THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 2853 OF 2023

(ARISING OUT OF CIVIL SUIT NO.0397 OF 2020)

1. A.K.T PROJECT MANAGEMENT LTD

2. KHATUNBHAI AMIRAL TAR MOHAMMED

(Suing through her appointed

Attorney Nizarali Sayani)

3. ZAITOON TARMOHAMED A.K.A NINA ::::::::::::::::::APPLICANTS

VERSUS

1. DFCU BANK LIMITED

2. NATIONWIDE PROPERTY SERVICES LTD :::::::::::::: RESPONDENTS

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

RULING

Introduction

This application was brought by Notice of Motion under **Section 98 of the Civil Procedure Act, Cap. 71, Order 9 Rule 23 and Order 52 Rule1 of the Civil Procedure Rules SI 71-1,** seeking orders that:

1. The dismissal order made on 27th of October 2023, in HCCS No.397 of 2020, A.K.T Project Management Ltd and 2 Others Vs DFCU Bank Ltd and another be set aside.

2. This Court be pleased to reinstate HCCS No.397 of 2020 A.K.T Project Management Ltd and 2 Others Vs DFCU Bank Ltd and another and all applications arising therefrom.

3. Costs of this application be provided for.

Background

The background of the application is detailed in the affidavit in support by Counsel Anthony Kusingura of M/s Nsubuga & Co. Advocates, and summarized below:

1. That Counsel for the Applicants was not aware that Court had fixed the suit for hearing on 27th October 2023.

2. That, unfortunately, Counsel for the Applicants had not received any notifications of the hearing from the ECCMIS notification system, or any physical hearing notices served upon them so they did not attend Court that day.

3. That the Applicants are interested in this matter as they had through their lawyers and before the dismissal, written several letters requesting to be given hearing dates for the matter and had physically followed up with Hon. Lady Justice Patricia Mutesi with whom the Applicants were aware that the matter had been re-allocated to.

4. That Counsel for the Applicants constantly checked ECCMIS for notification of the hearing of this matter however, they did not receive any notification of the same.

5. That further and in alternative, any inadvertence of the lawyers should not be visited on the Applicants as parties who have a *bonafide* claim and wish to pursue their rights.

6. That the application has been made without undue delay.

7. It is just, fair and equitable that this application be allowed so that the matter is heard on the merits.

In reply, the 1st Respondent through Counsel Richard Bibangambah of M/s K&K Advocates, opposed the application contending that:

1. The application is frivolous and untenable at law as the Applicants' affidavit in support of the Notice of Motion does not disclose sufficient cause for setting aside the ruling and/or reinstatement of the main suit.

2. The Applicants are guilty of dilatory conduct of Civil Suit No.397 of 2020 as they have not diligently prosecuted their case in this Court at the peril of the 1st Respondent despite filing this suit in 2020.

3. Without prejudice to the above and in the alternative, the Applicants be ordered to provide security for costs as a condition for reinstatement of the main suit.

Representation

The Applicants were represented by Counsel Richard Nsubuga of M/s Nsubuga & Co. Advocates while the 1st Respondent was represented by Counsel Richard Bibangambah of M/s K&K Advocates. The 2nd Respondent was not represented in this application.

Learned Counsel for the Applicants and the 1st Respondent filed their written submissions for which I am grateful and the same have been considered by this Court in this Ruling.

Issues for determination

1. Whether there is sufficient cause to set aside the order of dismissal of HCCS No.397 of 2020?

2. What are the available remedies to the parties?

Issue 1: Whether there is sufficient cause to set aside the order of dismissal of HCCS No.397 of 2020?

Applicants' Submissions

Counsel relied on **Section 98 of the Civil Procedure Act** which empowers this Court to make such orders as may be necessary for the ends of justice and **Order 9 Rule 23 of the Civil Procedure Rules** under which the application was brought. He submitted that as stipulated in **Rule 23 of Order 9 of the Civil Procedure Rules**, the consideration for grant of this application is that the Court must be satisfied that there was sufficient cause for nonappearance when the suit was called for hearing.

He referred to the averments in the affidavit in support and argued that they have been diligently following up the matter as evidenced by annexures "B", a copy of a letter by the Applicants dated 26th November 2020, seeking a hearing date and "C" a copy of a letter dated 9th February 2023, seeking a hearing date before Hon. Lady Justice Patricia Mutesi.

Furthermore, Counsel contended that on 24th October 2023, the Applicants filed Misc. Application No.2046 of 2023 and followed it through with letters requesting for a hearing date, unknown to them that the suit had been reallocated. Counsel insisted that they have never received any notifications vide ECCMIS as shown by annexures "E1-E6" (copies of the

ECCMIS notifications on their ECCMIS accounts between 18th July 2023 and 21st November 2023). Counsel submitted that it is Mr. Kusingura who on 14th November 2023, logged into ECCMIS and found that the suit had been dismissed on 27th October 2023 and also discovered that it had been previously fixed.

Counsel submitted that the Applicants' Counsel did not get the notification about this suit although they got notifications of other cases. Counsel submitted that ECCMIS has a short coming of selectively sending notices, and should not be relied upon to prove service of hearing notices by the Court. He also contended that in the least, parties should have been notified of the reallocation of the matter. Counsel reiterated that there was sufficient cause for nonappearance on 27th October 2023.

In the alternative and quoting the case of ***Edirisa Kanonya and Anor Vs Asuman Nsubuga and Others H.C.M.A No.373 of 2022***, he prayed that any inadvertence of the lawyers, should not be visited on the litigants as the Applicants herein are interested in pursuing their matter. In conclusion, he prayed for the grant of this application.

1st Respondent's Submissions

Relying on **Order 9 Rule 23 of the Civil Procedure Rules**, Counsel for the 1st Respondent submitted that the Court's description of sufficient cause is limited to acts that are devoid of negligence, inordinate delay and dilatory conduct. He cited the case of ***Bishop Kibuuka Vs the Uganda Catholic Lawyers Society & 2 Others (Misc. Application No.696 of 2018 [2019] UGHCCD 72 (11 April 2019)*** in which **Hon. Justice Ssekaana Musa** quoted the Kenyan case of ***Gideon Mosa Onchwati Vs Kenya Oil Co. Ltd & Another [2017] eKLR*** where it was held that:

"*It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides, is imputed to the appellant.*"

"*Sufficient cause" means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously*."

Counsel for the 1st Respondent submitted that the facts and circumstances of this case do not accord sufficient cause to this Court to set aside the order of dismissal of HCCS No.397 of 2020 for two reasons;

First, that the Applicants Counsel did not take diligent steps to attend the hearing of the suit on 27th October 2023. Counsel submitted that in the determination of what amounts to sufficient cause, and as held in the case of ***Norah Nakiride Vs Hotel International Ltd [1987] HCB 85***, it is a case-by-case basis to establish whether under the circumstances the Applicant honestly intended to be present at the hearing and did his best to attend.

He referred to paragraphs 10 and 11 of the Applicants affidavit in support of the application wherein their Counsel stated that he was unaware that the matter was fixed for hearing on 27th October 2023 and that he

discovered that not only had the suit been fixed earlier for hearing on 7th September 2023, 19th October 2023 and 27th October 2023 but also that it had been dismissed at the last hearing.

In further submission, Counsel contended that it is logically and legally untenable that the Applicants' Counsel honestly intended to attend the hearing of 27th October 2023 for which they were unaware and had not diligently checked on ECCMIS or perused the weekly cause list for about three months, that had they done so, they would have at least attended one of the three hearings.

Secondly, that the Applicants are guilty of dilatory conduct in the prosecution of this suit and that an order to set aside the dismissal would defeat the best interest of justice.

Counsel submitted that this Court is enjoined to refrain from condoning dilatory conduct and he referred to the case of ***Parambot Breweries (U) Ltd Vs Standard Chartered Bank & Anor Misc. Application No.380 of 2021***, in which **Hon. Justice Duncan Gaswaga** dismissed such an application regardless of the Applicant's evidence that it did not know about the hearing since it had not been served with a hearing notice and that he also disregarded the Applicant's evidence that he had taken necessary legal steps by writing letters to Hon. Justice Boniface Wamala to have the matter fixed for hearing under the mistake that he was the trial Judge.

Counsel for the 1st Respondent submitted that it is now the position of the law that Courts must consider the entirety of a party's conduct in the main suit before issuing orders to set aside. He referred the Court to the case of

Sserubiri Frank and Others Vs Salama Jacques and Others (Misc. Application No.205 of 2021) [2022] UGHCCD 230 (24 October 2022).

Counsel contended that in the instant case, it is the 1st Respondent's averment in paragraphs 8,9 and 10 of the affidavit in reply, that the 1st Respondent was served with a copy of the summons for directions on 11th February 2021, fixing the matter for 25th March 2021 and that though the matter did not proceed on that day due to the unavailability of the Registrar, the matter dragged on until 12th February 2022. Counsel further submitted that as per paragraphs 10 and 11 of the affidavit in support, it is demonstrated that the Applicants did not attend Court on the dates when the matter was called for hearing as they were unaware at all material times that the matter had been fixed for hearing.

Analysis and Determination

Section 98 of the Civil Procedure Act empowers this Court to make such orders as may be necessary for the ends of justice. Further, **Order 9 Rule 23 (1) of the Civil Procedure Rules** stipulates that:

> *"Where a suit is wholly or partially 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."*

In the case of ***Florence Nabatanzi Vs Naome Binsobodde SC Civil Application No.6 of 1987*** and ***Sipiriya Kyarulesire Vs Justine Bakanchulike Bagambe Civil Appeal No.20 of 1995***, the Supreme Court while handling such an application laid down principles which can be summarized as follows;

i. First and foremost, the application must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on the facts at hand.

ii. The administration of justice normally requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights.

iii. Whilst mistakes of Counsel sometimes may amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.

iv. Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law.

v. A vigilant Applicant should not be penalised for the fault of his Counsel on whose actions he has no control.

The term sufficient cause though not defined by our Civil Procedure Rules has been defined in several cases. In the case of ***Gideon Mosa Onchwati Vs Kenya Oil Co. Ltd and Anor Civil Suit No.140 of 2008 [2017) eKLR*** the Court relied on the definition in the Indian case of ***Parimal Vs Veena Alias Bhati, (2011) 3 SCC 545***, in which the Court observed that:

"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore 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 view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

The Court in the case of ***Capt. Philip Ongom Vs Catherine Nyero Owota Supreme Court Civil Appeal No. 14 of 2001*** stated that a litigant's right to a fair hearing in the determination of civil rights and obligations which is enshrined in Article 28 of the Constitution should not be defeated on ground of his/her lawyer's mistake.

The test to be determined herein and as submitted by Counsel for the 1st Respondent is whether the Applicants honestly intended to attend the hearing of the suit.

I have taken note of the hearing notices served via ECCMIS for hearing on 7th September 2023, 19th October 2023 and 27th October 2023 when the suit was dismissed.

The Applicants' Counsel contends that they never received any notification on ECCMIS that the said suit had been fixed for hearing and that they had no knowledge that the same matter had been reallocated to another Judge. Counsel for the Applicants contends that they were diligently following up the matter. Counsel for the Applicants further submitted that an application for discovery of documents vide Misc. Application No. 2046 of 2023 was filed and that a follow up was made in the chambers of Hon. Lady Justice Patricia Mutesi regarding the hearing of the application. I have noted from ECCMIS that indeed Misc. Application No. 2046 of 2023 is before Hon. Lady Justice Patricia Mutesi and it was admitted by the Registrar on 1st September 2023. I have also read the letter attached to the application as annexure "D" written by Counsel for the Applicants to the Registrar requesting for a hearing date of Misc. Application No. 2046 of 2023 and Counsel stated therein that the matter was allocated to Hon. Lady Justice Patricia Mutesi.

Having noted the above, I hold that the Applicants have shown sufficient cause as to why they failed to appear in Court for hearing on 27th October 2023. I am further inclined to rely on the case of ***AG Vs AKPM Lutaaya SCCA No.12 of 2002***, in which **Katureebe, JSC**, held that the litigant's interests should not be defeated by the mistakes and lapse of his Counsel. The same was considered in ***Godfrey Magezi and Brain Mbazira Vs Sudhir Ruparelia SCC Application No.10 of 2002***.

Further, as stated above the 2nd Respondent was not represented. The 2nd Respondent did not file any affidavit in reply opposing the application nor were submissions filed. It can therefore be concluded that the 2nd Respondent had no objection to the prayers of the Applicants.

Having considered all the above and in the interest of justice, the dismissal order of ***Civil Suit No.397 of 2020, A.K.T Project Management Ltd and 2 Others Vs DFCU Bank Ltd and another*** is set aside. Civil Suit No. 397 of 2020 is accordingly reinstated.

Issue 2: What remedies are available to the parties?

Counsel for the 1st Respondent submitted that the Applicants are not entitled to any remedies. Counsel submitted that the Applicants failed to satisfy the burden of proof that they had an honest intention to be present at the hearing. Counsel prayed in the alternative that the suit should be reinstated subject to the payment of security for costs in accordance with Order 9 Rule 23 of the Civil Procedure Rules and Order 26 Rule 1 of the Civil Procedure Rules. Counsel relied on the case of ***Wandera Asuman and Anor Vs Hajji Mawazi Wandera and others, Civil Appeal No. 96 of 2017.***

In regard to security of costs as prayed for by Counsel for the 1st Respondent, **Order 26 Rule 1 of the Civil Procedure Rules** provides that Court may if it deems fit order the Plaintiff in any suit to give security for payment of all costs incurred by any Defendant.

The rationale for security for costs was emphasized by the Supreme Court in the case of ***Noble Builders (U) Limited & Anor Vs Jabal Singh Sandhu, Civil Application No.15 of 2002*** wherein the Court stated that:

> "*a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded costs of the action, he will have real difficulty in enforcing that order. If the difficulty would arise from impecuniosity of the plaintiff the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by a significant expenditure of time and money, the defendant should be entitled to security*."

As stated in the case of ***Anthony Namboro and Fabiana Waburo Vs Henry Kaala [1975] HCB 315***, considerations for grant of an order of security for costs are;

i. Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit; and

ii. Whether the Applicant has a good defence to the suit which is likely to succeed.

As laid out under **Section 101 of the Evidence Act, Cap.6,** he who alleges must prove. In the instant application, Counsel for the 1st Respondent sought for the remedy but did not expound on the grounds and facts to support the remedy sought nor was evidence adduced. In the circumstances, the prayer for security for costs is denied on that basis.

However, in light of the fact that the 1st Respondent complied with Court directives and has incurred costs in opposing this application for reinstatement of Civil Suit No. 397 of 2020, which would not have been dismissed had Counsel for the Applicants appeared for the hearing on 27th October 2023, I hereby grant costs of this application to the 1st Respondent.

Accordingly, this application is allowed with the following orders:

1. The dismissal order of **Civil Suit No.397 of 2020, A.K.T Project Management Ltd and 2 Others Vs DFCU Bank Ltd and another** is hereby set aside.
2. **Civil Suit No.397 of 2020, A.K.T Project Management Ltd and 2 Others Vs DFCU Bank Ltd and another** is hereby reinstated.
3. Civil Suit No. 397 of 2020 is hereby set for hearing on **29th January 2024** at **9am**.
4. Costs of the application are awarded to the 1st Respondent.

It is so ordered.

Dated, signed and delivered electronically this **19th** day of **January**, **2024.**

Patience T. E. Rubagumya
JUDGE
19/01/2024
8:40am

5