

1 THE REPUBLIC OF UGANDA  
2 IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO.  
3 MISCELLANEOUS APPLICATION NO. 001 OF 2019  
4 ARISING FROM HCT-14-LD-NO. 0069 OF 2018

5 1. KETTI  
6 NANKANJA:.....APPLICANT  
7 VERSUS

8 1. YAFESI WAMALA  
9 2. KULABA DAVID

10 3. BENEDICT  
11 MUSISI:.....RESPONDENTS

12

13 BEFORE HON. LADY JUSTICE MARGARET MUTONYI JUDGE HIGH COURT

14 RULING

15 Brief Introduction:

16 KETTI NANKAJA(hereinafter referred to as “the Applicant”) brought this application under  
17 *Order 52 rr.1 & 2 of the Civil Procedure Rules, S.I. 71 -1 (CPR); Section 98 of the Civil*  
18 *Procedure Act (Cap.71) (CPA) and Section 33 of the Judicature Act* for orders that;

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- 20 1. *The dismissal order in Civil Suit No. 0069 of 2018 be set aside and the applicant’s Civil*  
21 *Suit be re-instated and determined on merit.*  
22 2. *Costs of this Application be provided for.*

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24 The grounds of the Application are amplified in the Applicant’s supporting affidavit, but briefly  
25 are;

- 26 (a) *That the Applicant instituted the above civil suit against the Respondents.*

- 27 **(b)** *That the Applicant instructed her lawyers to prosecute the case.*  
28 **(c)** *That the Applicant all along followed up her case to have it prosecuted.*  
29 **(d)** *That on the day that the case was dismissed, the applicant’s lawyers were present in the*  
30 *court together with the defendants’ Lawyers but both Lawyers were not ready to*  
31 *proceed.*  
32 **(e)** *That it was the first time the matter came up in Court for hearing.*  
33 **(f)** *That the Plaintiff’s Civil Suit was dismissed because both Lawyers for the Plaintiff and*  
34 *Defendants were not ready to proceed.*  
35 **(g)** *That the Applicant’s suit has merit with high chances of success if reinstated and*  
36 *heard on merit.*  
37 **(h)** *That the Applicant is ready and willing to prosecute her case if it is re-instated.*  
38 **(i)** *That it is fair, equitable and in the interest of justice that this application is allowed.*

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40 The Respondents **YAFESI WAMALA, KULABA DAVID and BENEDICT MUSISI**  
41 *(hereinafter referred to as “the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents”* respectively) vehemently opposed  
42 this application and filed affidavits in reply to the Application.

43

44 **Representation**

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46 During the hearing of this Application, the Applicant was represented by Counsel Wamukoota of  
47 Nandaah Wamukoota and Co. Advocates; the Respondents were represented by Kafuzi  
48 Kwemara of M/S Rwakafuzi & Co. Advocates, Mbogo Charles of M/S Mbogo & Co. Advocates  
49 and Tibaijuka Charles of Tibaijuka & Co. Advocates for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents  
50 respectively.

51 All Counsel filed written submissions which have been relied on by this Court in writing this  
52 Ruling.

53 **Issue**

54 The only issue for determination herein is whether the Applicant has proved sufficient cause to  
55 justify the reinstatement of Civil Suit No. 0069 of 2018.

56 **Resolution**

57 Counsel for the Applicant submitted that the Applicant's affidavit evidence was that Civil Suit  
58 No. 0069 of 2018 was fixed for hearing at Mukono High Court and it was the 1<sup>st</sup> time this matter  
59 came up for hearing before this Court. That whereas both parties were in Court with their  
60 witnesses, counsel in personal conduct of the matter for both the plaintiff and defendants were  
61 not in Court but had only sent representatives to hold their brief. That both Counsel informed  
62 court that they had instructions to seek an adjournment and were both not ready to proceed. And  
63 it was upon this basis that this Court invoked its inherent powers to dismiss the said Civil Suit  
64 under **Section 98 of the CPA.**

65 To this he noted that the applicant has since instructed new lawyers and is ready to prosecute her  
66 case and that further, the Applicant herein shall suffer irreparable loss if the said dismissal order  
67 which is the subject matter of this Application is not set aside.

68 He referred this court to **sections 98 of the CPA and 33 of the Judicature Act** as the enabling  
69 provisions of the law that the Applicant seeks to invoke the inherent powers of this Court to  
70 exercise its discretion and set aside the dismissal order.

71 He submitted that in an Application for setting aside a dismissal order, the Applicant must satisfy  
72 court that he/she was prevented from prosecuting his/her case by sufficient cause.

73 To prove his case, Counsel cited the case of **Nicholas Roussos Vs Gulamhussein Habib Virann**  
74 **and Anor SCCA No.9 of 1993(unreported)** wherein Court noted that,

75 "The Courts have attempted to lay down some of the grounds or circumstances which  
76 may amount to sufficient cause. **A mistake by an Advocate though negligent may be**  
77 **accepted as a sufficient cause."**

78 To this he noted that the Applicant in her Affidavit in support of the Application **paragraph 4**  
79 **clearly stated that she had instructed lawyers to prosecute her case and further in paragraphs**  
80 **7 and 8, that on the date the Civil suit was dismissed both lawyers who were present in Court**  
81 **informed Court that they were not ready to proceed.**

82 Counsel reiterated his submission that the failure to prosecute the Applicant's Civil suit by  
83 Counsel Tusime Judith of M/S Katende Sempebwa & Co. Advocates who had been duly  
84 instructed by the Applicant herein and who instead chose to send another Advocate one Okumu

85 Stella who informed court that she was not ready to proceed should not be visited on the  
86 Applicant who has at all material times been ready to prosecute her case. To buttress this case,  
87 counsel cited the case of *Captain Philip Ongom Vs Catherine Nyero Owota SCCA No. 14 Of*  
88 *2001* Wherein the Supreme Court held that;

89           “A litigant’s right to a fair hearing in the determination of Civil Rights and obligations is  
90           enshrined in Article 28 of the Constitution and should not be defeated on the ground of  
91           his or her lawyer’s mistakes.”

92 He concluded that in his view and in the pursuit of justice, the Applicant should not be  
93 condemned for her Counsel’s mistake and negligence given that she had duly instructed her  
94 lawyers already mentioned above.

95 That her former Advocate’s conduct amounted to mistake and or negligence of Counsel which  
96 cannot be visited on the client and hence amounts to sufficient cause, a ground that court should  
97 consider to set aside the dismissal order and re instate the main suit.

98 That in addition, the Applicant in furtherance of what has been pleaded in paragraph 9 of her  
99 affidavit in support has already instructed new lawyers Nandaah Wamukoota and Co. Advocates  
100 with specific instructions to lodge this application to have the dismissal order set aside.

101 All the respondents opposed the Application and submitted as hereunder;

102 Counsel for the 1<sup>st</sup> Respondent submitted that it was patently false for the Applicant to state that  
103 the case was coming up for the first time as the same had come up for disposal several times. He  
104 noted that the case had only changed registries.

105 He further stated that the Applicant cannot claim that Counsel with personal conduct of the case  
106 was unavailable as a ground to justify that she deserved an adjournment because when the suit  
107 came up, the Applicant was represented by Counsel and that the law does not know  
108 “adjournment Counsel” as any Counsel who represents themselves as such and appears before  
109 the bar must be competent and ready to proceed with Court business.

110 He emphasized that Court did not dismiss the suit unheard but rather that the Court gave the  
111 Applicant and her counsel an opportunity to proceed but they were not ready and accordingly the

112 suit was dismissed under **section 98** of the **CPA** which was properly done in order to prevent  
113 abuse of Court process as the case had remained unprosecuted for several years.

114 He further submitted that S.98 is about discretion and that as such, a party who complains about  
115 injudicious exercise of discretion can only appeal. He stated that there is no procedure provided  
116 for seeking to reverse a decision arrived at by Court under section 98 as the right to set aside a  
117 decision is available under 0.9 where the relevant rules can be proved to apply or under review  
118 where the circumstances exist. That to invoke S. 98 is the same thing as the Applicant saying that  
119 the court exercised its discretion injudiciously and or abused the process.

120 He emphasized that it couldn't be the same Court to take a second look at its discretion and  
121 reverse it itself.

122 Finally he cited the case of **Famous Cycle Agencies Ltd & 4 Ors Vs Manshukulal Ramji**  
123 **Karia&Ors SCCA 16/1994**, where in it was noted that,

124 “The granting of an adjournment to the party to the suit is thus left to the discretion of the Court.  
125 The discretion is not subject to any definite rules but should be exercised after considering the  
126 reasonable manner. It should be exercised after considering the party's conduct in the case, the  
127 opportunity he had of getting ready and the truth and sufficiency of the reason alleged by him for  
128 not getting ready.”

129 He concluded that Court having found the case in the system for several years and desiring to  
130 clear backlog had it fixed and the parties served well in advance, it was an abuse of process by  
131 Counsel to seek an adjournment and Court was within its rights to reject it and dismiss the suit  
132 for counsel not being ready to proceed.

133 For the 2<sup>nd</sup> Respondent, it was submitted that, the suit was dismissed under **section 98** of the  
134 **CPA** with no order as to costs as the plaintiffs and defendants were not ready to proceed. The  
135 Plaintiff was directed to re-instate the suit subject to the law of limitation. To this, counsel noted  
136 that the order of dismissal was a final order which gave rise to a decree and consequently could  
137 only be set aside by the same Court on review and or by an Appellate Court.

138 He further noted that, the Applicant without considering the import of Court's decision opted to  
139 invoke the inherent powers of Court under **section 33** of the **Judicature Act** to set the dismissal  
140 aside and reinstate the suit.

141 That further, in accordance with the 2<sup>nd</sup> Respondent's affidavit in reply, the decree granted by  
142 this court did not provide for an order to set aside the dismissal, and that rather than applying to  
143 set aside the dismissal, there are other remedies open to the applicant and that the instant  
144 application had no merit, was misconceived and had to be struck out with costs to the 2<sup>nd</sup>  
145 Respondent.

146 He emphasized that the court could not vary its own earlier decision because by making the  
147 decision, it became functus officio and would indeed be sitting in appeal against its own  
148 decision.

149 For the 3<sup>rd</sup> Respondent, it was submitted that none of the rules in **order 9** of the **CPR** particularly  
150 **rule 9-19** is applicable to this application because fees were paid, summons served and a WSD  
151 filed and that both parties were in Court when the matter was dismissed.

152 Counsel noted that the Applicant appears to have appreciated that fact and that's why she did not  
153 invoke any of the rules mentioned and instead she invoked **S.98 of the CPA** and **S. 33 of the**  
154 **Judicature Act**. He further noted that none the less the Applicant's submissions are based on  
155 principles and authorities applicable to the rules referred to above that's why she based her  
156 submissions on grounds like sufficient cause and authorities like **Twiga Chemical Industries V**  
157 **Bamusedde**, which are concerned with setting aside an exparte judgment and are based on  
158 relevant provisions of order 9 of the CPR.

159 And that above all, the suit was dismissed under S. 98 of the CPA which means that this  
160 honorable Court was satisfied that the dismissal was necessary for the ends of justice or to  
161 prevent abuse of court process and by seeking an Order to set aside this dismissal, the Applicant  
162 is in effect calling upon this Honorable Court to hold that the dismissal of her suit was not  
163 necessary for the ends of justice or to prevent abuse of Court process. That she indirectly wants  
164 this court to sit in appeal against its own decision and concluded that in his humble submission,  
165 justice can only be done by dismissing the application and leaving the Applicant with the option

166 given to her in the order that dismissed the suit which is filing a fresh suit subject to the law of  
167 limitation.

168 **Ruling**

169 I have carefully read the submissions of Counsel on both sides and applied them in writing this  
170 Ruling.

171 This case was filed on 10<sup>th</sup> March 2004, the Plaintiff presented her first witness on 8<sup>th</sup> November  
172 2011, about 7 years later. She took another 7 years without bringing witnesses to Court. Court on  
173 its own motion fixed the case for hearing on 10<sup>th</sup> October 2018 in a Civil session. The parties  
174 were duly informed and indeed the Plaintiff who has a right to begin and having begun by calling  
175 only one witness about 7 years ago attended court with an advocate who was not ready to  
176 proceed. It did not matter as to whether the defense was ready to proceed because the court was  
177 very ready to proceed with the hearing of this case.

178 It is trite law that justice is both for the Plaintiff and Defendant. It is therefore unfair for the  
179 Plaintiff to file a suit and take 14 years in Court without conclusion of the suit.

180 Needless to mention, the adversarial approach in our justice system coupled with pro adjournment  
181 Advocates and parties is the major cause of backlog in the Ugandan Judiciary.

182 On the date the main suit was dismissed, the Plaintiff and her Advocate came to Court ready to  
183 seek an adjournment and not to proceed. It was against this background that the Court exercised  
184 its discretion under Section 98 of the CPA to dismiss the case since the conduct of the plaintiff  
185 since 2004 by failing to have her case prosecuted amounted to abuse of Court process.

186 This Court is very much aware of the fact that negligence of Counsel should not be visited on the  
187 client. Ideally in a very old case like the instant case where Counsel in personal conduct is not in  
188 position to attend court and chooses to instruct another to hold a brief for him or her, the brief  
189 should include instructions to proceed which was not the case herein as the Plaintiff and her  
190 Advocate came purposely to seek an adjournment.

191 Be that as it may, this case was dismissed under section 98 of the CPA which allows the court to  
192 exercise its discretionary powers to meet the ends of justice. Having carefully perused the main  
193 file and specifically the evidence of PW1 one Arinaitwe Oversone a Registrar from Mukono

194 Lands Office, I hold the view that this is a matter that should be heard and decided on merit, the  
195 Plaintiff/ Applicant herein should be given a second chance to prosecute her case to its logical  
196 conclusion.

197 I am further persuaded by the decision in *Rawal vs Mombasa Hardware Ltd (1968) EA 392*  
198 Which was concerned with the dismissal of a case for want of prosecution under order XVI Rule  
199 6 of the Rules. Whereas the circumstances under order XVI Rule 6 of the Rules are different  
200 from the situation in this case wherein the dismissal was premised on section 98 of the CPA  
201 given the Plaintiff's failure to proceed with her case when it was called for hearing, the important  
202 extract from this decision is the Ruling of *Sir Charles Newbold at pg. 394-*; where the court held  
203 that, the trial court had the power to re-instate a suit within its inherent jurisdiction. I quote;

204 **“We all know that a Court has control over its order until it is perfected. Even if the order**  
205 **is made in the presence of the parties and after argument... It is still open to Court before**  
206 **it is perfected to recall the order.** Yet here it is urged that Rule 6 is to be construed in such a  
207 way as to prevent the Court from exercising control over its own order made, not only without  
208 argument, but, indeed, without even the knowledge of the parties and informally. I cannot accept  
209 such a construction.”

210 In applying the above decision, it would be an injustice to curtail the inherent powers of Court  
211 under Order 98 as long as the decision made is intended to meet the ends of justice for all parties  
212 involved. It is thus only fair that the order of dismissal is set aside to enable the Plaintiff  
213 prosecute her case.

214 I consequently allow this Application with the following orders;

- 215 1. The dismissal order in Civil Suit No. 0069 of 2018 is hereby set aside.
- 216 2. Civil Suit No. 0069 of 2018 be and is hereby re-instated to be determined on merit.
- 217 3. No order is made as to costs.

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219 Given under my hand and seal of this Honorable Court this 8<sup>th</sup> day of **October 2019.**

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222 \_\_\_\_\_  
223 Margaret Mutonyi  
224 **RESIDENT JUDGE**  
225 **MUKONO HIGH COURT**  
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