THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDAAT KAMPALA

MSICELLANEOUS APPLICATION NO. 674 OF 2019

(CIVIL DIVISION)

CIVIL SUIT NO. 163 OF 2019

GOLD BEVERAGES (U) LIMITED:::::::::::::::::::::::::::: APPLICANT

VERSUS

1. MUHANGURA KENNETH

2. SEGONGA GODWIN T/A

PLATINUM ASSOCIATES:::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

Gold Beverages (U) Limited *(hereinafter referred to as the "Applicant")* brought this application against Muhangura and Kenneth Segonga Godwin t/a Platinum Associates *(hereinafter referred to as the "1st" and "2nd" Respondent, respectively)* under Order 36 Rules 2,3 and 4 and Order 522, Rule1, 2 and 3 dot eh Civil Procedure Rules(CPR)

and Section 98 of the Civil Procedure Act(CPA) seeking for orders that;

1. ***the court order dismissing the suit (HCCS No.163 of 2018) for want of prosecution be set aside and the suit be reinstated.***
2. ***Costs of this application be provided for.***

The grounds of the application are mainly that the Applicant was prevented by sufficient cause from attending court as at the time when the suit was called for hearing, as the Applicant's, Managing Director (MD) had travelled abroad on a business trip to Mombasa. That upon return, he checked on court record but mixed up the actual date when the suit was coming for hearing. That it is thus in the interest of justice that this application be granted.

In his affidavit in support sworn by the Applicant's MD, he essentially reiterates that at the time the suit came up for hearing he had travelled abroad and his lawyers had also withdrawn the conduct of the case. That upon his return from abroad he checked the court file and got the hearing date of 11/09/ 2019 but his mind

had instead captured 11/10/2019. That as the date he had in mind approached, he instructed *M/s. S.K. Kiiza & Co. Advocates* to take over the conduct of the case, but upon checking on the court file, the said lawyers established that the case had actually come up on 11/09/2019 and was dismissed for want of prosecution. That he is still interested in pursuing his case to its logical conclusion.

The 1st Respondent opposed the application as having no merit and that it does not fulfill the conditions required for the grant of such an order. That the Applicant was his former tenant, who instituted HCCS No.163 of 2018 against him and the 2nd Respondent, for special, exemplary and general damages, interest and costs. That the 1st respondent filed his defence and that since the case first came up in court on 11/12/2018 and all through the scheduled hearings on 24/04/2019, 11/09/2019 and 06/11/2019, respectively, neither the Applicant nor his lawyers appeared in court. That it was time the Respondents' lawyers who at all times made attempts to extract hearing notices to make sure that the matter was heard and concluded. That after several adjournments,

the Respondents prayed for dismissal of the case for want of prosecution on 11/09/2019, which was granted by court.

The 1st Respondent also faulted the Applicant's MD for failing to attached any proof that he had travelled abroad all the times the matter came up for hearing. Also, that there is no evidence on court record to show that the Applicant notified anybody about the alleged withdrawal of his lawyers from the case. That this is a clear sign that the Applicant had no intentions of prosecuting his case, which is another tool employed to waste time and resources as has constantly been done since the Applicant's eviction from the 1st Respondent's property. That there is no valid claim to warrant grant of an order for reinstatement sought by the Applicant.

2nd Respondent also opposed the application and prayed for its dismissal with costs. He insists that the Applicant's MD was at all times in Uganda and has never travelled anywhere during the stated time and his lawyers have also at all times been within Uganda and knew about this case proceeding but ignored it. That after learning of the dismissal of their suit with costs, it is when the Applicant filed this application to frustrate taxation of the bill of

costs. That this application is in brought in bad faith and bad intent to deny justice and confuse and mislead court.

In his rejoinder, the Applicant's MD insisted that upon return from Mombasa, he lost his passport which is why he was unable to produce the copy thereof. That as he prepared to travel, his lawyers withdrew from the conduct of the case and he accordingly informed court and requested for more time to engage another counsel. That he is interested in having the merits of its suit heard and determined as there was no undue delay in filing this application.

At the hearing of this application the Applicant was represented by Mr. Simon Kiiza, the 1st Respondent by Mr. Patter Kahindi, while the 2nd Respondent was absent. The named counsel for the parties filed written submissions which court has taken into account. The issues for determination are as follows;

1. ***Whether the application meets the criteria for the grant of orders sought.***
2. ***What remedies are available to the parties?***

Resolution:

Issue 1: Whether the application meets the criteria for the grant of orders sought.

Counsel for the 1st Respondent raised a preliminary objection that the application is bad in law having been brought under a wrong law; under Order 36 Rule 2, 3 and 4 CPR, which are in respect of a specially endorsed plaint, judgment in default, and application for leave to appear and defend a summary suit, respectively. That as such it should be dismissed with costs. In reply counsel for the Applicant conceded that they omitted to cite the correct law, but added that citation of a wrong law does not render the application defective.

Court agrees with submissions on that point, of counsel for Applicant. It is a long established principle that citing of a wrong law or even the failure to cite any law under which a case is brought, is not fatal, for as long as the substance of the case is clear on the pleadings and the opposite party is not prejudiced thereby. Therefore, the objection has no merit and it is overruled.

On the substance of issue No. 1, it is noted that the main suit, HCCS No.163 of 2019, was dismissed for want of prosecution. This was after this court had observed that the plaintiff was not vigilant in pursuing its case, ever since the suit was filed. An order of dismissal for want of prosecution was thus extracted on 18/09/2019. Dismissal for want of prosecution is provided for under Oder 17 Rule 5 CPR as follows;

"5. Dismissal of suit for want of prosecution.

If the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery of the counterclaim, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on the hearing of the application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as to the court may seem just." [emphasis added].

In ***Agnes Nanfuka Kalyango & Others vs. Attorney General & Masaka District Administration C.A.C.A. No 64 Of 2000,*** the Court of Appeal noted that the three instances in which court would invoke its inherent powers to dismiss a suit for want of prosecution, are where there was inordinate delay; the delay was inexcusable, even if when credible excuse was made out; the defendant is likely to be seriously prejudiced by the delay; and the balance of justice demands it.

It was further held in ***Sekyaya Sebugulu vs. Daniel Katunda [1979] HCB 46,*** that once an action has been dismissed for want of prosecution, the plaintiff's only remedy is either an appeal against the order of dismissal or commencement of a fresh action subject to the law of limitation.

From the submissions of both counsel, as is discernible from the case authorities they cited, it would appear clearly that they were laboring under a mistake that this is an application for setting aside an *ex parte* dismissal order passed under Order 9 Rule 22 CPR which provides as follows;

"Where <u>the defendant appears, and the plaintiff does not appear,</u> when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

Where a suit is dismissed *ex parte* under the above provision, the remedy for the Applicant would lay under Rule 27 thereof, as follows,

"In any case in which <u>a decree is passed ex parte against a defendant,</u> he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms

as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also." [emphasis added].

Clearly, under the above provisions, the Applicant seeking to set aside an *ex parte* order is always necessarily a defendant. The case will have proceeded *ex parte* for the hearing against such a defendant. The law cited thus requires that such an Applicant/defendant demonstrates sufficient cause for his/her non-appearance in court, when the suit was called for hearing before the *ex parte* order/decree is set aside and he/she is allowed to defend himself/herself.

In the present case, however, it is the Applicant/plaintiff which filed the suit against the Respondents/defendants, and failed to prosecute its case, and the defendants/Respondents applied for the dismissal of the suit for want of prosecution. Therefore, the law applicable and the effect in both instances is quite different. There

is no provision under the law which requires the plaintiff/Applicant, whose suit has been dismissed for want of prosecution, to demonstrate good cause why he/she never attended court when his /her case was called for hearing. The dismissal for want of prosecution seals the matter for the plaintiff in the same court which issued the dismissal order, and recourse can only be had by the plaintiff to an appeal or commencement of a fresh action subject to the limitation period imposed by law. Issue No.1 is answered in the negative.

Issue No.2: What remedies are available to the parties?

Having found as above, the application is dismissed with costs to the Respondents.

BASHAIJA K. ANDRE

JUDGE

29/05/2020