THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 938 OF 2021
ARISING FROM CIVIL SUIT NO. 714 OF 2018

BUCHANA STEPHEN :: APPLICANT

VERSUS

ORIENT BANK (U) LIMITED :: RESPONDENT

(Before: Hon. Lady Justice Patricia Mutesi)

RULING

Background

On 5th September 2018, the Applicant filed Civil Suit No. 714 of 2018 in this court against the Respondent seeking the recovery of USD 116,200 plus general damages and costs. The suit arose from a transaction in June 2012 in which the Applicant had instructed its bank, the Respondent, to transfer USD 116,200 to a one Laxmi Petrochem with whom he was transacting. Laxmi Petrochem had an account in Wells Fargo Bank in California, USA. The Respondent duly transferred the money through Citi Bank in New York, USA.

Two days later, the Applicant instructed the Respondent to cancel the transfer after realizing that the said Laxmi Petrochem was a fraudster. The Respondent sent instructions to Citi Bank to cancel the transfer but, by that time, Citi Bank had already remitted the money to Wells Fargo. Citi Bank then communicated to Wells Fargo to return the money, but the latter did not respond. Citi Bank eventually advised the Respondent to notify the Applicant to settle the matter directly with Laxmi Petrochem.

After filing the suit, the parties held out-of-court meetings with a view to settling the dispute amicably. However, this mediation was not successful. When the suit was called for hearing on 27th August 2019, the Applicant and his counsel were absent and the suit was dismissed for want of prosecution.

The Application

This application is brought by notice of motion under Article 28 of the Constitution of the Republic of Uganda, 1995, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act and Order 9 rule 18 of the Civil Procedure Rules. It seeks an order setting aside the dismissal of Civil Suit No. 714 of 2018 ("the main suit"). In his supporting affidavit, the Applicant stated that he did not attend Court on 27th August 2019 because his former lawyers 'kept him in the dark' about the case.

The Respondent's affidavit in reply was affirmed by Mr. Lusiba Muhammad, its Legal Officer who asserted that the application is incurably defective and that the Applicant did not prove any sufficient cause why the main suit ought to be reinstated. The affidavit in rejoinder reiterated the contents of the Applicant's affidavit in support of the application.

Representation and hearing

The Applicant was represented by M/S Mushabe, Mununguu & Co. Advocates while the Respondent was represented by M/S Shonubi Musoke & Co. Advocates. The parties filed written submissions in support of their respective cases. The Respondent raised 4 preliminary objections which I will deal with together with the merits.

Issues for determination

1. Whether the application is properly before the Court.
2. Whether there is sufficient cause justifying the Applicant's non-appearance in court for the hearing on 27th August 2019.
3. What reliefs are available to the parties.

Determination

Issue 1: <u>Whether the Application is properly before the Court.</u>

The Respondent argued that reinstatement of the main suit is not available as a remedy in the circumstances, that the Application is incompetent for want of service, that there has been inordinate delay in bringing the Application and that

the alleged mistake of the Applicant's former counsel does not constitute sufficient cause for allowing this Application.

That reinstatement is not an available remedy in the circumstances

I have reviewed the Order dismissing the main suit on 27th August 2019. On that day, Counsel for the Respondent was present, but the Applicant and his counsel were both absent. The Court did not state the law under which the main suit was dismissed. It appears to me that while the dismissal was premised on 'want of prosecution' under Order 17 rule 5 of the CPR, the correct premise and law ought to have been 'non-appearance of the Applicant (then Plaintiff) and his counsel' under Order 9 rule 22 of the CPR.

As held in **Comtel Intergrators Africa Limited v National Social Security Fund, High Court Miscellaneous Application No. 772 of 2016**, my considered view is that the Court, in dismissing the main suit, used the words 'want of prosecution' generally to mean inadvertence of the Applicant and his counsel in attending court proceedings and diligently prosecuting the main suit, and not in the strict sense stipulated under Order 17 rule 5 of the CPR. Therefore, this error is not material since dismissal was still justified but on different grounds (non-appearance).

I find that since the proper reason for the dismissal ought to have been the non-appearance of the Applicant and his counsel, reinstatement is an available relief pursuant to Order 9 rule 23 of the CPR.

That this Application is incompetent for want of service

The record shows that this application was filed in the Registry of this Court on 8th July 2021 and endorsed by the Court on 17th December 2021. The Respondent argues that, thereafter, the application was served on it on 11th March 2022 but there is no affidavit of service on record to confirm that date of service. The Applicant states that he was informed by his lawyers that their law clerk made so many trips to the Court registry and that the Court clerks kept telling him that the mother file had gotten lost together with the Application until 10th March 2022 when the Application was retrieved and served the following day. The Application was, therefore, served 83 days after endorsement by the Court.

The best evidence to prove the said follow-up would have been the account of the clerk himself but the Applicant did not file any affidavit from the clerk. There is also no formal record of follow up. To this end, the Applicant's account of the follow-up amounts to hearsay which is inadmissible under Sections 30 and 59 of the Evidence Act Cap 6. It is trite law that the timelines for service of summons in Order 5 rule 1 equally apply to service of hearing notices and applications (See **Fredrick James Jjunju & Anor v Madhivani Group & Anor, High Court Misc. Application No. 688 of 2015)**. Therefore this application ought to have been served within 21 days from 17th December 2021. The Applicant has not applied or prayed for validation of the service.

Notwithstanding the above findings, the Respondent was served with the application and it duly filed an affidavit and written submissions in reply. In the interests of substantive justice, I am inclined to find that the Respondent has not suffered any real prejudice following the late service, in order to conclusively settle the merits of this application. The alleged delay and the mistake of the Applicant's former lawyers are considered in the next issue.

Issue 2: <u>Whether there is sufficient cause justifying the Applicant's non-appearance in Court for the hearing on 27th August 2019.</u>

To succeed in an application of this nature, an Applicant must satisfy the Court that there was sufficient cause for his non-appearance on the day when the dismissed suit was called on for hearing (See Order 9 rule 23 of the CPR). In **Kyegegwa District Local Government v Aharikundira Margaret, High Court Misc. Application No. 0025 of 2022**, the Court cited, with approval the Kenyan decision in **Gideon Mosa Onchwati v Kenya Oil Co. Ltd & Anor [2017] eKLR** in which "sufficient cause" was defined to mean:

> *"… the 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 viewpoint of a reasonable standard of a curious man. <u>In this context, "sufficient cause" means that a party has not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances</u>*

of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". (Underlined for emphasis).

The specific reason for the Applicant's non-appearance for the 27th August 2019 hearing has not been provided. The Applicant has simply averred that his former counsel was negligent in not telling him about the dismissal of the main suit. The Applicant has not told the Court where he and his former counsel were on 27th August 2019 and why they did not attend Court. Out-of-court mediation, in and of itself, cannot justify failure to attend Court, especially when such mediation is not brought to the Court's notice and the Court has not stayed its proceedings.

Furthermore, the Applicant argued that it was the mistake of his former lawyers not to tell him about the 27th August 2019 hearing and not to attend that hearing. It is evident from Annexure A to the Affidavit in reply that the dismissal order was served on the Applicant's former lawyers on 1st October 2020. Thus, notice of the dismissal can be imputed on the Applicant through his former lawyers. The Applicant has asked the Court to forgive his inadvertence in light of the general rule that mistakes of counsel cannot be visited on the litigants. At page 8 of his submissions in rejoinder, the Applicant suggested that all he had to do was to seek regular updates about his case from his former lawyers. He also submits that he sought these updates but his lawyers kept him in the dark. However, there is no record of any follow-up or any request for an update made by the Applicant to his former lawyers.

I am persuaded by the decision in **National Insurance Corporation v Mugenyi & Co. Advocates [1987] HCB 28** where it was held that 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. In the present case, I am not satisfied that the Applicant did his best to attend the hearing of 27th August 2019. "Mistake of Counsel" is not a magic wand which litigants can waive and get instant relief from their advocates' actions or omissions. Where a litigant is also guilty of dilatory conduct, he or she will be bound by his advocate's acts or omissions. (See **Stone Concrete Limited v Jubilee Insurance Co. Limited, High Court Misc. Application No. 358 of 2012**).

Had the Applicant been making regular requests for case updates to his former lawyers as he suggested, he would have discovered the hearing date of 27th August 2019 and attended the hearing. Alternatively, he would have discovered the dismissal much earlier and brought this application sooner. The main suit was dismissed on 27th August 2019, even before the onset of the coronavirus pandemic. There was, therefore, an inordinate delay when this application was brought on 8th July 2021 (1 year and 11 months later).

For the above reasons, I find that there is no sufficient cause justifying the Applicant's non-appearance in Court for the hearing on 27th August 2019. I accordingly dismiss the application with costs to the Respondent.

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Patricia Mutesi

JUDGE

(29/09/23)