thus disregarded.

I note with concern that significant evidence by Fadhul in respect of the attached and sold property was not rebutted. It was stated and shown that by the time the warrant of execution was made and executed, the lease of plot 31 Nile Crescent Jinja had expired. I agree with his counsel then that by 31/3/2019, Fadhul had ceased to have any interest in that particular property whose reversion had reverted to the controlling authority. It is not clear in whose possession the certificate of title was, at the time execution was ordered. Even then, under Section 48(1) and (2) CPA, the Learned Registrar was mandated not to allow any execution proceedings before calling for the lodgment of the duplicate certificate of title in Court. Had he done so, he would have confirmed at the earliest opportunity that the lease had expired and thus halted further execution because by then, Fadhul as the judgment debtor had no legal interest in that particular property against which execution could be levied.

I have found no provision in the law empowering a Registrar of the Court to issue a *"Court Vesting Order"* with respect to registered land either to a Land Board or the Registrar of Titles. The powers and procedure of issuing new leases or renewing those that have expired are by law vested in the respective District Land Boards under the Land Act and its amendments. Again, vesting orders for registered land are under the RTA the preserve of the Registrar of Titles upon order of a High Court Judge and not a Registrar, and even then, would not be applicable for an expired lease. I would then agree with Fadhul's counsel that the Learned Registrar was regrettably acting outside his jurisdiction. Indeed I note that on 24/7/2019, there was an attempt by the succeeding Registrar to redeem the situation when she recalled the warrant issued to the court bailiff and directed him to halt any further action with respect to his

instructions. Her subsequent decision on 19/8/2019 to issue the "Court vesting order" was therefore irregular and as it turned out, illegal. It is regrettable that judicial officers failed in their duty to conduct the execution in accordance with the law.

In conclusion, this application succeeds and is therefore granted. I order that the default judgment and decree passed in Civil Suit No. 015/2019 is set aside. Likewise, execution of the decree is set side.

I have in my ruling noted anomalies by officers of the Court which perpetuated these illegal proceedings. I would under those circumstances not be prepared to condemn the respondent in costs. I would instead order each party to bear their costs of the application. Since Fadhur's defence is recorded as filed, the matter shall go to hearing at the earliest opportunity.

I so Order

EVA K. LUSWATA

JUDGE

17/2/2021