THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 014 OF 2018

(ARISING OUT OF CONSOLIDATED CIVIL SUITS NO. 97 & 290 OF 2015)

PENTECOSTAL ASSEMBLIES OF GOD LIRA LIMITED-------------------- APPLICANT

VERSUS

1. **PENTECOSTAL ASSEMBLIES OF GOD LIMITED**
2. **UGANDA REGISTRATION SERVICES BUREAU………….. RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Section 98, of the Civil Procedure Act cap 71, Section 33 of the Judicature Act, Order 9 rule 12 & 27 and Order 52 rule 1 of the Civil Procedure Rules for the following orders that;

a) The order granted by this Honourable Court allowing the Respondents to proceed ex parte in Consolidated Civil Suits No. 97 & 290 and the subsequent directives be set aside.

b) The applicant be allowed to cross-examine the respondents' witnesses defend itself and prosecute its counter-claim.

c) The Applicant be allowed to defend and prosecute its case.

d) The Costs of this application be

The grounds upon which this application was brought are briefly set out in the Notice of Motion and in the affidavit of Joel Makalu, one of the members of the applicant and Katumba Pius Busobozi a Legal Assistant of GEMS Advocates herein which are as follows;

1. The applicant attended court on the 14th day of February, 2019 where the plaintiff led its witness in chief and the matter was adjourned for cross examination of the said witness on the 15th day of March 2019 with directives that the parties file their remaining witness statements and additional trial bundles.

2. That the Applicant filed all its witness statements and additional trial bundles before the next hearing and was ready to appear on the 15th day of March 2019.

3. That the 13th day of March 2019, Joel Makalu travelled with other witnesses from LIRA to GEM Advocates-the chambers of the Applicant's Lawyers to prepare for Court and he was informed that Counsel with personal conduct was not around but he had instructed another lawyer to hold brief for him in Court.

4. That he was informed by Mr Katumba Pius Busobozi one of the lawyers from Gem Advocates whose information he believed to be true and correct that the matter was coming up for hearing in the Afternoon at 3;00pm and that he should be ready for the hearing of the case at that time.

5. That on the 15th day of March 2019, the applicant appeared in Court at 3:00pm and was informed by the Court Clerk that the matter had proceeded in the morning in his absence and its counsel and a date for judgement was set for 24th May 2019.

6. That the Applicant was misinformed by his advocate of the time when the matter was coming up for hearing on the 15th day of March 2019 which mix up of the time prevent the applicant to attend court in time to participate in the proceedings.

7. That the applicant is very interested in prosecuting its case and has religiously attended all court proceedings save for the last appearance due to a mix up of time.

8. That the matters in the said suit raises issues of public importance like the right to practice religion and therefore it is just, fair and equitable that this application is granted to enable the merits of the suit be determined.

9. That the grant of this application shall not occasion an injustice to the respondent. That if this application is not granted the applicant would be denied a right to be heard in the main suit and counterclaim.

10. Katumba Puis Busobozi in hs affidavit stated that on the 14th day of February, he was informed by Mr Ojok Geoffrey Odur who is counsel in personal conduct of the matter that it had been adjourned to 15th March 2019 at 10;00am.

11. That due to an honest mistake, he misinformed the client and counsel holding brief that the matter was coming up at 3:00pm on the same day.

The respondents filed an affidavit in reply each opposing the said application on 24th April 2019.

The 1st respondents affidavit contended that;

1) That the matter was adjourned to the 15th day of March 2019 because Counsel for the Applicant was not ready to proceed with the hearing of the matter.

2) That this matter was adjourned several time because either applicant's Counsel was not in court or was in court but not ready to proceed with the hearing of the matter.

3) That the applicant's representative Mr Mukalu Joel was in court on the 14th day of February 2019 and clearly heard the matter being fixed for hearing on 15th March 2019 from 9:00am-3:00pm.

4) That the applicant is in the habit of changing lawyers and counsel who has filed this application is different from the ones who represented him at the trial.

5) That this matter is not about religion but rather the applicant who is deceitfully using the 1st respondent's name.

6) That the matter came up for hearing on 15th March 2019 but the applicant inordinately filed this case on 02nd April 2019.

The 2nd respondent in its affidavit contended that;

1) That the applicant is dishonest when its states that it was misinformed by counsel that the matter was coming up for hearing at 3:00pm yet the said lawyer noted the date and time in court, and even if that was not the case, the applicants representatives attended court, therefore it cannot be said that all the three representatives heard the same thing and the rest got it wrong.

2) That the respondents have all closed their respective case and filed submissions and are only awaiting judgement which had been fixed for 24th May 2019.

The applicants were represented by *Mr Okwir Joseph* and the 1st respondent was represented by *Ms Namara Anne* and *Mr Karwani Ronald* represented the 2nd respondent.

The applicant's counsel submitted that the main ground for the applicant's non appearance in court was misinformation given by his advocate and that at all times he was willing to attend court to defend the suit.

It was further his submission that mistake of counsel should not be visited on the client/applicant. In addition, he submitted that the application was brought without undue delay.

The 1st respondent's counsel opposed the application on ground that the applicant was present in court when the court announced the hearing date and therefore it was not the mistake of counsel but the party it's self who was in court.

That this matter had been fixed for hearing on that day but the applicant's counsel was not ready to proceed.

The 1st respondent's counsel further submitted that the application was brought on the 2nd day of April and this according to him was inordinate delay since it was slightly over two weeks.

Lastly the respondent's counsel submitted that ex parte proceedings were both brought under Order 17 rule 4 and Order 9 rule 20. She argued that a suit which has proceeded ex parte under O.17 r 4 cannot be set aside.

The 2nd respondent's counsel associated himself with the 1st respondent's counsel and argued further that on the 14th day of February 2019, the applicant's counsel was not ready to proceed with the hearing and therefor sought an adjournment.

Determination

It should be noted from the onset that the court proceeded under ***Order 17 rule 4*** which provides:

Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.

Once a matter proceeds under the above order, such order cannot be set aside but the only remedy open to the applicant is an Appeal after the whole case is determined.

According to the record of court for the 14th February 2019,

"*the matter proceeded in with the plaintiff's counsel taking his witness to the witness stand and the witness statement of the witness was admitted as his evidence in chief.*

The applicant's counsel at this stage sought an adjournment to prepare and be able to cross examine the witness.

The respondent's counsel opposed the application for adjournment and noted that this matter had taken a very long time. They equally prayed for a short adjournment to enable court finalise with the matter.

The court noted that this matter shall come up for hearing on 15th-03-2019 at 10;30am-4;00pm.

All witnesses must attend court"

The argument of counsel for the applicant that there was misinformation about the date cannot arise since they were all present in court on that and atleast none of them has said that they did not hear the time of hearing the case. What is surprising is that why did they decide to inquire from a person who was not in court.

The same person indeed confirms that he was told the case was coming up at 10:00am on 15th March 2019 but the said person claims to have made an honest mistake of misinforming the applicant's representative that the matter was at 3:00pm.

I do not see any relationship between 10:00am and 3:00pm. The fact that court had already ordered the parties to present all their witnesses. The respondent counsel had appeared to be unwilling to proceed with the matter even on 14th February 2019. He was granted an adjournment to prepare and proceed at the next hearing.

It is also clear that the applicants did not have any intention of proceeding with the matter and that is why they were coming with their unmentioned mentioned witnesses and Counsel who was holding brief with no intention of proceeding with the case.

The said Counsel has not sworn any affidavit to confirm ever coming to court to hold brief for Counsel Ojok Geofrey Odur on the said day. The supplementary affidavit of Katumba Pius Busobozi states that the clients appeared at court with their witnesses at 3:00pm. He does not mention the presence of any lawyer coming to court along with the applicant's representative.

This is a confirmation that they never intended to proceed on that day since they were merely appearing with the witnesses without their counsel and it was merely cosmetic to seek another adjournment.

The delay of over two weeks has not been explained by the applicant in the affidavit. The delay must show a sufficient cause or explain the reason for failure to file the application immediately.

The applicant has failed to demonstrate that it has good or sufficient cause for non attendance in court on the day the case was heard in order to have the counterclaim reinstated. Sufficient cause must relate and include the factors which caused inability to attend court on that day and also to

file the application within a shorter time than was filed after two weeks. See ***Tight Security Ltd vs Chartis Uganda Insurance Co. Ltd HCMA 8 of 2014***

I agree with the submission of counsel for the respondent. The applicant has not shown any sufficient cause for the failure to attend court on the day the matter had been fixed for hearing in presence of both counsel and the representative of the applicant. It is indeed true that this was not a mistake of counsel for the failure to attend court but rather taking a wrong decision of trying to re-establish a hearing date from a wrong person who was not in court. No reason is advanced why the applicants never consulted their advocate with whom they had attended court on the 14th day of February 2019. In the case of ***Hadondi Daniel vs Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003*** court held while citing ***Capt Phillip Ongom vs Catherine Nyero Owota SCCA No. 14 of 2001***, Justice Mpagi-Bahigeine agreeing with Justice Mulenga stated that:

> *" it would be absurd or ridiculous that every time an advocate takes a wrong step, thereby losing a case, his client would seek to be exonerated. This is not what litigation is all about. Counsel applied a wrong strategy….no sufficient cause has been shown to entitle the applicant relief sought."*

This application for setting aside the orders of this court is devoid of merit and no sufficient cause has been shown by the applicant and it is only intended to delay conclusion of the dispute in the main suit.

In the circumstances, the application is dismissed with costs to the respondents.

I so order

SSEKAANA MUSA

JUDGE

14th/06/2019