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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION NO. 1851 OF 2023
[ARISING FROM CIVIL SUIT NO. 757 OF 2018]

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DENIS AHAIWE] **APPLICANT**

VERSUS

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STANDARD CHARTERED BANK (U) LTD] **RESPONDENT**

Before: Hon. Justice Ocaya Thomas O.R

RULING

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Background

The Applicant brought this application under Section 98 of the Civil Procedure Act [“CPA”] and Order 22 Rule 23 and 26 and Order 9 Rule 27 of the Civil Procedure Rules [“CPR”]. The Application seeks the following reliefs:

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- (a) Judgment in Civil Suit 757 of 2018 be set aside.
- (b) Stay of execution doth issue of the judgment and decree of issued by this Honourable Court in Civil Suit 757 of 2018.
- (c) Costs of this Application be provided for.

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Applicant’s Case

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The Applicant contends that he was the defendant in Civil Suit 757 of 2018 [“The Main Suit”] in which he retained the services of Niwagaba & Mwebesa Advocates his counsel. The Applicant filed his written statement of defence in the above-captioned matter. The Applicant contends that shortly thereafter, he lost touch with the above said firm and did not receive updates from them regarding the progress of the case. The Applicant contends that, to his shock, he received a WhatsApp message from an



5 unknown phone number, +256782225890 which comprised of a notice to show cause why execution should not issue and the same was coming up on 6th June 2023.

The Applicant contends that he followed up and discovered that the said firm of Niwagaba & Mwebesa Advocates was defunct and could not offer him any legal
10 services. The Applicant maintains that he has never been served with any court correspondence and that he has a good defence to the entire claim, which he ought to have been allowed to substantiate on.

Respondent's Case

15 For the Respondent, this application was heavily opposed. The Respondent contended that it commenced the main suit against the Applicant for recovery of sums loaned to him. The Respondent obtained an exparte judgment rendered by this court on 27th January 2023.

20 The Respondent contends that on 31st January 2020, its advocates were served with a Notice of Change of Advocates indicating that M/s Obed Mwebesa & Associated Advocates had taken over conduct of the main suit on behalf of the Defendant. The Respondent's advocates resultantly sent an email to the above-mentioned lawyers for the Respondent seeking for input on a draft Joint Scheduling Memorandum. The
25 Respondent contends that a lawyer for the Applicant acknowledged receipt of the email and undertook to render a response.

The Respondent further contends that on 6th December 2022, the Respondent's lawyers wrote a letter to the Applicant's aforementioned lawyers, informing them of
30 the need to make their input to the Joint Scheduling Memorandum and of the hearing slated for 15 December 2022. The above said firm of Obed Mwebesa & Associated Advocates however informed the Respondent that they no longer had instructions. The Respondent contends that it then, through its counsel, took measures and informed the Applicant of the hearing but he Respondent stated that he was in Kisoro.
35 The Respondent adduced an affidavit of service to that effect.



5 It was also the case for the Respondent that the Applicant lacks a good defence to the
suit because (a) the insurance policy referenced by the Applicant only covered death,
disability and retrenchment and did not apply to losing a job. (b) no evidence was
attached to show that the total sum claimed was exorbitant or inflated and (c) the
Respondent attachment an account statement to its plaint to demonstrate
10 indebtedness.

The Respondent also contended that the Applicant did not provide security as
required by law, and that there was no evidence that the Applicant would suffer loss
if required to comply with the order to make payment to the Respondent and that the
15 balance of convenience favours it.

Representation

The Applicant was represented by M/s Obed Mwebesa & Associated Advocates while
the Respondent was represented by M/s S&L Advocates.

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Evidence and Submissions

The Applicant led evidence by way of an affidavit in support deposed by himself. The
Respondent led evidence by way of an affidavit in reply deposed by Jackline Nagasha,
the Respondent's recoveries manager. The Applicant did not file an affidavit in
25 rejoinder on November 30th 2023 and nor his written submissions in support of his
application as undertaken.

The Respondent filed written submissions the applicant having failed to file his which
I have considered in determining this application, along with all other materials on
30 record.

Decision

The Applicant's application is an omnibus application that seeks orders of setting
aside and stay of execution.

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It is trite law that an omnibus application may be brought where applications are of
the same nature, have the effect of mitigating a multiplicity of suits, one is a



5 consequence of the other or where no injustice would be occasioned by handling both applications. [See **Dr. Sheik Ahmed Kisuule vs Greenland Bank Ltd HC M.A No. 2 of 2012, Kapiri vs International Investments Ltd & 5 Ors HC M.A No. 160 of 2014 and ABSA Bank v Electromaxx (U) Ltd HCMA 21/176 of 2020]**

10 As long as the omnibus application is brought before a court with jurisdiction to grant both reliefs, and in a procedure that can accommodate both applications, then, the same is proper and should be entertained. Where however the court is not empowered to grant all the remedies sought or the procedure cannot accommodate all the applications, then the court should entertain and dispose the portion of the
15 omnibus application that is rightly before it and decline to grant the rest of the application/reliefs, referring it to the appropriate court or procedure. See **Gids Consults Limited & Anor v Naren Metha HCMA 864/2022, Abdul Kawuki v Habib Lukwago HCMA 1146/2022**

20 Setting Aside

Order 9 Rule 27 of the CPR provides thus:

“In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she
25 was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as
30 against all or any of the other defendants also.”

We must state here that applications for setting aside under Order 9 Rule 27 are distinct from applications under Order 9 Rule 12. In both rules, an Applicant will be applying to set aside an ex parte judgment (except in some circumstances where
35 judgment is entered under Order 50]. The judgment is exparte because it is achieved

5 at after the participation of only one side to litigation. [see **National Resistance Movement v Kampala Modernity & Printers Ltd HCMA 6 of 2016**]

Indeed, most of the judgments which will be sought to be set aside under Order 9 Rule 12 or Order 9 Rule 27 will be judgments issued after some sort of default by a litigant.
10 So, how does a party know under which rule to proceed? It depends on the default that allegedly caused the issuance of the judgment.

A party will proceed under Order 9 Rule 12 if the judgment was granted under the preceding rules (**that is Order 9 Rule 6, Order 9 Rule 8, and Order 9 Rule 10**) or
15 under **Order 50**. On the other hand, a party will proceed under **Order 9 Rule 27** where an exparte judgment has been given under any of the other rules of the CPR. [See **Nicholas Roussos v Gulamhussein Habib Virani & Anor SCCA 9/1993**].

Generally, where a party proceeds by the wrong law [for instance under Order 9 Rule
20 12 instead of Order 9 Rule 27], the same is not fatal for as long as the court is clothed with jurisdiction to hear the matter and the procedure utilised can accommodate the application. [See **Saggu v Roadmaster Cycles (U) Ltd 2002 1EA 258**]

Order 9 Rule 27 provides for setting aside of a judgment/decreed in two instances

- 25 (a) Where service of summons was not duly served
(b) A party was prevented from attending the hearing by sufficient cause

On record is an affidavit of service deposed by a one John Kikomeko. He states that he is an authorized process server. He indicates that he obtained hearing notices from
30 Mr. Andrew Munanura for service on the Applicant's lawyers, M/s Obed Mwebesa & Co. Advocates. When he attempted service, he was informed by the above-mentioned firm that they had lost contact with the client and no longer had instructions to handle the matter. Accordingly, the said firm refused to accept receipt of the hearing notices and/or endorse to acknowledge receipt of the same. It is notable that the above
35 communication was rendered by Mr. Obed Mwebesa himself, per the affidavit on record.



5 The deponent, John Kikomeko, indicates that he perused the loan documents and obtained the Applicant's phone number to wit 0752482909. He used this contact to call the Applicant inform him of the hearing schedule for 15th December 2022 and ask for access to him with the view of serving the hearing notices. The Applicant reportedly said he was in Kisoro and had not engaged new lawyers to represent him.
10 The deponent indicates that he could not be able to serve the Applicant but swears that he informed the Applicant of the above date.

For the Applicant, it was contended he lost touch with his counsel and did not receive updates on the progress of their case, not less the hearing of 15th December 2022, and
15 only found out that an exparte judgment had been issued when execution proceedings commenced.

It must be noted that at Obed Mwebesa & Associated Advocates had filed a notice of instructions on 31st January 2022. Accordingly, by the time of the service of hearing
20 notices (on 8th December 2022) the same firm, and not the firm of Mwebesa & Niwagaba Advocates, was the one acting for the Applicant/Defendant.

In **Nyanzi Ssentamu v Electoral Commission & Ors CAMA 10/2021**, the Court of Appeal held that a firm of advocates that is on record is deemed to continue having
25 instructions until a notice of cessation of instructions is filed on record. The evidence by Mr. Kikomeko in attempting to serve M/s Obed Mwebesa & Associated Advocates and them refusing to accept service is not disputed and I found it reliable. The said firm having refused to accept and acknowledge service, the same are deemed served as they had not right at law to decline service or refuse to endorse on process as
30 evidence of service.

Further, I noted that the evidence on record (specifically the affidavit of service) shows that the Applicant was informed of the date of the hearing but could not be served with physical copies of the same as he was not physically accessible. Where a party
35 take all reasonable measures to effect service and the party to be served (or their counsel) deliberately frustrate efforts to reach and serve them, depending on the circumstances, the court may deem service to have been made. This is the dicta in

5 **Andrew Mubiru v Susan Kasimbi HCMA 301/2015** cited by Counsel for the Respondent. I found myself persuaded by the said decision.

It follows that both the Applicant and his advocate were duly served with summons for the hearing where an order to proceed *ex parte* was given which resulted in the
10 *ex parte* judgment that the Applicant seeks to set aside. I therefore find that the Applicant has not demonstrated that the service of summons was ineffective as to render the *ex parte* judgment/decreed liable to be set aside.

Sufficient Cause Preventing Attendance

15 Is good cause the same as sufficient cause? In Uganda, the expressions "Good Cause" and "Sufficient Cause" have been used interchangeably, and to mean the same thing. In the Indian Case of **Parimal v Veema Civil Appeal No. 1467 of 2011**, the Indian Supreme Court defined "Sufficient Cause" this way;

""Sufficient Cause" is an expression which has been used in large number of Statutes.
20 The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this
25 context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that
30 whenever the court exercises discretion, it has to be exercised judiciously."

In the case of **Arjun Singh v. Mohindra Kumar & Ors., AIR 1964 SC 993** the Indian Supreme Court has this to say about "good cause" and "sufficient cause":

35 "The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause."



5 I note that the CPR uses “good cause” and “sufficient cause” in different instances. For instance, “good cause” is used in **Order 1 Rule 15, Order 36 Rule 11 and Order 9 Rule 21.**

On the other hand, the CPR uses “sufficient cause” in **Order 9 Rule 18, Order 9 Rule 26, Order 43 Rule 16 and Order 43 Rule 18**, among other instances.

A review of these rules quickly shows that the expression “sufficient cause” is used where a litigant must explain their default, or failure to take a step as directed by the law or court.

15 In my view, “good cause” and “sufficient cause” are not the same. “Good Cause” requires a party to show a legally sufficient reason why court should exercise a discretion in their favour. Good cause may exist in spite of a party’s own mistake; for instance, good cause may favour allowing a party amend a pleading to include a party who was mistakenly excluded or to amend their trial bundle and include a document they mistakenly forgot to include.

“Sufficient Cause” implies a much higher standard, requiring a party to show that they are not guilty of a default, or that it cannot be attributable to them. For instance, where an unrepresented party is hospitalised on the day of court, and accordingly an exparte decree is entered against them, there is sufficient cause to set it aside, since their failure to attend court is not a fault of their own.

I do not believe the rules committee were being colourful when they used “good cause” in one instance, and “sufficient cause” in another. They intended to apply two different standards.

Setting aside a decree is not a routine or simple exercise of judicial power. Once a decree is entered, it is ordinarily the end of the matter. However, the court is given unique powers to set aside its decisions either by way of appeal, review or setting aside in certain limited circumstances.



5 Therefore, the standard for sufficient cause is much higher than that for good cause, and requires a party seeking the intervention of court to be free of culpability for the default causing the application.

It is trite law that mistake, error, negligence or error on the part of the counsel should
10 not imputed on their client. [**Banco Arabe Espanol v Bank of Uganda SSCA No. 8 Of 1998**]. The plea of mistake of counsel is not a magic wand. As held in **Kateyo Eliezer v Makerere University LCMA 147/2021**, the legal proposition that a mistake or error of an advocate should not be visited on his client is not absolute; it depends on the circumstances of a given case.

15 Further, it is now settled law that inordinate delay and negligence to observe or ascertain plain requirements of the law are not mistakes of an advocate from which a client can be excused. [See **Bishop Jacinto Kibuuka v Uganda Catholic Lawyers Fraternity & Ors 696/2018**, **Kalyesubula Fred v Obey Christopher HCMA 171/2016**, **Eriga Jos v Vuzzi Azza & Ors HCMA 9/2017**]
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Therefore, mistake of counsel can constitute sufficient cause warranting the setting aside a judgment and/or decree under **Order 9 Rule 27**, but not always. [see **Nicholas Roussous v Gulamhussein Habib Virani & Anor SCCA 9/1993**]
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In **Fred Byamukama & Anor v Micheal Katungye HCMA 773/2023**, I dealt with failure of a party and their counsel to attend court being raised as sufficient cause under Order 9 Rule 27 thus:

“In the instant case, the mistake complained of was the omission by the applicants’
30 former counsel to attend court. The fact that a party has engaged an advocate is not by itself an excuse for a party not to attend court. The party ought to attend court, view the proceedings and, where applicable, participate. An advocate is there in supportive role, working to assist the client in their matter (be it claim or defence).

35 As I held in **Femisa International Limited & Anor v Equity Bank (U) Ltd HCMA 357/2022**, the act of engaging an advocate does not constitute an abdication of the litigant’s duty to diligently pursue their claim or defence. The client must consistently

5 check with their advocate and find out the progress of the suit. In the instant case, the Applicant contended evidence that they consistently followed up the progress of their suit with their former advocates who misrepresented to them that the suit was progressing well, whereas not.

10 “The Applicants did not adduce evidence, up to the requisite standard above, to show that they inquired from their lawyers about the progress of the case. There were no correspondences [Be they “formal” such as letters or emails or “informal” such social media messages adduced and nothing other than the deponent’s plain averment in the affidavit to show that the claimants regularly checked on the progress of their
15 case.” I found it more probable than not that the Applicants abandoned their case to their former advocates, and could have been made aware of the proceedings in the court earlier than they say they did.

There is no evidence on record of diligence and follow up by the Applicant in respect
20 of his lawyer’s conduct of the case which backs up the bare assertion that the Applicant followed up or that, inspite of this, there is sufficient cause that prevented the Applicant or his lawyers from attending court.

Even if the Applicant is to be heard to argue that the non-attendance of the hearing by
25 the Applicant’s advocates is sufficient cause, the same assertion would not be tenable because

(a) The same does not excuse the Applicant’s own absence without just cause. See **Fred Byamukama & Anor v Micheal Katungye HCMA 773/2023**

(b) Mistake of an advocate neglecting to attend court, without more, is negligence
30 to observe plain requirements of law and is not among the threshold of mistakes of an advocate which cannot be imputed on their client. It is now settled law that inordinate delay and negligence to observe or ascertain plain requirements of the law are not mistakes of an advocate from which a client can be excused. See **Bishop Jacinto Kibuuka v Uganda Catholic Lawyers Fraternity & Ors 696/2018, Kalyesubula Fred v Obey Christopher HCMA 171/2016, Eriga Jos v Vuzzi Azza & Ors HCMA 9/2017, Joseph Muyinza v**
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5 **William Tumusiime HCMA 820/2023, Femisa International Limited v
Equity Bank Limited HCMA 357/2022**

Accordingly, I find that the Applicant has not demonstrated sufficient cause warranting setting aside of the impugned judgment.

10 Stay of Execution

Once a judgment is entered in circumstances akin to the present case, only the overbearing interests of justice or the existence of circumstances referred to in Order 22 Rule 23 are sufficient reasons for grant of stay of execution. See **Byaruhanga**

15 **Mahmood v Top Finance Bank Limited HCMA 250/2023**

“(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution of the decree, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued by the appellate court or if application for execution has been made to it.

25 (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor the court may require such security from, or impose such conditions upon, the judgment debtor as it thinks fit.”

My understanding of **Order 22 Rule 23** is that it empowers the court to stay execution pending an application for stay of execution or the triggering of post judgment remedies such as appeals, reviews and setting aside.

Order 22 Rule 26 of the CPR requires the provision for security as a precondition for grant of stay of execution. The security need not be paid before the application is filed or determined, but the quantum of security is often determined in the ruling and must be paid in the timeframe imposed therein. See **Augustine Kasozi v Arvind Patel HCMA 503/2021, Luwa Luwa Investments v Uganda Revenue Authority**

5 **HCMA1336/2022, Uganda Debt Network v Edward Ronald Sekyewa HCMA
1657/2023.**

The Applicant has not pleaded that he required in order to pursue specific post
judgment reliefs, such as an appeal. In fact, the Applicant sought stay on the premise
10 that the main judgment ought to be set aside in order for him to be heard in the main
suit. Having found that no grounds exist for setting aside the judgment in the main
suit, and there being no other grounds in the pleadings warranting grant of a stay, it
follows that there is no reason to warrant a stay. Mere requirement to comply with a
decision of court (such as to perform an act or pay money) cannot be grounds for a
15 stay, even if it will impose a hardship, unless all other grounds for grant of a stay of
execution in the applicable law or rules exist. Judgments/decrees by their nature are
coercive and impose some hardship on a losing party, especially one who would not
have otherwise chosen to take the path of action decreed.

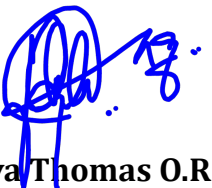
20 I therefore find no merit in the application for stay of execution.

Conclusion:

In the premises, the Applicant's application is dismissed with costs.

25 I so order.

Delivered electronically this 19th day of December 2023 and uploaded on
ECCMIS.

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Ocaya Thomas O.R

Judge

19th December, 2023

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