THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 221 OF 2020

(Arising from M.A No. 1033 of 2019 & Civil Suit No. 815 of 2019)

1. KAVULE INVESTMENTS LTD
2. NSUBUGA AHMED MUBIRU :::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

TROPICAL BANK LTD :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under *Section 98 of the Civil Procedure Act, Order 23 (1), Order 36 Rule 11 and Order 52 Rules 1 & 3 of the Civil Procedure Rules* for orders that:

1. The Order dismissing High Court Misc. Application No. 1033 of 2019 be set aside and the said application be reinstated, heard and determined on merit.
2. The judgment in Civil Suit No. 815 of 2019 be set aside and any execution of the said decree be stayed.
3. Costs of the application be provided for.

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

a) The Applicants were prevented by sufficient cause from entering appearance in Court when M.A No. 1033 of 2019 was called for hearing.
b) The Applicants are highly interested in prosecuting the said application and defending the main suit; which matters have high chances of success.
c) The Applicants stand to suffer substantial financial loss if the application is not granted.
d) It is in the interest of justice that the application is granted.

The application was supported by an affirmation deposed by **Muhamud Sewaya**, the Secretary of the 1st Applicant, the gist of which is as follows:

(i) When the Applicants filed M.A No. 1033 of 2019, they and their Counsel kept checking the Court Registry since November 2019 to establish if the application had been fixed for hearing but were constantly informed that the matter had not yet been fixed for hearing.
(ii) On the 9th of March 2020, the day the application came up for hearing before the Court, the deponent came to the Court on routine check on the matter and was advised by the Court Clerk that the matter was dismissed for non-appearance of the applicants and their Counsel.
(iii) The deponent immediately called Counsel in personal conduct of the matter who informed the deponent that he too had not been aware that the matter had been fixed for hearing on the 9th March 2020 and neither did he have a copy of the signed notice of motion on file.

(iv) The deponent had also been regularly checking the computerized case management system that lists the status of cases and the system had not been updated to indicate that the said application was cause listed for hearing on 9th March 2020. He also perused the cause list for the week 9th March to 13th March 2020 and he did not find the said application having been cause listed for hearing on the said date. A copy of the cause list for 9th March was attached.

(v) The deponent believes that if the Respondent's affidavit in reply was served onto the Applicant or its Counsel, they would have made an affidavit in rejoinder and would have attended the Court.

(vi) There was no record on the file that the Applicant's Counsel picked and served the Respondent with the Notice of Motion after the same was endorsed by the Court.

(vii) The absence of the Applicants and their Counsel when the application was called for hearing was occasioned by a lack of proper information or inadvertence of Counsel which ought not to be visited on the Applicant.

(viii) The Respondents in the main suit are claiming colossal sums of money against which the Applicants have a valid defence pending grant of the application for leave to appear and defend.

(ix) The Applicants were prevented by sufficient cause from attending court on the day it came up for hearing.

(x) It is in the interest of justice that this application is granted as the Applicant stands to suffer substantial financial loss if the judgment in the main suit is not set aside.

The Respondent opposed the application through an affidavit in reply deponed to by Stella Nansamba, the Recovery Manager of the Respondent, the gist of which is that:

(i) The affidavit made on behalf of the Applicant contains material falsehoods and therefore the application lacks merit as the Applicants exhibited extreme laxity in prosecuting M.A 1033 of 2019 and this application ought to be dismissed with costs.

(ii) The sums claimed by the Respondent in the main suit arose from credit facilities advanced to the Applicants which they deliberately failed to pay and stubbornly made it impossible for the Bank to foreclose the pledged securities. The Bank therefore filed the summary suit to expeditiously recover its money.

(iii) The Applicants filed M.A No. 1033 of 2019 with the sole aim of frustrating the Respondent's efforts to recover the outstanding balances on the credit facilities. Because of that motive, the Applicants did not follow up to ensure that the application was endorsed by the Registrar of court and to have it fixed for hearing.

(iv) The Respondent's advocates learnt of the said application when they tried to apply for default judgment. The advocates requested for the file to be brought to the attention of the Court Registrar in order to have it endorsed and fixed for hearing; which was done on the 18th February 2020, leading to the hearing date of 9th March 2020.

(v) When the application was fixed for hearing, the Applicants quickly picked the copies from the court record but did not serve the Respondent's advocates until the 2nd March 2020. The

Respondent's advocates managed to have an affidavit in reply filed on the 5th March 2020.

(vi) When the case file was called for hearing on the 9th March 2020, the Applicants and Counsel were not in Court. The deponent believes that the Applicant's advocates were aware of the hearing date and they actually turned up at court albeit late after the application had been dismissed. That is how the advocates were able to learn of the dismissal on the same day and immediately prepared and filed the current application.

(vii) It is evident from the foregoing facts that the Applicants and their advocates exhibited a high degree of laxity and procrastination in prosecuting an application for leave to appear and defend. The deponent stated that the dictates of justice demand that this application be dismissed with costs.

The Applicants filed an affidavit in rejoinder whose contents I have taken into consideration.

At the hearing, the Applicants were represented by Mr. Anthony Wabwire and Ms. Sophia Nakandi while the Respondent was represented by Mr. Kyewalabye Denis and Mr. Anthony Kaweesi.

The hearing proceeded by way of written submissions. I will appraise the Counsel's submissions in the course of resolution of the issue before the Court.

Issue for determination by the Court

One issue arises for determination by the Court, namely:

Whether the application discloses any grounds for setting aside dismissal of M.A No. 1033 of 2019, setting aside the default judgment in Civil Suit No. 815 of 2019 and reinstatement of the dismissed application.

Resolution by the Court

The application No. 1033 of 2019 was dismissed under *Order 9 Rule 22 of the CPR* for non-appearance of the Applicants when the matter was called for hearing. The Applicant seeks to move this Court under *Order 9 Rule 23 of the CPR* to set aside the dismissal and have the application reinstated and heard on its merits. *Order 9 Rule 23 CPR* provides –

> *Where a suit is wholly or partly dismissed under Rule 22 of this Order, 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 the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*

What amounts to sufficient cause has been a subject of court decisions in a number of decided cases. In the case of ***Kyobe Senyange vs Naks Ltd [1980] HCB 31*****,** it was stated that for sufficient cause to be disclosed, the court should be satisfied not only that the applicant had a reasonable excuse for failing to appear but also that there is merit in his/her defence to the case.

In ***National Insurance Corporation v. Mugenyi and Company Advocates [1987] HCB 28*** the Court of Appeal held thus:

> ***"The main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a prima facie defence to that case...."***

In ***Nakiride v. Hotel International Ltd [1987] HCB 85***, it was held:

> ***"In considering whether there was sufficient cause why counsel for the applicant did not appear in Court on the date the application was dismissed, the test to be applied in cases of that nature was whether under the circumstances the party applying honestly intended to be present at the hearing and did his best to attend. It was also important for the litigant to show diligence in the matter..."***

On the case before me, the Applicant put up a number of factors as constituting sufficient cause; which factors were contested by the Respondent. I will deal with the aspects along the lines they were argued by both Counsel as follows;

a) Lack of notification and non-cause listing of the matter;
b) Exercise of vigilance or lack of it on the part of the Applicants;
c) Negligence or inadvertence of Counsel; and/or
d) Availability of a plausible defence.

Lack of notification and non-cause listing of the matter

It was deposed in the affidavit in support and argued by Counsel for the Applicant that they had been regularly checking at the registry over the fixture of the matter and when the application was eventually fixed for hearing, they were neither notified nor did the matter appear on the court cause list of the week. The Applicant attached a copy of the said cause list.

In reply, it was argued by Counsel for the Respondent that the document purported to be the Court cause list had no endorsement by the Court and, as such, its authenticity was challenged by the Respondent. It was further alleged by the Respondent in the affidavit in reply that in fact it was the Applicants who picked the signed Notice of Motion from the Court and served the Respondent. It was therefore argued for the Respondent that the Applicant cannot then claim that they were unaware of the hearing date. Counsel for the Respondent further submitted that being unaware of the hearing date was no longer a defence for an applicant who failed to pursue their own suit. Counsel relied on the Supreme Court decision in ***Twiga Chemical Industries Vs Bamusedde [2005] 2 EA 325***. Counsel submitted that, as such, whether the matter was cause listed or not, the Applicants were expected to pursue their own matter with vigilance and could not plead ignorance of the date.

In their submissions in rejoinder, Counsel for the Applicant submitted that the copy of the cause list attached to the Applicant's affidavit was genuine as it was downloaded from the Commercial Division section of the High Court on the Judiciary website, which source is apparent on the

very copy of the cause list. Counsel for the Applicant therefore argued that the said cause list was official and needed not have any other endorsement by the Court. The Applicants denied ever having picked the signed notices or having served the Respondent with the same and insisted they only got to know about the fixture after the matter was dismissed.

Counsel for the Applicants further challenged the reliance on the case of ***Twiga Chemical Industries (supra)*** by the Respondent's Counsel submitting that the circumstances in the said case were distinguishable from the present circumstances. Counsel submitted that in the ***Twiga case***, the matter was called for hearing twice in the Applicant's absence; and the Applicant did not show that they had taken any steps to follow up their case. The application to set aside the default judgment in that case had also been made many months after the dismissal.

From the record, I notice that there is no evidence of notification to the parties of the hearing date of 9th March 2020. Scrutiny of the circumstances under which the Court proceeded to dismiss the application reveal that it was mostly based on the perceived failure or neglect of the Applicants in following up their case and lack of interest in prosecuting the same. Where such an Applicant shows up with a claim that they were unaware of the particular hearing date, such a claim ought to be given a consideration. It is true that there is no evidence on record of any efforts taken by the Applicants or their advocates towards having the application fixed. I am however of the considered view that the period of three and a half months that the application had taken before being fixed do not suffice under the law to justify dismissal of an

application without notice to the applicant. The lack of interest in the matter could only be sufficiently ascertained upon the Applicant being notified and they fail to appear for the same. It was therefore important that the Applicants, even when they were the owners of the application, ought to have been notified that their application had been fixed for hearing on the said date.

I have not found any evidence to satisfy the Court that it was the Applicants who picked the signed notices and served them onto the Respondent. This allegation by the Respondent was unsupported by any evidence. I am also in agreement with Counsel for the Applicants that the decision in ***Twiga Chemical Industries (supra)*** was based on the particular circumstances of that case which were different from the circumstances of the present case. It is clear to me that the finding relied upon by Counsel for the Respondent was not a general statement of the law but rather a finding based on the particular circumstances of that case. It is therefore not true that according to the said decision, the position of the law is that being unaware of a hearing date is no defence to a plaintiff who fails to pursue his/her own case. The law is clear as to when a plaintiff/applicant is entitled to notice and when not.

I have further found that there is no issue on the authenticity of the copy of the cause list that was relied upon by the Applicants. The copy clearly indicates it was downloaded from the Judiciary website which is public information. The Applicants do not need permission of the Court to access the website and neither do they need to have such information endorsed by the Court before it can be relied upon. The authenticity of such information is verifiable from the Judiciary website. I am therefore

in position to believe the Applicants' averment that the application in issue had not been included on the Court cause list of the week of 9th to 13th March 2020. This made the Applicants' absence in Court on the said date more excusable.

The Applicants have therefore satisfied the Court on a balance of probabilities that they had a reasonable excuse for failing to attend Court when the application came up for hearing. From the position of the law highlighted above, such amounts to sufficient cause.

On basis of the above finding, the ground of vigilance or lack of it in pursuing the dismissed application has been taken care of. I will only add that in respect of the present application, the Applicants are not guilty of any lack of vigilance since they brought the application without any delay. In light of the foregoing conclusion, the ground of mistake or inadvertence of Counsel for the Applicants becomes irrelevant.

I will however dwell a little on the ground of availability of a plausible defence. According to the decision in ***National Insurance Corporation v. Mugenyi and Company Advocates (supra)***, before setting aside a dismissed case and reinstating of the same, the Court also has to look at the nature of the case and whether there is a prima facie defence to the matter.

It was shown by the Applicants that the main suit involves colossal sums of money against which claims the Applicants have a valid defence including aspects of fraud, illegality, coercion, misrepresentation and

undue influence. These allegations are contained in the Applicants' affidavit in support and in rejoinder.

In reply, Counsel for the Respondent argued that matters concerning coercion and undue influence can only be advanced as a sword and not a shield (defence). As such, Counsel argued, the Applicants should not have waited for the Respondent to file the main suit for them to raise those allegations as their defence. The Applicants ought to have challenged the transaction before the Respondent moved to recover its money.

My view is that the point raised by learned Counsel for the Respondent goes to the merits of the defences sought to be raised by the Applicants. It goes beyond the determination of whether the facts put before the Court by the Applicants raise a prima facie defence to the main suit. It should also be noted that the application sought to be reinstated is an application for leave to appear and defend the summary suit. As such, if the application is reinstated and heard on its merits, the Court will have opportunity to assess whether the alleged lines of defence constitute bona fide triable issues of fact or law.

For purpose of establishing sufficient cause for setting aside dismissal and reinstatement of the dismissed application therefore, I am satisfied that the Applicants have established that the matters raised in their application disclose a plausible defence.

In all therefore, the Applicants have satisfied the Court that they were prevented by sufficient cause from attending the Court when M.A No.

1033 of 2019 was called for hearing. They are therefore entitled to an order setting aside the dismissal and reinstatement of the said application. Since default judgment and decree were entered on basis of the said dismissal, the same have to be set aside accordingly. Any execution that may have been commenced is accordingly stayed and/or set aside.

In the premises, the application is allowed with the following orders:

1. The Order dismissing High Court Misc. Application No. 1033 of 2019 is set aside and the said application is reinstated for hearing on merit.
2. The default judgment and decree entered in Civil Suit No. 815 of 2019 are set aside.
3. Any execution of the said decree is stayed and/or set aside.
4. The costs of the application shall be in the cause.

It is so ordered.

Boniface Wamala

JUDGE

18/09/2020