THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORTPORTAL

MISC. APPLICATION NO. 075 OF 2023

(ARISING FROM CIVIL SUIT NO. 24 OF 2022)

1. KAGABA CHARLES ADYERRI

2. VICTORIA MATOVU KAGABA :::::::::::::::::::: APPLICANTS

VERSUS

KAWAMARA ANDREW :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

RULING

Introduction:

The applicant brought this application under Section 98 of the Civil Procedure Act and Order 43 rule 4 (1), 52 rule 1 & 2 of the Civil Procedure Rules for orders that:

1. **The dismissed Civil Suit No. 24 of 2022 be reinstated.**
2. **The costs of taking out the application be provided for.**

Grounds of the Application:

The grounds in support of the application are contained in the affidavit of Mr. Kagaba Charles Adyeri, (the 1st applicant) who averred thus:

1. That through her lawyers, the 1st applicant filed Civil Suit No. 24 of 2022 on 31st May 2022. That without his knowledge and that of the 2nd applicant, the

summons to file a defense were issued by Court on 1st June 2022. That the lawyers never communicated such development nor did they serve.

2. That since the issuance of the summons was not brought to the attention of the applicants there was no follow up on the matter. That later on 27thFebruary 2023, the suit was dismissed for non-service of summons which the 1st applicant was not aware of.

3. That the matter took one year without any updates from the lawyers and when he followed up with the court registry, he discovered that the application had been dismissed for non-service of court summons.

4. That if the application is not allowed, it shall cause a miscarriage of justice and cause more suffering and financial loss to the applicants. That it was fair and equitable that the same is granted for the ends of justice to be met.

Reply by the Respondent:

The Respondent opposed the application and contended thus:

1. That it was not true that the applicants had no knowledge of the summons issued on 1st June 2022. That the applicant had no lawyer to ensure service of the summons.

2. That no one was there to follow up the matter save for the applicants themselves. That the court was right to dismiss the suit for non-service of the summons on 27th February 2023.

3. That the application is tainted with falsehoods and cannot be relied upon to have the case reinstated. That if the application is denied, no injustice shall be suffered by the applicant and as such should be denied.

Representation and Hearing:

Mr. Victor A. Busingye appeared for the applicants while ***Mr. Mugabi Geofrey*** appeared for the Respondent. Both counsel addressed me by way of written submissions which I have considered herein.

Issues:

1. **Whether the affidavit in support of the application is defective.**
2. **Whether there is sufficient cause for reinstatement of Civil Suit No. 072 of 2022.**
3. **Remedies available to the parties.**

Resolution:

Arguments:

Mr. Bisingye for the applicants contended that summons were issued and the applicants had no knowledge of the same. That equally their lawyers did not inform them of the same. That since this fact was not known to the applicants, they did not follow up in the case and as a result it was on 27th February 2023 dismissed for non-service of summons. That upon the applicants checking with the Court Registry, they found that the case had been dismissed and filed an application to re-instate it. That the applicants have so much interest in having their case prosecuted and as such it should be re-instated.

In reply, Mr. Mugabi for the Respondent contended that the applicants did not take efforts to follow up in their case. That the Respondent took the trouble and served himself and filed a defense on 1st July 2022 and still no efforts were made to fix the case for hearing. Counsel further submitted that the applicant in an application for a re-instatement must show that there is sufficient cause to warrant a re-instatement. He cited the decision of ***Nic v Mugenyi& Co. Advocates HCB 28*** cited in ***Edirisa Kanonya & anor v Asuman Nsubuga & 3 others HCMA No. 373 of 2022*** to support his submissions.

It was contended that the applicant did not adduce any convincing reason to warrant a re-instatement and further that the application was supported by a defective affidavit which should be struck out. Counsel cited the case of ***Baryaija v Kikwisire & anor, Civil Appeal No. 324 of 2017*** cited in ***Edrisa Kanonya (supra)*** where it was held that an affidavit is a very serious document, once it contains falsehoods on one part, the whole affidavit becomes suspect. He thus asked court to strike off the affidavit and consequently have the application dismissed with costs.

CONSIDERATION BY COURT:

Issue No. 1: Whether the affidavit in support of the application is defective

In ***Saggu vs Roadmaster Cycles (U) Ltd (2002) 1 EA 258*** court guided in relation to defective affidavits thus:

> ***"a defect in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2) (e) of the Constitution and that a Judge has power to order that an undated affidavit be dated in Court or that the affidavit be re sworn, and may penalize the offending party in costs."***

Further in ***Male H. Mabirizi K Kiwanuka v The Attorney General, Supreme Court Civil Application No. 7 of 2018***, the Supreme Court adopted the decision in ***Saggu v Roadmaster Cycles (U) Ltd (supra)*** that; ***"Despite the fact that this case is a Court of Appeal case, we find its decision persuasive and is good law."*** It further observed thus:

> ***"Both the applicant and the Solicitor General relied on the case of Kasaala Growers Co- Operative Society vs Kakooza Jonathan & Another, Supreme Court Civil Application No. 19 of 2010 which draws a clear distinction between an affidavit which is defective and one which does not comply with the requirements of the law. The one which is defective is curable and the one which does not comply with the law is incurable. An affidavit which is undated is defective but is one that can be cured. One of the ways of curing***

such an affidavit is by way of allowing the affidavit to be dated as was held in the case of Saggu vs Roadmaster Cycles (U) Ltd (2002)1 EA 258".

In addition, in ***Hon. Theodore Ssekikubo& 3 Others vs The Attorney General & 4 Ors Constitutional Application No. 6/2013 followed the case of Banco Arabe Espanol vs Bank of Uganda Civil Application No. 08 of 1998*** where it was held that:

> ***"..... a general trend is toward taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in Article 126 (2)(e) of the Constitution..... Rules of procedure should be used as handmaidens of justice but not defeat it."***

In the **Besigye Kiiza v Museveni Yoweri Kaguta and Another (Election Petition No.1 of 2001) [2001] UGSC 3 (21 April 2001),** in the lead judgment by ***Odoki JSC***, he guided that where an affidavit contains falsehoods, it does not invalidate the same but the offending parts can be severed and the rest of the content can be relied upon. The Supreme Court adopted a liberal approach to affidavits. In ***Yona Kanyomozi v Motor Mart (U) Ltd. Supreme Court Civil Application No. 6 of 1999, Mulenga, JSC*** held that some parts of counsel's affidavits were false and that those parts were irrelevant to the application and could be ignored.

In ***Rutuku Francis & 5 others v Eliphas Ndamagye, Court of Appeal Civil Appeal No. 111 of 2017, Barishaki Cheborion JCA*** observed that whereas the position in ***Besigye Kiiza v Museven (supra)*** is to the effect that you can sever the offending

parts, where the said contents are severed and the remaining parts are incapable of supporting the application, the affidavit collapses.

I have considered the objection by Mr. Mugabi and the affidavit in support of the application and the reply by the Respondent. The applicants indicated in the supporting affidavit that they had instructed a lawyer who did not communicate about the issued summons and neither did the lawyer effect service; that this was a deliberate falsehood since they had no lawyer.

I have perused the plaint in Civil Suit No. 24 of 2022 filed by the applicants and found that the same were filed by the applicant in their personal capacities and did not instruct counsel to do so. The plaint and the summary of evidence are signed by the applicants in their personal capacities. Further, the summons did not show that they were taken out by counsel. There is equally no notice of instruction from any law firm on record. Therefore, the applicants were self-represented.

It thus follows that the averments by the 1st applicant that they instructed counsel is a deliberate falsehood and the same is severed from the affidavit. Therefore, paragraph 3 is hereby severed from the affidavit of Mr. Kagaba Charles Adyeeri. However, after severing the contents that offend Order 19 rule 3 of the Civil Procedure Rules, I find that the remaining content is capable of supporting the application at hand. I shall thus consider the remaining parts of the affidavit in the determination of the merits of this application. The affidavit is therefore not defective and this issue is resolved in the negative.

Issue No. 2: Whether there is sufficient cause for reinstatement of Civil Suit No. 072 of 2022.

The power to order for reinstatement of a case dismissed under Order 5 of the Civil Procedure Rules lies in the discretion of Court. Such discretion should be exercised sparingly and only in deserving circumstances. Where a party has been guilty of dilatory conduct or where there has been delay in filing an application for re-instatement, court should be reluctant to grant such a reinstatement. (See; ***MwanguhyaFenehansiKing Oyo NyimbaKabambaIguru, HCMA No. 033 of 2023).***

The discretion flows from the inherent powers of Court under Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act. Such discretion, should exercised judiciously depending on the peculiar circumstances of each case. Twinomujuni JA **(RIP)** in **TiberioOkeny & 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 Applicant 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 …".

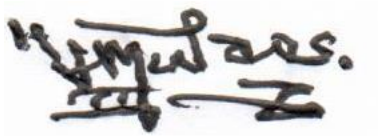
In the present case, the applicants were self-represented in the main suit. I believe there was no communication to them by Court as to the issuance of the summons. Whereas Mr. Mugabi claimed that the Respondent served himself and filed a written

statement of defense, there is none on record neither is the same attached to the affidavit in reply. This tends to confirm that there was no service of the summons. I believe in the interests of substantive justice that mistakes of parties especially unrepresented litigants should be treated fairly. It is my view that since the applicants have demonstrated interest in prosecuting their case and filed the current application without inordinate delay, they should be given a second chance. I therefore find that the applicants have showed sufficient cause to warrant setting aside the dismissal order. I thus resolve this issue in the affirmative.

Remedies:

The application is granted. **T**he dismissed Civil Suit No. 24 of 2022 is hereby be reinstated. The applicants shall pay the costs of this application.

I so order



Vincent Wagona

High Court Judge / FORTPORTAL

DATE: 30/11/2023