THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 049 OF 2023

(ARISING FROM CIVIL SUIT NO. 022 OF 2019)

MUKWAYA THEMBO LAWRENCE :::::::::::::::::::::::: APPLICANT

VERSUS

1. **BWAMBALE JONENI**
2. **KATARAGYE ANDREW JAMES :::::::::::::::::: RESPONDENT**

BEFORE: HON. JUSTICE VICENT WAGONA

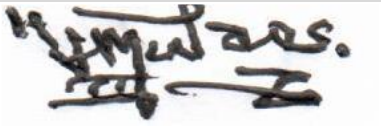
RULING

This ruling follows and application under Section 98 of the Civil Procedure Act and Order 9 rule 23 and Order 52 rule 3 of the Civil Procedure Rules for orders that:

1. **Civil suit no. 022 of 2019 be reinstated and determined on its merits.**
2. **The costs of taking out this application be provided for.**

The application was supported by the applicant's affidavit dated 21st June 2023 stating:

1. That on 24th April 2019, he filed Civil Suit No. 22 of 2019 against the respondents. That on the 25th of May 2022, he got sick and failed to attend court and thus instructed counsel Atuhaire to attend on his behalf and he found the case already dismissed.
2. That his case has a high likelihood of success if heard and determined on merits and it is in the interests of justice that the application for reinstatement be allowed. That the Respondents would not suffer any prejudice if the application is granted.



The application was opposed by the Respondents through an affidavit of Bwambale Joneni who stated as follows:

1. That the application was served outside the 21 days provided for under the Civil Procedure Rules thus rendering the same incurably defective.
2. That the application was an abuse of court process since it was signed on 19th June 2023, filed on 20th June 2023 before the affidavit in support which is dated 21st June 2023.
3. That the applicant failed to prosecute his case until it was dismissed for want of prosecution after several adjournments.
4. That the applicant was never sick and he was always seen by the deponent when the case came up for mention and no evidence of such was attached to the application.
5. That counsel Atuhaire on whom the applicant is shifting the blame had no instructions in the matter since there is not notice of instructions on file as such negligence of counsel does not arise.
6. That the applicant has not showed sufficient cause to warrant setting aside the dismissal order. That the application is thus frivolous and should be rejected with costs.

Representation and hearing:

The Applicant was self-represented and later instructed counsel Atuhaire who represented him while the respondents were represented by counsel Mishele Geoffrey. Both parties addressed me on the merits of their application through written submissions which I have duly considered herein.

Issues:

I find the following issues at the heart of this application thus:

1. **Whether there is sufficient cause to warrant setting aside the dismissal order in Civil Suit No. 22 of 2019.**
2. **Remedies available to the parties.**

Resolution:

The gist of the applicant's submission is that this court has inherent powers to make any order for purposes of ensuring that justice is met. That the applicant immediately after getting knowledge of the dismissal of his suit, filed an application for reinstatement and that it is in the interests of justice that the suit is reinstated.

Learned counsel Mishele on the other hand raised a point of law contending that the suit at hand is frivolous since the notice of motion was served outside the 21 days and cited a number of authorities to support his argument. He further contended without prejudice to the point of law, that the applicant failed to prosecute his case for 4 years as such there is no sufficient cause to warrant a reinstatement of the same. He thus asked court to dismiss the suit with costs to the Respondents.

Consideration by court:

I will first resolve the point of law raised by counsel Mishele for Respondents.

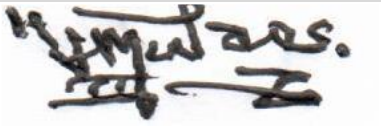
Order 5 rule 1 of the Civil Procedure Rules is to the effect that every summons issued by court must be served within 21 days from the date of issue. Rule 3 emphasizes that where summons have been issued and not served within 21 days or where there

is no application for extension of the summons or the application for extension is dismissed, the suit stands dismissed without notice.

In **Stop and See (u) Ltd Vs. Tropical Africa Bank Ltd, Misc. Application No. 333 of 2010,** Madrama J (as he then was) guided that applications, like plaint and defense, are bound by the same timelines as provided for under Civil Procedure Rules. That this by implication means that upon service of the notice of motion, the respondent should file an affidavit in reply if any within 15 days from the date of service. That a rejoinder should equally be filed within 15 days from the date of receipt of an affidavit in reply or within the time as ordered by court which could be shorter than the 15 days.

Order 5 rules 2 and 3 seem to post a clear position that once summons expire before service and there is no application for extension within 15 days or the application for extension is dismissed, the suit stands dismissed without notice. This would translate into a position that there would be no suit to talk about at law.

However, Courts have approached Order 5 rules 2 and 3 with a purposive approach and interpreted that the failure to follow the time lines under order 5 does no render the pleadings fundamentally defective. Justice Stephen Musota (as he then was) in **The Ramgarthia Sikh & 3others Vs. The Ramgarthia Sikh & 6 others, HCMA No. 325 of 2015** observed thus: **"*I will find that in the interest of justice, the affidavit in reply will be admitted in order to allow court to finally and effectively dispose of this matter. The delay in this case was not as long as that which was in Stop and See case (supra) quoted above of over six months. In this case, it was only a matter of days"***



Whereas the position is **Ramagarthia (supra)** related to an affidavit in reply, it is my view that it may in appropriate instances, apply to summons or notices of motion. I believe that whereas the rules were meant to curtail delays, the bigger picture is to ensure substantive justice. I thus invoke Article 126 (2) (e) of the 1995 Constitution to validate the notice of motion filed by the applicant especially taking into account that he lacked legal representation.

The above analysis leads me to the main issue for investigation in this suit being; **whether there is sufficient cause to warrant setting aside the dismissal order of civil suit no. 22 of 2019.**

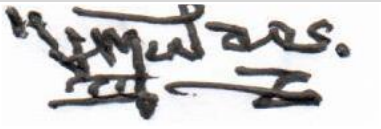
The power to order for reinstatement is derived from the general powers of court under section 98 of the Civil Procedure Act and section 33 of the Judicature Act. Such discretion should be exercised sparingly and only in deserving circumstances. Where a party has been guilty of dilatory conduct or where there has been delay in filing an application for re-instatement, court should be reluctant to grant such a reinstatement. (See ***MwanguhyaFenehansi Vs. King Oyo NyimbaKabambaIguru, Misc. Application No. 33 of 2023).***

In ***Shah vs. Mbogo& Another (1967) EA 116 (Harris J)***, guided on exercise of discretion thus: ***"The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."***

In the persuasive Kenyan case **of Ivita vs. Kyumbu [1984] KLR 441**, it was observed in relation to delay thus: ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

Twinomujuni JA (RIP) in **Tiberio Okeny & Anor V The Attorney General and 2 ors CA 51 of 2001** gave the broad contours within which the discretion is to be exercised where he observed thus:

> ***"(a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.***
>
> ***(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits***



and that error and lapses should not necessarily debar a litigant from pursuit of his rights.

(c) 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.

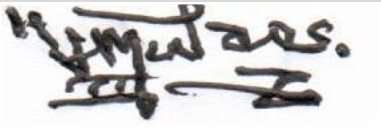
(d) Unless the Applicant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.

(e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law …"

The Hon. Justice Twinomujuni further held that:

"it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors …".

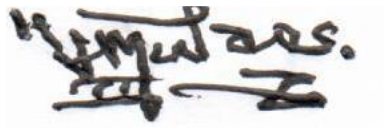
In this case the applicant was self - represented. He now has a lawyer. The interests of justice will be better served when the suit is heard on the merits. I thus in the



interests of justice and bearing in mind that the applicant was not represented and he had on his own made efforts to file the necessary documents on time and he even filed the current application without undue delay grant this application. This application therefore succeeds with the following orders:

1. **That Civil Suit No. 022 of 2019 is hereby reinstated and the dismissal order dated 5th May 2023 is set aside.**
2. **That the costs of this application are awarded to the Respondents in the cause.**

I so order.



Vincent Wagona

High Court Judge

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DATE: 15.09.2023