The Republic of Uganda

In The High Court of Uganda at Soroti

Miscellaneous Application No. 0059 of 2023

(Arising from Civil Suit No. 0037 of 2021)

National Housing and Construction Co. Ltd :::::::::::::::::::::::::::::::: Applicant

Versus

1. Pade Joseph Walter
2. Atwau Edison
3. Taban Emmanuel Goodman
4. Checkwopop Stephen
5. Soroti City Council
6. Soroti District Land Board

:::::::::::::::::::::::::::::::: Respondents

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

1. Introduction:

This is an application brought under Order 9 rule 23 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for orders that the order dismissing Civil Suit no. 37 of 2021 be set aside and the said suit be reinstated and heard on its merits and that costs of this application be provided for.

2. Grounds:

The grounds of this application as set out in the application and supporting affidavit sworn by Mutuwa Gloria are briefly that the counsel was prevented by sufficient cause from appearing when the suit was called for

hearing, that the applicant's suit has a great likelihood of success and no injustice shall be suffered for reinstatement since the matter was still in its initial stages.

In support of the application, M/s Mutuwa Gloria in her affidavit averred that she is the counsel for the applicant in this matter and that on 11th January 2023 she travelled to Soroti to attend court hearing on 12th January 2023 but that the following day, however, when she reached court she felt extremely unwell and fell down.

That she was rushed to Joint Clinic where she was diagnosed with severe PUD-exercabation (gastro-duodenal ulcer) which needed major surgery and she was advised to seek alternative treatment in Kampala as the clinic could not handle the surgery, in the result of which made her to miss the hearing even though she had travelled for it.

That before leaving Soroti she established that the matter had not been given a mention date. When she reached Kampala, due to her deteriorating health she took sick leave for a month and only resumed duty on 11th April 2023 and that it was then that she learnt that the suit had been called before the judge on 2nd March 2023 which was a date that was never communicated to the applicant and the suit was dismissed for non-appearance.

That she had never missed any court appearance in the matter and had diligently attended all court scheduled hearings save for the unfortunate date of 12th January 2023 which was beyond her doing.

That given these factual restatement of events, the application should be allowed with her failure to attend court not be visited on the applicant.

The 1st and 2nd respondents in their affidavit in reply sworn by Atwau Edison with the authority from the 1st applicant averred that the affidavit

in support of the application is full of falsehoods and misrepresentations intended to mislead this honourable court.

That on the 3rd of November 2022 court gave both parties directions to file the joint scheduling memorandum, their respective witness statements and trial bundles.

That the plaintiff had instructed Counsel Amodoi Moses to hold brief for her on the 12th day of January 2023 and on the same date court noted that the plaintiff had not complied with the directions given on the 3rd of November 2022 and court declined to give the plaintiff more time in which to file their documents and referred the file to the judge.

That when the matter came up on the 2nd day of March 2023, his counsel informed court that the plaintiffs were no longer interested in the matter since they had failed to comply with the schedules given by court and he prayed that the same be dismissed with costs.

That this court accordingly dismissed the suit and ordered that in future the plaintiff can file a fresh suit after paying the defendants costs.

That the legal department of the applicant is not understaffed and it cannot be used as an excuse for failure to comply with court's directives.

That the suit was not dismissed for non-appearance rather want of prosecution and the applicant was not prevented by sufficient cause from appearing in court as they were aware of mention date of 2nd March 2023.

In her affidavit in rejoinder counsel Mutuwa Gloria, stated that the applicant duly shared her Joint Scheduling Memorandum to each Defendants' respective counsel, however, that her efforts were frustrated as none of the defendants' counsel returned a filled scheduling memorandum to enable filing of the same.

That on 12th January 2023 she intended to bring this to court's attention as well as file the plaintiff's trial bundle and witness statements but she was severely ill.

That it is not true that court directed the applicant to file a fresh suit rather court was categorical that the applicant can have the matter reinstated as this application seeks to do.

The 3rd to 6th applicants did not file affidavits in reply, though there is also no evidence by way of affidavit of service that they were served with this application.

The proceedings however indicate that they were aware of this application for on 1st June 2023, counsel for the 5th and 6th respondents were in court and he requested for two weeks to file an affidavit in reply.

The 4th respondent was also in court and he informed court that his lawyer was in Lira.

On 8th June 2023 the 3rd respondent was present in court and stated that his lawyer was in Lira.

Consequently, even if there is no proof that the application was served on the 3rd to 6th respondents, they were aware of the same and opted not file replies and submissions.

3. <u>Representation:</u>

The applicant was jointly represented by its Legal department and M/s Engulu & Co. Advocates while the 1st and 2nd respondents were represented by M/s Omongole and Co. Advocates.

This matter proceeded by way of written submissions and the same have been considered in the determination of this application.

4. Determination:

a. Preliminary Objection:

The 1st and 2nd respondents in their submissions raised a preliminary objection that this application was served was out of time.

Counsel submitted that Order 5 rule 1 and 2 of the Civil Procedure Rules requires summons to be issued within 21 days from the date of issue.

That according to the holding in ***Nyanzi Muhammed vs Nassolo Harriet and 2 others MA 14/2021*** the timelines as well that apply to service of summons in ordinary plaint, also apply to service of applications.

That the summons in this matter were issued on the 19th day of April 2023 and should have been served on the respondents within 21 days but the applicant chose to serve the pleadings on the 12th day of May 2023 which was out of time.

In reply to this preliminary objection counsel for the applicant submitted that the Civil Procedure Rules do not specify time frames for serving notice of motions and that Order 5 of the Civil Procedure Rules does not apply to applications.

Counsel further submitted that the nature of pleadings in applications was extensively discussed by Hon. Justice Stephen Mubiru in ***Lam-Lagoro v Muni University (Miscellaneous Civil Cause No. 7 of 2016) [2017] UGHCCD 85*** in which the learned judge while citing the holding in ***Springwood Capital Partners Limited v. Twed Consulting Company Limited, High Court Misc. Application No. 746 of 2014*** where a notice of motion was filed on 13th October 2014 and the affidavit in reply to the application was filed on 1st December 2014 which about six weeks from the date of service of the application and the question that arose was whether the respondent was obliged to file the affidavit in reply within 15 days as prescribed by Order

12 rule 3 (2) of the Civil Procedure Rules after service of the application on the allusion to the express requirement that a defendant served with summons in the form prescribed under Order 8 rule 1 of The Civil Procedure Rules has to file a defence within 15 days after service of the summons and the court held that the same time lines should apply to all interlocutory applications such that a reply to an application has to be filed within 15 days and failure to file within the 15 days puts the affidavit in reply out of the time prescribed by the rules, Justice Mubiru went on to hold that

> *"... although I agree with the argument that the rules of procedure are meant to give parties time-lines within which to file and complete their pleadings and that legal practitioners ought to be discouraged from filing affidavits in reply at pleasure, I respectfully defer from the conclusion reached in that decision. Unlike a written statement of defence which serves only one purpose of disclosing the case a defendant proposes to put forward or serving as a means of disclosing the facts which support particular issues raised by each party, an affidavit can be used in a number of important ways, most often as containing evidence to support or oppose an application. The affidavit becomes evidence in the case. This is illustrated by Order 52 rules 3 and 7 of The Civil Procedure Rules which indicate that the filing an affidavit alongside a motion or chamber summons is optional, only when evidence is required in support of the application. Whereas a written statement of defence presents allegations of facts the defendant will rely on, an affidavit in reply presents evidence on oath. Affidavits are a way of giving evidence to the court other than by giving oral evidence. They are intended to allow a case to run more*

quickly and efficiently as all parties know what evidence is before the Court. Consequently, time constraints applied to defenses may be misplaced when applied to affidavits.

Where the rules committee considered it necessary to specify time limits for the filing of affidavits in reply, it prescribed such time periods, for example under Order 10 rule 8 of The Civil Procedure Rules, interrogatories are answered by affidavit which has to be filed within ten days, or within such other time as the court may allow. That the Rules Committee did not generally specify time limits for the filing of affidavits in reply in my view is indicative of the flexibility with which it intended courts to deal with them. The only rule that can safely be implied by this silence is that all affidavits in reply, and other pertinent documents attached as annexures, should be filed before the hearing of the motion or summons in chambers. An affidavit in reply, being evidence rather than a pleading in stricto sensu, should be filed and served on the adverse party, within a reasonable time before the date fixed for hearing, time sufficient to allow that adverse party a fair opportunity to respond. For that reason, an affidavit in reply filed and served in circumstances which necessitate an adjournment to enable the adverse party a fair opportunity to respond, should not be disregarded or struck off but rather the guilty party ought to be penalised in costs for the consequential adjournment.

Of course the Rules of procedure, like any set of rules, cannot in their very nature provide for every procedural situation that arises. Where the Rules are deficient, my view is that the court should go so far as it can in granting orders which would help to further the administration of justice, rather than hampering it. In the circumstances, I find the

rigidity proposed in Springwood Capital Partners Limited v. Twed Consulting Company Limited, High Court Misc. Application No. 746 of 2014 unjustifiable. I find myself unable to agree that the decision in that case should be followed, most especially since it is not binding on this court. General rules should not be rigidly applied in all instances; some flexibility, controlled by the presiding Judge exercising his or her discretion in relation to the facts of the case before him or her, must necessarily also be permitted, especially where no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs. I think in appropriate cases, if the interests of justice require it, the Court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party. The letter and spirit of Article 126 (2) (e) of The Constitution of the Republic of Uganda, 1995 is that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. In modern times, courts do not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts."

The above reasoning is distinguishable from the instant situation for the sole reason that, while as stated by the learned judge, that it is necessary for *"...the courts in modern times, courts do not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts..."*, in the instant

matter given the fact that there was need for proper following of procedures, so as to avoid the compromising of the administration of justice, I find that in the circumstances of this matter, since both parties found themselves in court and even made replies and submissions to this application, then assertion that there is no affidavit of service on record which would enable this court to ascertained when this application was the served on the 1st and 2nd respondents is of no material benefit to any of the parties before me and consequently serves no justiciable purpose.

Given the import of my above consideration, then I am inclined to overrule the preliminary objection and would proceed to determine this matter on its merits.

b. Submissions on the application:

Counsel for the applicant submitted that the affidavit in support of the applications bears facts that clearly show that until 12th January 2023 the applicant had been diligently pursuing the suit and when the suit was set down for mention before this honourable court, the applicant was conveniently not served despite the pleadings on record bearing the address for service and by so doing the applicant was denied the right to a fair hearing which is a non-derogable.

Counsel noted that no evidence has been produced as to ascertain that service of court process was effected on the applicant such as an affidavit of service nor was any hearing notice reflecting 2nd March 2023 taken out by the applicant.

Counsel relied on ***Edison Kanyabwera vs Pastori Tumwebaze CA No.6 of 2004*** where court found that Order 5 rule 17 of the Civil Procedure Rules relating to the making of affidavits of service after summons have been served also applied to hearing notices and the same was mandatory.

Counsel further relied on ***Siraj Kimuli vs Stanbic Bank Civil Appeal No. 23 of 2009*** where it was held that;

> ***"...Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had non-notification of any intention to apply for it is one that has never been adopted "England". To say that an order of that kind is to be treated as a mere irregularity and not something affected by a fundamental vice is an argument which in my opinion, cannot be sustained..."***

Counsel submitted that court further observed that once a party supposed to be served as of right is not served prior to a dismissal, case must be reinstated as of right as all proceedings that happened would be a nullity.

Counsel for the applicant added that it is further the applicant's case that when directions were issued by this Honourable Court, the Applicant's counsel embarked on drafting the joint scheduling memorandum and duly shared the same with each of the defendants' respective counsel, but that, however, her efforts were frustrated as none of the defendants' counsel returned a filled scheduling memorandum to enable filing of the same. That on 12th January 2023 she intended to bring this to court's attention as well as file the plaintiff's trial bundle and witness statements but she was severely ill.

Counsel prayed that court finds merit in this application and sets aside the dismissal order.

Counsel for the 1st and 2nd respondent, in reply, submitted that Civil Suit No. 0037 of 2021 was dismissed for want of prosecution when the applicant failed to comply with the directions of court regarding hearing of the suit.

That the *ex parte* dismissal order was issued under Order 9 rule 22 of the Civil Procedure Rules with the only remedy for the applicant lying in Order 9 rule 27 of the Civil Procedure Rules

Counsel additionally submitted that the law requires sufficient cause to be shown by the applicant in a situation where the case proceeded in their absence however, in the instant case the applicant had failed to prosecute own case and it is the respondents who applied for dismissal for want of prosecution.

Accordingly, Counsel relying on ***Musa Nsimbe vs Ssentongo Kirizestom and 11 Others MA 904/2021*** and ***Gold Beverages (U)Ltd vs Muhangura Kenneth and Anor HCMA 674/2019,*** submitted that given that suit was dismissed for want of prosecution, the only remedy available to the applicant was in the filing of a fresh suit and there was no need to demonstrate sufficient cause as to why they did not attend court as it is not a requirement for a suit dismissed for want of prosecution.

Counsel added that the respondents should not be blamed for the failures and delays of the applicant in prosecuting its own suit and that in addition, the respondents did not fix the matter for hearing or mention on the day it was dismissed but that instead it was the court on its own motion that did so and parties got to be notified of the same.

Consequently, counsel prayed that this application be dismissed with costs to the 1st and 2nd respondents.

c. Analysis and Conclusions:

In this matter, I have to deal with substance of the law based on the facts as deposed in the affidavits in support and against this application.

The applicant herein brings this application under Order 9 rule 23 of the Civil Procedure Rules and section 98 of the Civil Procedure Act.

Order 9 rule 23 of the Civil Procedure Rules provides as follows;

> **(1) 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.**
>
> **(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.**

Before the provisions of Order 9 rule 23 of the Civil Procedure Rules are Order 9 rule 22 which provides that;

> **Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.**

In this matter, Counsel for the 1st and 2nd respondents assert that the head suit which this application seeks to have reinstated was dismissed for want of prosecution.

The dismissal of suit for want of prosecution is provided for under Order 17 rule 5 of the Civil Procedure Rules as amended in 2019 and it provides thus;

(1) In any case, not otherwise provided for, in which no application is made or step taken for a period of six months by either party with a view to proceeding with the suit after the mandatory scheduling conference, the suit shall automatically abate; and

(2) Where a suit abates under sub rule (1) of this rule, the plaintiff may, subject to the law of limitation bring a fresh suit."

After a critical analysis of the evidence before me and my reading of the above provisions of the law, I find that the above provisions of the law do not apply to the current circumstances.

This conclusion of mine is anchored on the fact on record where it shown that when Civil Suit No. 0037 of 2021 came up on the 3rd of November 2022 before the Assistant Registrar of this Honourable court, the parties were given directions to file their Joint Scheduling Memorandum by 24/01/2022 and witness statements and trial bundles by 12/01/2023.

On 12/01/2023, parties excluding counsel with full brief for the plaintiff were in court before the Assistant registrar of this Honourable Court. One Mr. Amodoi Samuel held brief for Ms. Mutuwa Rose, counsel for the applicant/ plaintiff.

Mr. Amodoi Samuel informed court that Ms. Mutuwa Rose, counsel for the applicant/ plaintiff was in hospital. This fact was not disputed.

By Counsels for the 1st and 2nd respondents who informed court that they had filed their trial bundles in compliance with the court directions. The Assistant Registrar noted that indeed the witness statements and trial bundles from the 1st and 2nd defendants had been filed but further noted that since the matter was backlog she would refer it to the Hon. Judge for further management.

The file appears to have been forwarded before this Honourable Court on that basis with no dates fixed for parties to appear.

The records then show that this honorable court on its own motion fixed the head suit for parties to appear before it for mention and directions on the 2nd of March 2023.

On that date indeed Counsels for the defendants were in court while counsel for the plaintiff was absent. Counsel for the 1st and 2nd defendants, Mr. Emmanuel Ekima informed court that the matter was for mention and direction but the plaintiff appears to not be interested as it was neither represented nor any of its officials were in court yet by 12/1/2023, the plaintiff had been directed to file its documents including trial bundles and witness statements and the Joint Scheduling Memorandum but had not done so and as such it should be deemed that it was no longer interested in the matter which thus should be dismissed accordingly with costs. Counsel for 5th and 6th defendants, M/s Diana Mudoola concurred. Both Counsels for the 1st and 2nd defendants and for the 5th and 6th defendants then prayed that the matter be dismissed with costs.

In its ruling on the brief submissions made as above, this Honourable Court ruled noted thus and ruled as follows;

> ***"From the record of proceedings, parties were properly directed to file a JSM, trial bundles and witness statements. On record we have those of the defendants (i.e. witness statements & trial bundles) for the 1st and 2nd defendants. The plaintiff even after being required to do so did not do so and no reason given. That failure by the plaintiff doesn't only show lack of interest in proceedings with this matter but a blatant failure to follow court orders. The above being so, this court finds that by its very action or inaction, the plaintiff appears to be no longer***

interested in pursuing this matter. Accordingly, this suit would be dismissed for want of prosecution with costs to the defendants. The plaintiff may in future reinstate this matter subject to paying fresh fees and also taking into account the time within which such matter may be filed (i.e. limitation period)

I so order."

From the wordings of the ruling, it is clear that this Honourable Court was persuaded by the submissions on inaction of the plaintiff, to rule as it did which made it to proceed on to dismiss the head suit herein on that basis but not majorly on the non-appearance of the applicant and her counsel and as such, I find Order 9 rule 23 of the Civil Procedure Rules inapplicable.

Going forward, upon my perusal of the file Civil Suit No. 0037 of 2021, I note that after the Assistant Registrar forwarded the suit to the Judge on the 12th January 2023 she gave no date to the parties as to when the matter would be mentioned and or further directions given. The file was merely forwarded to the judge r, as stated by the records ***"for management"***. Sic.

The record show that albeit that anomaly, the matter was thus fixed before the judge for mention and directions with the learned Assistant Registrar procedurally required to inform parties to appear before the judge on the 02/03/2023.

Apparently, this information was not passed to all parties including the plaintiff as no notice is on record to that effect with no proof that the applicant/ plaintiff being aware of the date next when the matter would be handled. On 2nd March 2023, the head suit was thus dismissed on information presented to court by counsels who appeared in court that day when the head suit came up for mention. Subsequently the head suit

was dismissed yet there was no evidence on record to show that proper process was carried out with all parties informed.

In ***Official Receiver Continental Bank of Kenya Ltd v Mukunya [2003] 1 EA 213,*** the court considered the effect of failure to serve process upon the party thereby affected. The court cited the case ***Graig v Kanseen [1943] 1 All ER 108*** where the Court of Appeal in England considered a similar situation like the instant one and held that:

> ***"The failure to serve the summons upon which the order in the present case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside".***

The Court in ***Official Receiver Continental Bank of Kenya Ltd*** (cited above) also considered the case of ***Khami v Kirobe and others [1956] EACA (Volume 23) 195*** where the Court of Appeal for Eastern Africa held:

> ***"The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had non-notification of any intention to apply for it is one which has never been adopted England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained".***

Mbaluto J thus in ***Official Receiver Continental Bank of Kenya Ltd v Mukunya (above op.cit.),*** after considering the above cases found that in the circumstances of that case the order granted by Ransley J on 21 October 1999 was apart from other irregularities, a nullity in that it was obtained without serving a party affected by it namely the First Objector who was owner of one of the properties ordered to be attached and the order must therefore be set aside ***ex debito justitiae***.

The said circumstances exist in the instant matter for indeed there is no evidence that applicant was aware of the date that the dismissed head suit was coming up on the 2nd of March 2023 for mention and directions yet counsels who appeared in court on that date claimed that the plaintiff in the head suit was aware. There was, however, no proof in that regard adduced.

It should be remembered that the principle of ***ex debito justitiae*** as articulated in ***Graig v Kanseen [1943] 1 All ER 108*** essentially provides that a person who is affected by an order of the court which can properly be described as a nullity, is entitled ***ex debito justitiae*** to have it set aside.

This is because there the court has an inherent jurisdiction to set aside a determination made where there has been a failure to observe the simple principle of equity that a person against whom a charge or claim is made must be given a reasonable opportunity of appearing and presenting his or her case.

Relating the principle of ***ex debito justitiae*** to the instant case, I am satisfied that when the judge set the date of 2nd march 2023, the procedural requirement was for the Assistant registrar of this Honourable Court to ensure that all parties were informed through the court process server of the date set by the judge but it abundantly clear that this simple procedural

requirement was not followed and so the date set by the judge was not communicated to all parties including the applicant.

This is because there is no evidence of service unto the applicant or any other party by way of an affidavit of service.

Accordingly, in my considered view where the next date set for parties to appear no due service was not communicated then any subsequent resultant procedure was a nullity meaning that the resultant order of this Honourable Court made on 2nd March 2023 was without giving parties ample opportunities to be in court and handle their matters judiciously.

Furthermore, I am persuaded by the averment of learned counsel for the applicant that indeed an attempt was made for the plaintiff through counsel on the 12th of January 2023 to be in court before the Learned Assistant Registrar but counsel for the plaintiff fell sick and this information, as per records, was conveyed to court and is not disputed.

That learned counsel was taken ill on that unfortunate date is further proven by attachments to the averments of counsel of the applicant as proven and verified by medical documents to that effect on record.

These facts that were not even disputed by the 1st and 2nd respondents even in their submissions and thus are taken as admitted.

Consequently, I am of the considered view that Civil Suit No. 0037 of 2021 was spuriously dismissed by this Honourable Court on unproven evidence.

That being so, I would find the applicant has proven by justifiable reasons as to why this application be allowed with the head suit reinstated.

I am persuaded by the applicant's then quandary in which the applicant was in and unsubstantiated rationale which led this Honourable Court to dismiss the applicant's head suit.

Accordingly, I do find that it just and proper that this Honourable Court vacates its earlier decision and orders after allowing this application which I do so with the consequence that the order dismissing Civil Suit No. 0037 of 2021 is set aside.

5. Conclusions and Orders:

- This application is found to have merits and it is allowed.
- The orders dismissing Civil Suit No. 0037 of 2021 is accordingly set aside with Civil Suit No. 0037 of 2021 reinstated.
- The parties herein are further directed to complete all preliminary matters relating to Civil Suit No. 0037 of 2021 before the Learned Deputy Registrar of this Honourable Court including the filing of own Trial Bundles, Witness Statements and a Joint Scheduling Memorandum after which the head suit will be placed before me for mention and directions on the way forward.
- This application is allowed with each party to bear own costs in the interest of justice.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

6th October 2023