THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(EXECUTION AND BAILIFFS DIVISION)

5 **MISCELLEANOUS APPLICATION NO. 3189 OF 2015**

(ARSING FROM EMA 2380 OF 2013)

(ARISING FROM CIVIL SUIT 514 OF 2013)

10 **1. MS KLEAN SERVICES LTD**

2. SUSAN J. OKURUT …………………..……………… APPLICANTS

VERSUS

15 **OPURE FRED……………………………………..……… RESPONDENT**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

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This application made under S.98 CPA and 0.52 C.P.R sought orders of this court to stay execution in civil suit 514/13 pending the hearing and determination of an application to set aside the default judgment and decree in civil suit 514/13.

25 Costs of the application were also applied for.

The application is supported by the affidavit of Lydia Mulindwa, the Manager of the First Applicant in which it is stated among other things that, the Applicants **intend** to file an application to set aside the default judgment and decree in civil suit 514/13. And that the
30 Applicants were not aware of the civil suit in which notice to show cause was issued and advertised in the Monitor Newspaper of 05.12.15.

There is an affidavit in reply deponed by the Respondent wherein he contends that the Applicants' affidavit is full of false hoods, as they were served with summons and were therefore aware of the suit.

Further that the application has no merit as the Applicants have never filed any application to set aside default judgment, among other things.

The application which was filed on 18.12.15 was first called on 17.05.16 although the motion indicates that it had earlier been given the date of 17th May 15 2016, which was crossed out and the date of 27.06.16 inserted.

On that date of 17.05.16, the matter was adjourned to 26.05.16, at the instance of Counsel who was holding brief for Counsel for the Respondent.

On 26.05.16, again Counsel for the Respondent was absent. Court directed hearing notices to issue and to be served on Counsel for the Respondent and matter was adjourned to 06.06.16.

On 06.06.16, the matter was again adjourned as Counsel for the Applicant claimed she had just been served with the affidavit in reply.

On 27.06.16, both Counsel were present and court was informed that the parties had agreed to reconcile their books and report back to court. The application was adjourned to 05.07.16 on agreement of both Counsel to give the parties a chance to try and settle out of court.

However, on 05.07.16, it was reported that the Applicants were not interested in the reconciliation and therefore there was nothing to report to court. This was confirmed by Counsel for the Applicants. Court accordingly decided to go ahead and determine the application.

Counsel for the Respondent then raised a preliminary objection. He contended that the application had no merit since there was no pending suit on which the application was premised and therefore court was not seized of jurisdiction to hear the matter under S.98 CPA.

It was pointed out that the application to set aside the default judgment had not been filed in any court and this was confirmed by the affidavit in support of the application paragraph 6.

And that without any application, court cannot act on the whims of the Applicant to stay the execution and it should be dismissed with costs.

5 In reply, Counsel for the Applicant insisted that court has inherent powers under S.98 CPA to take any action in order for the ends of justice to be met.

That since application arises out of an application for execution which is before this court, there is a pending suit.

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Further that the affidavit in support indicates **intention** to file application to set aside exparte judgment, since application could not be filed while the application for execution was pending and the mother file had been called to the Execution Division. A letter, Annexture A to the affidavit indicates that a request was made for the file to be returned to the mother station to

15 enable application to set aside be filed.

Counsel then prayed court to use its powers under S. 98 CPA to overrule the objection and hear the application for stay.

20 Counsel for the Respondent reiterated his earlier submissions asserting that without any pending suit before any court, the application for stay is misconceived and should be dismissed with costs.

Whether application is misconceived.

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Under S.98 CPA, ***court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.***

The Applicants in the present case seek to stay execution. As pointed out by Counsel for the

30 Respondent and rightly so, the application is premised on an application for setting aside the default judgment and decree in civil suit 514/2013.

However, as clearly indicated by the affidavit in support of the application paragraph 6, the Applicants have expressed the intention to file the application to set aside the exparte judgment and decree but no application has actually been filed.

While the Applicants contended that they were not aware of the suit and have since becoming aware of the same applied for the file to be returned to Nakawa Court to enable them file necessary application to no avail, a look at the lower court record indicates otherwise.

The suit was filed on 26.09.13, summons were issued on 07.10.13. According to the affidavit of service, service was effected on 08.10.13 and the Second Defendant received the summons and the plaint although she declined to sign. Affidavit of service is dated 07.11.13 and it was filed in court on 23.12.13. Judgment was entered against the Defendants jointly and severally on 23.01.14.

The decree was extracted on 26.08.14. The file was forwarded to the Execution Division on 18.09.14.

Notice to show cause was issued twice on 23.03.15 and 23.06.15 respectively. Court even directed that the notice to show cause be served by way of substituted service where upon it was advertised in the Daily Monitor Newspaper of Friday 10.07.15. The file indicates that this was done after the Second Respondent, a Director in the First Applicant Company again refused to sign to acknowledge receipt of the notice to show cause.

On 18.12.15, Counsel for the Applicants appeared in court and stated that applications had been made to set aside exparte judgment and to stay execution. Court decided to stay the matter pending the outcome of the two applications.

Since 18.12.15, it is over six months and no application to set aside exparte judgment has been filed.

Counsel for the Applicants' argument that they applied for the file to be sent back to Nakawa to enable them file the application to set aside judgment cannot be sustained as it appears to have

not been followed with any action. Yet, this application for stay is premised on the application to set aside exparte judgment.

The letter to the presiding Magistrate asking for file to be called from the Execution Division to enable Applicants file application to set aside judgment is dated 17.12.15. If the Applicant had not got the file, why then did they inform court on 18.12.15 that an application to set aside exparte judgment had been made instead of filing the same? They could have got a copy of the decree and the plaint from the Execution Division but preferred not to do so but instead went ahead to rely on an application that they have not filed.

In the circumstances, this court finds that it would be a waste of time to hear the application for stay which is premised on a non-existent application and it would indeed be an abuse of the process of court for to invoke its inherent powers to make such orders and it would result into an injustice to the Respondent, yet S.98 CPA was meant to make ends of justice meet and to prevent abuse of the process of court.

For all those reasons, court is constrained to agree with Counsel for the Respondent that the application is misconceived. The objection is therefore upheld and the application is dismissed with costs to the Respondent.

Applicants were offered an ohne branch to reconcile accounts which they have declined to do and it would seem they are just buying time hoping that the decree will go away by itself, which is not the case.

Flavia Senoga Anglin
Judge
11.07.16