

5 miscellaneous application no. 88 of 2016 be reinstated at the terms
stated therein

c) That the main suit No. 27 of 2016 be fixed for hearing and
determination on its merits

d) That costs of the application should be in the main cause.

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2. Grounds of this Application:

The grounds upon which the application is based were that;

15 a) The applicant has sufficient reason for her non-attendance of court
proceedings on 10th October 2019, when the matter was dismissed for
want of prosecution, which was occasioned by counsel's negligence

20 b) That the respondent and some officials at the Ministry of Lands,
Housing and Urban Development have embarked on a scheme to alter
the facts of the case, as they at the time of filing the main suit No. 27 of
2016, in utter disregard of the pending suit and the interim orders of
this court, which schemes are calculated to defeat justice thus the need
to reinstate the Interim Order dated 10th November 2016 vide
Miscellaneous Application No. 88 of 2016, at its terms to maintain the
status quo without requiring fresh applications

25 c) That the applicant's suit is a land dispute well founded in law and has
a high probability of success wherefore, in the interest of justice ought
to be entertained and disposed on merits

d) That the application is brought in good faith, and has been filed
without delay.

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5 3. Affidavits Evidence:

The applicant, Oyollo Rosemary Akech, swore an affidavit in support of the application. She averred that she is the plaintiff in Civil Suit No. 27 of 2016, which was dismissed. That the Civil Suit seeks several remedies including trespass and recovery of land. She deponed that in 1998, she was allocated
10 land/ a plot at Senior Quarters in Kotido Town Council, Kotido District, which she took possession of, and developed a residential building. That, the respondent trespassed on an undeveloped piece of the land, and erected a building thereon, until an interim order was issued to stop him in Miscellaneous application no. 88/ 2016. According to the applicant, she then
15 filed Civil Suit No. 27 of 2016, and was represented by counsel Johnny De West Ariko of M/s Muhumuza, Kateeba & Co. Advocates, who informed him that the matter was coming up for further hearing on 10th October 2019 and assured her that he would attend on the applicant's behalf.

However, that the applicant, was shocked when she was informed by Counsel
20 Johnny De West Ariko that Civil Suit No. 27 of 2016 was dismissed for want of prosecution since both parties and their counsel were not present when the suit was called for hearing.

That, counsel informed the applicant that he was late for court proceedings that day since he travelling from Lira to Soroti High Court.

25 That, the applicant, was also unable to make it to court to attend the hearing, as she was away attending to other commitments and her lawyer had assured her that he would be attend the court proceedings on her behalf. She averred that, it was the mistake of counsel to have appeared late on 10th October 2019 when the matter was called for hearing. (paragraphs 1, 2, 3, 5,6, 7, 8, 9, 10,
30 11, 12, 13, 14 of the affidavit in support of the application)

5 Mr. Okello Francis, the respondent swore an affidavit in reply to the application. He averred that the suit property referred to as Plot 4 is different from the land under dispute.

That, the Department of Survey mistakenly merged two different pieces of land and they have started the process of correcting the error.

10 Furthermore, that the suit land does not belong to the applicants and the interim order was consented to by the parties with the agreement that the applicant would prosecute the main suit without delay.

That, the respondent has never trespassed on the applicant's property as the suit land does not belong to her.

15 That the respondent made diligent efforts to attend court but the applicant did not do so which led to the eventual dismissal of the suit.

Furthermore, that the applicant's attitude towards court directives such as the locus visit by court has been dismissive and neglected.

20 Mr. Okello also averred that the applicant had a duty to prosecute her suit and not to abandon it in court and that the present application does not demonstrate any sufficient cause. (See paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 and 14 of the affidavit in reply)

4. Submissions

a. Applicant's submission

25 For the applicant, it was submitted that as demonstrated in paragraphs 7-10 of the affidavit in support of the application, the applicant is aggrieved by trespass. That, her lawyer informed her that the matter was coming for hearing on 10th October 2019, but she was unable to attend the hearing.



5 However, he assured her that he would attend the court proceedings on her behalf. That, as per paragraphs 11-15 of the affidavit in support, the applicant stated that she was shocked to hear that the civil suit was dismissed because her lawyer Johnny De West Ariko, was late for proceedings, yet she had facilitated him to appear on her behalf. It was submitted therefore, that the
10 applicant has sufficient cause for her non-appearance, and that and thus the court should exercise its discretion to reinstate Civil Suit No. 27/ 2016 so that it can disposed of on its merits. It was further submitted by counsel that different decisions by the courts have stated that the negligence or the mistake of counsel should not be visited upon a litigant except in cases, where
15 the litigant is guilty of dilatory conduct or where she or he failed to instruct an advocate. Here counsel referred to several cases, including **Captain Philip Ongom vs Catherine Nyero Owota Civil Appeal No. 14 of 2001** as well as **Banco Arabe Espanol vs Bank of Uganda SCCA No. 08 of 98** and **Ggolooba Godfrey and Margaret Kizito Civil Appeal**
20 **No. 7 of 2006**, to support this position.

Another submission by counsel was that intent to prosecute the suit has been held to constitute sufficient cause. Here counsel relied on **Crown Beverages vs Stanbic Bank of Uganda Limited HCMA No. 0181 of 2005**, as well as **Florence Nabatanzi vs Naome Binsobodde Civil**
25 **Application No. 5 of 1997**.

The argument of counsel was that the applicant expressed sufficient interest in prosecuting the suit, and that upon learning that the matter was dismissed on 10th October 2019, she lodged an application to reinstate it on 15th October 2019, but the same was dismissed because the affidavit in support was
30 defective.

5 However, that she immediately lodged another application on 19th December 2019. It was argued by counsel that the applicant has demonstrated her interest in prosecuting the matter and should not be punished for the negligence of counsel.

b. Respondent's submissions:

10 On whether the applicant had demonstrated sufficient cause, counsel for the respondent, M/s Kob Advocates and Solicitors argued that the applicant averred in paragraph 14 of her affidavit that she had commitments which hindered her from appearing before this Honourable Court in Civil Suit No. 27 of 2016 and therefore she had failed to demonstrate sufficient effort in
15 ensuring that the matter was prosecuted.

It was argued further that the applicant is guilty of dilatory conduct, and that she failed to follow up on her case. counsel's contention was that the applicant failed to prove any sufficient reason to why she was unable to attend court proceedings that day when the matter came up for hearing, and
20 therefore the mistake of counsel cannot suffice in this case. counsel submitted further that there is no merit in setting aside the order dismissing Civil Suit No. 27 of 2016 and reinstating the case.

In relation to the second issue, that is, whether this honourable court can reinstate the interim order vide Miscellaneous Application No. 88 of 2016, it
25 was submitted that the *status quo* of the land has changed now that rental houses were constructed on the suit land, and therefore, this court could not reinstate the interim order.

That, the applicant would instead have to file a fresh application, if she wishes to reinstate the interim order.

5 Furthermore, that the applicant's prayer is not supported by any law and should be disregarded.

In the submissions in rejoinder, counsel for the applicant submitted that the applicant very ably proved that she was vigilant about her case, and sought to immediately reinstate it when she heard it had been dismissed.

10 5. Decision of Court:

I have given due consideration to the pleadings and submissions of the parties. However, I will not delve into the submissions regarding the merits of the main suit filed by the applicant.

15 Instead, I will give more consideration to the submissions relating to this present application. The law applicable to this application is set out under Order 9 Rule 23(1) **of the Civil Procedure Rules** which provides as follows;

20 ***“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 aside the dismissal aside, 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***
25 ***thinks fit, and shall appoint a day for proceeding with the suit.”***

5 In *National Insurance Corporation versus Mugenyi and Company Advocates, 1978, HCB page 28*, the court laid out the test for sufficient cause as under **Order 9 Rule 23** of the Civil Procedure Rules as follows;

10 *“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 defense to that case....”*

15 In the present case, the applicant averred in her affidavit in support that although she filed Civil Suit No. 27 of 2016 and was represented by counsel Johnny De West Ariko of M/s Muhumuza, Kateeba & Co. Advocates who informed her that the matter was coming up for further hearing on 10th October 2019 and assured her that he would attend on the applicant’s behalf but that she was shocked when she was informed by Counsel Johnny De West
20 Ariko that Civil Suit No. 27 of 2016 was dismissed for want of prosecution since both parties and their counsel were not present when the suit was called for hearing.

She also stated in her affidavit that counsel informed her that he was late for court proceedings that day since he travelling from Lira to Soroti High Court.
25 She averred that, it was the mistake of counsel to have appeared late on 10th October 2019 when the matter was called for hearing.

The courts have found in several cases such as *Nicholas Roussos Vs Gulamhussein Habib Virann and Anor SCCA No.9 of*

5 **1993(unreported)** that a mistake by an advocate though negligent may be accepted as a sufficient cause.

I believe that this principle is applicable in the present case, where the applicant's counsel failed to attend court proceedings on time on the day the matter was fixed for hearing.

10 Furthermore, in considering whether there was sufficient cause, the test to be applied in cases of this nature is whether under the circumstances the party applying honestly intended to be present and did his best to attend. ***See Nakirridde V Hotel International Ltd [1987] HCB 86.***

15 Counsel's contention was that the applicant failed to prove any sufficient reason to why she was unable to attend court proceedings that day when the matter came up for hearing, and therefore the mistake of counsel cannot suffice in this case.

I believe that the applicant has proved that she had honest intention to prosecute the matter. I am convinced by her averments that upon learning
20 that the matter was dismissed on 10th October 2019, she lodged an application to reinstate it on 15th October 2019, which was soon thereafter though the same was dismissed because the affidavit in support was defective.

25 However, she immediately lodged another application on 19th December 2019. She also hired counsel to prosecute the matter.

In my considered view, this is sufficient proof of an honest intention to prosecute the suit.

- 5 In relation to the second issue, that is, whether this honourable court can reinstate the interim order vide Miscellaneous Application No. 88 of 2016, counsel for the respondent argued that the status quo of the suit land has since changed and that now there were rental houses constructed on the suit land, and therefore, this court could not reinstate the earlier interim order.
- 10 However, I believe that the interim order previously issued in **Miscellaneous Application No. 88 of 2016** is still valid in content be reinstated within the terms stated therein and the recent construction of rental units, if any, is not a barrier to its reinstatement.

6. Orders:

- 15 For the reasons above, I accordingly allow this application with the following orders;
- a) That the order of this court dismissing the applicant's **Civil Suit No. 27 of 2016** for want of prosecution is set aside and the suit file is restored to enable its disposal on merits subject to the law of limitation.
- 20 b) That in the interest of justice, Interim Order issued by this court wherein maintaining the status quo on the suit property vide **Miscellaneous Application No. 88 of 2016** is reinstated with the terms stated therein.
- c) That the main suit **HCCS No. No. 27 of 2016** should be fixed for
- 25 hearing and determination on its merits within Six months from the date of this ruling

5 d) That costs of the application toe in the main cause.

I so order.

A handwritten signature in blue ink, consisting of stylized initials and a surname, positioned above a dotted line.

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Hon. Justice Dr. Henry Peter Adonyo

Judge

7th June 2022