

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC. APPLICATION NO. 149 OF 2015

KILEMBE MINES ::::::::::::::::::::::::::::::::::::::: APPLICANT

- VERSUS -

IBRAHIM MAKOMA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This application is by Notice of Motion brought under Order 9 rule 18 and 48 of the Civil Procedure Rules and Section 98 of the Civil Procedure Rules for orders that the orders made by this court dismissing Civil Suit No. 766 of 2006 be set aside, and that the suit be reinstated and be heard on its merits. That costs of the application be provided for.

The application is supported by the affidavit of Kiyemba Mutale the advocate in charge of the matter wherein he deponed that:-

1. “We received instructions to represent the applicant in the suit.
2. We filed all the necessary documents in order to pursue the suit.

3. When the case came up for hearing on 9th of January 2015, none of the parties attended since the applicant's counsel was out of the country. Consequently the case was fixed for 7th May 2014, in absence of all parties.
4. The onus was on this court to issue out hearing notices to invite the parties to come to court but court did not issue out hearing notices as required by law.
5. On 7th May 2014, the case was called for hearing and none of the parties attended since they were never served with hearing notices.
6. Consequently the case was dismissed for lack of prosecution though they had no knowledge of the hearing which resulted in their absence".

The respondent opposed the application by swearing an affidavit in reply stating that counsel for the applicant had knowledge of the hearing date since they had been served with a hearing notice thereof.

At the hearing of the application, the applicant was represented by Ms. Nakamate while the respondent Mr. Makoma Ibrahim appeared in person.

Counsel for the applicant submitted that they were prevented to appear in court on due date for sufficient cause because the applicant and counsel had no notice, the case was coming that day. She submitted that no hearing notices were issued to notify both parties.

In reply the respondent submitted that notices of the hearing date were extracted by court and served on to counsel for the applicant and an affidavit of service to that effect was filed in court sworn by Ms. Ayesigire Hope and thus counsel for the applicant was aware of the hearing date. He argued that the fact that they took a whole year to bring the application shows loss of interest in the matter and thus the applicant has not shown sufficient cause for their non appearance to warrant reinstatement as required under Order 9 rule 18 of the Civil Procedure Rules.

In rejoinder, counsel for the applicant submitted that the affidavit of service sworn by Ms Ayesigire Hope was an afterthought. That the affidavit was filed on 27th July 2015 after the case was dismissed on 7th May 2014. The affidavit was commissioned on 27th July 2015, when the applicant had already filed the application in April 2015.

After carefully considering the application as a whole, the submissions of counsel for the applicant and those for the respondent, I considered that Order 9 rule 18 of the Civil Procedure Rules under which this application is brought allows the plaintiff subject to the law of limitation to bring a fresh suit or apply for an order to set the dismissal aside upon showing sufficient cause.

From the record of proceedings I note that when the case came up for hearing on 9th January 2014, none of the parties or their lawyers were in court. Court on its motion adjourned the matter for further mention

on 7th May 2014 whereupon it was dismissed upon failure of the parties or their counsel to turn up.

Counsel for the applicants contends that they were not aware of the hearing date. While the respondent insists that the applicant's lawyers were aware of the date as they were served with hearing notices and an affidavit of service sworn and filed in this court to that effect.

The affidavit sworn by Ms. Ayesigire Hope a process server attached to the affidavit in reply to the application states that on 10th day of January 2014, she received hearing notices for service upon the applicant lawyers. In paragraph 5 of her affidavit she states that on reaching the reception she introduced herself and explained the purpose of her visit and tendered in the documents which they went through and informed her that they no longer represent the applicant and thus she should serve the applicant personally but was unable to find them. The affidavit was commissioned on 27th July 2015 and filed that day.

From that information, it is evidently clear that the affidavit was sworn and filed after one year and three months when the case was dismissed.

It is also clear from paragraph 5 of the affidavit of service that indeed the applicant was never served with hearing notices from court. And

as deponed, this was sufficient cause for non appearance on the day appointed to hear the matter as counsel was not aware of the date.

In the circumstances and in the interest of justice, I will allow this application and accordingly order the reinstatement of the dismissed suit.

STEPHEN MUSOTA

J U D G E

14.09.2015.