

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION No.1463 OF 2022
ARISING FROM CIVIL SUIT No.250 OF 2022**

LAKHI HIGH TECH LTD :::APPLICANT

VERSUS

DELHI PUBLIC SCHOOL INTERNATIONAL::::::::::::: RESPONDENT

Before Hon. Lady Justice Patricia Kahigi Asimwe

Ruling

Background:

The Applicant filed this application under Order 9 Rules 12 and 27 of the Civil Procedure Rules seeking the following orders:

- a) The interlocutory judgment entered on 28th September 2022 in H.C.C S No. 250 of 2022 be set aside;
- b) The Applicant be granted leave and extension of time within which to file a written statement of defence; and
- c) The costs of the application be provided for.

The background to this matter is that on 25th February 2022, the Respondent filed a suit against the Applicant seeking orders for breach of contract. On 28th February 2022, summons were issued to the defendant to file a defence. On 1st March 2022, Mr. James Okori swore an affidavit of service in which he stated that he called the Applicant's Director, Mr. Raghunath Kishori Vijay, about the summons. The director told him that he would come to his office to receive the summons and negotiate a settlement. The following day the director of the Applicant proceeded to the office and acknowledged receipt of the summons. On 28th September 2022, the matter was called for hearing and the Respondent applied for interlocutory judgment against the Defendant/Applicant for failure to file a defence within the stipulated time and that the



35 matter be set down for formal proof. Prior to doing so court directed
the clerk to find out from Mr. Raghunath Kishori Vijay whether he
had received the summons. Mr. Raghunath Kishori Vijay
confirmed to the clerk that he had received the summons.
Accordingly, judgement was entered against the Applicant and the
40 matter set down for formal proof. On 12th October 2022, the
Applicant filed the present Application in court.

The Application was supported by an affidavit sworn by Mr.
Raghunath Kishori Vijay, the Applicant's Director who stated as
follows:

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- i) That he was called by the Respondent's lawyers to receive
summons to file a defence. He then spoke to the Respondent's
director Mr. Sudhir Ruparelia, who assured him that the
dispute would be resolved by settlement and advised him to
50 see the Respondent's lawyers and have the matter closed.
- ii) He subsequently proceeded on a business trip to South
Sudan and India under the belief of the verbal assurances of
the Respondent's director that the matter would be settled.
He did not take any steps to file a Written Statement of
55 Defence until he received a phone call from a court clerk on
28th September 2022 informing him that the case was coming
up on 13th October 2022.
- iii) He subsequently engaged and instructed their lawyers whose
search on the file discovered that an interlocutory judgement
60 was entered against the Applicant on 28th September 2022.
- iv) He made an error of judgement and a mistake in failing to file
a defence.
- v) The Applicant was not served with any hearing notice or
summons for the hearing of 28th September.
- 65 vi) The Application was filed without delay; the Applicant is
interested in defending Civil Suit No.250 of 2022 to which he
has a counterclaim.

The Respondent in response filed an affidavit in reply sworn by Mr.
Sanjay Kumar Chandarana who stated as follows:

- 70 i) The Respondent's Director (Mr. Sudhir Ruparelia) did not give any verbal assurances to the Applicant's Director in regard to closing the case;
- 75 ii) The Applicant was duly served with summons to file a defence and was at all material times aware of Civil Suit No.250 of 2022 but negligently declined to file a defence, a fact conceded by its Director; and
- iii) Setting aside the interlocutory judgement will prejudice the Respondent who has diligently prosecuted the suit.

80 The Applicant filed a Rejoinder in which Mr. Raghunath Kishori Vijay stated that hearing the case on its full merits inter-parties would not in any way prejudice the Respondent.

Submissions:

The parties filed written submissions in accordance with the Court's directions.

85 Counsel for the Applicant cited a number of cases including: *Pinnacle Projects Ltd V Business in Motion HCMA No.362 of 2010* and *Mugo V Wanjiri [1970] EA 481 at 483* in support of the applicant's case that they had sufficient reason for not filing a defence.

90 Counsel for the Applicant while relying on the case of *Bankone Ltd V Simbamanyo Estates Ltd HCMA No. 645 of 2020*, submitted that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred.

95 Counsel also referred Court to the Kenyan case of *International Air Transport Association & Anor v Roskar Travel Ltd & 3 Ors [2022] KEHC 200 KLR* where court held that: "the defence if one has been brought to the Court, however irregular, should be considered, the question as to whether the Plaintiff can be reasonably compensated by costs for any delay occasioned should also be considered and
100 by costs for any delay occasioned should also be considered and that finally, it should always be remembered that to deny the subject a hearing should be the last resort of Court."

Counsel concluded that in the circumstances, the interlocutory judgement be set aside, the Applicant be allowed to file a Written Statement of Defence out of time and be awarded costs.

For the Respondent, Counsel submitted that none of the reasons advanced by the Applicant amount to sufficient cause to move this Court to set aside the interlocutory judgement.

He submitted that it is trite law that ignorance of the law is no defence. Counsel invited Court to consider the position in *Shamsudin Jiwan Mitha v Abdulaziz Ali Ladak [1960] 1 EA 105* to the effect that failure to instruct an Advocate does not amount to sufficient cause to set aside an interlocutory judgement. Counsel invited Court to adopt the position in *Kibuuka V Uganda Catholic Lawyers Society Miscellaneous Application No.696 of 2018* where the Court held that: “*sufficient cause means that a party had not acted in a negligent manner or there was want of bonafide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have not been acting diligently or remaining inactive.*”

Counsel maintained that the Applicant’s Director was guilty of dilatory conduct and Court should consider the fact that the Applicant seeks to file its Written Statement of Defence over six months after it was served with summons to file a defence. Counsel referred this Court to a paragraph in *Makula International v His Eminence Cardinal Nsubuga Civil Appeal No.4 of 1981 at page 16* to the effect that “*It is well established that a Court of law has no residual or inherent power to extend time for filing pleadings.*” In conclusion, Counsel prayed that this Application be dismissed with costs.

Resolution:

Under **Order 9 Rule 27** of the **Civil Procedure Rules** SI 71-1 it is provided as follows:

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 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 against all or any of the other defendants also.

Therefore, for court to set aside an *ex parte* judgement, the Applicant must satisfy the court that he or she was not duly served or that he or she was prevented by any sufficient cause from appearing when the suit was called for hearing.

In the present case, there is evidence on record that the Applicant's director was duly served with the summons to file a defence. The Applicant's director has not denied this service. He did, however, state in his affidavit that after receiving the summons, he contacted the director of the Respondent who assured him that the matter would be resolved by a settlement. I also note that the process server who served the director of the Applicant stated in paragraph 4 of his affidavit of service that Mr. Raghunath Kishori Vijay, the director of the Applicant had informed him that he would pick the summons and also negotiate a settlement. The Applicant's director admits that he made an error and mistake of failing to file a defence.

I find that the Applicant's director seems to genuinely have believed that the matter would be settled hence the failure to file a defence.

In the case of ***Banco Arabe Espanol V Bank of Uganda*** Supreme Court Civil Appeal No.8 of 1998, the supreme court while citing

175 that case *Essaji v. Solanki* (1968) EA 218 at 222 held that “the
administration of justice should normally require that the substance
of all disputes should be investigated and decided on their merits,
and that errors, lapses should not necessarily debar a litigant from
the pursuit of his rights.”

180 The failure to file a defence was an error on the part of the
applicant which as was held in the case of **Banco Arabe Espanol
V. Bank of Uganda** (Supra) should not bar the Applicant from
defending itself in this matter.

185 I also note that this application was filed without delay. The
Applicant after receiving a phone call from the court clerk on 28th
September 2022, about the main suit (Civil Suit No. 250 of 2022),
engaged lawyers who by the date of the next hearing had already
filed this present Application. The Applicant’s lawyers together
with their client represented by Mr. Raghunath Kishori Vijay made
an appearance at the hearing that was held on 13th October 2022.

Therefore, in the interest of justice the application is allowed and
Court orders as follows:

- 190 a) The interlocutory judgement entered on 28th September 2022
in H.C.C S No. 250 of 2022 is hereby set aside;
b) The Applicant should file its defence within 15 days from the
date of this ruling; and
c) The costs of the Application shall abide by the main cause.

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Dated this 13th day of December 2022

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Patricia Kahigi Asiimwe

200 **Judge**

Delivered on ECCMIS