THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-CA-0014-2008

(Arising from NABWERU Chief Magistrate's Court Civil Suit No. 146 of 2007)

STEWARDS OF GOSPEL TALENTS LIMITED :::::::::::: APPELLANT

VERSUS

NELSON ONYANGO & 7 OTHERS :::::::::::::::::::: RESPONDENTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This appeal was brought under Section 76 (1) (h) of the Civil Procedure Act, O.43 r.1 (1) and (2) and O.44 r.1 (b) of the Civil Procedure Rules. The appellant seeks orders that the appeal be allowed, the decision of the Magistrate's Court be set aside and substituted with an order that Civil Suit No. 146 of 2007 be reinstated and heard on its merits, and the respondents pay the appellant the costs in this court and in the court below.

From the pleadings, the appellant filed a suit against the respondents jointly and severally in the Chief Magistrate's court in Nabweru at Nabweru vide ***C. S. No. 146 of 2007***. In the suit, the appellant sought a permanent injunction to restrain the respondents from trespassing on its church property called Kazo Gospel Church, where they were at the time allegedly erecting a makeshift structure within its incomplete church building, general damages and costs.

The main suit was fixed for hearing and the appellant called its first witness on 18/12/2007. During cross-examination of PW1 Galukande Michael Peters, learned counsel for the respondents sought an adjournment to allow PW1 to bring some documents and the matter was adjourned to 7th January, 2008.

Come that day, neither the appellant nor its counsel appeared in court. The learned trial Magistrate Grade I dismissed the suit for want of prosecution under O.9 r.22 of the Civil Procedure Rules. The following day the appellant filed an application to reinstate the suit vide Miscellaneous Application No. 004 of 2008. It was heard on 31/01/2008 and disallowed by the Trial Magistrate His Worship Aggrey Bwire. Hence this appeal.

The grounds of appeal are stated in the memorandum of appeal. The thrust of these grounds is that the learned trial Magistrate erred in law and fact in finding that the appellant had not shown sufficient cause for not appearing when Civil Suit No. 146 of 2007 was called for hearing.

I will concentrate on this ground alone because in my view the answer thereto is bound to dispose of the entire appeal.

It is the duty of the first appellate court to review the record of evidence for itself in order to determine whether the decision of the trial court should stand.

In so doing I must bear in mind that an appellate court should not interfere with the discretion of a trial court unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of discretion and that as a result there has been a miscarriage of justice.

See: National Insurance Corporation vs Mugenyi [1987] HCB 28

Following the dismissal of the main suit on 07/01/2008, the appellant filed two affidavits in support of the application for reinstatement. One was by Michael Kiganda Galukande and the other by the Advocate handling the matter Yeboah Wameli Anthony. According to Mr. Galukande, counsel called him on 06/01/2008 and informed him that the applicants need not go to court on 7/01/2008 when the matter would come up for hearing

as court would not be able to proceed on that day and that he would inform them (his clients) of another day. This position was not denied by the applicant's counsel. Counsel's reason was based on his understanding of the law that during court vacation the court could not sit and adjudicate in a civil matter without a certificate of urgency. If anything, this is the only reason being advanced by the appellant for its inability to attend court on 7/01/2008. The whole question is whether the reason advanced by the appellant and its counsel amounted to 'sufficient cause' as envisaged under O.9 r.23.

O.9 r.22 provides for the procedure when the defendant only appears. It reads:

> ***"Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless……."***

Then under O.9 r.23, where a suit is wholly or partly dismissed under rule 22, "***the plaintiff shall be precluded from bringing a fresh suit in respect of the same action; but he/she may apply for an order to set the dismissal aside, and, if he/she satisfies the court that there was sufficient cause for non-appearance 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***."

From the above law, in an application for restoration of a dismissed suit under O.9 r.22, all the applicant needs to do is to satisfy court that there was sufficient cause for non-appearance, that is, that he had an honest intention to attend the hearing but failed to do so, and that he was diligent in applying.

The law does not offer a definition of what amounts to 'sufficient cause' but in **Shabir *Din vs Ram Parkash Anand (1955) 22 EACA 48***, it was held that a mistake by the plaintiff's counsel though negligent, may be accepted. In ***Nuru Nakiridde vs Hotel International [1987] HCB 85***, sickness of Counsel was accepted to constitute a just cause.

It is trite that an application for adjournment may or may not be allowed by a judge in the exercise of his/her own discretion and an appellate court would be reluctant to interfere unless it is proved that the judge did not exercise the discretion judicially. ***Nitin Jayant Madhvani vs East Africa Holdings Ltd & Others SCCA No. 14 of 1993*** (reproduced in ***1993 vs KALR 34***).

So what happened in this case?

Hearing commenced on 18/12/2007. The evidence of PW1 was not completed. It was adjourned to 07/01/2008. The Judicature (Court Vacation) Rules Statutory Instrument 13 – 20 provides as follows:

> ***"3. In each year the court shall be in vacation from the 15th July to the 15th August inclusive and from the 23rd December to the 7th January inclusive."***

As regards court business in vacation, it provides as follows:

> ***"4. In vacation the court shall deal with criminal business but shall not sit for the discharge of civil business other than such civil business, as shall, in the opinion of the presiding judge, be of an urgent nature."***

From the records, there is no indication that as the matter was being adjourned to 07/01/2008 the issue of the date being in court vacation was ever considered. And from the evidence of Michael Kiganda Galukande, their counsel rang him up on 06/01/2008 and advised him not to proceed to court because the court would not be able to proceed on that day. He verily believed the information to be true and did not go there. He was wrong because the court proceeded with the matter. Whereas counsel for the defendants turned up, whether or not he was aware that 07/01/2008 was still vacation time, counsel

for the plaintiff didn't. On account of counsel and the client's absence, court dismissed the plaintiff's claim.

In his ruling, the learned Trial Magistrate observed:

> ***"Surprisingly, there is nothing in the affidavit of the said counsel that he informed counsel for the opposite party nor court that he would not appear for further hearing because 7/01/2008 was in court vacation. Nor was any submission on this point made by counsel for the applicant/plaintiff."***

I have found this observation in the ruling of the court a little puzzling because at page 2 of the proceedings in Miscellaneous Application No. 004 of 2008, counsel for the applicant is on record as having conceded, in the submissions, that neither the plaintiff nor their counsel was in court on 7/01/2008 but the applicant had shown sufficient cause in paragraph 5 of Kiganda's affidavit that ***"the applicant could not be in court at that time because the Directors had been advised by counsel that the suit was not coming up for hearing."***

Counsel did submit that the directors relied on the advice of counsel and were reasonably entitled to do so. The learned trial Magistrate did not make any finding to the contrary, regarding what the appellant's counsel had told the directors. The presumption is that he is the one who advised them not to attend court on 07/01/2008.

Further down (on the same page 2) counsel for the applicant in that application submitted:

> ***"Paragraph 4 of the affidavit of Wameli. It is clear that counsel did not appear in court and advised his clients also not to appear because he realized that 7/01/2008 was in court vacation and hence Wameli thought that court would not sit to deliberate civil matters, including the said suit in court vacation as no certificate of urgency had been issued."***

In view of the above submission which appears in the proceedings of the trial court, it was in my view a misdirection on the part of the learned trial Magistrate to state in his ruling that learned counsel did not make any submission on the point of the court vacation. Learned Counsel did address the court on that point.

Regarding the reason given for non-attendance, that is that the court was in court vacation, the learned trial Magistrate observed (p.5 of the ruling):

> ***"There is no evidence in the affidavit of counsel Mr. Wameli Anthony and Galukande that they did their best to attend. They did not attempt to attend only to be prevented by something beyond their control. They sat away comfortably, when they knew the last minute of court was that the hearing was for 7/01/2008.***
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> ***Rule 4 of Judicature (Court Vacation). Rules gives discretion to court to hearing civil matters in court vacation. If counsel or his client had reservations about 7/01/2008 they should have come to court to confirm on 7/1/2008 or have informed the opposite party and court. That they did not do."***

Once again, I have no doubt in my mind that this was a misdirection on the part of the learned trial Magistrate. The issue was not whether learned counsel for the applicant was right or wrong in his advice to his clients. The issue was whether he told them so and they believed him.

The two sections are couched in mandatory terms: court shall be in vacation during the indicated period, all the dates inclusive; and, court shall deal with criminal business, not civil, except, as shall be in the opinion of the presiding judge, be of an urgent nature.

From the evidence, there was nothing urgent about the fixture. The case was merely adjourned to 7th January, 2008 as an ordinary adjournment. As a judicial officer, the trial

Magistrate knew or ought to have known the court practice in transacting civil business during the court vacation. The hearing is preceded by a certificate of urgency, obtained before the hearing in the main cause proceeds. There was no such certificate in the instant matter.

It would appear that disputes arising out of the court vacation rules are rare, perhaps because the law is fairly straight forward. No authority has been cited to me directly on the point. A case from outside this jurisdiction, ***Macfoy vs United Africa Co. Ltd [1961] 3 ALL E.R. 1169***, is very instructive.

In that case, the plaintiffs issued a writ for moneys alleged to be due for goods supplied to the defendant. Service was effected during a similar court vacation in Sierra Leone.

The defendant having failed to deliver a defence within the time allowed, such period being reckoned from the end of the court vacation, the plaintiffs obtained judgment against him in default of a defence. Subsequently, the defendant applied to have the judgment set aside, and for a stay of execution, on the ground that he had a good defence on the merits of the claim. He did not then suggest that the judgment was a nullity but treated it as a regular judgment and swore an affidavit giving reasons why he was too late to file a defence. The applications were dismissed and the defendant appealed to the West African Court of Appeal. On appeal, the defendant for the first time took the point that the delivery of the statement of claim to him in the court vacation was a nullity and that all proceedings were therefore void. The appeal was dismissed. On appeal to Her Majesty in Council, it was held that whether the judgment in default of defence should be set aside was a matter for the discretion of the court, the delivery of the statement of claim in the court vacation being a voidable act, not a nullity. Her Majesty in Council was of the view that in the circumstances of the case, the West African Court of Appeal had rightly exercised their discretion. The appeal was accordingly dismissed.

Applying the same principle to the facts herein, it is clear to me that the hearing of the case in the court vacation was a voidable act. It was not a nullity.

Accordingly, whether or not to proceed with the hearing on 07/01/2008; or to set aside the dismissal order in the application for re-instatement were all matters within the trial Magistrate's discretion. As such court would be slow to interfere with that discretion unless it was not exercised judicially. In ***Yahaya Kariisa vs Attorney General & Anor SCCA No. 7 of 1994*** (reproduced in ***[1994] vs KALR 144*** Court noted:

> ***"Court has discretion to allow or refuse an adjournment but the discretion must be exercised judiciously. Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable in the given set of circumstances."***

I agree.

In the instant case, the record shows that the prayer to reinstate was refused partly because "***the applicant/plaintiff had had flagrant and culpable inactivity even when the witnesses were in court on 17/12/2007, under the pretext that the principal witness had flown in from South Africa and it later transpired that they began with Galukande Michael Peters later, who on that day had been in court."***

Surely a party knows better how to conduct its case. Court should not be unduly bothered when a party makes changes in the line up of its witnesses. In any case the same trial Magistrate did allow that adjournment, implying that it was justified.

Counsel is an officer of court. He told court that he had personally advised his clients not to go to court on 07/01/2008. His advice was based on his interpretation of the law that court was still on vacation. His clients believed him and heeded his advice. I have already indicated that the act of proceeding in court vacation was voidable, implying that counsel's advice was not altogether misconceived. I have failed to know why in the circumstances the learned trial Magistrate could not give Counsel's word the due respect

it deserved as an officer of court, especially so since the record shows that prior to this incident, he was not in the habit of absenteeing himself. He should have made some due allowance for do

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ubt, if not to counsel, at least to his client who had relied on his professional advice.

It is trite that courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and errors or lapses should not necessarily debar a litigant from the pursuit of his rights. Unless the other party will be greatly prejudiced, and cannot be taken care of by way of an order for costs, hearing and determination of disputes should be fostered rather than hindered: ***Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998***. By saying so, I should not be understood to mean that rules of procedure should be ignored. Each case must be decided on the basis of its own circumstances.

In the circumstances of this case, I'm of the considered view that learned Counsel for the appellant's failure to appear in court on 7/01/2008 on the basis of his personal interpretation of the law may have an error of judgment on his part. However, as the court observed in ***Shabir Din*** case, supra, a mistake by the plaintiff's counsel though negligent may be accepted. In the instant case, I would accept it.

As for diligence in applying, I notice that the suit was dismissed on 7/01/2008 and the application for re-instatement was filed the following day. This in my view was evidence and conduct of a party who honestly desired to be heard in the main suit, his counsel's apparent error of judgment notwithstanding.

It would appear to me that the learned trial Magistrate erred in law and fact in not finding that the appellant had shown sufficient cause for its non-appearance when the case came up for further hearing on 07/01/2008. Consequently it has been shut out from the

judgment seat without proper considerations. The trial Magistrate's discretion was in my view not judicially exercised and this has occasioned a miscarriage of justice. The interests of justice demand that the appeal be allowed and the impugned order of dismissal be set aside so that the matter is heard and determined on merits. I therefore find merit in the first ground of appeal and allow it.

As this ground alone disposes of the entire appeal, I allow it in its entirety.

As regards costs, given that the hearing date had been fixed by consent of both parties, and the court's improper exercise of the discretion to allow the application for reinstatement is not a matter that can be blamed on either party, I would order each party to bear its own costs of appeal. However, the order for costs in the lower court, the subject of this appeal, shall not be interfered with in view of the finding that the appellant through its counsel was at fault for the non-appearance in court on the due date.

The file shall be sent back to the Chief Magistrate Nabweru to place it before the same Magistrate, or in his absence, his successor, to continue with it as by law established.

Orders accordingly.

Yorokamu Bamwine
JUDGE
05/08/2009