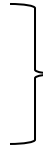


THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC APPLICATION NO. 048 OF 2023
(ARISING FROM HCT-CV-MA-076 OF 2018)
(ARISING FROM KAS-CV-CS-149 OF 2016)

1. BALUKU ALISEN

**2. ALISEN FOUNDATION GROUP
OF COMPANIES**



..... **APPLICANTS**

VERSUS

SUNDAY KIKATILYO

..... **RESPONDENT**

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

This application was filed by way of notice of motion under section 98 of the Civil Procedure Act Cap. 71, Order 9 Rule 23, and Order 52 Rule 1 and 3 of the Civil Procedure Rules SI 71-1 seeking the following orders:

- I. Misc. Application No. 076 of 2018 be reinstated and heard on merit.
- II. Costs of this application be provided for.

The grounds of this application are set out in the affidavit of Baluku Alisen, the 1st applicant, the gist of which is that:

- a) On the 16th of November 2018 the applicants filed in this court an application for leave to appeal out of time vide Misc. Application No. 076 of 2018

- b) In the years 2018 and 2019, the 1st applicant requested a hearing date, but he was told that the trial judge was on transfer and had to wait for the new judge to report.
- c) In the year 2020, COVID-19 stopped the applicants from following up on the application.
- d) That in 2023, the applicant followed up on the matter and was told by Bwambale Jonen, a Court Bailiff, that Misc. Application No. 076 of 2018 was dismissed with costs.
- e) The applicants are ready to prosecute the application.
- f) It is in the interest of justice that Misc. Application No. 076 of 2018 be heard on merit.
- g) The reinstatement of Misc. Application No. 076 of 2018 will not in any way prejudice the respondent.

The respondent opposed this application by an affidavit in reply, wherein he stated that:

- a) The application has no merit and was filed with no authority since it has no authorisation from the 2nd applicant company.
- b) Neither the applicants nor their advocate attended court in Misc. Application No. 076 of 2018 which was dismissed with costs on the 10th of September 2020.
- c) The application has been brought with inordinate delays, almost 2 years after the dismissal of Misc. Application No. 076 of 2018.
- d) The applicants have subjected the respondent to costly litigation by filing matters that they are not willing to prosecute.
- e) The applicants are guilty of dilatory conduct having dragged the entire litigation process with undue regard to procedure and strict timelines.

- f) That it is just and equitable that this application is dismissed with costs to the respondent.

Background

The respondent filed Civil Suit No. 149 of 2016 as a summary suit in the Chief Magistrate's Court of Kasese at Kasese, seeking recovery of UGX. 23,443,000/= from the applicants which was part of the money he contributed to a partnership business with them. The applicants applied for leave to appear and defend which the learned trial Chief Magistrate declined to grant and subsequently entered the judgement in favour of the respondent.

Being dissatisfied with the judgement and decree of the trial Chief Magistrate, the applicants opted to appeal. However, they did not file the Memorandum of Appeal in this court within the required timeframe. Subsequently, they applied to this court vide Misc. Application No. 076 of 2018 seeking an unconditional leave to appeal out of time. On the 10th of September 2020, this court dismissed the said application due to the non-appearance of the applicants under Order 9 Rule 22 of the Civil Procedure Rules. This application seeks for the reinstatement of Misc. Application No. 076 of 2018 which sought an unconditional leave to appeal out of time.

Representation and hearing.

The applicants are unrepresented while the respondent is represented by *M/S Masereka C & Co.* Advocates. Both the applicants and counsel for the respondent filed submissions which have been considered in this ruling.

Issues for determination

The issue for determination is whether the application raises sufficient grounds for this court to set aside its dismissal order and reinstate Misc. Application No. 076 of 2018.

Submission by the applicants

The applicants submitted that they failed to prosecute Misc. Application No. 076 of 2018 because the 1st applicant has a permanent disability and had been referred to Nairobi Hospital for treatment. When he came back, he started pursuing the application, but he was told that the file was missing. That, at some point, there came COVID-19 which restricted the 1st applicant's movement. When the COVID-19 lockdown was over, the 1st applicant was informed to wait for a new judge since the one who was handling Misc. Application No. 076 Of 2018 application was on transfer.

It was the submission of the applicants that this court is vested with powers under section 98 of the Civil Procedure Act and section 33 of the Judicature Act to grant the orders being sought in this application.

Submissions by Counsel for the Respondent

Counsel for the respondent first raised a preliminary point of law to the effect that the 2nd applicant was a corporate body on whose name this application was made without express authority from its directors. Counsel submitted that it is trite that where the applicant or plaintiff is a corporate body, there must be a company resolution authorizing such a suit to be instituted which was not the case with the 2nd applicant.

Counsel submitted that a suit instituted in the names of the company without the express authority of the directors is incompetent. Counsel referred this court to the cases of ***Bugerere Coffee Growers Ltd Vs. Sebadduka & Another (1970) 2 EA 147; Masaka Tea Estates Ltd Vs. Samalia (kiganja) Tea Estate Ltd & others HCMA of 2004; and The***

Money Lenders Association of Uganda Ltd & Another Vs. Uganda Registration Services Bureau Company Cause No. 011 of 2019.

On the merits of this application, counsel for the applicant submitted that for this application to succeed, the applicants must satisfy this court that there is a sufficient cause that prevented them from prosecuting Misc. Application 076 of 2018. Counsel referred this court to the case of ***Rosette Kizito Vs. Administrator General & Others SCCA No. 009 of 1996*** where it was held that sufficient reason must be related to the inability or failure to take a particular step in time. Counsel also referred this court to the case of ***Bishop Jacinto Kibuuka Vs. The Uganda Catholic Lawyers Society & Another HCMA No. 696 of 2018*** for the definition of a sufficient cause.

Counsel for the respondent argued that the dismissal order was made on the 10th day of September 2020 when the country-wide lockdown had been lifted and therefore it was not true that the applicants were prevented from prosecuting Misc. Application 076 of 2018 by the covid-19 lockdown.

Counsel also argued the applicants did not give any proof that they were unable to prosecute the dismissed application due to the COVID-19 lockdown or the treatment that the 1st applicant was undergoing in Nairobi Hospital. Counsel cited sections 102 and 103 of the Evidence Act on the burden of proof.

Counsel also submitted that the applicants were guilty of dilatory conduct and the instant application was an afterthought that was intended to waste this honorable court's time. Counsel referred this court to the case of ***Isadru Vicky Vs, Perima Aroma & 6 others HCCA No. 033 of 2014***

where Hon. Justice Stephen Mubiru emphasized the need for efficiency and economy in the conduct of litigation.

Counsel submitted that Msc. Application No. 076 of 2018 which was dismissed in September 2020 had been filed in the year 2018 and the application for reinstatement was made in June 2023 which is more than two years after the dismissal. It was the submission of counsel that the conduct of the applicant should not be condoned as it defeats this court's efforts to reduce the backlog and a waste of court resources.

Counsel for the applicant also submitted that there was a serious abuse of the court processes by the applicant and this court should not prolong the proceedings anymore. Counsel submitted that this application should be dismissed with costs to the respondents.

Consideration by Court

Before I delve into the merits of this application, I will first deal with the preliminary point of law raised by counsel for the respondent. The preliminary objection is that this application is incompetent to the extent that it was filed in the name of the 2nd applicant, a corporate body, without a resolution authorising the 1st applicant to do so. Counsel also argued that the 2nd applicant company had not authorised the 1st applicant to depone the affidavit in support of this application on its behalf.

The long-held common law position was that a company resolution is a mandatory requirement before the commencement of any legal proceedings in the name of the company. This position was fortified in the case of

Bugerere Coffee Growers Vs. Sebadduka & Another (supra) where the court observed 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 the minutes.”

However, in the recent past, courts have given a liberal interpretation to this common law position and held that ***Bugerere Coffee Growers case*** is no longer a good law in cases where directors initiate legal proceedings on behalf of the company (***See United Assurance Company Ltd. Vs. Attorney-General Uganda Court of Appeal Civil Appeal No. 1 of 1986***)

For instance, in the case of ***M/S Tatu Naiga & Co. Emprorium Vs Verjee Brothers Limited SCCA NO.008 of 2000***, Kanyeihamba, JSC, as he then was, held that:

“Any director who is authorised to act on behalf of a company, unless the contrary is shown, has the powers of the board of directors to act on behalf of that company.”

The Supreme Court hastened to add that ***“Any authorised director can give the necessary authority to institute such a suit.”***

In the recent case of ***Alisen Foundation Group of Companies Limited v Bazara HCMA No. 054 of 2023***, Hon. Justice Vincent Wagona held thus:

“Section 52 of our Companies Act [of 2012] 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 the commencement of proceedings in the Courts of law.”

In the instant case, the affidavit in support of this application was deposed by Baluku Alisen, the 1st applicant. In the affidavit, it is stated that he is the Director of the 2nd applicant company. The respondent did not produce any evidence to the contrary.

In the premises, the 1st applicant being a director of the 2nd applicant, it is my considered view that he has implied authority to institute the instant application, and as one of the applicants, he did not require any express authorisation to depone an affidavit on behalf of the 2nd applicant.

Therefore, the preliminary objection raised by counsel for the respondent is hereby overruled.

As regards the merits of this application, the applicant seeks this court to set aside its order dismissing Misc. Application NO. 076 of 2018. The court's record shows that Misc. Application No. 076 of 2018 was dismissed on the 10th of September 2020 under Order 9 Rule 22 of the Civil Procedure Rules due to the applicants' non-appearance. In seeking this court to reinstate Misc. Application No. 076 of 2018, the applicant proceeds under Order 9 Rule 23 of the Civil Procedures Rules. The Rule 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”

An applicant proceeding under order 9 rule 23 of the Civil Procedure Rules must establish a compelling case or sufficient reason as to why the court should set aside its dismissal orders and readmit his or her application or suit.

In the case of ***Parambot Breweries (U)Ltd (In receivership) VS. Standard chartered Bank & Another HCMA 380 of 2021*** Hon. Justice Duncan Gaswaga relying on ***The Registered Trustees of the Archdiocese of Dares Salaam Vs. The Chairman Bunju Village Government & others Civil Appeal No. 147 of 2006*** held thus:

“Sufficient cause is proven if a party and his advocate show that he and his lawyer did not act in a negligent manner but more importantly that there was want of bonafide on their part in view of the facts and circumstances of a case and the applicant cannot be alleged to have been ‘not acting diligently’ or “remaining inactive.”

In the case ***Abel Balesesa Vs. Yesero Mugenyi (supra)***, it was held that:

“What constitutes sufficient cause is left to the court’s discretion. While exercising this discretion, the judge has

to decide whether there has been an abuse of process, which amounts to an affront to the public conscience that requires the proceedings to be stayed. Where there has been a serious abuse of the process the court should express its disapproval by refusing to prolong the proceedings any further.”

In considering whether there was a sufficient cause as to why the applicant or his counsel did not appear in court on the date the application or the case was dismissed, the test to be applied is whether, under the circumstances, the party applying honestly intended to be present at the hearing and made the best effort to attend. It is also important for the litigant to demonstrate due diligence in the matter ***(see National Insurance Corporation Vs. Mugenyi and Company Advocates F19871 HCB 28)***.

In the instant application, the applicants who are unrepresented state that they were prevented from attending court because the 1st applicant has a permanent disability which required him to get treatment from Nairobi Hospital. The applicants also state that the COVID-19 lockdown prevented them from attending court and when they came to court, they were told to wait for the new judge to handle their application.

Nonetheless, no evidence was adduced to show that when the matter was dismissed, the first applicant was in Nairobi for treatment. Never mind that the second applicant is a corporate body that could have sent a representative at the time of the hearing.

Counsel for the respondent contends that this application has no merit because the applicants are guilty of dilatory conduct since the Misc.

Application No. 076 of 2018 was dismissed in 2020 and an application to reinstate it was made in 2023 more than two years after its dismissal.

I note that the matter being sought to be reinstated is one where the applicant had applied to this court seeking unconditional leave to file an appeal. Despite the reasons behind the delay in initiating the appeal, which Miscellaneous Application No. 076 of 2018 aimed to remedy, the application itself did not fulfil its intended purpose due to the applicants' non-appearance in court.

It should be noted that the application was filed in the year 2018 and dismissed in the year 2020. It took the applicants more than two years to apply for reinstatement. This, to say the least, is a classic case of inordinate or inexcusable delay which poses a great risk to a fair trial and may prejudice the respondent.

I am not convinced that the applicants had a good reason for not showing up in court. Whether it's the 1st applicant getting treatment in Nairobi hospital, the COVID-19 lockdown, or the judge being transferred, the affidavit in support of this application doesn't provide any cogent evidence that the applicants truly meant to be at the hearing and tried their best to come to court when the application got dismissed.

In absence of the evidence that the applicants made any best effort to attend court, it can be inferred that the applicants are guilty of dilatory conduct which if condoned can amount to abuse of the court process.

In the premises, this application lacks merit and is hereby dismissed with no order as to costs.

It is so ordered.

Dated at Fort Portal this 31st day of January 2024

A handwritten signature in black ink, appearing to read 'Mugabo', written in a cursive style. The signature is positioned above a horizontal line.

Vincent Emmy Mugabo
Judge