THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – MA – 0054 OF 2023

ALISEN FOUNDATION GROUP

OF COMPANIES LIMITED ::APPLICANT

VERSUS

BAZARA JULIUS :: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

RULING

The applicant commenced this application under section 98 of the Civil Procedure Act and Order 52 rule 1 & 2 of the Civil Procedure Rules for orders that:

1. ***Civil Suit No. 034 of 2019 be reinstated and determined on merits***
2. ***That the costs of taking out the application be provided to the applicant***.

The application was supported by the affidavit deponed by Mr. Baluku Alisen, the Director of the applicant who averred as follows:

1. That on 11th June 2019, he filed Civil Suit No. 034 of 2019 against the Respondent. That before the case could be determined on merits, he got sick. That prior to that, he used to attend court even on occasions where the Respondent's counsel was absent.
2. That he did not recover quickly as such he did not attend court. That it became difficult for him to attend court and as a result, Civil Suit No. 034 of 2019 was dismissed for want of prosecution on 1st June 2023.
3. That his case was affected by an act of God since he fell sick before its conclusion. That he was ready to prosecute the same without fail since he had since recovered.

4. That it is in the interests of justice that the application is allowed and the Respondent shall not suffer any prejudice.

The application was opposed by Respondent who contended as follows;

1. That the application at hand is incurably defective since the supporting affidavit was filed without written authority from the applicant which ought to be in form of a resolution.
2. That on the date the suit was dismissed, neither the applicant's representative or her lawyer were present thus he prayed for dismissal of the suit.
3. That the application has no merit since there is no proof of the alleged sickness.
4. That it is in the interests of justice that the application is dismissed with costs for being defective.

Issues:

1. **Whether the application before court is incompetent.**
2. **Whether this is sufficient cause to warrant setting aside the order dismissing civil suit no. 034 of 2019.**
3. **Remedies available.**

Representation:

The Applicant was self-represented while the Respondent was represented by Mr. Masereka Chan. Parties filed written submissions which I have considered.

Issue 1: Whether the application before court is incompetent.

Legal Arguments:

Learned counsel for the Respondent submitted that where a plaintiff is a corporate body, there must be a resolution authorizing such suit to be instituted which was not complied with in the current application. Learned counsel cited the case of ***Bogere Coffee Growers v Sebadduka& Anor (1970) E.A*** to support his argument where it was held thus: ***"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or board of directors meeting and recorded in minutes".***

Learned counsel also cited the case of ***Masaka Tea Estates Ltd V Samalia (Kiganja) Tea Estates &ors HCMA No. 505 of 2004*** where it was observed that a suit in the names of a company without authority of the Directors is not maintainable in law. The suit was thus struck out for want of authority. He cited other authorities that reiterated the position in the afore-stated authorities and asked court to have the application struck out for want of authority by the company to authorize the institution of the suit at hand.

CONSIDERATION BY COURT:

There has been a constant debate in legal discourse as to whether it is a mandatory requirement for a company to take out a resolution before commencing an action in Court. The common position has been that a resolution is required prior to commencement of legal proceedings. This stems from the rule in ***Foss v Harbottle (1843) 2 Hare 461, 67 ER 189*** which is to the effect that in an action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. That such claims are initiated by a company after passing a resolution to that effect. This position was emphasized in ***Bugerere Coffee Growers***

Ltd versus Sebadduka & Anor [1970] 1EA 147, where court observed that: ***"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or board of directors' meeting and recorded in the minutes".***

There however seems to be a deliberate legal migration by Courts from the position in ***Bugerere Coffee Growers (supra)*** where courts have observed that the failure to take out such resolution prior to commencement of the suit does not render the same a nullity. In ***HCMC No. 11 of 2019, Money Lenders Association Uganda Limited & Anor v Uganda Registration Services Bureau, Wejuli J*** held inter-alia that: ***"It is indeed a settled position of the law in this jurisdiction, that Resolution to commence a suit is not a necessary pre-requisite….."***

In ***United Assurance Co. Ltd v Attorney General, Civil Appeal No. 1 of 1986 (unreported)*** which was cited with approval in ***Civil Appeal No. 10 of 1994, Navichanda Kakubhai Radia v Kakubhai Kalidas & Co. Ltd,*** it was observed thus: ***"Every case must be decided on its own facts. Looking at the various authorities and the law, I would say that one way of providing a decision of the board of directors is by its resolution in that behalf. But I would not go so far to say as suggested in Bugerere Coffeee Growers Ltd v Sebanduka supra, unless of course the law specifically requires a resolution as appears to be the case in instances specifically provided for in the Companies Act, an authority to bring action in the names of the company is not one of those instances where a resolution is required."***

In the Supreme Court of Nigeria in **Haston (Nigeria) Limited v African Continental Bank Plc, SC 109, 1998 (2002) LPELR) 1359 (SC)** it was stated inter-alia ***"It has been the rule for a long time now since Foss v. Harbottle (supra) was decided that the proper plaintiff in an action for a wrong done to a company is the company itself. The contention of the defendant in the two courts below and in this court is that the company by a resolution of her board of directors, must authorise that an action be taken. But this must be presumed until the contrary is proved by the party that asserts the contrary. The defendant has not led a shred of evidence to support its contention that the action here was not authorised by the plaintiff's board of directors. In any event section 279 (3) of Companies and Allied Matters Act enjoins a director (and the chairman of the board is a director) to "….act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purpose for which it was formed, and in such manner as a faithful, diligent, careful and ordinary skillful director would act in the circumstances." What is involved in this case is the assets of the plaintiff. Victor Ndoma Egba was not only the chairman of the plaintiff company but also the sole signatory to its current account with the defendant bank. Who is best in the position to act in the circumstances of this case where the company's account had been debited with fraudulent withdrawals other than the chairman and sole signatory of the account. By describing Victor Ndoma Egba as its chairman in exhibit 2 and holding him out as sole signatory of its account, the plaintiff has expressly or impliedly authorised him to act in the matter concerning her account see section 65 of Companies and Allied Matters Act …"***

The synopsis from the above reasoning is that the Companies Act allows directors to act on their behalf and any action done or taken by a director by virtue of section

65 of the Companies Act of Nigeria binds the company as if it was an act by the company. Therefore, where a director authorizes commencement of a suit, it is assumed that the authority was given by the company.

Section 52 of our Companies Act authorizes the directors to deal or transact on behalf of the company beyond what is stated in the company's memorandum. Section 59 further adds that any document or proceeding requiring authentication by a company shall be signed by a director and need not be under its common seal. It is therefore my view that the Companies Act gives the Directors powers to act beyond what is provided for under the memorandum, which may include commencement of proceedings in the Courts of law.

The second argument raised by Mr. Maseraka for the Respondent was that Mr. Baluku Alisen who deponed the affidavit in support of the application was not authorized by the applicant which authority must be in form of a resolution. This objection is partly settled by my analysis in the first concern above. It is settled law that a company is an artificial person without hands, a heart or body to execute its day to day calls. Therefore, the company transacts through its directors who are its soul and mind behind its operations. I therefore in the absence of evidence presented to the contrary, presume that the applicant acted with authority of the company.

I have also considered the provisions of the Companies Act and regulations there-under. I have not found any provision that restricts a director from swearing an affidavit on behalf of the company. I am persuaded to adopt the reasoning in ***Haston (Nigeria) Limited v African Continental Bank Plc (supra)***, that the directors as the sole mind behind the company act in the best interests of the company.

I am also alive to Order 29 rule 1 of the Civil Procedure Rules which is to the effect that; "***In a suit by or against a corporation any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case."*** The rules do not make it a requirement for a director to first obtain a resolution to depone an affidavit on behalf of the company.

Therefore, I overrule the points of law raised by Mr. Masereka and I will proceed to consider the merits of the application.

Whether this is sufficient cause to warrant setting aside the order dismissing Civil Suit No. 034 of 2019.

The applicant submitted that its director was sick for some time and this made it hard to appear and prosecute the case..

In response, Mr. Masereka asserted contended that the applicant did not adduce any iota of evidence before court to prove the assertion that he was sick. That the applicant's director did not attach any proof of the alleged sickness or any record of such.

CONSIDERATION BY COURT:

Order 9 rule 23 of the Civil Procedure Rules provides thus:

(1) Where a suit is wholly or partly 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.*

(2) *No order shall be made under this rule unless notice of the application has been served on the opposite party*.

The test for reinstatement under Order 9 rule 23 is proof of sufficient cause that prevented the plaintiff from entering appearance when the suit was called for hearing.

In *Hadondi Daniel vs YolamEgondi Court of Appeal Civil Appeal No 67 of 2003* the term sufficient cause was described thus; "…***Sufficient cause must relate to the inability or failure to take necessary step within the prescribed time."***

In *The Registered Trustees of the Archdiocese of Dar es Salaam Vs The Chairman Bunju Village Government & Others quoted in Gideon MosaOnchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR* the it was stated 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 bona fides, is imputed to the appellant."

Further to the above, the supreme Court in ***Kansiime K. Andrew v Himalaya Traders Ltd & 5 others, Supreme Court Civil Application No. 60 of 2021***, adopted the dicta in Supreme Court of India in ***Parimal versus Veena alias Bhart lz01-1-l 3 SCC 34S*** as what amounts to sufficient where it was observed thus;

"….. In this context sufficient cause means a party had not acted in a negligent manner or there was want of bonafide on its part in view of the facts and the circumstances of each case.."

Therefore, sufficient cause connote any legally justifiable excuse presented by a party that prevented him or her from doing an act mandated by the law in a given period of time as long as such excuse or conduct was not negligent or a party has not taken steps to take the act without undue delay and the omission was an innocent one.

The case law appears to leave the meaning of "sufficient cause" to judicial discretion and determination based on the facts, surrounding circumstances and the merits of each particular case and to ensure the ends of justice. The conduct of the parties, for example, whether or not, a party has been grossly negligent, careless, reckless or palpably indifferent in prosecuting the case, would be a consideration. A delay that is beyond the full control of the party or due to occurrence of facts that could not be contemplated by the party, should favour an extension of time in appropriate cases.

(***See Kyegegwa District Local Government v Aharikundira Margaret, HCMA No. 25 of 2022).***

Twinomujuni JA (RIP) in Tiberio Okeny & Anor V The Attorney General and 2 ors CA 51 of 2001 gave the broad contours within which the discretion is to be exercised where he observed thus;

> *"(a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.*
>
> *(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.*
>
> *(c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.*
>
> *(d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.*

(e) 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 requirements of the law …"

The **Hon. Justice Twinomujuni** further held that

"it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors …".

In ***Tushabe Chris v Co-operative Bank Ltd, Supreme Court Civil Application No. 8 of 2018,*** it was observed that sickness constitutes sufficient cause. However, there must be evidence to that effect and such sickness should fall within the time that a party was mandated to perform an act required by law and not after.

In this case the applicant did not attach any evidence of the alleged sickness. I therefore reject the excuse by the applicant's director that he was sick when the case was called for hearing since no evidence is adduced to that effect. The applicant has however showed interest to prosecute the suit and the current application was filed without inordinate delay. I find that it is in the interests of justice that the case is heard interparty. Further, the Respondent shall not suffer any prejudice if the case is heard on merits to avoid further proceedings. The errors and lapses by the parties should not bar a party from pursuit of his or her rights considering that the parties filed the necessary trial bundles and witness statements.

I therefore allow this application with orders:

1. **That the order dismissing civil suit no. 34 of 2019 made on 26th June 2023 is set aside.**
2. **That the applicant shall take immediate steps to progress the case.**
3. **That the applicant shall pay the costs of this application.**

It is so ordered.

Vincent Wagona

High Court Judge

FORT-PORTAL

DATE: 13/11/2023