THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISCELLANEOUS APPLICATION NO.62 OF 2020

(Arising From Civil Suit No.53 OF 2016)

BUSINGE JONATHAN :: APPLICANT

VERSUS

1. CHINA RAILWAY NO.5 ENGINEERING

GROUP CORPORATION LTD

2. CHINA RAILWAYS WAJU GROUP CORPORATION

3. ISINGOMA JOSEPH :: RESPONDENT

RULING

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This application under **O.9 r.27 CPR** and **Section 98 CPA** is seeking for orders that the order dismissing **Civil Suit No.53 of 2016** be set aside and the dismissed civil suit be reinstated for its disposal on merits inter parties.

[2] The Application is supported by the affidavit of the Applicant wherein there are grounds for the Application. Briefly the grounds are;

1. That the Applicant filed **Civil Suit No. 53 of 2011** against the defendants for trespass, recovery of land, compensation, damages for loss of property, costs and a permanent injunction among others.
2. That the matter was fixed for hearing on 15/7/20 before His Lordship Paul Wolimbwa which date also was the last adjournment, a fact that was communicated to him by his Counsel **Zemei Susan**.
3. That on the said date of 15th/7/2020 the Applicant came to court at 8:20 am but at the court's gate, the police officer manning the

gate ordered him to wait from outside and wait for his file to be called by the clerk upon which he would enter as one of the ways of emphasizing the health Ministry restrictions in combating **Covid 19** spread.

4. That he waited for his counsel, **Susan Zemei** outside the court perimeter fence who instead had sent her Associate **Kinali Albert** to appear on her behalf and because the said **Kinali Albert** was not aware that he had been blocked from accessing court by the security personnel, he ended up failing to access court.
5. That his constitutional right to be heard will be curtailed and denied if this honourable court does not set aside the order dismissing **Civil Suit No.53 of 2016** and reinstate the matter for its disposal.
6. That this application has been brought without inordinate delay and it is in the interest of justice that this application be granted.

[3] In its affidavit in reply, the 1st Respondent Corporation through its country representative **Mr. Lipeng** deponed as follows;

1. That this application was issued by this honourable court on 27th July, 2020 and fixed for hearing on 9th/Dec/2020 but was not served upon the 1st Respondent until 14th/Dec/2020.
2. That the Notice of Motion was therefore served upon the 1st Respondent when it had expired and the Applicant ought to have sought the leave of court before serving the Notice of Motion upon the 1st Respondent.
3. That the contents of the affidavit in support of the Motion have no merit in that the Applicant had lost interest in prosecuting

the case and this application is an abuse of court process and an afterthought.

4. That whereas the main suit had been fixed for hearing on the 15th/July/2020 before His Lordship Gadenya Paul Wolimbwa, the 1st defendant/Respondent was not served with the Hearing Notice and therefore could not attend court.
5. That the grounds set up by the Applicant as to why he failed to access court are not verifiable in that the Applicant's lawyer failed to turn up, a vigilant plaintiff should have rang her on phone to establish the reason for her absence.

[4] As for the 3rd Respondent, he deponed in his affidavit in reply as follows;

1. That the affidavit of the Applicant is full of falsehoods and it ought to be expunged off the court record.
2. That the Applicant has not been appearing in court and this has delayed the matter in court for a period of about 4 years from being disposed off in time.
3. That the Applicant lacks sufficient cause for his non-appearance for hearing because on both the 8th day of July 2020 when the suit was adjourned for the first time and on the 16th July 2020 when the suit was dismissed, the Applicant was absent.
4. That the Applicant's application is vexatious and frivolous as it is wrongly brought into court and that it has been brought in bad faith with the intention of the applicant to deny the 3rd Respondent a right to a speedy trial as guaranteed under the 1995 Constitution of Uganda.

Counsel Legal Representation

[5] The Applicant is represented by **M/s Zemei, Aber Law Chambers, Masindi** while the 1st Respondent is represented by **Ms Kwesigabo, Bamwine & Walusimbi Advocates, Kampala** and the 3rd Respondent is represented by **M/s Mwebaza & Co Advocates, Hoima**. The 2nd Respondent did not participate in this Application, on record, there is no proof that it was served with the application and its affidavit in reply is therefore not available.

[6] Counsel for the Applicant submitted that on the day of hearing, the Applicant arrived at court premises at 9:00am but was prevented by security personnel from entering in strict application of **Covid rules** but advised him to wait for his advocate Counsel **Susan-Zemei**. That unknown to the Applicant, Counsel Suzan Zemei was not at court in person but only sent her Associate Counsel **Kinali Albert** to hold brief for her. It followed her absence that the matter was dismissed for want of prosecution but in the presence of Counsel **Kinali Albert** who was holding brief for the Applicant's Counsel.

[7] Secondly, the instant Application was filed on the **17th July 2020,** only two days after the dismissal of **Civil Suit No.62 of 2020** which implies that he had an honest intention to execute his case thereby bringing this application without inordinate delay. She relied on the authority of **STEWARDS OF GOSPEL TALENT LTD Vs NELSON ONYANGO & 7 ORS H.C.CIVIL APPEAL No.14 OF 2008.**

[8] Thirdly, that there was sufficient cause for non-appearance of the Applicant when the suit was called for hearing **(O.9 r.23 CPR)** as enforcement of **SOPs** by court security to avoid congestion in court to prevent **Covid 19** is a matter of Judicial notice to this honourable court. She relied on the following authorities for the proposition of what amounts to sufficient cause;

a) PINNACLE PROJECT LTD Vs BUSINESS IN MOTION CONSULTANTS (H.C.M.A No.362 OF 2010)

b) NICHOLAS ROUSSOS Vs GULAM HUSSEIN HABIB VIRANI & ANOR S.C.CIVIL APPEAL No.09 OF 1993.

c) BANCO ARABE ESPANOL Vs B.O.U S.C.C.A No.8/1998.

It was her prayer therefore that this court finds a just cause and grant this application with costs to the Applicant.

[9] Counsel for the 1st Respondent on the other hand submitted raising a substantial point of law which is as follows;

a) That the Application before court is not competent because it expired. The Applicant did not serve the 1st Respondent within the time stipulated by law and did not seek the leave to extend time before the same was served upon the 1st Respondent, 5 months after the same was issued **(O. 49 r.2** and **O.5 r.1(2) CPR)**

Counsel relied on the following authorities for his objection;

a)EDISON KARYABWERA Vs PASTORI TUMWEBAZE S.C.C.A No.06 of 2004.

b)KWESIGA GEORGE Vs IGANGA MUNICIPAL COUNCIL &ANOR H.C.MISC.APPN No.003 OF 2016.

c)FREDRICK JAMES JJUNJU & ANOR Vs MADHIVAN GROUP LTD & ANOR H.C.M.A No.688 of 2015

d)MICHAEL MULO MULAGGUSSI Vs PETER KATABALO H.C.MISC.APPEAL No.006 OF 2016.

b) Counsel concluded that in the instant Application, the Notice of Motion was issued by this Honourable court on **27th July2020** and ought to have been served upon the 1st Respondent by the **17th Aug/2020** which did not take place and no application to extend the time was made and hence it expired. He therefore

prayed that this Honourable court ought to dismiss this application with costs.

[10] Counsel for the 3rd Respondent also raised a point of law to the effect that this application is wrongly before this court basing on the fact that the Applicant filed this Application under **O.9 r.27 of the CPR**. That **O.9 r.27** is a remedy only available to the defendants yet under **Civil Suit No.53 of 2016,** the head suit from which this application arises, the Applicant was a plaintiff and not a defendant. Secondly, that **O.9 r.27 CPR** is invoked where a decree is passed *ex parte* against the defendant and thirdly, that it is applicable when the defendant was absent.

Decision of Court

[11] The objections raised by the 1st and 3rd Respondents are points of law. It is therefore incumbent upon this court to first determine these objections. I shall begin with the point of law raised by the 3rd Respondent's counsel.

[12] I agree that **O.9 r.27 CPR** is not applicable in the instant application. It is however my view that counsel for the Applicant, though she did not respond to this objection, she inadvertently cited **O.9 r.27 CPR** but intended to cite **O.9 r.23** which provides as follows;

> *"i) where a suit is wholly or partly dismissed under rule 22 of this order the plaintiffs 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 aside the dismissal order and if he or she satisfies the court that there was sufficient cause for non-appearance when the suit was called on 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."

[13] I am fortified in this position by the Counsel for the Applicant's submission where at **page 1 of her written submissions,** she stated that the Applicant brings this application for reinstatement of the suit under **Section 98 CPA** and among others, **O.9 r.23 CPR**. She went further at page 2 of her submissions to submit that;

"O.9 Rule 23 provides that the plaintiff whose suit was dismissed under rule 22 for non appearance may apply for an order to set aside the dismissal provided he satisfies court that there was sufficient cause for non appearance 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."

[14] O.9 r.22 CPR however provides as follows;

"where the defendant appears and the plaintiff does not appear, 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."

[15] In the instant case, the record shows that on the **8th day of July 2020** when the head suit was given the last adjournment to the **16th July 2020 at 11:30am** for hearing, both parties were absent. However, as counsel for the Applicant concedes, court took it upon itself to notify counsel for the Applicant of the last adjournment date and she also

accordingly communicated it to the Applicant himself as conceded in **paragraph 3** of the Applicant's affidavit in support.

[16] On the **16/7/2020,** the day the matter was slated for the last adjournment, as counsel for the Applicant submitted, neither party was present save for counsel **Kinali Albert** who had appeared holding brief for counsel **Susan Zemei** and the suit was dismissed in his presence. In her submissions and the Applicant's affidavit in support, both counsel and the Applicant appear to had mistaken the date for last adjournment of the suit to be 15th/7/2020 but the correct position is that it was 18th/7/2020 and that is when the suit was dismissed for want of prosecution.

[17] The foregoing therefore clearly imply that the head suit was not dismissed under **O.9 r.22 CPR** as counsel for the Applicant conceded but under **O.9 r.17 CPR** which provides that;

> *"where neither party appears when the suit is called for hearing, the court may make an order that the suit be dismissed."*

[18] Once a suit is dismissed under **O.9 r.17 CPR**, if the plaintiff is interested in its restoration, he or she has to proceed under **O.9 r.18 CPR** which provides that the plaintiff may, subject to the law of limitation, bring a fresh suit or he or she may apply for an order to set aside the dismissal, and if he or she satisfies court that there was sufficient cause for his or her non appearance, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

[19] It follows therefore from the foregoing, the Applicant could neither bring this application under **O.9 r.27 CPR** nor **O.9 r.23 CPR**, both orders are inapplicable to this application because the suit was

dismissed for want of prosecution when neither party appeared on the date appointed or fixed for hearing.

[20] In the circumstances of this case, I uphold the point of objection raised by counsel for the 3rd Respondent that this application is wrongly before this honourable court.

[21] As regards the point of law raised by counsel for the 1st Respondent in his written submissions, the issue is whether the application before court is competent. According to counsel for the 1st Respondent, the application before court is not competent because it expired. The Applicant did not serve the 1st Respondent within the time stipulated by law and did not seek the leave of court to extend time before the same was served upon the 1st Respondent five months after the same was issued.

[22] Counsel for the Applicant in her submissions, did not respond to this point of law raised, by way of any reply. However, as counsel for the 1st Respondent rightly submitted, the law on service of Motions is under **O.5 r.1 (2) CPR** which provides as follows;

> *"Service of summons issued under sub-rule (1) of this rule shall be effected within twenty-one days from the date of issue; except that time may be extended on application to court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension."*

[23] In **FREDRICK JAMES JJUNJU & ANOR Vs MADHIVAN GROUP LTD & ANOR H.C.MISC.APPN No. 688 OF 2015,** Justice Basheija Andrew observed that the position of the law, is that applications whether by Chamber Summons or Notice of Motion and/or Hearing Notices, are by law required to be served following the manner of the procedure adopted for service of summons under **O.5 r.1(2) CPR**, See also **AMDAN KHAN Vs STANBIC BANK LTD(U)LTD H.C.M.A No.900 OF**

2013 and **KANYABWERA Vs PASTORI TUMWEBAZE, S.C.C.A No.6 OF [2005]2 E.A 86.**

[24] In the instant case, the present application to reinstate the suit was filed on **17th/7/2020** and court sealed and issued the Notice of Motion on 27th/7/2020. The Applicant did not serve the application on counsel for both the Respondents until **14th/12/2020** and **17th/12/2020** respectively, almost **5 months** from the date it was issued. Actually counsel for the 1st Respondent received the application under protest owing to the late service upon him. Clearly the twenty-one days stipulated in the rule had long expired and any service of the application was out of time set by the law. Service of the Motion ought to have been effected within 21 days from the date of issue.

[25] Counsel for the Applicant argued in her submissions that it was unknown to the Applicant that his counsel **Susan Zemei** who was in personal conduct of his matter was not going to appear in person and that she would send her Associate so as for him to be present in court. That therefore this was an error of counsel for the Applicant which need not to be visited on the Applicant and that the circumstances amounted to sufficient cause for the purpose of setting aside the dismissal of the suit.

[26] The above arguments would have been valid had counsel invoked the exception in **O.5 r. 1(2) CPR** and applied for extension of time within 15 days from the expiry of the initial time stipulated for the service. In the instant case where the Applicant failed to file one and no reasons have been advanced as to why counsel failed to serve the Respondents within the prescribed time or apply for extension of time within which to serve as required under the law, the notion of mistake of counsel would not apply.

[27] Under **O.5 r.1 (2) CPR** it is provided that;

> "*where summons have been issued under this rule and-*
>
> *a) Service has not been effected within twenty-one days from the date of issue; and*
>
> *b) there is no application for extension of time under sub-rule (2) of this rule; or*
>
> *c) the application for extension of time has been dismissed, the suit shall be dismissed without notice."*

[28] It follows therefore from the above foregoing, the effect of the failure to comply with service of the N.O.M application as stipulated under the rules is to have this application dismissed. The application is accordingly found incompetent and it is dismissed with costs.

Byaruhanga Jesse Rugyema

JUDGE.

22/9/21.