

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 1082 OF 2019
(ARISING OUT OF CIVIL SUIT NO. 454/2004)
FAUSTINO NTAMBARA
VS
JACK KITYO SEGAWOLE

BEFORE HON. DR. JUSTICE HENRY PETER ADONYO

RULING

1. Background:

The applicant filed this application against the Respondent under Order 9 rule 27, Order 52 rules 1 and 3 of the Civil Procedure Rules S.I 71-1, section 98 of the Civil Procedure Act and section 33 of the Judicature Act Cap. 13 seeking for orders allowing the Respondent to proceed with the hearing of Civil Suit No. 456/2004 in the absence of the applicant be set aside, that the *ex parte* judgment be granted in Civil Suit No. 454 of 2004 be set aside.

On 15th January 2020, in the presence of Walukaga Isaac, Counsel for the Respondent and Mr. Kaganzi Lester Counsel for the Applicant

and the Respondent Mr. Jack Kityo Segawole both counsel agreed before the Deputy Registrar, Commercial Court that the matter be adjourned to 5th February 2020 for mention. On that day an order was also made by the Deputy Registrar of this Court that the *status quo* in regards to the suit land be maintained until hearing of this application. **See: M.A 1082/2019.**

2. Proceedings in Court:

On 5th February 2020, when the matter came before this Court for hearing neither the Applicant nor his counsel were in court. Mr. Isaac Walukaga appearing for the Respondent was in court and sought to have the matter dismissed under **Order 9 rule 22** and **Order 17 rule 4** of the Civil Procedure Rules S.I 71-1 submitting that indeed on 15th January 2020 when the matter was last adjourned to 5th February 2020 before the Registrar of this court and set for mention both parties were present before the Deputy Registrar but that on this day when it has now come for its hearing, the applicant and or his legal representative have conveniently absconded with no reason being as to why they are not in court .

Mr. Isaac Walukaga thus he moved this court to deal with the matter accordingly as per the above cited provisions of the law.

3. Decision of Court:

The basis of the instant application is that the Applicant and his counsel have failed to appear before court with no reasons given as

to why both are absent in court yet when the matter was previously adjourned all parties including counsels were in court.

The application has been tendered under **Order 17 rule 4 of the Civil Procedure Rules**. It provides that where any party to a suit to whom time has been granted fails to produce his or her evidence or to cause the attendance of his or her witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.

The most relevant side heading of this rule is where the rule provides that Court may proceed notwithstanding either party failing to produce evidence.

My reading and interpretation of Order 17 Rule 4 of the Civil Procedure Rules is that it vests a judicial officer who has conduct of a matter before him or herself with the discretion and power to decide immediately as to what next step the court may take where a party fails to perform any act necessary for the progress of a suit which position has also been judicially pronounced upon by court in a decision dated the 11th May 2018 of ***Kiiza Augustine vs Katusabe Vincent*** HCT-01-CV-LD-CA-060 (2013) ***reported in [2018] UGGCLD 25.***

The genesis of the instant application is that this in honourable court in High Court Civil Suit No. 454/ 2004 per Egonda Ntende J (as he then was) passed in the head suit *ex parte* judgment sometime back

with the instant application seeking to have the same decision set aside and the parties to be allowed to have the head suit heard and decided on merit *inter parte*.

My perusal of the court record and indeed the direction by which the head suit has taken since it was filed shows clear dilatory conduct on the side applicant for he has shown no keenness in ensuring that ensuring that appropriate steps are followed to have this matter concluded in good time as provided for in the law yet he has a duty to follow up his matter through his approved legal representative or personally.

This dilatory behaviour manifests strongly given the court record even from the head suit No. 454 of 2004 wherein because of laxity an *ex-parte* judgment was subsequently passed for the record shows that on the 12th June 2007 the Defendant in the head suit now the applicant and his lawyer were equally absent in court on that date yet the Respondent then through his lawyers was present with the court being generous enough to direct the alternate part counsel to effect service onto the party which was absent and the matter adjourned to 25th June 2007 for further handling.

On 25th June 2007 the matter was in court but apparently the Applicant either in an attempt to outwit the court or the other party omits to include the proceedings in respect of that date particularly page 11 of the proceedings attached to the notice of motion where the court further fixed the hearing of the head suit on the 30th August 2007 with the respondent's counsel then was again asked to serve

the applicant who was not present in court then and he did so yet the applicant herein claims that such service was not carried out.

The applicant herein is, however, only saved by the fact that the proceedings in respect of 30th August 2007 are equally missing. However, it would seem to me that the applicant has on several occasions been generously granted opportunities to present his evidence but has failed to do so with his latest conduct of absenting from court being but a manifestation of a series of behaviour previously shown which to me is a clear manifestation of lack of seriousness yet he seeks to have set aside an *ex parte* judgment made against him way back in 2008. The constant lack of vigilance manifested by the applicant to have the matter heard inter partes on previous occasions even when given generous opportunity is indeed an abuse of the court process.

The above finding notwithstanding, this court notes that a dismissal of a suit under **Order 17 rule 4 of the Civil Procedure Rules** finally disposes of a suit as was held in the case of **Ntalo Mohamed vs Stanbic Bank of Uganda Limited Misc. App. No. 211 of 2017**.

However, for justice to be seen to be done and noting that this matter is coming before me for the first time, I am of the considered opinion that it is of no harm for the court to show compassion and at least give one last opportunity to the applicant to appear in court and have his application heard as justice hurried is justice buried.

I would thus grant one FINAL adjournment to the Applicant and or his counsel to be in court on the next date set for the hearing of this matter which I now fix for the 17th day of February, 2020 at 9.00 am

Orders:

- a. One **FINAL** adjournment is allowed in this matter for the applicant and or his counsel to appear in court to prosecute this application.
- b. This matter shall come for hearing on the 17th day of February, 2020 at 9.00 am.
- c. The costs of today the 7th and that of 5th February, 2020 is awarded to the Respondent.

I do so order accordingly.

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HON. DR. JUSTICE HENRY PETER ADONYO

JUDGE

7TH FEBRUARY 2020