

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
MISCELLANEOUS APPLICATION NUMBER 56 OF 2019
(ARISING FROM HCCS NUMBER 9 OF 2011)

KAGADI SEVENTH DAY ADVENTIST CHURCH
ASSOCIATION OF UGANDA ===== APPLICANT

VERSUS

JOSEPH KASUMBA ATEENYI =====RESPONDENT

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

This application is brought under the provisions of Section 98 of the Civil Procedure Act; Order 9 rule 21 and Order 52 rule 1 and 3 of the Civil Procedure Rules.

The Application seeks orders that:

The exparte Order in Civil Suit No. 009 of 2011 entered against the applicant on the 5th day of 2019 be set aside;

- That the Applicant be availed with the court proceedings dated 5th February 2019;
- That the Applicant be granted leave to cross examine the respondent's witnesses;
- That the costs of the Application be provided for.

The grounds of the application are that on the day HCCS 009 of 2011 was called in court for hearing, counsel for the Applicant, who had informed counsel for the Respondent that he would be at the Chief Magistrates Court , Mbarara attending to MA 293 of 2018 Nyamitanga Division Local Government vs. Nalubega Ssana Mwajuma , was attending the said court and that the Representative of the Applicant, who were travelling to court for the hearing in a private car

suffered a moto accident and arrived at court, when the judge had already directed the Respondent to proceed exparte.

The Respondent opposed the Application on the following grounds, namely: -

- That the applicant's counsel lied that he was attending **MA 293 of 2018 Nyamitanga Division Local Government vs. Nalubega Ssana Mwajuma** at the Chief Magistrates Court, Mbarara on the day the judge ordered the case to proceed exparte. The Respondent attached the record of MA 293 of 2018, which showed that the Applicant was absent from court, and
- That the Applicants have taken so long (nine months) to apply to set aside the order of the judge.

Order 9 rule 21 of the Civil Procedure Rules provides that:

Where the court has adjourned the hearing of the suit exparte, and the defendant at or before the hearing appears and assigns good cause for his or her previous nonappearance, he or she may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he or she had appeared on the day fixed for his or her appearance.

Section 98 of the Civil Procedure Act, on the other hand provides that:

Nothing in this Act shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

The court is empowered under the above two provisions of the law to grant such remedies that will ensure that justice is done between the parties but at the same time, the above provisions of the law give the court the sword to limit cases of abuse of court process by litigants, who have no justifiable cause either through negligence or dilatory conduct or conduct analogous to the two conditions from disabusing the discretionary powers of the court.

In the matter before me the applicant's lawyer contrary to the rules of precedence of courts abandoned attending proceedings in the High Court in favour of proceedings in the Chief Magistrate, which was not only irregular but negligent on his part. It is however, doubtful whether the Applicant's counsel attended the Chief Magistrates Court in Mbarara. According to the affidavit in opposition of the application, the respondent availed a record of the Chief Magistrates Court on 5th of February 2019, which showed that counsel for the Applicant did not attend court as he had indicated in the affidavit supporting the application.

I would have believed the Respondent on this point had he attached a certified copy of the proceedings before the Chief Magistrates Court, Mbarara in MA 293 of 2018. In the absence of a certified record, I am therefore unable to hold that counsel for the Applicant was not in the Chief Magistrates Court, Mbarara on the 5th of February 2019. Is the reason afforded by the Applicant's counsel sufficient cause to set aside the exparte order? As I noted above, counsel for the Applicant was negligent in abandoning the High Court in favour of the Magistrates Courts and therefore the reasons advanced for his absence from the High Court cannot therefore be treated as sufficient cause within the meaning of Order 9 rule 21 of the Civil Procedure Rules.

I will now consider the second reason advanced by the Applicant that prevented its representatives from attending court that is to say that the car the representative of the Applicant were travelling on the 5th of February 2019, got a mechanical failure, which prevented from getting to court in time. I did not doubt this reason advanced by the Applicant, as I believed that the representatives of the Applicant were honest and forth coming. Despite getting the accident, I credit the Applicant's Representative, for persevering and coming to the High Court on the day of the hearing. The applicants persevered because they were interested in pursuing the case to its logical conclusion in court. I am, however, disturbed by the conduct of the Applicant after the court granted the respondents leave to proceed exparte. The Applicant took about nine months to apply to court to set aside the exparte order. Here, the Applicants, were as negligent as their counsel, because they should have petitioned the court within three months or so to set aside the exparte order. On the face of it therefore, the Applicants have not demonstrated sufficient cause for me to set aside the exparte order.

Notwithstanding my reservations, I note that I am dealing with is a land matter, which affects the right to property for the respective parties. The right to property is protected in the Constitution under article 26 and can only be taken away after a party has been heard. I am equally mindful of the need to have serious land cases decided on merits by having all the parties heard. I am also, equally aware that the Respondent would not be prejudiced if I allowed the Applicant to present their case provided he is granted costs of the application and of recalling the witnesses who were heard by the court on 5th February 2019.

In view of the reasons assigned and in light of the powers conferred upon the court in **Order 9 rule 21 of the Civil Procedure Rules and section 98 of the Civil Procedure Act**, I find that this is a proper case for which I should sparingly use the inherent powers of the court to set aside the exparte order of the court dated 5th February 2019, despite negligence on the part of the Applicant and its counsel. The Applicant will however, meet the costs of this Application and the costs of recalling the Respondent's witnesses for purposes of cross examination. The Applicant must pay the taxed costs by 30th June 2020 or else they suffer the fate of not being heard in this matter.

Decision

I have allowed the application with the following orders: -

- a) The exparte order in Civil Suit No.0009 of 2011 entered against the Applicant on 5th February 2019.
- b) The Applicant shall pay the taxed costs of this application and recalling the respondent witnesses for cross examination by the 30th of June 2020 or else, the Exparte Order of 5th February 2019, will be confirmed.

It is so ordered.


Gadenya Paul Wolimbwa

JUDGE

2014/2020

All the parties are advised
that the court has allowed the application
and the applicant must pay the taxed costs
of this application and recalling the respondent
witnesses for cross examination by the 30th of June 2020
or else the exparte order of 5th February 2019
will be confirmed.