THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 046/2018

(ARISING FROM M/A 005/2018 & LAND CLAIM NO. 013 OF 2018)

OKURUT JOSEPH:::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

OKWI JULIUS::::::::: ::::::::::::::::::::::::::::::RESPONDENT

JUDGEMENT

This Appeal arises from the decision and orders of a magistrate grade one which was delivered on 29/6/2018 in which application no. 5/2018 seeking to re- in state civil suit number 013 of 2012 was dismissed. The original case was dismissed on 17th February 2015 for want of prosecution on the application by the respondent.

Being dissatisfied by the decision, the appellant appealed to this court on the following grounds; -

1. That the learned trial Magistrate erred in law and fact when he held that the 3 years is in excusable delay in having a suit re-instated thus occasion a miscarriage of justice.

2. That the learned trial Magistrate erred in Law and fact when he held that the applicants suit is a gone case that collapsed beyond repair thus occasion a miscarriage of justice.

3. The Learned trial magistrate erred in law and in fact when he implied in his decision that the appellant did not act with vigilance and actually sat on his rights whereas not occasioning a miscarriage of justice.

4. The learned trial magistrate erred in law and fact when he evaluated the respondent's evidence in isolation thus coming to a wrong conclusion.

5. The learned trial magistrate erred in law when he failed to find sufficient cause to re-instate the matter.

When the appeal came up for hearing, the appellant was represented by counsel Lillian Omurangi while the respondent by David Obore. Both parties were afforded time to file written submissions which they did.

DUTY OF THE 1ST APPELLATE COURT.

I am fully aware of the duty of this court as the 1st appellate court to subject the evidence on record to a fresh and exhaustive scrutiny and do a re-appraisal before coming to a conclusion. **(see Father Nanensio Begumisa and 3 Others vs. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236).** In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions **(see Lovinsa Nankya v. Nsibambi [1980] HCB 81).**

Ruling on Preliminary objection.

I have carefully considered the submissions of both counsel on the preliminary objection. The evidence on record clearly shows that the appellant did request for court proceedings within the 30 days. There is no evidence to show when and how he got the said proceedings. However, the lower court record shows that by 20th November 2018, the registrar was still asking for the lower court record as per request letter which was received on 21/ 12 2018. This appeal was filed on 5th October 2018 even before the record was formerly supplied to the appellant. I am in agreement with counsel for the appellant that once a request for proceedings is received by court, computation of time with in which to appeal stops running until the record is provided. There is no evidence on record to show that the certified record was actually given to the appellant.

In my considered view, the appeal was filed in time since time stopped running from 20th July 2018 when the appellant's request for the proceedings was received by court. The decision appealed against was delivered on 29th July 2018. This means that by the time the appellant requested for the proceedings, he had 9 days remaining to make the 30 days required under section79 1(a) of the CPA. Therefore, the preliminary objection herein lacks merit and the same is overruled.

The appeal shall proceed on its merits. I will therefore proceed to resolve the grounds.

RESSOLUTION OF THE GROUNDS.

Grounds 1, 2&3 were argued together and 4&5 also together. I therefore shall resolve them in the same order. They are as follows;

1. **That the learned trial Magistrate erred in law and fact when he held that the 3 years is inexcusable delay in having a suit re-instated thus occasion a miscarriage of justice.**

2. That the learned trial Magistrate erred in Law and fact when he held that the applicants suit is a gone case that collapsed beyond repair thus occasion a miscarriage of justice.

3. The Learned trial magistrate erred in law and in fact when he implied in his decision that the appellant did not act with vigilance and actually sat on his rights whereas not occasioning a miscarriage of justice.

On the above 3 grounds, counsel for the appellant in his written submissions submitted that the trial magistrate failed to exhaustively scrutinize the circumstances surrounding the whole case and never gave clear reasons for his decision which occasioned a miscarriage of justice. That order 17 rule 6(1) is not couched in mandatory terms and court has discretion to act judiciously in a manner which is just and proper. Counsel recited the evidence in M/A no. 5 of 2018 arguing that the appellant exercised vigilance did not sit on his rights and it was counsel's error which should not be visited on the appellant relaying on decided case of **Bamanya vs Shamsherali zaver SCCA 70 OF 2001**

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where the delay of 2 and a half years was forgiven. That it was wrong for the magistrate to hold otherwise. In his view there was no dilatory conduct on the part of the appellant

On the other hand, the respondent's counsel submitted that under order 17 rule 6 (2) the remedy for the appellant was to bring a fresh suit subject to the laws of limitation. Counsel agreed with the decision of the lower court in dismissing a suit which not been prosecuted for about 2 years and worse still taking another 3 years to file an application for re-instatement. That there was lack of vigilance on both counsel and his client. That the inordinate delay between 2012 to 2015 when the main suit was dismissed and 2015 to 2018 when an application for re-instatement was made is not excusable in his view.

Resolution

From the evidence on the lower court, the applicant filled land claim number 013 of 2012. The same was never prosecuted until 18th February 2015 when court dismissed the suit for want of prosecution. After three years the appellant filled MISC. Application no 005 of 2018 on 6th march 2018. The same application was dismissed hence this appeal.

For applications of such nature, once sufficient cause is shown to the satisfaction of the Court, this rule makes it mandatory for the Court to make an order setting aside the dismissal upon such terms as to costs or otherwise as the court thinks fit.

The phrase "sufficient cause" that is normally used interchangeable with the phrase "good cause" has been explained in a number of authorities. In the cases of: **Mugo v Wanjiri [1970] EA 481 at page 483, Njagi v Munyiri [1975] EA 179 at page 180 and Rosette Kizito v Administrator General and Others [Supreme Court Civil** Application No. 9/86 reported in Kampala Law Report Volume 5 of 1993 at page 4] it was held that sufficient reason must relate to the inability or failure to take the particular step in time.

In **Nicholas Roussos vs Gulamhussein Habib Virani & Another, Civil Appeal No.9 of 1993 (SC) (unreported),** the Supreme Court attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. They include mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness by a party.

In this appeal it was the submission of the appellant's counsel submitted that the mistake of counsel should not be visited on his client.

Courts have also established some tests to be applied when dealing with an application like this one. In the case of **National Insurance Corporation v Mugenyi and Company Advocates [1987] HCB 28** the Court of Appeal which was the apex court in Uganda at the time held that; *"The main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so.*

That ruling was adopted in the case of **Nakiride v Hotel International Ltd [1987] 85 where Kalanda A. J. (as he then was) held that;**

"In considering whether there was sufficient cause why counsel for the applicant did not appear in Court on the date the application was dismissed, the test to be applied in cases of that nature was whether under the circumstances the party applying honestly intended to be present at the hearing and did his best to attend. It was also important for the litigant to show diligence in the matter..."

In this appeal it was the submission of the appellant's counsel submitted that the mistake of counsel should not be visited on his client. In the lower court the evidence of the appellant was that upon filling civil suit no. 131/2012, the applicant went to Sudan before it could be heard and that the same was later dismissed. That the lawyer he instructed could neither communicate its progress nor follow up the case yet he had expected counsel to handle the case with diligence which he mistakenly never did. That he only learnt of the dismissal when he returned to Uganda. However, when the notice to show cause why execution should not issue against the judgement debtor was served on the appellant's lawyer m/s Ogire&co. Advocates who had filled the case, they clearly stated that they did not have instructions to proceed in the matter and that they last heard from the appellant when instructions to file a case was given

As already stated in the case **Nicholas Roussos vs Gulamhussein Habib Virani & Another, Civil Appeal No.9 of 1993** of cited by the

applicant's counsel, mistake of counsel was held to be one of the grounds that amount to sufficient cause and I agree with that position.

However, this position has confines least would give litigants and their lawyers an escape route to their laxity which would in turn be abuse of court process.

This was expounded on in the case of Eternal Church of God vs Kasoke (HCT-01-CV-MA-001 OF 2016. Court had this to say "the issue of not visiting counsel's mistake on a litigant in my view is a mere excuse by new Advocates to get themselves clients, the litigant just as his advocate needs to know the hearing dates of his case. Equity aids the vigilant as the maxim states. It is not only the duty of the advocate to show up in court but the litigant too. litigants ought to be vigilant and follow up their cases." I entirely agree with the above holding.

However, in this appeal there is actually no mistake of counsel as he clearly stated in the reply to the notice to show cause on record that he did not have instructions to proceed. It was rather the mistake of the appellant himself to give the lawyer instructions to proceed. Courts have been clear that a mistake of counsel who is fully instructed is forgivable but failure to instruct an advocate in time is not forgivable see **Ojara v Okwera (MISCELLANEOUS CIVIL APPLICATION No. 0023 OF 2017** where it was held among others that **"***Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law".*

In this case, even if the appellant had given his lawyer instructions to proceed, there is no reason why the appellant could not appoint an attorney to prosecute his case. For 5 years he cannot have been seated comfortably in Sudan without finding out from his lawyer the status of his case or even instruct other lawyers to prosecute his case. The applicant was indeed not vigilant in following up his case for over two years and worse still brings an application for reinstatement after 3 years. Besides there is no evidence on record to show that the appellant actually went to Sudan and /or when he returned. In his affidavit in support of the application he simply states that he learnt of his case dismissal upon return to Uganda but no evidence was attached to his affidavit to prove that fact.

I therefore find that the trial magistrate rightly found that there was no sufficient cause to warrant reinstatement of the original suit and that the appellant was guilty of inordinate delay.

Therefore, Grounds 1,2 &3 fail.

Grounds 4&5

4. The learned trial magistrate erred in law and fact when he evaluated the respondent's evidence in isolation thus coming to a wrong conclusion.

5. The learned trial magistrate erred in law when he failed to find sufficient cause to re-instate the matter.

On the 2 grounds, counsel for the appellant submitted that there was sufficient cause to warrant re-instatement of the suit. Counsel cited a number of authorities arguing that the mistake or negligence of counsel should not be visited on a litigant who was interested in pursuing his case. That the appellant in this case was in Sudan and trusted his Lawyer to proceed with the case.

To buttress his point, counsel cited the case of **Yona Kanyomozi vs Motor Mart M/A no. 8/98** where court held that" ….*it is trite law that a vigilant client as was the appellant/ applicant should not be penalized for the dilatory conduct of his advocate if he has not directly or indirectly contributed to it."*

He further submitted that the appellant honestly intended to have the main case determined on its own merit and he has established sufficient ground to set aside the dismissal of the application and re-instate the main case on its merits. That the appeal be allowed with costs.

On the other hand, counsel for the respondent submitted that the appellant's evidence on record is that he was in South Sudan on official duties when the case was dismissed. That however there nothing on the lower court record to prove the same as there was no evidence of a passport or letter to show his travel to South Sudan.

On the mistake of former counsel, he submitted that in this case the mistake was both by the advocate and the appellant who did not attend court for 3 years before the dismissal as was rightly noted by the trial magistrate in his ruling.

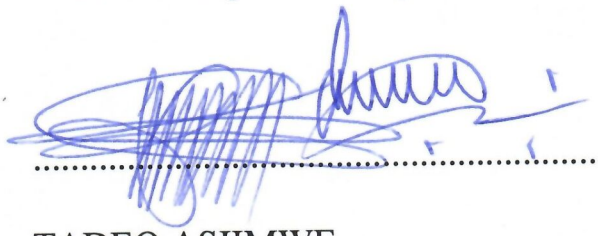
Resolution.

The court finding in grounds 1,2 & 3 above equally determines the remaining two grounds and I find no good reasons to resolve them.

Therefore, for the same reasons already given in this Judgement, grounds 4&5 also fail.

In conclusion, this appeal lacks merit and the same is hereby dismissed with the following orders.

1. The decision and orders of the trial Magistrate are here by upheld.
2. The respondent is granted costs of this appeal.



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TADEO ASIIMWE

JUDGE.

25/11/2021