THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 22 OF 2020

Arising from Miscellaneous Application No. 508 of 2018

Also arising from Miscellaneous Application No. 144 of 2018

Also arising from Miscellaneous Application No. 236 of 2015

All arising from Makindye Chief Magistrates Court Civil Suit No. 63 of 2012

*(This is an appeal from the decision of Her Worship Katushabe Prossy, the Chief Magistrate of Makindye Chief Magistrates' Court (as she then was) delivered on the 4th February 2020)*

FUELEX (U) LIMITED:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

NATIONAL WATER AND SEWERAGE CORPORATION:::::::::RESPONDENT

**Judgment.**

**Before:** Hon Justice Dr. Douglas Karekona Singiza.

## 1 Introduction

This appeal dates to 2012 and has had an up-and-down history. On several occasions, the Court dismissed the Applications of the Appellant for non-appearance and want of prosecution. This therefore means that the case has taken longer than it should have taken and consequently, unnecessary time and resources have been wasted. As I will soon explain, the only dispute in this appeal is whether this court should, in the interest of justice, allow the appellant to have its case heard, irrespective of his alleged dilatory conduct.

### 1.1 Background.

On 24th February 2012, the appellant instituted a suit against the respondent for recovery of Uganda Shillings Seventeen Million (UGX 17,000,000) for the damage caused to its property, general damages and costs of the suit, vide Civil Suit No. 63 of 2012. The respondent filed its written statement of defence with a counterclaim and served it on the appellant. The suit was however, dismissed because the appellant failed to prosecute its case. The court also entered an *ex parte* judgment on the counterclaim in favor of the respondent on the 8th October 2013; the appellant was ordered to pay to the respondent Uganda Shillings Ten Million (UGX 10,000,000) as general damages, interests, and costs of the suits.

The respondent commenced execution proceedings at the High Court (Execution Division) and a notice to show cause why execution should not issue was served. The appellant then instituted an application for the stay of execution and for an order that the judgment in Civil Suit No. 63 of 2012 be set aside *vide* Miscellaneous Application No. 236 of 2015. The idea was to have the suit reinstated and heard on its merits. That very application was also dismissed for want of prosecution on 26th April 2017 under Order 9 Rule 17 of the Civil Procedure Rules.

The appellant subsequently filed Miscellaneous Application No. 144 of 2018 seeking that the dismissal order in Miscellaneous Application No. 236 of 2015 be set aside. He also sought for a hearing of the main suit. However, Miscellaneous Application No. 144 of 2018 was also dismissed on 14th November 2018 for non-appearance of the appellant and her counsel.

Thereafter, the appellant filed Miscellaneous Application No. 508 of 2018 seeking orders that the order dismissing Miscellaneous Application No. 144 of 2018 be set aside and that the court appoints a day for proceeding with the suit on its merits. On the 4th February 2020, the learned chief magistrate dismissed the application with costs. Aggrieved with the ruling of the learned chief magistrate, the appellant then filed the present appeal.

In this ruling I will refer to the Fuelex (U) Limited as "Fuelex" and National Water and Sewerage Corporation as "NW&SC'.

## 2 Grounds for the Appeal.

The Fuelex appealed the ruling and orders of the learned chief magistrate on five grounds, namely:

1. *That the learned chief magistrate erred in law, fact, and unreasonably when she ignored the fact that Miscellaneous Application No. 144 of 2018 was entertained without the mother file and dismissed Miscellaneous Application No. 508 of 2018 contrary to the earlier directive or orders of the court requiring that the mother file first be returned and on a date when the matter had been scheduled only for mention to ascertain whether the mother file had been returned to the court from the Execution Division [of the High Court]..*

2. *That the learned chief magistrate erred in law and fact when she failed to take into consideration the background and special circumstances of this matter and thereby wrongly exercised her discretion in dismissing the application.*
3. *That the learned chief magistrate erred in law and fact when she found and held that there was no intention to prosecute and or appear on the appointed date to prosecute the application.*
4. *That the learned chief magistrate erred in law and fact when she denied and curtailed the appellant's right to a fair hearing.*
5. *That the learned chief magistrate erred in law and fact when she dismissed in whole the applicant's Miscellaneous Application No. 144 of 2018.*

## 2.1 Legal Representation.

At the commencement of the appeal, the Fuelex was represented by M/s Kabayiza, Kavuma, Mugerwa & Ali Advocates while the NW&SC was represented by M/s Bluebell Legal Advocates.

## 3 Summary of the decision of the learned chief magistrate.

The learned chief magistrate relied on Order 9 Rule 27 of the CPR which in essence deals with circumstances under which to set aside the *ex parte* decree passed if for sufficient cause, there are good reasons that could have prevented a party to a suit from attending court when the matter was called for hearing.

Explaining the meaning of a term "mention" the learned chief magistrate observed that a mention date is intended to discuss the progress of the case in which case it becomes important for counsel to attend mention dates so that the litigants, opposite counsel, and the court discuss the management of the case. It was the reasoning of the learned chief magistrate that if counsel had designated another lawyer to 'hold

brief' for him, the lawyer holding brief should have been aware that the matter was scheduled for 9:00 am. That it was therefore imperative for the lawyer holding brief to attend the court at the designated time and not to appear at 10:30 am.

The learned chief magistrate made a point that while a mistake of a lawyer should not be visited on the litigant, a lawyer cannot laxly handle a matter properly scheduled at a specified time and then plead that his or her dilatory conduct should not be laid upon the client.[1] The learned chief magistrate took the view that since neither the advocate nor the appellant was in court it was proper for her to dismiss the application with costs.

### 3.1 Role of the first appellate court.

The first appellate court must review the evidence of the case, reconsider the materials before the trial judge, and make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it.[2] Thus, an appellate court has the duty to re-evaluate the evidence to prevent a miscarriage of justice while thoughtfully reaching its own conclusion.[3] It is a given that the appellate court must re-examine the facts and come to its own conclusions, but it must always constantly be aware that it hasn't seen or heard the witnesses and should account for this.[4] There is also a responsibility to re-examine the evidence, scrutinize it thoroughly, and reach its own conclusions on both factual and legal grounds.[5]

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[1] Eternal Church of God v Sunday Kasoke Joseph HCT-01-CV-MA-11 of 2016.
[2] Kifamunte Henry V. Uganda, S.C. Criminal Appeal No. 10 of 1997.
[3] Dr. Amumpe v. Muhangi (Civil Appeal 62 of 2019) [2021] UGHCCD 21 (30 March 2021).
[4] See Justice Clement De Lestang in Selle and Others vs. Associated Motor - Boat Ltd and Others (1968) EA 123 at Page 126; Karamira v. Kiggundu (Civil Appeal 93 of 2018) [2021] UGHCLD 5 (22 January 2021).
[5] see Mariam Nanteza & Others v. Nasani Rwamunono & Another, Court of Appeal Civil Appeal No. 28 of 2013; Namirembe v. Kasujja and 2 Others (Civil Appeal 36 of 2021).

Thus, the appellate court must consider the concerns made at trial and the evidence given by both parties at trial. This calls for the fresh re-evaluation of the evidence to give it a fresh look considering the grounds stated in the memorandum of appeal.[6]

4 Submissions of the Appellant.

Ground 1.

According to the Fuelex, Miscellaneous Application No. 144 of 2018, was dismissed wrongly given that the original file was at the High Court Execution Division and there was no proof that it was in the court registry at the time. The Fuelex's argument was that the court needed to have established the whereabouts of the mother file before it could proceed with the application, which made the decision to dismiss the application unreasonable. It is also the contention of the Fuelex that the application was unfairly dismissed since the matter was coming up for mention rather than for hearing. Emphasis here was therefore put on the distinction between a "hearing date" a "mention date".

Ground 2.

The Fuelex also faults with the learned trial chief magistrate for her failure to adhere to the basic principles on fairness[7]. The argument remains that had the court considered the background and special circumstances of the matter, a different outcome would have resulted.

Ground 3.

[6] See Fredrick J.K. Zaabwe vs. Orient Bank & 05 Others, SCCA No. 4 of 2006; Begumisa & others v. Tibabaga (2004)2 EA 17

[7] Deailas of which are anchored on the decision of *Bank Arabe Espanol v Bank of Uganda [1999] 2 E. A 2*

The Fuelex argument on this ground is a bit hazy but the contention seems to be that the delay to attend the court in time was unavoidable since their lawyers had an election petition in another court. In any case, Fuelex maintains that they were only late by 30 minutes, further demonstrating their intention to prosecute their application which had in any case been fixed for a mention.

Ground 4.

According to the Fuelex, a fair hearing is the cornerstone of any judicial process; the right is non-derogable as premised in Articles 28 and 44 (c) of the Constitution. Fuelex recalls its previous efforts to set aside the ruling and orders in Civil Suit No. 63 of 2012 and the resulting several applications filed but which were for some misfortune, never been heard to highlight the alleged denial of the right to a fair hearing.

### 4.1 Submissions of the Respondent.

The NW&SC's main argument deals with a plenary objection on ground 5. Here, the main attack was that ground 5 of the appeal offended Order 43 Rule 1 (2) of the Civil Procedure Rules because it was not clearly and accurately presented. The fact that the ground did not specifically point out the errors observed or any specific areas of the miscarriage of justice, or the points which were wrongly decided was highlighted.

On ground 3, according to the NW&SC, the test to be applied in the circumstances of this nature is whether Fuelex had honestly intended to attend the hearing and did its best to do so as enunciated.[8] The NW&SC insist that the Fuelex was guilty of dilatory conduct and thus, wasted the court's time from the onset. The failure by

[8] The NW&SC cited *National Insurance Corporation v Mugenyi and Company Advocates*. Civil Appeal No. 14 of 1984.

Fuelex to prosecute the main suit and other related applications which were all dismissed for non-appearance seems was put across. To illustrate the lack of intention to prosecute the main suit, the NW&SC explained further that the Fuelex's lawyer who had been appointed to 'hold brief' opted instead to first attend to a different matter fixed for 10:30 am rather than the one fixed for 9:00 am.

The NW&SC elected to argue both grounds 1 and 2 together since in their view, these two grounds are of a similar nature by highlighting the risks caused by a litigant who continuously disregards court process and ultimately wastes the court's time. A point was made that the need to bring litigation to a closure as a matter of public policy must be taken seriously, little less the costs of a prolonged litigation.

Ground 4.

It was the argument of the NW&SC that Articles 28 and 43 (1) of the Constitution on the right to a fair hearing, must balance with other policy considerations. An examination of the Fuelex's dilatory conduct throughout the proceedings must be made in the context of possible abuse of court process, with the risk that such a conduct was in fact intended to forestall court process.

## 5 Dealing with the preliminary objection

Courts have always guided that grounds of appeal ought to be (a) as clear as possible (b) as brief as possible (c) as persuasive as possible without descending into narrative and argument.[9] Any formulated grounds of appeal should therefore be premised on the law and not merely on facts and should flow directly from the decision appealed against without descending into a narrative and argument.[10]

[9] M/S TatuNaiga & Co. Emporium v Verjee Brothers Limited SCCA No.2/2000; Kitgum District Local Government &Another v Ayella Odoch Jimmy Joel.HCCA No.008/2015.
[10] Ruryabeita Frank Vs. Beyunga Kenneth & 3 others, Civil Appeal No. 59 of 2020.

It is true that neither the present memorandum of appeal before me nor the submission of the Fuelex discusses and reflects in brief and concise terms, the grounds as presented. I however take the view that a decision on whether a ground is cast in unclear and imprecise terms is one that is mostly subjective and is dependent at times on an individual judge's legal skills. Where, discernable the grounds as presented, a court can still comprehend the nature of the complaint with the trial court's decision, there is no need to dismiss such grounds. I therefore find no merits in the objections as presented.

## 6 Discussion on the rules of timelines

I would like to stress that the rules on timelines are not mere technicalities because they regulate the conduct of any court's business. These rules ensure not only fairness but also orderly disposal of suits.[11] However, it is a settled principle that the constitutional parameters on fair and quick justice create a set of value-based judicial system which the rules of procedure cannot wantonly ignore.[12] The litigant must satisfy the court that in the circumstances of the case, it is not desirable to have undue regard to technicalities.[13]

### 6.1 The test on setting aside a dismissal

The thrust of ground 3 of the appeal is founded in the power of the court to set aside its own *ex parte* decision. The test in an application to set aside an *ex parte* dismissal is not a complicated one. First is that there must be a demonstration that the applicant had honestly intended to attend the hearing and did his or her best to do. In doing so,

[11] Stop and See (U) Ltd v Tropical Africa Bank Ltd (Miscellaneous Application 333 of 2010) [2010] UGCommC 41

[12] See Article 126 (2) (e) of the Constitution. See also Utex Industries v Attorney General. SCCA No. 52 of 1995.

[13] Kasirye, Byaruhanga and Co Advocates v Uganda Development Bank SCCA No. 2 of 199.

the court must be guided by the consideration of the nature of the plaintiff's case to reinstate the claim or not.[14]

It is a given that even where no sufficient cause is shown, the court may still go ahead and set aside the dismissal by invoking its inherent power.[15] The main reason for invoking the above powers is that litigants should always be supported to have their disputes determined on merits except in plain and obvious cases.[16] The caution is always that the inherent powers of the court should only be invoked in very compelling circumstances and in a limited manner. I should stress that, what constitutes sufficient cause is left to the court's discretion.[17]

### 6.2 Eleven usual considerations

The 11 considerations that the court must bear in mind before dismissing a party or its pleadings were discussed in detail by the Court of Appeal in *Bahinguza & Anor v Attorney General*,[18] and are summarized below:

1. The court must be conscious of the fact that striking out a pleading and/or a proceeding that may deprive a party of presenting and prosecuting his /her cause of action is an extreme measure and as such should be taken as a last resort and in the clearest of cases.
2. Deviations and lapses in form and procedure, which are not jurisdictional in nature, do not cause prejudice or miscarriage of justice to the opposite party. Thus, where the inconveniences caused can be catered for with costs against

[14] Fred Kyewalabye v Richard Ssevume & Ors (Civil Appeal 1 of 2004) [2006] UGHC 60
[15] See Girado Vs Alam & Sons [1971] EA 4.
[16] See Justice Mulenga in Ismail Serugo v Kampala City Counsel and Another, Constitutional Appeal No. 2 of 1998.
[17] Ivita vs. Kyumbu (1984) KLR 441
[18] Miscellaneous Application NO. 269 OF 2013 [2015] UGCA 5.

the offending party, a heavy punishment of extinguishing the cause of action of a party to the cause should be avoid,

3. The court should apply and enforce the objects, purposes, spirit, and core values of the statutory provision, rather than its mere words or rules. The court should not allow itself to be too bound and tied by the procedural rules of practice as to be compelled to do that which will cause injustice in a particular case.
4. The court should consider what any delay is likely to be occasioned, as well as the costs and prejudice to the parties before the court strikes out the offending document.
5. The court must consider the prejudice that is likely to be suffered by the non-offending party and compare it against the prejudice to be suffered by the offending party.
6. The court should aim at achieving fair, just, speedy, proportionate, timely, and costs saving adjudication of cases before it.
7. *The court must not overlook or fail to act firmly against acts/omissions that result in failure to take an essential step and thus subvert the expeditious disposal of cases/appeals.*
8. *Therefore, mistakes and/or lapses, negligent acts or dilatory tactics, or acts of counsel or the client, that amount to an abuse of court process ought not to be tolerated once the court is satisfied that there has been intentional and/or continuous default on the part of the offending party and if it is a delay, then the delay must not be inordinate* [Emphasis mine].
9. The court must consider all the circumstances surrounding the failure to take an essential step, and once satisfied that the failure to do so amounts to depriving the innocent party of a fair trial, then the court must act firmly against the offending party.

10. A court of law ought to be conscious that justice looks at both sides of the procedural or substantive elements of the case and in accordance with the law.
11. The court should not tolerate disobedience of the law out of sympathy to the offending party, or on the mere assertion that no prejudice has been caused to the innocent party. The absence of prejudice is not an excuse for breaching rules and timelines set by law.

### 6.3 Application of these principles

In applying the above test, the courts' examination must always focus on whether the dismissal of the party's case who had offended the rules of procedure was in fact extreme. The extreme nature of such a dismissal again depends on whether there were other options such as an award of costs to remedy the violations of the rule by the offending party.

The key principle from the *Bahinguza & Anor* case is that as much as possible, courts of law should adopt a more flexible approach to avoid locking out good cases on account of breach of rules of procedure. As part of flexibility, it seems that a careful balancing of the different competing interests of the parties is crucial. That aside, the call for quick disposal of a dispute remains the overarching consideration. It follows then that an offending party, especially one who is guilty of deliberate efforts to forestall the progress of the case must face the risk of being locked out of the court by an order of a dismissal to safeguard the integrity of the courts.[19]

## 7 Assessment

In the present case, the learned chief magistrate dismissed the application because, in her view, counsel for the Fuelex had scheduled his workload badly. She cites the

[19] Caneland Ltd & Others vs Delphis Bank Ltd Civil Application No. 344 of 1999; Mugisa M Abraham & 4 Ors v Rwambuka and Co. Advocates (Miscellaneous Application 733 of 2018) [2019] UGHCCD 138.

lawyer's decision to opt to attend to another court case which had been scheduled 10:30 am for hearing as manifestly wrong. She concluded that by showing little regard and respect to a court sitting which had been scheduled for 9:00 am, Fuelex fell short of an honest intention to attend to their case notwithstanding that that very application had been scheduled for mention.

Clearly, the learned chief magistrate was right in criticizing the counsel in personal conduct because of the way he or she had organized his diary. It should have been so obvious that a lawyer could not be able to attend both courts almost at the same time. Fuelex's explanation that their lawyer was late by only 30 minutes is something this court cannot even begin to rationalize.

A lawyer is late when he or she appears at the later time than earlier scheduled. Especially where a lawyer had had his cases previously dismissed on account of coming to court late, it is more concerning that Fuelex's lawyer found a period of 30 minutes well within time. It is my view that the nature of the present appeal leans only towards one direction- Fuelex's dishonesty in its intention to attend court to prosecute its many applications.

In conclusion, the learned chief magistrate was right in holding that the Fuelex had failed to demonstrate an honest intention to presents its case, given the nature and circumstances of the case. I therefore, hold ground 4 in the negative.

## 8 Final decision

The approach of the learned chief magistrate when she held that a mistake of counsel should not be visited on an innocent litigant is a basic principle, which is well known that requires no debate. However, the idea that the principle should only apply where a new lawyer has come on board is not without fault. Indeed, the impact of a mistake of a lawyer is always felt by a litigant notwithstanding the time that a lawyer has

been engaged with the client. All the same, I find no reasons to interfere with the learned chief magistrate's decision insofar as she correctly finds that the cumulative actions of the Fuelex and their counsel were sufficient proof of dilatory conduct and serious enough to amount to misuse of court process.

At the risk of sounding repetitive, I would like to stress that the same law firm that failed to prosecute Civil Suit No. 63 of 2012 had also failed to enter appearance in Miscellaneous Application No. 236 of 2015, Miscellaneous Application No. 144 of 2018, and Miscellaneous Application No. 508 of 2018. This evidence clearly shows that the Fuelex was not interested in exercising its right to a fair hearing. It is most likely that Fuelex made a conscience decision not to prosecute its cases including the one that triggered this appeal in order prevent the NW&SC from executing the judgment it obtained on 8th October 2013. The net result is as follows:

1. The preliminary objection on the 5th ground of appeal is dismissed.
2. The Appeal fails on all other four grounds with the results that the decision of the learned chief Magistrate is upheld.
3. Costs awarded to the NW&SC.

**Douglas Karekona Singiza**

**Acting Judge**

**10 October 2023**