

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS APPLICATION NO. 450 OF 2019

(ARISING OUT OF MISCELLANEOUS APPLICATION NO. 266 OF 2019)

(ARISING OUT OF CIVIL SUIT NO. 104 OF 2019)

BIO PHARMA CENTRE COMPANY LIMITED=====APPLICANT

VERSUS

DR. ELFATIH ALAMIN ELNOUR ALI=====RESPONDENT

RULING

BEFORE HON. JUSTICE SSEKAANA MUSA

This is an application brought by way of Notice of Motion under Section 98 of the Civil Procedure Act Cap. 71, Order 36 rule 11 and Order 51 rule 1 & 2 of the Civil Procedure Rules.

The prayers sought in the application are;

- a. An order be made reinstating Miscellaneous Application No. 266 and setting aside dismissal order entered by Court.
- b. Costs of the suit.

The background and grounds to this application are laid out in the supporting affidavits of Mr. Abdalla Ahmed Bakhit, a director of the applicant company and Mr. Deogratius Odokel Opolot, Applicant's Counsel; but briefly they are that:

1. The Respondent herein filed a summary suit against the Applicant vide Civil Suit No. 104 of 2019. Upon receipt of service of summons thereto, the Applicant filed an application for unconditional leave to appear and defend vide Miscellaneous Application No.266 of 2019.
2. That Miscellaneous Application No. 266 was fixed for hearing for the 28th day of May 2019 at 11:30 a.m. That while the Applicant's Counsel was

headed to court on the scheduled day when he was involved in an accident which delayed him from reaching court in time.

3. That by the time Counsel reached the court for the hearing, the application for unconditional leave vide Miscellaneous Application No. 266 of 2019 had already been dismissed.

The parties had to make their cases as to whether there were grounds to issue the orders to reinstate Miscellaneous Application No. 266 of 2019 and setting aside the dismissal order. The issues for determination by the Court are;

- 1. Whether there are any grounds to merit the setting aside of the dismissal order and reinstating of the application.**
- 2. What are the remedies available to the parties.**

RESOLUTION OF ISSUES

In addition to consideration of the evidence on file, I have read with great care the submissions of both parties and to that end I hereby resolve the issues thus,

Issue 1: Whether there are any grounds to merit the setting aside of the dismissal order and reinstating of the application.

Counsel for the Applicant submits on setting aside of a decree relying on Order 36 Rule 11 of the Civil Procedure Rules; wherein he quotes the provision which provides for setting aside a decree where Court is satisfied that service of summons was not effective or for any good cause, giving leave to the defendant to appear and defend.

He further submits that the good cause is clearly reflected in the instant case as he quotes the 1st affidavit of Mr. Odokel Opolot, Counsel of the Applicant, wherein the deponent stated under paragraph 4 and 5 that he was involved in an accident while headed to Court on that fateful 3rd day of July 2019. Adding that he therefore reached 15 minutes late only to meet Counsel for the Respondent who allegedly notified him that his application for leave to appear and defended had been dismissed for non-appearance.

The Applicant relied on, inter alia, the case of **Pinnacle Projects Ltd v Business in Motion Consultants Ltd, Miscellaneous Application No. 362 of 2010**, wherein it was held that “the phrase ‘good cause’ is not defined under the rules but is defined in Black’s Law Dictionary, 7th Edition as a legally sufficient

reason.” However, the phrase ‘sufficient cause’ that is normally used interchangeably with the phrase “good cause” has been explained in a number of authorities.”

Further quoting **Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers’ Society & 2 Others, Miscellaneous Application No. 696 of 2018**; that the holding regarded sufficient cause being defined to mean where a party has not acted in a negligent manner or where a party cannot be alleged to have not been acting diligently.

On the other hand, the Respondent’s submitted firstly that the application was frivolous and the prayers merely academic considering that the application before Court does not seek to set aside the judgement and extracted decree. This they argue is so considering that the issue of setting aside of the decree was only raised by the Applicant in his submissions and not the application. They therefore argue that the Applicant brought this application under the wrong law and procedure, Order 36 Rule 11.

The Respondent goes on to tackle the issue of sufficient reason in arguing that there is an inconsistency in the 6th paragraph of the supporting affidavit of Mr. Deogratius Odokel Opolot wherein he stated that he “he met an accident”; and page 2 of the Applicant’s submissions wherein he states that he was involved in an accident which led to his failure to reach Court in time. The respondent avers that there is no iota of proof to the said allegation and thus the application should be dismissed.

He further avers, in reliance on this Court’s ruling in **Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers’ Society & 2 Others, Miscellaneous Application No. 696 of 2018**, wherein it was held that regarding the need for medical forms once a party alleges sickness as ground for non-appearance in court and claims to have seen or gone to a doctor, the person relying on that reason would have to furnish Court with such proof that he was prevented from appearing in Court.

The Respondent denies the Applicant’s assertion that he met Counsel for the Respondent after the dismissal of the application, who notified him of the said dismissal.

In consideration of the parties’ submissions, this Court finds that there are no grounds to set aside the dismissal and reinstate the application because

sufficient cause was not adequately proved by the Applicant as to why he failed to appear.

First of all, and in agreement with the Respondent, the application for leave to appear and defend under Miscellaneous Application No. 266 of 2019 was dismissed; upon which this Court entered Judgement in favour of the Plaintiff in Civil Suit No. 104 of 2019. A decree was thereafter extracted and signed by Court, however, the application before Court does not seek to set aside the said Judgement and decree.

I agree with the Respondent that the Applicant's argument, being brought under Order 36 Rule 11 is erroneous as that platform provides for the setting aside of a decree, which the Applicant did not expressly state in the Notice of Motion. I find that recourse should have been had to **Order 9 Rule 23 (1)** of the **Civil Procedure Rules, S.I 71-1** which stipulates that;

"Where a suit is wholly or partly dismissed under Rule 22 (Procedure when defendant only appears) 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 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."

Considering the common adage "Justice delayed is justice denied", and the spirit of summary proceedings to bring an expedient disposal of the matter, it is rather a disregard of this spirit where the Applicant, who filed an earlier application for leave to appear and defend that was granted, goes ahead to misuses that opportunity to be heard in not appearing for the said application.

In the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others**, Court ably held in quoting **Mosa Oncwati v Kenya Oil Co. Ltd & Another [2017] KLR**, that;

"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..."

It is rather eminent that there was a heavy reluctance and inaction by the Applicant and his lawyer to place themselves in the ambit of the law to defend the matter, especially one brought under summary suit.

Furthermore, and as noted by the Respondent, the discrepancies between the Applicant's affidavit to the effect that he "met an accident" and their submissions asserting that he was involved in an accident, offer an insight into the frivolity of the Applicant's effort to establish cause that is questionable.

The Respondent also points out a rather paramount occurrence in his affidavit at paragraph 6, which stated that; "on the 3rd of July, 2019, when the matter was coming up for hearing, I was sick and the doctor advised that I have a bed rest and as such I informed my lawyer to proceed to court."

I rather agree with the submissions of Counsel for the Respondent in relying on this Court's ruling in **Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers' Society & 2 Others Miscellaneous Application No. 696 of 2018**, Ssekaana, J held;

"Respondent Counsel's submission that the applicant has not attached medical forms is devoid of merit since not every sickness/illness leads to seeking medical attention unless a party states that he went to see a doctor."

The applicant's director Mr. Abdalla Bahkit did not furnish any such proof as regards a consultation with a doctor, neither did his counsel satisfactorily prove involvement in an accident, which would reasonably have been captured by a traffic accident report; leave alone the inconsistency of having stated in his application that he only met an accident.

I therefore find that there are no grounds to merit the award of the Applicant's prayers and thus resolve the issue in the negative.

Issue 2: What are the remedies available to the parties.

The **Judicature Act Cap. 13** under **Section 33** provides that:

"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or

equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

This court has powers under **Section 98 of the Civil Procedure Act, Cap. 71** to make such orders as may be necessary for the ends of justice as well as under **Order 9 Rule 23 of the Civil Procedure Rules** to set aside dismissal on sufficient cause being shown.

Considering as the applicant was not able to establish sufficient grounds to award an order reinstating Miscellaneous Application No. 266 of 2019 and setting aside dismissal order arising from the same application, I find no rationale behind the award of the remedies sought.

Application is dismissed with costs.

I so order,

Ssekaana Musa

Judge

20th December 2019