THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 289 OF 2021

(ARISING FROM CIVIL SUIT NO. 192 OF 2018)

LUI YAN HUA :: APPLICANT

VERSUS

KIM SUK YOUNG KIM :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 52 Rules 1 & 3 of the Civil Procedure Rules for orders that;

a) The order dismissing HCCS No.192 of 2018 on the 25th of March 2021 be set aside, the suit be reinstated and heard/determined on its merits.

b) Each party bear their own costs.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit sworn in support of the application by Nicholas Mwasame, an advocate with the firm representing the Applicant. Briefly the grounds are that the main suit which was coming for the first time was fixed for hearing on the 25th day of March 2021 at 9:30 am. Counsel in personal conduct of the matter, Nicholas Mwasame, and the Applicant arrived at the Judge's Chambers at about 9:15 am, and found that the matter had been called and dismissed for non-appearance. The suit is meritorious and ought to be determined on its merits. The application has been filed

hastily and without undue delay. It is in the interest of justice that the application be granted.

[3] The Respondent opposed the application through an affidavit in reply deponed to by Wilfred Niwagaba, Counsel for the Respondent, in which he stated that the affidavit in support of the application was full of falsehoods particularly in regard to the averments on alleged partial success of mediation and the claim that the suit was coming up before the court for the first time. He stated that the suit had been fixed on several occasions but the plaintiff did not enter appearance on the set dates. He further stated that it was not true that the Applicant and his Counsel were at Court on the scheduled date and time of hearing the matter. He stated that the Court Clerk audibly called out the file and the suit was rightly dismissed under Order 9 rule 22 for non-attendance of the Applicant and his Counsel. He concluded that the Applicant lacks interest in prosecuting the matter and has not disclosed any sufficient cause as to warrant reinstatement of the dismissed suit. He prayed for dismissal of the application with costs to the Respondent.

Representation and Hearing

[4] The Applicant was represented by Mr. Nicholas Mwasame of Shonubi, Musoke & Co. Advocates while the Respondent was represented by Mr. Wilfred Niwagaba of M/s Niwagaba Advocates & Solicitors. Counsel agreed to make and file written submissions which were duly filed. I have considered the submissions in the course of determination of the matter.

Issue for Determination by the Court

[5] One issue arises for determination by the Court, namely:

Whether the application discloses sufficient grounds for setting aside the dismissal and ordering reinstatement of the main suit?

Submissions by Counsel for the Applicant

[6] Counsel for the Applicant submitted that the circumstances disclose sufficient cause for the Applicant's non-appearance when HCCS No. 192 of 2018 was first called for hearing. Counsel cited the cases of ***National Insurance Corporation v Mugenyi & Co. Advocates [1987] HCB 28; Nakiride v Hotel International Ltd; Bishop Jacinto Kibuka V Uganda Catholic Lawyers Society, HCMA No. 696 of 2018; Crown BeveragesLtd v Stanbic Bank (U) Ltd, HCMA No. 181 of 2005; and Mosa Oncwati v Kenya Oil Co. Ltd & Anor [217[KLR***. Counsel stated that the Respondent does not dispute the fact that the main suit had been scheduled for 9:30 am on the cause list. Counsel further argued that the Applicant's participation in the mediation, fixing the suit for trial and further appearance at the court premises on the day of the hearing was evidence of intention to have the matter prosecuted. Counsel also stated that the application to set aside the dismissal order was made within reasonable time and invited the Court to permit the Applicant to be heard on the merits of HCCS No. 192 of 2018.

Submissions by Counsel for the Respondent

[7] It was submitted by Counsel for the Respondent that the affidavit in support of the application is full of false hoods as the Applicant and Counsel were not at Court on the date set for hearing. He stated that the

Court Clerk audibly called out the file but the Applicant and his Counsel were not within the court premises. Counsel thus submitted that the Applicant has failed to demonstrate sufficient cause to warrant grant of the prayers sought in this application. Counsel argued that the conduct by the Applicant and his Counsel only reveals negligence and lack of interest and vigilance in prosecution of the matter. Counsel prayed that the application be dismissed with costs to the Respondent.

Resolution by the Court

[8] The main suit herein was dismissed for non-appearance of the Plaintiff/ Applicant when the matter came up before the Court on 25th March 2021. It was dismissed pursuant to the provision under Order 9 rule 22 of the CPR. The Applicant thus seeks the setting aside of the dismissal and reinstatement of the suit for hearing *inter partes* in accordance with Order 9 rule 23 of the CPR. *Order 9 Rule 23 CPR* provides as follows:

> *"Where a suit is wholly or partly dismissed under Rule 22 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 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".* [Emphasis added]

[9] What amounts to sufficient cause has been a subject of court consideration in a number of decided cases. In the case of ***Kyobe Senyange vs Naks Ltd [1980] HCB 31*****,** it was stated that for sufficient

cause to be disclosed, the court should be satisfied not only that the applicant had a reasonable excuse for failing to appear but also that there is merit in his/her defence to the case. In ***National Insurance Corporation v. Mugenyi and Company Advocates [1987] HCB 28*** the Court of Appeal held thus:

> ***"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. Two other tests were namely the nature of the case and whether there was a prima facie defence to that case...."***

[10] In ***Nakiride v. Hotel International Ltd [1987] HCB 85***, it was held thus:

> ***"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..."***

[11] In the present case, it was claimed by the Applicant that the reason he and Counsel were not present when the case was called up before the Court was because of a confusion regarding the time at which the case was fixed. It was stated for the Applicant that while the case was fixed at 9.30am, it was called and was dismissed by the Court at 9.00am. It was further stated for the Applicant that the Applicant and Counsel were at

court by 9.00am but were seated in a different place and when they checked with the Clerk at 9.15am, they were informed that the case had been dismissed. It is submitted for the Applicant that the Applicant has established sufficient cause for his failure and that of his advocate to attend court. Counsel further stated that the Applicant has established that he is interested in prosecuting the case, that the case has merits and he has brought this application without undue delay. On their part, it has been shown by the Respondent that the Applicant's evidence is full of falsehoods and ought not be relied upon by the Court.

[12] I will begin with the question of alleged falsehoods contained in the affidavit in support of the application. The deponent of the affidavit in support, who happens to be counsel in personal conduct of the matter, categorically states that the suit was fixed for hearing on 25th March 2021 at 9.30am. He purports to attach a copy of the hearing notice as Annexure "A" but omits to attach it. I believe the omission was deliberate because the copy of the hearing notice does not support that averment. The other reason I believe it was deliberate is because when the deponent refers to Annexure "B" which appears to support their case, he attaches a copy thereof. I do not believe that the deponent genuinely forgot to attach Annexure "A" which does not favour him and remembered Annexure "B" which is favourable to him.

[13] The document supposed to be Annexure "A" to the affidavit in support is a copy of the hearing notice that communicated fixture of the suit on 25th March 2021 at 9.00am. According to the record on the main suit, the hearing notice was taken out by M/S Shonubi, Musoke & Co. Advocates, the firm representing the Applicant/ Plaintiff, and was served

onto the Respondent/ Defendant by a process server by the name of Emong Sarah from the same law firm. The affidavit of service is on record. According to the copy of the hearing notice attached to the affidavit of service, the matter was fixed at 9.00 am. The Applicant's counsel who was the same counsel in personal conduct then, cannot claim not to have been aware that the matter was fixed at 9.00am. It is unfortunate that counsel chooses to be dishonest and flatly lie that the matter was fixed at 9.30am. This is conduct unbecoming of an officer of the court.

[14] The above conclusion holds notwithstanding presence of a copy of the Cause list which indicated the matter as coming up at 9.30am. To begin with, the excerpt attached by Counsel for the Applicant has no date. One cannot be sure it was for that particular fixture. But more importantly, an advocate that is possessed with a duly issued and served hearing notice cannot claim to have been confused by indication of a different time on the cause list. Indeed, in my view, any such confusion ought to have compelled the advocate to seek clarity from the Court Clerk as to the correct position. It is because of this clear position that I am of the firm view that the Applicant's advocate made a deliberate false hood in his affidavit. I believe a case of this nature brings out the rationale behind Regulation 9 of the Advocates (Professional Conduct) Regulations which bars advocates from handling contentious matters both as advocates and witnesses.

[15] In view of the foregoing, I am unable to believe the Applicant and his advocate that they were at the court when the matter was called. The record indicates the matter was called at 9.05am. I take judicial notice of

the practice that when a matter is called and any of the parties is not within the court room, a person loudly calls out in the corridor and at the nearby sitting area to ensure that a party present is not recorded absent. This itself is evidence that it is not true as claimed that the Applicant and Counsel were at the court. The Applicant and his advocate ought to have owned up their mistake and avoided placing blame on the court.

[16] I have deliberately dealt with this particular aspect at length because of the growing trend of unprofessionalism amongst legal professionals. I cannot take lightly an officer of the court who chooses to tell a deliberate lie in the face of the court. I would applaud an advocate who tells the court that they are sorry they were unable to appear in time but because of the nature of the case, their client be given opportunity to be heard. Such honesty defines the sanctity of the legal profession and it should not be let to be washed down the drain.

[17] Be that as it may, I note that the Applicant has indicated that his case is meritorious and ought to be determined on its merits. He has also acted diligently in bringing this application without undue delay. For this reason, it would not be in the interest of justice to close the Applicant from being heard. In ***Re Christine Namatovu Tebajjukira [1992-93] HCB 85***, the court stated that the ***"administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights"***. Basing on this ground, I find that the Applicant has established sufficient cause as to justify setting aside dismissal of the

main suit and ordering reinstatement of the suit for hearing on its merits. However, because of the conduct of the Applicant and his advocate first above alluded to, the Applicant will meet the costs of this application in any event.

[18] In the premises, the application is allowed with the following orders:

a) The order dismissing HCCS No. 192 of 2018 is set aside and the suit is reinstated for hearing and determination on its merits.
b) The costs of this application shall be met by the Applicant in any event.

It is so ordered.

Dated, signed and delivered by email this 1st day of November, 2022.

Boniface Wamala
JUDGE