THE REPBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

MISCELLANEOUS APPLICATION NO. 373 OF 2022

(ARISING FROM MISCELLANEOUS APPLICATION NO. 221 OF 2022)

(ARISING FROM CIVIL SUIT NO. 147 OF 2017)

1. **EDIRISA KANONYA**
2. **MAIMUNA NAMIREMBE :::::::::::::::::::::::::::::::::::::: APPLICANTS**

VERSUS

1. **ASUMAN NSUBUGA**
2. **NUSURA NABANJA**
3. **THE COMMISSIONER LAND REGISTRATION**
4. **RWANTALE GILBERT :::::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

RULING

1. This was an application for an order to reinstate Miscellaneous Application No. 221 of 2022 and to hear it on merit. It was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Cap. 71, Order 9 rules 22 and 23 and Order 52 rules 1 & 3 of the Civil Procedure Rules, S.I 71-1.

2. The grounds of the application are contained in the Notice of Motion and supported by the affidavit dated 8th September, 2022 by

Odele Anthony, an advocate at M/s DeMott Law Advocates & Solicitors. The grounds were that:

(a) the Applicants acting through their duly instructed lawyers M/s DeMott Law Advocates & Solicitors filed Miscellaneous Application No. 221 of 2022, seeking for orders that the 4th Respondent be joined as a Defendant in Civil Suit No. 147 of 2017, an order doth issue for the amendment of the plaint in the above suit to reflect the addition of the defendant in Civil Suit No. 147 of 2017 and the costs of the application be provided for;

(b) the said application was dismissed on the 24th of August, 2022, for non-appearance by the Applicants and their counsel;

(c) when the date for the hearing of the application was given as 24th August, 2022, Mr. Mutyaba Ivan being the Advocate who has obtained the date and documents from court, mistakenly wrote 24th October, 2022, which wrong date he communicated to the Applicants;

(d) when the matter was called for hearing on the correct date of 24th August, 2022, neither the Applicants nor their lawyers were present in court;

(e) Mr. Mutyaba Ivan was reminded of the matter when counsel for the 1st and 2nd Respondents called him inquiring of his whereabouts since the parties were about to be called to court;

(f) upon receiving the call, neither the lawyers at the firm nor the Applicants could make it to Mukono in only few minutes to attend court;

(g) Mr. Mutyaba Ivan in the Deponent's presence, made a courteous request to the 1st & 2nd Respondent's counsel to have the matter adjourned with costs for the day, to accommodate the Applicants, but this request was ignored by the opposite counsel;

(h) the Deponent is aware that Mr. Mutyaba Ivan contacted Mr. Kato, a clerk at the court with a view of getting a lawyer within the court precincts to hold brief but he was informed that all the available Lawyers were not robbed and therefore unable to appear in court with such short notice;

(i) as a firm, a follow-up was made on the matter and it was found that it had been dismissed for non-appearance of the Applicants;

(j) both the Applicants and their lawyers were by reason of inadvertent error on the part of counsel in personal conduct of the matter, misinformed about the correct hearing date and time;

(k) the said application is very pertinent given that it seeks to add the 4th Respondent to the main suit being that part of the suit land is registered in his names and that court orders in the main suit are likely to affect him and he is necessary to be part of the suit for court to dispose of the questions of controversy between the parties with finality;

(l) the Applicants intended to prosecute the application but were let down by mistake of counsel; and

(m) the dismissed application was not entertained on merit thus the need to investigate and answer the questions of controversy between the parties.

3. The application was opposed by the 1st & 2nd Respondents by an affidavit in reply deponed by Nicholas Kyeswa, an advocate practicing under M/s Nsubuga Mubiru & Co. Advocates sworn and filed in this court on 3rd February, 2023. The grounds for opposition were that:

(a) the Applicants' counsel filed Miscellaneous Application No. 221 of 2022, fixed it for hearing and served the law firm on behalf of the 1st & 2nd Respondents and the firm assigned Mr. Wanyama John, Esq, with stern instructions from the 1st & 2nd Respondents to oppose the application;

(b) it was the duty of the Applicants' counsel to prosecute the application and when he failed, it was dismissed for want of prosecution;

(c) the telephone call by the 1st & 2nd Respondents' counsel to the Applicants' counsel was out of courtesy and did not in any way impute any obligations on him to prosecute the application and the offer of costs that counsel for the Applicants wanted to trade for adjournment was unprofessional;

(d) the Applicants entered a consent with the 4th Respondent in respect to Miscellaneous Application No. 248 of 2017 withdrawing Civil Suit No. 147 of 2017 and all the claims against the 4th Respondent;

(e) upon withdrawing Civil Suit No. 147 of 2017, court made an order to the effect that all the claims against the 4th Respondent who was the 3rd Defendant in that suit were withdrawn or struck out under Order 25 Rule 1 of the Civil Procedure Rules, S.I 71-1; and

(f) this application lacks merit and a waste of court's time.

4. Both counsel filed the parties' written submissions and the Applicants' counsel filed a rejoinder. On the 27th February, 2023, when the application came up for hearing, the Applicants were represented by Counsel Mutyaba Ivan from M/s DeMott Law Advocates & Solicitors. The Respondent was represented by Counsel Wanyama John from M/s Nsubuga Mubiru & Co. Advocates.

5. The Applicants' counsel argued that re-instatement of suit is a remedy available to a party whose suit has been dismissed in default or judgment passed in default. That he or she must have sufficient grounds lest the application will be dismissed. Counsel cited Order 9 Rule 23 of the Civil Procedure Rules, S.I 71-1 in part and the case of **Lucas Marisa v. Uganda Breweries Ltd (1988-90) HCB 131**.

6. Counsel added that to succeed in an application of this nature, the Applicant had to satisfy court that there was sufficient cause for non-appearance and that the sufficient cause had to relate to the

failure by the Applicant to take necessary step at the right time. (see the cases of **NIC v. Mugenyi & Co. Advocates (1987) HCB 28** and **Girado v. Alarm & Sons Uganda Ltd (1971) EA 448**).

7. That in this case, the Applicants honestly intended to attend the hearing of Miscellaneous Application 221 of 2022 and did their best to do so by engaging advocates. That as stated in paragraph 4 of the supporting affidavit, counsel in personal conduct of the matter mistakenly wrote the date for hearing as 24th October, 2022 as opposed to 24th August, 2022 which was the actual date. That the wrong date was further communicated to the Applicants.

8. Further, that counsel having personal conduct of the said application was only reminded of the matter by the 1st & 2nd Respondents' counsel who called inquiring of counsel's whereabouts since the parties were about to be called in court. That the court being in Mukono and the chambers being in Kampala, it was impossible for counsel to make it to court in time and that all calls for courtesy to seek an adjournment to accommodate the Applicants were not taken. That a follow-up on the matter was made from court revealed that the same was dismissed for non-appearance.

9. Learned counsel submitted that this was purely a matter of mistakenly quoting the wrong date in the dairy that led to the parties and their counsel not attending court and the same should not be visited on the litigant. Besides, that Miscellaneous Application No. 221 of 2022 seeks to add Rwantale Gilbert as a Defendant to the main suit considering that he is registered as proprietor to the suit land and the

head suit cannot proceed to its logical conclusion in the absence of the said individual.

10. That any order issued by court shall be in vain as it will not be possible to enforce such order against Rwantale Gilbert in the event that the head suit proceeds without him as a party. Further, that refusal to grant this application will mean that the Applicants will be compelled to file another application which will unnecessarily clog court with multiple applications.

11. The Applicants' counsel concluded that it is in the interest of justice that Miscellaneous Application No. 221 of 2022 be reinstated and heard on its merits to avoid multiplicity of suits. He prayed that court finds that sufficient cause has been shown for non-appearance and allows the application.

12. On the other hand, the 1st & 2nd Respondents' counsel argued that the Applicants' claim of mistaken date is a lie as the date was already reflected in the application and therefore, there was no need to write the same date somewhere before communication could be made to the Applicants. That the Applicants' failure to attach a photocopy of the particular page from the diary bearing the wrong date leaves a lot to be desired. Counsel cited the case of **Mujulizi James v. Kyeyune Biromba, Miscellaneous Application No. 2158 of 2021**). That the Applicants' counsel is dangling the aspect of a wrong date as an afterthought.

13. It was further contended for the Respondent that it was very unprofessional that counsel should trade costs for an adjournment. That a diligent advocate who intended to attend court more so when the client's case was in danger of being dismissed should have asked Kato to pass over the phone to the said advocates with a view of requesting them to hold brief for him and the advocate should have applied to court to be heard.

14. Counsel stated that the above arguments mean the affidavit in support of the application contains obvious falsehoods and the Applicants are not coming to court with clean hands as equity demands. That affidavits are very serious documents, once one contains falsehoods in one part, the whole affidavit becomes suspected. Referred to the case of **Baryaija v. Kikwisire & Anor, Civil appeal No. 324 of 2017**, the 1st & 2nd Respondents' counsel prayed that paragraphs 4 and 9 of the supporting affidavit to the application be severed from the affidavit for containing falsehoods.

15. Additionally, learned counsel averred for the 1st & 2nd Respondents that the Applicants entered a consent with the 4th Respondent in respect to Miscellaneous Application No. 248 of 2017 withdrawing Civil Suit No. 147 of 2017 and all the claims against the 4th Respondent. That upon withdrawing the said suit, court made an order to the effect that all the claims against the 4th Respondent who was the 3rd Defendant in that suit were withdrawn or struck out under Order 25 rule 1 of the Civil Procedure Rules, S.I 71-1.

16. Counsel submitted that Miscellaneous Application No. 221 of 2022 that the instant application seeks to reinstate is a non-starter and an abuse of court process. That this application lacks merit and he prayed for its dismissal with costs.

17. In rejoinder, the Applicants' counsel submitted that the Civil Procedure Rules provide a guide on how matters must be handled in court procedurally. That the rules are strict but they also provide remedies in instances of mistake or error. That in their strict forms, the Rules are never designed to defeat justice or deny parties a right to a fair and just hearing. That the arguments of the 1st & 2nd Respondents' counsel are directed to imply that the 4th Defendant should not be a party to the suit or heard regardless of whether his presence is pertinent to the suit or not.

18. Counsel further rejoined that they are also perturbed by the Respondent's line of argument as to the Plaintiff consenting to Miscellaneous Application No. 248 of 2017, which was done to avoid wasting time on the said application which could go up to the appeal court, yet a consent and then a prayer to add the said Defendant would save court's time. In addition, that the 1st & 2nd Respondents do not represent the 4th Respondent to raise an argument in this regard. Counsel prayed that such argument is disregarded.

19. Further rejoinder by the Applicants' counsel was that the 1st & 2nd Respondents' counsel does not deny being in contact with the Applicants' counsel and that he is also alive to the suggestions that were discussed to salvage the situation in the said moment. That it's

true that the 1st & 2nd Respondents' counsel was not under any obligation to courteously help the situation but the occurrences that led to the dismissal were out of mistake of the Applicants' counsel and not the litigants who should not be punished for the said mistake. Counsel reiterated his earlier prayer that this application is allowed by this court.

Issue

Whether there is sufficient cause shown by the Applicants to warrant re-instatement of Miscellaneous Application No. 221 of 2022.

20. The powers of this court to exercise its discretion to set aside and reinstate a dismissed application are not in dispute. Such powers are set out in section 98 of the Civil Procedure Act Cap. 71, which empowers courts to make such orders as may be necessary for the ends of justice. Order 9 rule 23 of the Civil Procedure Rules, S.I 71-1, also vests courts with power to set aside dismissal where sufficient cause has been shown.

21. The Kenyan case of **Gideon Mosa Onchwati v. Kenya Oil Co. Ltd & Anor [2017] KLR 650,** described what constitutes sufficient cause as follows:

> *"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."*

The court further 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"*

22. The question of whether an oversight, mistake, negligence or error on the part of counsel should be visited on the party represented by the said counsel or whether it constitutes sufficient reason or cause justifying discretionary remedies from courts has been discussed by courts in numerous authorities which dealt with different circumstances.

23. It is trite law that parties are not visited with punishment arising from the mistake or inadvertence or negligence of counsel when the mistake, inadvertence or negligence is in respect to procedural matters in which case, the court would lean towards accommodating the parties' interests without allowing mere procedural irregularities, brought about by counsel, to preclude the determination of a case on the merits. The court must however be satisfied that the allegation of inadvertence of counsel is true and genuine.

24. In the case of **Banco Arabe Espanol v. Bank of Uganda, SCCA No. 8 of 1998**, it was held that;

> *"A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits."*

25. Similarly, in the case of **Shabin Din v. Ram Parkash Anand (1955) 22 EACA at 48**, it was held that:

> *"The mistake or misunderstanding of the Plaintiff's legal advisor, even though negligent, maybe accepted as a proper ground for granting relief under the equivalent of Order 19 rule 20, of the Civil Procedure Rules, the discretion of the court being perfectly free and the words "sufficient cause" not being comparable or synonymous with "special ground. "*

26. The case of **Florence Nabatanzi v. Naome Binsobodde, Supreme Court Civil Application No. 6 of 1987**, laid down the guiding principles to be followed by courts when faced with situations like the instant case. These principles are summarized as follows:

(a) 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 not withstanding 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 their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights;

(c) Whilst mistakes of counsel sometimes may amount to an error of judgment but not inordinate delay negligence to observe or ascertain plain requirements of the law;

(d) 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;

(e) A vigilant Applicant should not be penalized for the fault of his counsel on whose actions he has no control.

27. From the record of the instant application, the 1st & 2nd Respondents do not dispute the fact of the phone communication between their legal representative and that of the Applicants. The

evidence clearly indicate that the Applicants' counsel brought it to the attention of the Respondents' counsel of him mistaking the hearing date for another date and pleading with counsel to have the matter adjourned to another date with costs of the day considering that he could not make it from Kampala to Mukono High Court within time. Further evidence shows that the 1st & 2nd Respondents' counsel declined the request by Applicants' counsel on the ground that it was unprofessional to trade costs for an adjournment.

28. On the basis of the authorities referred to above, I consider that the present case is one where the error on the part of counsel in the form of mistaking the actual hearing date for a different date should not be visited on the Applicants, especially in view of the fact that counsel went ahead to inform them of the mistaken date which misled the Applicants leading to their non-attendance on the actual date, hence dismissal of the application.

29. This court finds no genuine reason provided by the 1st and 2nd Respondent to fault the Applicants who were misled by their counsel. Otherwise, I see no reason why the Applicants would adamantly refuse to prosecute their application to add a party against whom they claim to have cause of action. The 1st & 2nd Respondents' concern of the Applicants consenting to withdraw the 4th Respondent from being a party to their suit is in my judgment, a matter to be raised by the 4th Respondent himself or by his legal representative and this can best be determined in Miscellaneous Application No. 221 of 2022 and not in this application.

30. In light of the above analysis, this application is allowed and I set aside the order of dismissal of Miscellaneous Application No. 221 of 2022 and order for re-instatement of Miscellaneous Application No. 221 of 2022. Each party shall bear their own costs of this application.

I so rule and order accordingly.

This ruling is delivered this ...21st... day of ...March... 2023 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Mutyaba Ivan from M/s DeMott Law Advocates & Solicitors, for the Applicants;

(2) Counsel Wanyama John from M/s Nsubuga Mubiru & Co. Advocates, for the 1st & 2nd Respondents;

(3) Mr. Asuman Nsubuga, the 1st Respondent;

(4) Ms. Pauline Nakavuma, the Court Clerk.