THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO. 944 OF 2022

[ARISING FROM CIVIL SUIT NO. 336 OF 2015]

KALYESUBULA AKUWATI] APPLICANT

VERSUS

1. **BANK OF AFRICA] RESPONDENT**
2. **CORONET CONSULT LIMITED]**

Before: Hon. Justice Ocaya Thomas O.R

RULING

Background

The Applicant brought this application under the provisions of Sections 14 and 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Orders 9 Rule 18 and 52 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following reliefs:

(a) The order of dismissal of Civil Suit No. 336/2015 be set aside.

(b) A day for proceeding with Civil Suit No. 336/2015 be set/ appointed.

(c) Costs of this application be provided for.

The Applicant contends that he filed HCCS 336/2015 ["the main suit"] seeking a number of reliefs against the Respondents. Thereafter, sometime in April 2022, the Applicant got a call from a person not known to him saying he should repay a loan of UGX 600,000,000 to the 1st Respondent which he was not aware of.

The Applicant contends that after this phone call, he remembered a case he had with the Respondents for losing his merchandise but was sure that the same matter was still before court as he was in touch with his lawyers at the time M/s Kabega, Bogezi and Bukenya Advocates who informed him that the matter was still pending.

The Applicant avers he called his lawyer, a one Joan Akello and informed her about the call he had just gotten. She informed him that she had requested the court for a hearing date and would call him back as soon as she got one. The Applicant avers that he made numerous calls to the said advocate but the same were not answered.

The Applicant avers that because of this, he contacted the firm M/s DIT Advocates for assistance to follow up his case since the firm of M/s Kabega, Bogezi and Bukenya Advocates were not responsive yet the bank was frequently calling him.

The Applicant states that his new counsel, M/s DIT Advocates informed him that the main suit was dismissed on 23 March 2021 on account of neither party appearing for the hearing of the matter. The Applicant further contends that he has been appearing in all court hearings and filing the necessary documents including trial bundles and scheduling notes. The Applicant asserts that he was prevented from attending the hearing on 23 March 2021 because he was not informed of that the case was coming up for hearing and that his former advocates did not attend court on that day for whatever reason.

The Applicant asserts that he has always been in touch with his former advocates inquiring on the progress of the suit and was always assured that the matter was proceeding normally with no mention of the dismissal of 23 March 2021. It is the Applicant's contention that the main suit was a merited cause and would be unjustly dealt with by a dismissal on account of neither party attending court and that the Applicant is always willing and able to prosecute the matter.

For the 1st Respondent, this application was opposed. The 1st Respondent contended that:

(a) The Applicant did not show any diligence in prosecuting the main suit.
(b) The Application for reinstatement was brought eighteen (18) months from the date when the court dismissed the suit for want of prosecution.
(c) Delay in instituting this application is unjustified and amounts to dilatory conduct on the part of the Applicant.
(d) The reasons supporting this application are matters of professional negligence for which the Applicant can invoke professional liability.
(e) Kabega, Bogezi and Bukenya advocates were the Applicant's agents and any communication shared to them were imputed on the Applicant.

For the 2nd Respondent, this application was also opposed. The 2nd Respondent contended that:

(a) The Application to set aside was filed way out of time and ought to be dismissed with costs.

(b) The present application is frivolous and ought to be dismissed with costs.

(c) The Applicant's evidence is tainted with falsehoods

Representation

The Applicant was represented by M/s DIT Advocates, the 1st Respondent was represented by M/s ENS Advocates and the 2nd Respondent was represented by M/s Ahamya Associates & Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support and rejoinder deponed by himself. The 1st Respondent led evidence by way of an affidavit in reply deponed by Fahad Mwanga, the 1st Respondent's legal manager, litigation. The 2nd Respondent led evidence by way of an affidavit in reply deponed by Christian Baine, a director of the 2nd Respondent.

All counsel made submissions in support of their respective cases which I have read and factored in before arriving at my decision below. As submissions are not evidence, I have not felt the need to reiterate the same below, also for purposes of judicial economy. However, I am thankful for all counsel for their submissions.

Decision

Order 9 Rule 18 of the CPR provides thus

"Where a suit is dismissed under rule 16 or 17 of this Order, the plaintiff may, subject to the law of limitation, bring a fresh suit or he or she may apply for an order to set the dismissal aside; and if he or she satisfies the court that there was sufficient cause for his or her not paying the court fee and charges, if any, required within the time fixed before the issue of the summons or for his or her nonappearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

It follows that for this court to set aside the order dismissing the main suit and reinstate the same, the Applicant must demonstrate that there was sufficient cause for non-appearance when the suit was called for hearing. See **Kisam Investments (U) Limited v The Attorney General HCMA 742/2023**

Sufficient Cause Preventing Attendance

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. 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 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 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":

"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."

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. 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.

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 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.

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.**

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**]

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 check with their advocate and find out the progress of the suit.

The Applicant led evidence to the effect that he constantly and regularly followed up the conduct of his matter with his lawyers. He contends that his lawyer neither attended court nor informed him of the date which are both mistakes of the advocate that should not be visited on him.

Mistake of an advocate neglecting to attend court, without more, is negligence 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 **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.**

An Applicant who claims a mistake of an advocate who they have since disengaged should ideally show what action they have taken against the advocate or firm, as further evidence of the genuineness of their case. See (broadly) **Colleb Katorogo & Anor v GROFIN SGB & Ors HCMA 534/2021, Valentine Omollo Ongeso v Kennedy Odenge (2021) eKLR. Fred Byamukama & Ors v Micheal Katungye HCMA 773/2022**

Where no evidence of the same is present, it makes their assertions less reliable, especially if the said firm has not been joined as a party in order for it to be heard. See **Joseph Muyinza Bunoli v William Tumusiime HCMA 820/2023, Byaruhanga Mahmood v Top Finance Bank Limited HCMA 250/2023**

In this case, the Applicant contends that their former advocate did not only fail to attend court but failed to alert him of the day of court. Whereas I take the view that the mistake of counsel in the present circumstances was one which could not be visited on the Applicant, I found the evidence that the Applicant's former advocate did not inform the Applicant, which information would have assisted the Applicant to be in court on the day the matter came up even in the absence of their advocate, where at the very least an adjournment could have been requested.

Moreover, the evidence that the Applicant was always in court when the main suit came up except when it was dismissed was not challenged by the Respondents demonstrating days when the Applicant was not in court for instance. The Respondents asserted that he was not diligent, but did not show how indeed the Applicant was not a diligent litigant. As was held in **Night Nagujja v Namuwonge Agnes & Ors HCMA 1878/2021**, it is not enough for a party to throw unsubstantiated allegations at the court, hoping that the court will fill in the gaps, speculate or use its powers to separate the hay from the chaff. It is trite law that courts base their decisions on evidence and not assumptions, abstractions or innuendos. See Also **Centenary Bank v Federation Of Association Of Uganda Exporters Limited & Ors HCCS 474/2016, Luswata Mary Veronica v Exim Bank HCMA 1118/2023**

Accordingly, and subject to the rest of my findings below, I find that there is sufficient cause for granting the reliefs sought.

Inordinate Delay

The Respondents contended that this application was inordinately delayed. Counsel for the 1st Respondent contended the Application for reinstatement was brought eighteen (18) months from the date when the court dismissed the suit for want of prosecution and accordingly, the same should be declined. The main suit was dismissed on 23 March 2021 and the Applicant's application was filed in May 2022.

It is the Applicant's evidence that he first got signs that the conduct of the main suit was not proper around April 2022. The Applicant asserts that only on 4 May 2022 was the Applicant made aware by his new advocates of the dismissal of the suit. [See paragraphs 3-9 of the affidavit in support]

An inordinate delay is a delay that is unusually or disproportionately large or excessive. See **Abel Belemesa v Yesero Mugenyi HCMA 126/2019**

Where a party takes an inordinate delay in seeking for a relief, the court may refuse to grant that relief. see **David Muhenda v Humphrey Mirembe SCCA 5/2012**, **Wilberforce Muhangi v Kamusinga Faith HCMA 128/2023, Patrick Katto v De Brink HCMA 791/2023.**

A delay of even more than a few weeks is, in most cases where a corrective remedy such as setting aside, review or appeal is sought is an inordinate delay, especially where a very compelling reason for such delay cannot be provided. A litigant who seeks corrective remedies should be vigilant, diligent and act expeditiously, and should commence proceedings to obtain the sought reliefs as soon as possible.

I have not found evidence to suggest that the Applicant was aware of the dismissal prior to the date declared in his affidavit, or that he ought to have known. Counsel for the Respondents contended that the Applicant ought to have known that of the date of the hearing and its consequent dismissal owing to the fact that this information was known or could have been known by the Applicant's advocate whose knowledge is imputed on the Applicant. I don't agree with this view. The knowledge of an advocate will not be imputed on their client if the advocate is not acting "for and on behalf of a client". The basis of this in the law of agency, which enunciates the principle that unless an agent is acting for and on behalf of the client, they are acting on the frolic of their own and their actions cannot be imputed on the principal. See **Fredrick JK Zaabwe v Orient Bank SCCA 4/2006**

Therefore, it cannot be said that the neglect of the Applicant's former advocates of his case could be seen as an action "for and on behalf of" the Applicant. Accordingly, I am

inclined to believe the Applicant's evidence on this head, and I therefore return the finding that the present application is not inordinately delayed.

Interests of Justice: Safeguards

The main suit arises from a credit transaction between the Applicant and the 1st Respondent.

In **Luwa Luwa Investments v Uganda Revenue Authority HCMA 1336/2022**, I held thus:

> "As this a Commercial court, the decisions of the court should be cognizant of economic realities in Uganda today. For a business, loss of cash flow can be akin to driving a dagger at the heart of a person, who will most certainly die. Surely, that should be a consideration that court should look at to identify the justice of the case. Moreover, Uganda, like many African countries experiences high costs of credit, which mean that borrowing to replace lost cash flow can be difficult or ruinous. This, coupled by inflation, that can affect the value of money retained means that the retention of money from a business can cause "irreparable damage" …. Tax is the life blood of government. The state relies heavily on tax to be able to perform its functions including to govern, provide welfare, execute public projects and ensure security. This is ever more critical in Uganda, which has a history of instability as a result of, to some extent in my view, the absence of the state or its inability to discharge its roles. Uganda is also uniquely placed at this time; it exists in a fairly turbulent region which poses security threats to the state and people of Uganda as well as to our neighbours. The state must therefore have the resources to fulfil its functions, and have them on time.
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> On the other hand, the people must have an efficient and permissive environment to challenge tax assessments which they find to be incorrect, and not be prevented from pursuing reversals, either at first instance or appeal because of onerous pre-conditions. There should be a balancing act. In each case, the court should consider all the circumstances together and give a decision that best achieves the justice of the case."

In **Stanbic Bank Limited v Kesacon Services Limited HCMA 724/2023** I dealt with some of the policy considerations relating to how this Court considers applications/actions involving money or its recovery

"The role of the Commercial Court in my view is to ensure that there is expeditious disposal of suits to avoid thrombosis in commerce occasioned by a backlog of an unresolved commercial claims or disputes. This is more so where the claims are for money. It must be recalled that money is an asset and a lengthy period of its retention means credit will become more expensive as lenders are precluded from putting their monies to use and will shift to prefer institutional borrowers that are unlikely to default as opposed to other borrowers. This has the effect of raising the cost of money and making it difficult, if not impossible, especially for domestic borrowers to access credit."

See also **Ropani International Limited & Ors v DFCU Bank Limited HCMA 1919/2023**

As I noted in Kesacon (above) the court is cognizant of the need for players in the debt market to recover sums advanced and unpaid expeditiously. This is balanced with other considerations including the need to protect borrowers from oppressive, illegal or unconscionable agreements, the right for parties to be heard (both at first instance and on appeal) among other rights. Once the amount of a debt is certain, it is the role of a court approached by a creditor to facilitate, within the letter of the law, the exercise of their recovery rights. If such recovery rights are impeached by fraud, illegality, duress, undue influence, unconscionability or such other factors, then the court has a duty to provide redress to a borrower. The court is therefore mindful of the fact that delays in recovering a debt that has become ascertained affects the financial solidity and/or profitability of lenders but also negatively affects the debt market by making debt more expensive (owing to higher recovery risks) or less accessible (owing to a lot of monies being tied up in non-performing unrecovered debt). See also **Aya Investments Limited v Industrial Development Corporation Of South Africa HCMA 3063/2023**

Whereas the Applicant has demonstrated sufficient cause, the 1st and 2nd Respondent are going to be dragged back into litigation by no fault of their own, on the basis of the evidence before me.

In recognition of the harm that long, protracted and non-diligent litigation can cause, some jurisdictions require a litigant to ensure their case is not only prosecuted, but diligently prosecuted and in the event that the same is not true, reliefs of reinstatement may be denied. See (for example in Nigeria) **S&D Construction Co. Ltd v Ayoku & Anor.**

(2011) LPELR-2965(SC), Mr. Simeon Mmuodili & Ors v Chief Michael Onwuba & Ors SC.528/2014.

Under Section 98 of the Civil Procedure Act, the inherent power of court is saved in the following terms;

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

These provisions vest the High Court with wide discretionary and inherent powers respectively to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it. See also **Kagumaho Musana v Rama and 3 Others HCMA 933 of 2019 and Tullow Uganda Limited & Anor v Jackson Wabyona & Ors HCMA 443/2017, Green Meadow Limited v Patrice Namisono HCMA 1368/2022**.

In my view, the present circumstances warrant the court taking measures to ensure that the Applicant is diligent with their conduct of this matter, in order to prevent cyclical proceedings which prevent the final adjudication of the matters between the parties. The main suit for which reinstatement is sought was filed in 2015, but even as at the date of dismissal, a hearing had not been conducted, six or so years later. This underscores a possible lack of diligence by the Applicant which meant that their suit hadn't been fixed, heard and determined in the most efficient manner.

In **Landis v. North American Co., 299 U.S. 248 (1936)**, the US Supreme Court recognized that court could grant certain reliefs dependent on there being diligent prosecution of an action in respect of which, or related to which, a relief was sought.

In the administration of justice, often times court needs to take proactive measures to ensure that the justice prevails and no party is subjected to undue prejudice, either by delay, lack of diligent prosecution or other factors capable of occasioning prejudice. In our justice system, the mantle is on the party initiating the cause to prosecute it and the defending party has little agency/involvement to expedite the resolution of the dispute on its merits. However, and especially in commercial transactions, the speed of dispute resolution can have a real and lasting impact on all or one of the parties. Accordingly,

there are situations where court has to take proactive measures to ensure that justice is achieved.

The failure to diligently prosecute a case can result in detrimental consequences, not only for the parties involved but also for the administration of justice as a whole. It fosters a cycle of delay and uncertainty, hindering the timely resolution of disputes and perpetuating legal complexities. Therefore, it becomes imperative for the court to intervene and institute measures that promote diligent prosecution and expedite the resolution of pending matters.

The concept of providing security to the court serves as a safeguard against the risk of non-compliance or further delays in the litigation process. By requiring the Applicant to furnish security, the court establishes a tangible commitment to the diligent prosecution of the case, thereby instilling confidence in the judicial process and ensuring the efficient administration of justice.

Moreover, the provision of security serves as a form of accountability, holding the Applicant responsible for their actions and obligations throughout the legal proceedings. It underscores the importance of actively advancing the case towards its final determination and reinforces the principle of procedural fairness and efficiency.

This is not to say that any Plaintiff will be asked to provide security at the filing of their suit. Nor does it mean that all Applicants who file applications of this nature should be required to provide security. No. A court, where it feels that there is need for additional measures to ensure diligent prosecution of a matter in the interests of justice may direct that certain measures as are just be taken, whatever those measures would be. Security may only be one of those measures. The court may employ create case management techniques or issue orders or directives which achieve the interests of justice. The circumstances of this case are unique, and in my view, require for the court to put in place safeguards to ensure diligent prosecution by the Applicant of its case.

Accordingly, it is necessary that the Applicant provide security to the court to provide assurance that they will diligently prosecute their suit to final determination.

Accordingly, I find that the circumstances of require the Applicant to provide security as above, in the quantum and period provided in my orders below.

Costs

In the present case, the Respondents are not, even if they do not succeed in the main suit, would not be faulted for the present proceedings. Accordingly, the cost expense for these proceedings, notwithstanding the merits of their defence, was not occasioned by any fault of their own. See **Geralldine Begumisa v EADB & Ors HCMA 436/2022, Kisam Investments v Attorney General HCMA 742/2023**

Conclusion

Accordingly, I allow the application and I make the following orders

(a) The order dismissing HCCS 336/2015 is hereby set aside on the condition set out in (b) below.

(b) As security for their diligent litigation of this suit, the Applicant is ordered to provide security of UGX 50,000,000 within thirty (30) days from the date of this ruling. In the event that the Applicant's suit is dismissed for failure to prosecute the same after the date of this ruling, the above sum shall be forfeited to meet any liability due to the Respondents from the Applicant.

(c) The Applicant is directed to extract mention notices for further management of the main suit.

(d) The Registrar of this court is directed to issue directions and notification on the adherence by the Applicant of the order in (b) above.

(e) The Applicant shall bear the costs of this application.

I so order.

Delivered electronically this 22nd day of March 2024 and uploaded on ECCMIS.

Ocaya Thomas O.R

Judge,

22nd March, 2024