THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 278 OF 2019

(ARISING FROM CIVIL SUIT NO. 273 OF 2016)

KOTOKYO WILBER WILLIAM ::::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **JOHN K. KAGGWA**
2. **ATTORNEY GENERAL::**

RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application by the applicant seeking for orders that;

1. The judgment passed against the applicant in civil suit no. 273 of 2016 be reviewed and set aside.
2. The applicant/defendant be allowed to be heard, file a defence and the matter be determined inter-parties on merit.
3. Costs of this application be provided for.

It was brought on the grounds contained in the supporting affidavit sworn by the applicant which were briefly that the applicant was aggrieved by the judgment of court in civil suit no. 273 of 2016, the applicant was never heard and that the applicant has a formidable and plausible defence to the respondent's suit.

The 1st respondent filed an affidavit in reply opposing the application wherein he stated that the applicant was duly served but habitually refused to acknowledge receipt of the documents served and has no regard for court process. He further stated that the application is not only bad and barred in law but also unjust.

The 1st respondent also raised two preliminary objections contending that the application was served out of time contrary to the law and that the applicant is guilty of contempt of court hence has no right of audience before this court.

The applicant was represented by *Abraham Mpumwire* while *Lukongwa Aubrey* represented the 1st respondent.

When the application came for hearing, the following issues were raised for determination;

1. **Whether the applicant can be heard when he is guilty of contempt of court.**
2. **Whether the application is competent.**
3. **Whether this is a proper case for review of court.**
4. **Whether the applicant is entitled to the remedies sought.**

Both parties filed final written submissions that were considered by this court.

I shall now proceed to determine the matter.

Issue 1: Whether the applicant can be heard when he is guilty of contempt of court.

The applicant's counsel submitted that there was no contempt of court order that was issued by this court and that the applicant was never served with court summons or any pleadings in regards to the contempt of court thus the proceedings in Misc. Application No. 183 of 2016 are unknown to the applicant.

On the other hand the 1st respondent's counsel submitted that the applicant was duly served with the documents relating Misc. Application No. 183 of 2016 and that his feigning ignorance of the same is not surprising in the least. In the ruling of Misc. Application No. 183 of 2016, Her Worship Nakitende Juliet stated; *this application proceeded exparte for reasons that the respondent never attended court despite the fact that he was served with the application as well as the director legal affairs civil registry Naguru being served with the same application.*

Counsel for the respondent further submitted that from the facts leading up to the institution of Misc. Cause No. 5077 of 2016 which was for unconditional release and Misc. Application No. 183 of 2016 for contempt, the 1st respondent feeling his rights had been trampled on by the applicant herein instituted Civil Suit No. 273 of 2016 for some declarations and reliefs from this court. As a matter of fact, all the orders given in the lower court were a basis for the 1st respondent to institute Civil Suit No. 273 of 2016 hence they are all intertwined.

Counsel cited the case **Kabale University vs Henry Rwaganika & anor Appeal No. 007 of 2016** where the court cited **Hankinson vs Hankinson [1952] ALL ER 579** "a party in contempt by disobeying an existing order cannot be heard in a different but related cause of action, until such a person has purged himself/herself of the contempt."

Counsel submitted that was found in contempt and continues to disobey the order of court. Even if the applicant claimed to be aggrieved by the contempt order, he ought to first comply with it or purge himself of such contempt or else he is in compromise of the obligation to obey court orders and can therefore not be heard when he is guilty of contempt.

In rejoinder, the applicant's counsel reiterated that the applicant was never aware of the proceedings. Counsel also submitted that the case of **Kabale University vs Henry**

Rwaganika & anor Appeal No. 007 of 2016 cited by counsel for the 1st respondent is distinguishable from the instant case. Counsel submitted that while courts have emphasized the importance of compliance with court orders, they have clearly stated *that this is subject to the party's right to challenge the order in issue…it is the responsibility and duty of the party concerned in case that party for some genuine reason finds compliance with the court order not possible, to appropriately move court issuing the order and bring to the attention of court the reason for non-compliance.*

Counsel submitted that the applicant was not aware of the proceedings but is willing to comply with the same although he reiterated that the applicant is not in contempt of any orders of court in the matter before court. Counsel concluded that the right to a fair hearing under Article 28 of the Constitution is non derogable and cannot therefore be fettered by an order of contempt.

I have read the ruling of Her Worship Nakitende Juliet in Misc. Application No. 183 of 2016 from which this preliminary objection emanates. As quoted by the 1st respondent, the application proceeded exparte for reasons that the respondent (now applicant) never attended court despite the fact that he was served with the application as well as the Director legal affairs civil registry Naguru being served with the same application. Her Worship found the now applicant in contempt of court which orders the he did not proceed to set aside or purge himself of the contempt.

As stated in the case of **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] EA 344 (HCK) - *"A court of law never acts in vain and as such, issues touching on contempt of court take precedence over any other case of invocation of the jurisdiction of the court."*** The applicant ought to have purged himself of the contempt or applied to set the orders aside. The facts on record are not sufficient to determine whether the applicant is still in contempt of a court order.

I concur with Lady Justice Flavia Senoga Anglin in **Comform Uganda Limited v Megha Industries (U) Ltd (MISCELLANEOUS APPLICATION NO.1084 OF 2014),** she held;

"This court therefore finds that, the Applicants cannot have courts discretion exercised in their favor before they have purged themselves of contempt…To hold otherwise would be encouraging impunity by litigants who find court orders unpleasant and decide to disobey them."

Whereas it is true that the applicant cannot seek audience of the court without purging himself of the contempt, the court has to consider the circumstances of the case especially where it is not the same court. In the present case, the applicant was dragged to court by the respondent and had every right to defendant himself. The contemptuous conduct in another matter(court) should not be used against him not to access justice in different matters. The applicant may be denied access to court in similar matter and in the same court but not in all courts due to the one incident of being contemptuous.

This issue is resolved in the affirmative.

Issue 2: Whether the application is competent.

The 1st respondent raised a preliminary objection stating that the application was served out of time. The Notice of Motion was endorsed by the Registrar on 2nd April 2019 and service of the same was done on 12th September 2019.

Counsel for the applicant submitted that the application was not served out of time as alleged by the 1st respondent and is therefore competent. Counsel submitted that when the application came up for mention on the 9th September 2019 the court directed the application be served upon the respondents within 10 days which was accordingly done.

On the other counsel for the respondent submitted that that was disturbing considering that the application that came up for hearing that day was Misc. Application No. 282 of 2019 for stay of execution which had also not been served upon the respondent.

Counsel further submitted that the applicant did not serve the present application in time, did not apply for extension of time as expected by law and even if court had told him to serve the application within the 10 days, it would still not waive the 1st respondent's right to challenge service upon appearance in court to argue the application.

The applicant in rejoinder submitted that on 9th September 2019 counsel for the applicant prayed to be allowed to serve the respondents afresh to which court exercised its discretionary powers, permitted and directed that the application be served onto the respondents within 10 days from 9th September 2019 and the same was duly served on the respondents on the 12th September 2019.

I have perused the record and have indeed found that the applicant served the respondent outside the time prescribed. The respondent has not set out any prejudice suffered when he was served out of time. He has indeed filed an affidavit reply and therefore the preliminary objection is useless and baseless. In addition, this court has the right to exercise its discretion in the interest of justice as well as well as administer justice without undue regard to technicalities. See **Article 126 of the Constitution**.

Whether this is a proper case for review of court.

Counsel for the applicant submitted that the application has sufficient grounds warranting grant an order for review; there was a mistake or error apparent on the face of record in the ruing and the applicant is an aggrieved party who has vast interest in the matter.

Counsel submitted that there was a mistake and/or error on the face of record as HCCS No. 273 was heard ex-parte and the ex-parte evidence contained material

falsehoods, misinformation and errors which he was never given a chance to challenge through cross examination and adducing evidence in rebuttal.

Counsel further submitted that the applicant was never served with any court summons or hearing notices to enable him prepare his defence or attend court proceedings and only learnt of the suit in a newspaper article on 25th November 2018. It was their submission that the applicant was denied a right to be heard and was condemned based on misinformation and errors presented by the respondent in that suit.

In response, counsel for the respondent submitted that the application does not warrant grant of orders for review. Counsel submitted that the applicant seemed to rely on the ground of mistake on the apparent face of the record to which counsel cited the case **MK Creditors Limited vs Owora Patrick Misc. Application No. 143 of 2015** among others. In that case, Justice Rugadya Atwooki citing the decision of Independent Medico Legal Unit v Attorney General of the Republic of Kenya {Application No. 2 of 2012; arising from Appeal No. 1 of 2011} in which the phrase 'error on the face of the record' had this to say;

"I found this decision quite instructive. It explains error on the face of the record in the following terms,

As the expression 'error apparent on the face of the record' has not been definitively defined by statute, it must be determined sparingly and with great caution.

The error apparent must be self-evident; not one that has to be detected by a process of reasoning.

No error can be an error apparent where one has to travel beyond the record to see the correctness of the judgment.

It must be an error which strikes one by merely looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.

A clear case of error apparent on the face of the record is made out where without an elaborate argument, one could point to the error, here is a substantial point of law which stares one in the face, and there could be no two opinions entertained about it.

In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish."

For the rejoinder, counsel for the applicant reiterated their earlier submissions and also further stated that the 1st respondent is bent on humiliating the applicant through execution of the orders of court yet he was not given a chance to defend himself.

I have to note that there is a discrepancy between the applicant's grounds for review in the affidavit supporting the motion and the final written submissions. According to the affidavit, the applicant seemed to rely on the ground of sufficient cause by reason of the applicant not being heard but the submissions seem to rely on the mistake/error on the apparent face of the record.

Regardless I shall delve into the merits of this issue.

Order 46 rule (1) of *the Civil Procedure Rules* empowers this court to review its decisions where there is a mistake or a parent error on the face of the record.

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error

apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. ***(Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)***

The applicant seeks the court to delve into a long process of reasoning to determine the correctness of the judgment citing material falsehoods and absence of pertinent material facts. With the above authority in mind, the applicant's arguments require this court to engage in a long process of reasoning to determine whether or not his actions towards the 1st respondent breached his constitutional rights. This requires elaborate discussion of evidence or argument to establish.

Greater care, seriousness and restraint are needed in review applications. In the case of ***MK Financiers Limited vs Shah & Co Ltd Misc. App No. 1056*** Justice Flavia Senoga Anglin held that;

"If the applicant was not satisfied with court's decision, he ought to have appealed instead of applying for review. Since it has been established that an erroneous view of evidence or of law and erroneous conclusion of the law is not ground for review, though it may be good ground of appeal." Misconstruing of a statute or other provisions of law cannot be a ground for review.

The proper way to correct a judge's alleged misapprehension of the procedure or substantive law or alleged erroneous exercise of discretion is to appeal the decision, unless the error be apparent on the face of record and therefore requires no elaborate argument to expose"

The per *incuriam* decisions ought to be appealed to a higher court since they are not apparent on the face of the record. They are not manifest and clear to any court but rather are an apprehension of the law and evidence. ***See Edison Kanyabwera v Pastori Tumwebaze SCCA No. 2004***

Furthermore the applicant seeks to rely on sufficient cause to warrant the grant of orders for review on grounds that he was never served with summons to enable him prepare his defence or to attend court proceedings.

I find this unreliable owing to the fact that there is an affidavit of service on record that shows that the applicant was served but declined to acknowledge receipt of the documents. The applicant and Attorney general were duly served and the 2nd respondent filed a defence in the suit and it is not clear whether the said Statement of defence was for both defendants.

An application to set aside an exparte/default judgment is primarily made on the basis of its irregularity (although in some cases, the court may consider the merits of the applicant's case in specific circumstances). The concern of court at this level is whether the applicant's case should go on trial on the basis of merit in addition to other circumstances of the case.

Normally when a defendant raises a defence or an issue which would affect adjudication on merits at trial, it would be just (subject to other considerations) to set aside the judgment. The applicant must produce to the court the evidence that he has a prima facie defence or whether any useful purpose could be served if there were no possible defence to the action. And it must not be a fanciful defence or a façade but a case which raises a real issue or valid basis of contention which affects the merits. See ***Mercurine Pte Ltd v Canberra Development Pte Ltd [2008] 4 SLR (R) 907***

It is sufficient that the applicant raises one or more issues of contention which justify a trial on the merits. The question is whether the applicant has a sufficiently strong case to win at trial. In the case of ***Alpine Bulk Transport Co Inc Ltd v Saudi Eagle Shipping Co. Inc [1986] 2 Lloyd's Rep 221***, the Court of Appeal applied and set the following guidelines for setting aside judgment as follows;

"…….bearing in mind that in 'matters of discretion no one can be authority of another'

(i) A judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives right of property;

(ii) The Rules of Court give the judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and court should not 'lay down rigid rules which deprive it of jurisdiction';

(iii) The purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) The primary consideration is whether the defendant 'has merits to which the court should pay heed' not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown 'merits' the court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication.

(v) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence.

This court guided by the above principles, has established that the applicant has no genuine defence and/or reason why he never filed a defence in this matter after he had duly received the summons to file a defence. In addition, the 1st respondent's case was about violation of the applicant's fundamental human rights and the applicant has not set out in the affidavit any justification for the said violations as the trial court found. There is no defence on merits to warrant setting aside the judgment since it was premised on evidence upon full testimony before the court.

The applicant has not satisfactorily proved to this court that he was indeed unaware of the proceedings and judgment thereto that he is seeking to be reviewed and set aside.

With the preceding, I do not find evidence to warrant the grant of orders for review and setting aside.

The application is therefore dismissed with costs to the 1st respondent.

I so order.

SSEKAANA MUSA
JUDGE
30th/04/2021