THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - OS – 248- 2007
(Arising out of Civil Suit No. 735 – 2006)

INSPECTORATE OF GOVERNMENT :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

AMERICAN PROCUREMENT CO. LTD :::::::::::::::::::::::::: 1ST RESPONDENT

ATTORNEY GENERAL :: 2ND RESPONDENT

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

The applicant The Inspectorate of Government (hereinafter referred to as "IGG") filed this application by Notice of Motion seeking orders that the court order and decree entered by the Registrar on 8th February 2007 in **Civil Suit No. 735 of 2006, American Procurement Co. Ltd V Attorney General**, be reviewed and set aside; and a declaration that the said decree and order is null and void for it was entered in error and was unenforceable against the government. The applicant also prays for the costs of this application.

The grounds of the application as set out in the Notice of Motion are that:-

1- The Registrar erred in law and fact when he disregarded the court orders, which was on record, arising out of **Miscellaneous Application No. 20 of 2007 (Inspector of Government V American Procurement Co. Ltd,** and the **Attorney General)**. That joined the applicant to the suit as a 2nd defendant;

2- The Registrar acted in erred when he entered the decree and taxed ex parte the Bill of Costs without ascertaining or appreciating the entire record of proceedings;

3- The applicant is aggrieved by the erroneous decree which was never brought to the inspectorate's attention and when the applicant had extracted a court order and filed a written statement of defence.

4- The irregular decree and order as granted by the Registrar is likely to cause irreparable loss to the Government of Uganda and the same ought to be reviewed and set aside;

5- Counsel for the 1st Respondent never opposed the application from which the order joining the applicant was made and no injustice will be occasioned to the 1st Respondent when the reliefs sought under this application are granted.

The facts surrounding this application can be derived from the affidavits filed in support and opposition to the motion.

In her affidavit in support of the motion, dated 17th April 2007, Lady Justice Faith Mwondha stated that through a letter dated 11th December 2006 and signed for Solicitor General by the Acting Director of Civil Litigation, Mr. Joseph Matsiko, the Solicitor General referred the matter in HCCS No. 735 of 2006 **American Procurement Company Ltd Vs Attorney General** to the IGG to handle in court because the applicant IGG had halted payment of the plaintiff / 1st Respondent's fees on the grounds that investigations were being conducted by the Applicant/IGG on a purported contract between the Ministry or Works, Housing and Communication and the 1st Respondent. The 2nd Respondent/Attorney General had by this time filed no written statement of defence. The IGG states in para 3 and 4 of the same affidavit and pursuant to the said letter, that the applicant filed **Miscellaneous Application No. 20 of 2007** to be joined as a party to **HCCS No. 735 of 2006** which was argued without objection from counsel for the 1st Respondent on the 31st January 2007. That the court order joining the applicant as a 2nd defendant to the suit was filed and extracted from court on the 2nd February 2007 with the knowledge of His Worship Eudes Keitirima the Registrar and served on the 1st Respondent and the Attorney General / 2nd Respondent on the 5th February 2007 (Annexture "C").

The IGG states further, in para 5 of the same affidavit, that the 1st Respondent / plaintiff was expected, as required by law, to amend and serve his pleadings on the Inspectorate of Government but by the time the Applicant filed its written statement of defence based on the pleadings as contained in the original plaint on 21st February 2007, no amended copy of the plaint had been filed and/or served on the applicant.

In the supplementary affidavit dated 20th April 2007 the IGG stated (in para 8 and 9) that, as apparent on the face of the record, on the 8th February 2007 and after allowing the application joining the Inspectorate as a 2nd defendant to the suit, the plaintiff/1st Respondent (American Procurement Co. Ltd) argued **Miscellaneous Application No. 930 of 2006** before The Registrar and entered a default judgment of Shs.4,163,593,643/= against the Government. That the plaintiff filed and extracted the decree on the same day of 8th February 2007, and that there was no notification to the IGG about the decree by the 2nd Respondent/Attorney General, who has sent the file to the Applicant to the Inspectorate to handle in court, nor by counsel for the plaintiff who had known that the Inspectorate of Government was a party to the proceedings.

The IGG states in para 10 of the same affidavit that the Attorney General who never objected to the decree in default thereafter executed various deeds of assignment with the plaintiff company in respect of various properties in order to offset the decretal amount of the suit pursuant to the letters dated 27th March 2007 from American Procurement Co. Ltd and Robert Mwesigwa attached as Annextures "D" and "E" (copies of the deeds are attached and marked "F" and "G").

The IGG concludes therefore (in para 18) that the aforementioned series of events that followed the irregular entry of the default judgment and the decree by His Worship the Registrar on 8th February 2007 vide HCCS No. 930 of 2006, which is the subject of investigations by the Inspectorate of Government will occasion irreparable

loss to the Government of Uganda and that it is judiciously important to have it set aside or reversed by court.

The 1st Respondent opposes that application stating that it is misconceived, lacks merit and is not grounded in law, and should be dismissed with costs.

In the affidavit sworn by Robert Mwesigwa, CEO of the 1st Respondent (in para 5 and 7) he admits that the applicant was joined as a defendant to the main suit and filed a written statement of defence but states that the other defendant/2nd Respondent/ Attorney General did not file a defence and the 1st Respondent was perfectly within its right to apply for judgment as against the said defendant. He states further that no judgment has been entered against the applicant and that the 1st Respondent's claim of Shs.4,163,593,613 could not be argued or enforced against the applicant.

In his affidavit dated 11th May 2007, Mr. Komakech Geoffrey counsel for the 1st Respondent states that the mere fact that the applicant IGG was joined as 2nd defendant did not divest the Registrar of the power to enter judgment against the 1st defendant/Attorney General who had not filed any defence to the claim, nor does it entitle the applicant IGG to apply to set aside a judgment against the 1st defendant /Attorney General who had not filed any defence (para 7 and 8). He states further in para 9 of the affidavit that the Government will not suffer any irreparable injury but rather the 1st Respondent who stands to lose in case the order is set aside (para 10).

The 2nd Respondent/Attorney General also opposed the application by the Applicant IGG contending that it did not disclose sufficient grounds and was bad in law and

misconceived. The 2nd Respondent relies on the affidavit sworn by Mrs. R. G. Rwakoojo, a Principal State Attorney and Acting Director of Civil Litigation in the chambers of the Attorney General, dated 7th June 2007.

In para 6 of that affidavit its stated that when the 1st Respondent initiated legal proceedings against the 2nd Respondent/Attorney General by serving a Statutory Notice of intention to sue, the 2nd Respondent/Attorney General wrote to the Ministry of Works, Housing and Communications requesting for instructions to defend them, and that in reply the Permanent Secretary in the letter dated 31st July 2006 (Annexture "B") stated that the plaintiff/1st Respondent's claim was correct and that the reason the Ministry of Works, Housing and Communication would not pay was because the fees notes of the plaintiff/1st Respondent were under investigation and blockade by the applicant/IGG.

The defendant states further that the 2nd Respondent/Attorney General was of the opinion that it did not have a defence to the suit and that when it was served with the application to enter default judgment by the 1st Respondent, the 2nd Respondent/Attorney General sent the application and records to the Applicant IGG herein for its consideration vide letter dated 11th December 2006 (see para 9) on the affidavit. Furthermore the applicant IGG who had been joined as 2nd defendant to the suit on 31/01/07 vide a court order extracted on the 2nd February 2007, failed and/or neglected to attend court to protect its interests when the application for default judgment was fixed, resulting in the Registrar entering judgment against the 2nd Respondent (see para 11).

In the applicant's affidavit in rebuttal of the 1st Respondent's affidavit, The IGG states (in para 5) that Miscellaneous Application No. 930 of 2006 intended to have a default judgment entered against the government was overtaken by Miscellaneous Application No. 20 of 2007.

The IGG asserts in para 7 that it was erroneous for counsel for the 1st Respondent and the Registrar both of whom were aware of the court order on record to enter a judgment in default against the Government on 8th February 2007 when the position of the file had changed and when the applicant IGG herein had filed a written statement of defence within the time prescribed by the rules. The IGG further asserts that the 1st Respondent had not shown that any irreparable injury that would be occasioned if this application was allowed.

The IGG further in rebuttal of the 2nd Respondents/Attorney General's affidavit in reply denies that there was no defence to the suit when the Attorney General had received instructions from the Permanent Secretary, Ministry of Works that the purported contract was a subject of investigations by the IGG who had halted payment.

The IGG deponed that it was erroneous for the 2nd Respondent to have not opposed the default judgment entered by the Registrar on 8/02/07 and to have neglected, failed or ignored to refer the same to the IGG/Applicant to whom the file had been sent for handling in court (para 13).

The IGG further deponed that it was further wrong for the A.G./Solicitor General thereafter to have executed the various deeds of assignment in an effort to settle the decretal amount of Ug.Shs.4.1bn without the knowledge of or reference to the IGG who was handling the investigations and who had halted the payment to the 1st Respondent (See para 14).

In IGG's opinion therefore, as expressed in para 15 of the affidavit, both the arguments of the 2nd Respondent/Attorney General were designed to frustrate the constitutional functions of the Applicant embodied in the 1995 Constitution and the Inspectorate of Government Act, and the same cannot be sustained to oppose the applicant's application.

The applicant brought this application under Order 9, rule 12 and 27, Order 46, rule 1 and 2, Order 50 r. 8, Order 52 r 1 and 3 of the Civil Procedure Rules S. 1 71-1, and Ss. 82 and 98 of the Civil Procedure Act (Cap 71).

0.9 r. 12 of the CPR provides that;

> *"Where judgment has been passed pursuant to any of the proceeding rules of this order, or where judgment has been entered by the Registrar in cases under O.50 of these Rules the court may set aside or vary the judgment upon such terms as may be just".*

Miscellaneous Application No. 930 of 2003 was filed before the Registrar seeking default judgment based on the fact that the defendant in the original suit/the Attorney General had filed no defence for as stated by Mrs. Rwakoojo, a Principal

State Attorney in the chamber of the Attorney General, in para 7 of her affidavit dated 7/06/07, the Attorney General was of the opinion that he had no defence to the suit. Clearly, in entering the judgment in default in the application, the Registrar exercised his judicial powers under O.50 r. 2 of the CPR which provides that-

> *"in uncontested cases and cases in which the parties consent to judgment being entered in agreed terms, judgment may be entered by the Registrar".*

Order 9 rule 12 confers on a Judge very wide discretionary powers to set aside or vary an ex-parte judgment upon such terms as may be just. The rationale for this lies largely on the premise that an ex-parte judgment is not a judgment on the merits and where the interest of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing.

In

Nyombi V Ann Mary Nalongo [1987] HCB 82

It was held that the reasons for setting aside an ex-parte judgment were unlimited. Furthermore the court has wide discretion to look at the whole proceedings of the ex-parte judgment and the subsequent actions taken.

In **Ramanbal J. Patel V M/S Madhvani International** HCCS 891/1990 (unreported)

It was further held that in order to set aside an ex-parte judgment the applicant must show that he has a prima facie defence and satisfy court that there is a reasonable explanation why ex-parte judgment was entered against him.

The applicant's argument is that it was erroneous for counsel for the 1st Respondent and the Registrar to entertain the said application and enter judgment in default against the Government on 8th February 2007 when the position of the file had changed.

I agree that by the time **Miscellaneous Application No. 930 of 2006** was argued before the Registrar the position of the main suit had changed. The IGG/applicant was a 2nd defendant thereto it was clear from the Solicitor General's letter to the IGG (dated 11th December 2006) that the main suit had been referred to the IGG by the Attorney General to handle it in court. It was also clear from the affidavit sworn by David Makumbi in support of **Miscellaneous Application No. 20 of 2007** dated 1the January 2007, that the IGG opposed the plaintiff's claim and had halted its payments based on a complaint received by the IGG that the plaintiff's claim was based on an illegal/irregular contract between the plaintiff and the Ministry of Works, Housing and Communications and that the IGG/Applicant was investigating the matter within her powers and functions as laid out in the constitution and the Inspectorate of Government Act of 2003.

The applicant also states that she did not attend court to oppose **Miscellaneous Application No. 930 of 2006** before the Registrar on 8th February 2007 because not only had the application been overtaken by **Miscellaneous Application No. 20 of 2007** which was served on the 1st Respondent on 19th January 2007 (Annexture "A" to the IGG's affidavit in rebuttal of the 1st Respondents affidavit in reply) but also because she had expected the 1st respondent to amend his pleadings to reflect the

IGG as a 2nd defendant to the main suit and to serve them on the IGG, which was never done. She states however that she filed a written statement of defence within time prescribed by law based on the 1st Respondents original pleadings.

It is a statutory requirement under O. 1, r. 10(4) of CPR that;

> *"where a defendant is added or substituted the plaint shall unless the court otherwise directs be amended in such manner as maybe necessary and amended copies of the summons and of the plaint shall be served on the new defendant and if the court thinks fit on the original defendants".*

And under O.1, r. 10(5) of the same rules;

> *"for the purposes of limitation the proceedings against any person added or substituted as defendant shall be deemed to have begun only on the service of the summons on him or her".*

Both respondents concede that although at the time of hearing **Miscellaneous Application No. 930 of 2006** on 8th February 2007 the Applicant/IGG had obtained a court order joining her as defendant to the main suit, no amendment of the pleadings had been made by the 1st Respondent to reflect this or served on the Applicant/IGG and that the IGG's WSD was filed within time.

It has been argued that ex-parte judgment was not entered against the Applciant/IGG but rather the 2nd Respondent/Attorney General so the Applicant/IGG has no cause to complain. In fact counsel for the 2nd Respondent/Attorney General Mr. Mwaka argued that the Attorney General did not apply to set aside the ex-parte judgment,

suggesting that the Attorney General was happy with the ex-parte judgment as they had no viable instructions to defend the case. He went further to argue that the Applicant/IGG could not apply to set aside the said ex-parte judgment against the Attorney General on their behalf. The arguments between counsel for the Applicant/IGG and 2nd Respondent/Attorney General were very baffling for a Judicial Officer. Both parties ideally sought to represent the interests of the Government of Uganda albeit with opposing and contradicting positions. Whereas I agree that technically the IGG and Attorney General can be parties in their own right and so a default judgment can be entered against one irrespective of the other, yet in reality and substance they are the same party; that is The Government of Uganda. Now in this case, an ex-parte judgment against the Attorney General is a de facto judgment against the IGG thus rendering her defence of the matter nugatory!

This is evidence of confusion on the Government side. In any event if the requirements of order 1 rule 10(4) of the CPR had been followed to amend the pleadings this circus would have been spared us.

It is written statement of defence para 4 of the Applicant/IGG states that she received a complaint on alleged fraudulent payment of Ug.Shs.5bn to the plaintiff which payment was premised on a fraudulent contract between the Ministry of Works, Housing and Communications and the plaintiff/1st Respondent. She states further that upon preliminary investigations the applicant/IGG found it necessary to halt the payment as empowered under the constitution until the investigations are completed.

It is however incredible that, with knowledge of the IGG's investigations of the plaintiff/1st Respondent's claim and that she had halted payment of the claim, and after referring the main suit to the IGG to handle it in court, the 2nd Respondent/Attorney General went ahead to **"execute"** (inverted comas emphasis mine) various deeds of assignment with the plaintiff in respect of various properties. (copies of the deeds are marked "F" and "G", attached to the applicant supplementary affidavit in support of the application), in order to offset the decretal amount of the suit, and without notice to the IGG.

In any event a close look at the deeds of assignment (marked "G" and "F") dated 29th March 2007 will show that whereas they were signed by the Assignor, Mr. Robert Mwesigwa and Debtor being The Ministry of Justice and Constitutional Affairs, The Assignee being The Privatisation Unit did not sign both of them. Clearly on the face of the deeds they are executory not executed. I doubt if Government would have honoured the deeds without the signature of the Assignee.

In the circumstances as discussed above therefore, it is befitting for court to exercise its powers to set aside the ex-parte judgment on the grounds of that looking at the proceedings as a whole the file had changed, and thereafter there is evidence of irregularity and confusion as to who the parties to the suit are. The IGG is accordingly given an opportunity to defend her position based on the merits of the case.

The decree/order is therefore set aside. Costs are for the Applicant.

Geoffrey Kiryabwire

JUDGE

Date: 30/08/07