

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 593 OF 2016
(ARISING FROM MISCELLANEOUS APPLICATION NO 0090 OF 2016
ARISING FROM CIVIL SUIT NO 45 OF 2016)

1. MONACO COSMETICS LTD}
2. GASANA CHARLES}
3. MWESIGYE PATRICK}.....**APPLICANTS**

VERSUS

OLD STANLEY HOTEL LTD}RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant brought this application under the provisions of Order 9 rule 23 and 27 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act for orders that:

- Miscellaneous Application No. 0090 of 2016 arising from Civil Suit Number 045 of 2016 which was dismissed on the 18th of May, 2016 under Order 9 rule 22 of the Civil Procedure Rules is reinstated by setting aside the dismissal order.
- Court issues fresh hearing notices to be served on the Applicant.
- Costs of the application be provided for; and
- Such further or other orders as this honourable court may be pleased to grant.

The grounds of the application are that the Applicant's Counsel John Bosco Mudde had sufficient cause for nonappearance when the matter was called for hearing as he fell sick the day before the hearing. Secondly, a default judgement entered against the Applicant in Miscellaneous

Application No. 0090 of 2016 is set aside. Thirdly it is just and fair that the decree for dismissal of the Applicant's application for leave to appear and defend the suit is set aside so as to allow the Applicants to defend their suit.

The application is supported by the affidavit of Mudde John Bosco, an advocate working with Messieurs Katende, Sempebwa & Company Advocates. He deposes that he is the Counsel having personal conduct of the matter and well versed with the facts. The Applicant filed Miscellaneous Application No. 0090 of 2016 for leave to appear and defend Civil Suit No. 45 of 2016 on 10th February, 2016. The court fixed the application for hearing on the 18th of May, 2016. On the 17th of May, 2016, he fell ill and was unable to appear in court on the 18th of May, 2016 for the hearing of Miscellaneous Application No. 90 of 2016 and was unable to inform the Applicants to attend court in his absence. The medical report is attached as annexure "A" and is dated 17th of May, 2016. He failed to attend the hearing. Furthermore he deposes that according to the nature of the case and the amounts of money involved of US\$129,213, it is important that the case is decided on its merits. Lastly, he repeats the other grounds in the notice of motion.

In reply Isiagi Stanislas, the Managing Director of the Respondent Company deposed an affidavit in opposition in which he deposes as follows:

There was no sufficient cause preventing the Applicant's Counsel from attending court when Miscellaneous Application No. 0090 of 2016 came for hearing. He contended that annexure "A" shows that the Applicant's Counsel was diagnosed with malaria and flu these are not serious diseases that could make him fail to attend court. Furthermore, the parties cannot be prevented from attending court because their lawyer is sick. Even if the Applicant's Counsel was in a critical condition, which he was not, he works in a law firm with very many lawyers and he could have sent one of them to hold his brief for him as he usually does. In the premises the Applicant has no plausible defence to the main suit and the present application is a tactic meant to abuse court process and delay justice. Alternatively he deposes that the Applicants deposit the decretal sum in court and security for costs before the hearing the application.

When the application came for hearing Counsel Emmanuel Muwonge appeared for the Applicants but the Respondent's Counsel was absent. He prayed for an order to proceed ex parte

under Order 9 rule 20 of the Civil Procedure Rules. The matter accordingly proceeded ex parte under Order 9 Rule 20 of the Civil Procedure Rules.

The Applicant's Counsel submitted that sickness has been held to be a sufficient ground for reinstatement of a dismissed suit. He relied on **Crown Beverages Limited versus Stanbic Bank High Court Miscellaneous Application 181 of 2005** as well as the case of **Video World Entertainment Ltd versus Jean Nammi and another High Court Miscellaneous Application No. 517 of 2014**.

As far as the facts are concerned he submitted that the Applicants application was dismissed on the 18th of May, 2016 and an application for reinstatement was filed on 15th of July, 2016 and there was diligence on the part of the Applicant to have the matter heard. The Applicants Counsel relies on the grounds facts in support of the application which facts, he submitted, show sufficient cause to set aside the dismissal for want of appearance.

Resolution of application

I have carefully considered the facts. High Court Miscellaneous Application No. 0090 of 2016 is an application for unconditional leave to appear and defend the main suit brought against the Applicants by the Respondent. When it came for hearing on the 18th of May, 2016 Counsel Priscilla Agoye represented the Respondent and the Applicants' Counsel was not in court. She moved the court to dismiss the application under Order 9 rule 22 of the CPR for non-attendance of the Applicants. The short ruling of the court shows that the application was filed on 10th February and issued by the registrar on 14th March, 2016. It was fixed for the 18th of May, 2016 at 10:30 AM. By 11:30 am the Applicants were not in court and neither was their lawyer. The application was dismissed under Order 9 rule 22 of the Civil Procedure Rules.

Order 9 rule 22 of the Civil Procedure Rules is couched in mandatory terms. It provides as follows:

"Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree

against the defendant upon such admission, and, where part of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

Section 2 of the Civil Procedure Act defines a 'suit' as "all civil proceedings commenced in any manner prescribed". An application for unconditional leave to defend a summary suit is a civil proceeding and is therefore a suit to which Order 9 Rule 22 of the Civil Procedure Rules applies. It follows that rule 22 also applies to miscellaneous applications such as Miscellaneous Application 0090 of 2016. The following rule Order 9 rule 23 of the Civil Procedure Rules provides that where a suit is wholly or partly dismissed under rule 22, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action but he or she may apply for an order to set aside the dismissal. The dismissal may be set aside upon satisfying the court that there was sufficient cause for nonappearance of the Applicant or Counsel when the suit was called for hearing. Where there is sufficient cause, the court shall make an order setting aside the dismissal.

It follows that the only question for determination is whether there was sufficient cause for nonappearance of the Applicants' Counsel. The application was supported by affidavit evidence and there was no need to summon the Applicants to appear personally in court. Their Counsel was able to prosecute the application without the need for the presence of the Applicants. The Applicants' Counsel further deposed that he had not informed the Applicants about the hearing date. It is my holding that this was not gross negligence since the presence of the Applicants in prosecuting the application was unnecessary. I therefore do not agree with the Managing Director of the Respondent that the Applicants ought to have appeared for the hearing of the application. They had not been informed of the hearing date by their Counsel and their presence was not necessary.

Secondly, whether there was sufficient cause or not depends on the facts and circumstances of each case. I further do not agree with the depositions of the Managing Director of the Respondent that malaria or flu is not a serious condition. The medical report clearly indicates that the Applicant's lawyer was supposed to have a bed rest for two days. Possibly he was required to recover from his flu and he was therefore unable for sufficient reason to appear the next day when the application had been fixed for hearing.

Lastly, the Respondent's Managing Director Mr Isiagi Stanislas deposed that the Applicant's lawyers had very many lawyers. However, the Managing Director of the Respondent did not give further facts to demonstrate that the other lawyers did not have other schedules or commitments. To a limited degree the Applicant's lawyer ought to have notified his colleagues. However, this is a clear case where his omission to do so ought not to be visited on his clients who are the Applicants.

Finally I have considered the two authorities relied on by the Applicant's Counsel. In **Crown Beverages Limited versus Stanbic Bank Uganda Limited Miscellaneous Application No. 0181 of 2005, High Court civil suit number 0710 of 2003** was dismissed and there was an application to set it aside on the ground among other grounds that the Applicant's Counsel was indisposed when the case came for hearing. It was submitted that the Applicant's Counsel was prevented from attending court for sufficient cause. Honourable Justice Bamwine agreed with the Respondent's Counsel that an application for restoration of a dismissed suit requires the Applicant to satisfy the court that there was sufficient cause for nonappearance i.e. that he had an honest intention to attend the hearing, and he did his best to do so. His Lordship further noted that the law does not offer a definition of what amounts to 'sufficient cause' and in the case of **Shabir Din vs. Ram Pakesh Anand (1955) 22 EACA 48**, it was held that the mistake by the plaintiff's Counsel though negligent, may be accepted. He further noted in another authority that the sickness of Counsel was accepted as sufficient cause. He held that the Applicant's Counsel was prevented from attending court by a sufficient cause. He further found that a period of four months before applying was not inordinate delay.

I have further considered the case of **Video World Entertainment Centre Limited versus Jean Nammi & Another HCMA No. 517 of 2014 (arising from HCCS No. 453 of 2011)** being the ruling of Honourable Lady Justice Hellen Obura. She agreed with earlier authorities that sufficient cause and good cause have been held to relate to the inability or failure to take a particular step in time. The listed grounds which amounted to good cause in earlier authorities include mistake by an advocate through negligence, ignorance of procedure by an unrepresented defendant, illness of a party.

The above authorities are applicable to the circumstances of the Applicant's case where the Applicants' Counsel fell sick and this is proven by a medical report attached to his affidavit in support of the application. The application was brought about one month and a half after the dismissal and there was therefore no inordinate delay in filing the application for reinstatement.

In the premises, I am satisfied that there was sufficient cause for the nonattendance of the Applicants' Counsel on the 18th of May, 2016 when the Applicants application came for hearing. The doctor had expressly advised the Applicants' Counsel to take a bed rest of two days on the 17th of May, 2016 and the Application came for hearing on the 18th of May, 2016.

In the premises, the dismissal of High Court Miscellaneous Application No. 90 of 2016 (arising from Civil Suit Number 45 of 2016), dismissed on the 18th of May, 2016 is hereby set aside under Order 9 rule 23 (1) of the Civil Procedure Rules because there was sufficient cause for nonappearance of the Applicants' Counsel when the application was called for hearing.

Secondly, upon reinstatement of High Court Miscellaneous Application No. 90 of 2016, the default decree entered by the registrar against the Applicants for payment of US\$ 129,213 with interest and costs on the 20th of May, 2016 is hereby set aside.

I have carefully considered the affidavit in opposition and the prayer of the Respondent for the Applicant in the alternative to deposit the decreed sum and provide security for costs. Order 9 rule 23 (1) of the Civil Procedure Rules provides that the dismissal shall be set aside upon such terms as to costs or otherwise as the court deems fit. It does not make provision for deposit of the decreed sum. Secondly, costs are at the discretion of the court.

In the premises, costs of the application shall abide the outcome of High Court Miscellaneous Application No. 90 of 2016.

Ruling delivered in open court on 10th of October 2016

Christopher Madrama Izama

Judge

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

Ruling delivered in the presence of:

John Bosco Mudde for the Applicants

Respondent and Counsel are absent

Jude Sseruwu: Court Clerk

Christopher Madrama Izama

Judge

10th October 2016