THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 895 OF 2020
(Arising from M.A No. 550 of 2019 & Civil Suit No. 115 of 2018)

NATHAN MWESIGYE RUBANGURA :::::::::::::::::::::::::::::::: APPLICANT
VERSUS
ICEA GENERAL INSURANCE CO. LTD :::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA
RULING

Introduction

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

1. The Order dismissing High Court Civil Suit No. 115 of 2018 and Miscellaneous Application No. 550 of 2019 be set aside.
2. The said Civil Suit and Miscellaneous Application be reinstated and heard on their merits.
3. Costs of the application be provided for.

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

a) The main suit was fixed by court on 23rd September 2020 at 9:00am without notice to the Applicant.
b) The cause list and court system showed that the suit was before Justice Wamala Boniface yet the physical file was discovered to be before another Judge.
c) The Applicant and his Counsel were prevented by sufficient cause from appearing.
d) The Applicant is desirous of prosecuting his case and has always been vigilant.

e) The application has been brought without delay and it is just and equitable that the application is granted.

[3] The application is supported by an affidavit deposed by **Nathan Mwesigye Rubangura**, the Applicant, in which he states that he was the plaintiff in the main suit and the applicant in the miscellaneous application both of which were dismissed by the court on 23rd September 2020. The main suit had been partly settled by consent of the parties and only the issue of damages was pending determination by the court. The Applicant states that on 22nd September 2020, his lawyers informed him that they had seen a Commercial Court cause list indicating that Civil Suit No. 115 of 2018 was coming up for hearing on 23rd September 2020 before Hon. Justice Boniface Wamala. He states that on 23rd September 2020, the lawyers and himself went to court and met the Clerk to Justice Boniface Wamala, one called Betty, who checked in the court system and confirmed that the case was allocated to Justice Boniface Wamala but she did not have the physical case file. The Clerk further informed the deponent that the Judge was not at the station as he was scheduled to be at the High Court Civil Division on that day. The Clerk then advised the deponent and his lawyers to allow her time to look for the case file and advise them on a next date when the trial Judge would be available.

[4] The deponent further states that he later learnt from the same said Clerk that the case file was still before Justice Adonyo Peter in whose docket it was first allocated. The deponent was advised to write a letter requesting the transfer of the file to the trial Judge which the Applicant did. It was then that the Applicant was advised by the Deputy Registrar that both the main suit and the application had been dismissed by Justice Peter Adonyo when they came up before him on 23rd September 2020 in absence of any of the parties. The Applicant was thus advised to seek reinstatement of the suit and the application. The deponent states that he was shocked by this development

since his lawyers and himself were prevented from appearing before the court on that day because of the mix-up in the court system. He thus states that he was prevented by sufficient cause from attending court on the stated day yet he has always been desirous of prosecuting his suit and the application.

[5] The Respondent opposed the application through an affidavit in reply deponed to by **Harmon Opiyo**, the Head Claims and Head Legal Department of the Applicant Company, in which he stated that he has been advised by their lawyers that the application is incompetently before the court because it was brought under the wrong law. The deponent states that the Applicant has led no evidence to prove that he indeed appeared before the Chambers of Justice Boniface Wamala on the stated day. He states that the Clerk allegedly contacted by the Applicant was not the person responsible for allocation of court cases and the Applicant ought to have cross checked with the Registrar of the Court. The deponent further states that no sufficient cause has been shown by the Applicant to justify setting aside of the dismissal and reinstatement of the suit and the application. He concluded that this application is an abuse of the court process and only intended to waste this Court's time.

Representation and Hearing

[6] The Applicant was represented by Mr. Mujurizi Jamiru from M/S Mujurizi, Alinaitwe & Byamukama Advocates while the Respondent was represented by Mr. Ssewagudde Frank from M/S Katende, Ssempebwa & Co. Advocates. Counsel agreed to make and file written submissions, which were duly filed. I have considered the submissions of Counsel in the course of determination of the matter.

Issue for determination by the Court

[7] One issue arises for determination by the Court, namely:

Whether the order dismissing Civil Suit No. 115 of 2018 and M.A No. 550 of 2019 ought to be set aside and the said matters be reinstated for hearing on their merits.

Submissions by Counsel for the Applicant

[8] It was submitted by Counsel for the Applicant that the court record does not indicate the rule under which the suit and the application were dismissed. Counsel submitted that since the matters were dismissed in absence of both parties, the correct provision ought to have been Order 9 Rule 17 of the CPR. As such, the application would have been brought under Order 9 Rule 18 of the CPR for reinstatement. Counsel however argued that the general rule of law is that where an application omits to cite any law or cites a wrong law but the court's jurisdiction to grant the orders sought exists, then the irregularity or omission can be ignored and the correct law inserted. Counsel relied on the decision in ***Francis Wazarwahi Bwengye Vs Haki W. Bonera, HC CA No. 0033 of 2009***. Counsel argued that the most important issue in the present case is for the Court to establish whether there was sufficient cause for non-appearance of the parties when the suit was called for hearing. Counsel submitted that the Applicant has established that he was prevented by sufficient cause which was the mix-up in the court system. Counsel further relied on the case of ***Norah Nakiridde vs Hotel International Ltd [1987] HCB 86*** for the proper test of what amounts to sufficient cause. Counsel prayed that the application be allowed with costs in the cause.

Submissions by Counsel for the Respondent

[9] On their part, Counsel for the Respondent submitted that the application is incompetent and ought to be dismissed with costs. Counsel submitted that the Applicant had deliberately failed and/or omitted to attach a copy of the dismissal order which he sought to be set aside for purpose of guiding the court on the rationale of the dismissal of the matters herein in issue. Counsel

further submitted that the application was wrongly brought under Order 9 Rule 23 of the CPR which rule provides for reinstatement only where the matter has been dismissed under Order 9 Rule 22 of the CPR in a case where only the defendant appears in court when the suit is called for hearing. In the present suit, the matters were dismissed for non-appearance of both parties and therefore cannot be reinstated under the cited provision.

[10] Counsel for the Respondent referred the Court to the decision in ***Nicholas Roussos Vs Gulam Hussein Habib Virani & Another, SCCA No. 9 of 1993*** wherein it was held that where there is a clear procedure or any particular procedure prescribed by law, that procedure should be strictly followed. Counsel also cited the case of ***Speaker of the National Assembly vs Karume, Court of Appeal Civil Appeal No. NAI 92 of 1992 (Kenya SC)*** over the same legal position. Counsel for the Respondent discounted reliance by Counsel for the Applicant on the decision in ***Francis Wazarwahi Bwengye Vs Haki W. Bonera (supra)*** by pointing out to the Court contrary holdings in the cases of ***Concorp International Ltd Vs Uganda Moslem Supreme Council, HC M.A No. 368 of 2004*** (cited in ***Master Telecom and Computers Ltd Vs Greater African Radio Ltd & Another***) and ***Kibugumu Patrick alias Munakukaama vs Aisha Mulungi & Another, HC M.A No. 455 of 2014***.

[11] Counsel further submitted that the Applicant has not established any sufficient cause for their non-appearance in court since their claims that they appeared on the stated day are unsubstantiated and not supported by any evidence. Counsel submitted that the application was simply an abuse of the court process and an attempt at wasting the court's time and contrary to the rule that there should be an end to litigation. Counsel prayed that the application be dismissed.

[12] Counsel for the Applicant made and filed submissions in rejoinder which I have also taken into consideration.

Resolution by the Court

[13] The record of the Court dated 23rd September 2020 indicates that both HCCS No. 115 of 2018 and HCMA No. 550 of 2019 were dismissed by Hon. Justice Henry Peter Adonyo when they came up before him in absence of both parties. The order of dismissal does not cite any law under which the dismissal was effected. Under the law, this means the court proceeded in exercise of its inherent powers under Section 98 of the CPA. Section 98 of the CPA provides as follows: -

> ***"Saving of inherent powers of court.***
> *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."*

[14] According to the record, the Learned Judge indicated that none of the parties was in court, no action had been taken on the matter since the filing of the Written Statement of Defence and change of names; which showed lack of interest. He thus accordingly dismissed both the suit and the application. No doubt the Learned Judge had the power to take the decision he did as, in his view, the situation tended towards abuse of the process of the court which he had both the power and duty to curtail. The dismissal was therefore lawfully done by the court. The dismissal, however, was not in finality since it was only based on assumed lack of interest on the part of the parties to the case. This means that had the Applicant been in court on the day the maters came up, the Judge would not have invoked his inherent powers to that effect. This further means that if the Applicant satisfied the court that he was prevented by sufficient cause from appearing on the stated day, there would be nothing to stop the court from invoking the same inherent powers to set the dismissal

aside and reinstate the matters for hearing on merit. This position would pertain even where the Applicant is not in position to cite a particular rule under which he is bringing the application.

[15] I hold the above view because, as I have stated above, the omission by the Court to cite any law under which the dismissal was effected did not make the dismissal illegal or less effective. Secondly, where the matter was dismissed without citing a particular legal provision, it cannot be incumbent upon the party affected by the dismissal to bring the application for reinstatement based on a particular legal provision. Obviously in my view, there would be no specific provision to talk about. Where, like in the instant case, the court relied on its inherent powers to effect a dismissal, the affected party is equally entitled to invoke the court's inherent powers to have the dismissal set aside. This is particularly so where there is no legal bar in face of such a party that would prevent the party from invoking the court's inherent jurisdiction. No such bar has been pointed out in the instant case.

[16] In the instant case, the Applicant cited Section 98 of the CPA as one of the provisions he was relying upon in bringing this application. Since there was no specific provision under which the order he sought to set aside was passed, the Applicant rightly invoked the provision under Section 98 of the CPA. The Applicant further cited Order 19 Rule 23 of the CPR. Clearly, that provision was not applicable to the case at hand. However, having rightly invoked the provision under Section 98 of the CPA, the citing of Order 19 Rule 23 of the CPR in addition was merely superfluous and had no legal effect on the application. Such superfluous reference to a legal provision cannot be a proper basis for an argument by the Respondent's Counsel that the application is incompetent for citing a wrong law. The Applicant having properly premised his application on Section 98 of the CPA, the reference to Order 9 Rule 23 of the

CPR can safely be ignored by the Court without occasioning any procedural breach or prejudicing the justice of the matter.

[17] I am also of the further view that even if the Applicant had wrongly cited Order 19 Rule 23 of the CPR as the basis of his application, the correct position of the law is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted. This position was aptly stated by **Yorokamu Bamwine J.** (as he then was) in ***Francis Wazarwahi Bwengye Vs Haki W. Bonera, HC CA No. 0033 of 2009*** in which the Court also relied on the decision in ***Tarlol Singh Saggu vs Roadmaster Cycles (U) Ltd, CACA No. 46 of 2000***. In light of the foregoing, therefore, I am strongly of the view that the application is properly before the Court.

[18] I now proceed to investigate whether the Applicant has established any sufficient cause for his non-appearance when the matters came up in court. 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...."***

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

"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..."

[20] In the present case, it was shown by the Applicant that he learnt of the fixture of the case through his lawyers who came to learn of the same from the court cause list. The matters were fixed for hearing before Justice Boniface Wamala on 23rd September 2020 at 9:00am. The Applicant received the information a day before, on 22nd September 2020. The Applicant avers that on 23rd September 2020, he and his lawyers went to court but the Trial Judge (as per the cause list) was not at station. They approached the Clerk to the Judge who checked the system and confirmed that the case file was indeed allocated to Justice Boniface Wamala but she (the Clerk) did not have the physical file with her. Secondly, the Trial Judge was on that day scheduled to be at the High Court Civil Division and not at the Commercial Division. The Applicant further shows the steps he and his lawyers took which led to the discovery that while in the court system the case file was allocated to Justice Boniface Wamala, the physical file was still under the docket of Justice Henry Peter Adonyo before whom the file was first allocated. It also transpired that on the same day that the court system and the cause list showed that the case file was coming up before Justice Boniface Wamal, the physical file was actually placed before Justice Henry Adonyo who dismissed it in the circumstances already set out herein above.

[21] Clearly in my view, the Applicant cannot be faulted for any of the unfortunate occurrences in the matter. The Applicant is not, in the least,

responsible for the mix-up in the court system and the failure of the file movement from one docket to another. The fact that the system indicated Justice Boniface Wamala as the Trial Judge is not in dispute. It is also not in dispute that on the same day, the case file came up before Justice Henry Adonyo and the matters were dismissed. The record clearly shows so. As such, any allegation by the Respondent imputing lack of diligence on the part of the Applicant or absence of proof of the facts stated by the Applicant is baseless. It is clear to me that whatever mess that prevented the attendance of the Applicant to the court on that day was occasioned by the court and the Applicant was simply a victim who is genuinely aggrieved by dismissal of his cases.

[22] In the circumstances, the Applicant has established that he honestly did his best to attend the court but was hampered by a mix-up in the court system; which amounts to sufficient cause. He has thus satisfactorily shown to the Court that he was prevented by sufficient cause from appearing before the Court when the matters were called for hearing. The Applicant is, therefore, entitled to an order setting aside the dismissal and reinstatement of the said matters. In the premises, the application is allowed with the following orders:

a) The Order dismissing High Court Civil Suit No. 115 of 2018 and Miscellaneous Application No. 550 of 2019 is set aside and the said matters are reinstated for hearing on their merits.
b) The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered by email this 5th day of January 2022.

Boniface Wamala

JUDGE