THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL.

MISCELLANEOUS APPLICATION NO. HCT- 01-CV-MA-0045 OF 2003.

(ARISING FROM CIVIL SUIT FROM CIVIL SUIT NO-01-CV-CS 005/2002)

ORIGINAL CIVIL SUIT NO. 023/2002 AT HIGH COURT KAMPALA)

1. **KAPAMPA STEPHEN**
2. **BALUKU ALFRED**
3. **MS. MUHINDO ANASTAZI MUSENENE (ADMINISTRATORS OF ESTATE OF LATE FRANCIS MUSENENE ::::::::::::::APPLICANTS**

VERSUS

THE CO-OPERATIVE BANK LTD (IN LIQUIDATION) :::::: RESPONDENT

BEFORE: HON: JUSTICE MR. VINCENT EMMY MUGABAO.

RULING.

The application was brought by Notice of Motion under Order 48 rule 1 and Order 9 rules 19, 20 and 26 of the Civil Procedure Rules (CPR), section 98 of the Civil Procedure Act and section 33 of the Judicature Act.

The applicants are seeking for orders that the order dismissing Civil Suit No.005/2002 be set aside, the suit be heard and determined on the merits and costs of the application be provided for. Originally, the application was filed on 2.9.2003 and supported by the affidavit of Musenene Francis (now Deceased). On the 30-11-2012 the applicants, as administrators of Late Musenene's estate, filed an amended Notice of Motion accompanied by the sworn affidavit of Kapampa Stephen, the 1st applicant.

Briefly, the grounds as set out in the Notice of Motion and the supporting affidavit are that, the then applicant (Musenene) and his Advocate did not appear in court on the day the suit was called and the same was dismissed

on 6-3-2003. The absence was occasioned by the respondent's failure to effect service on the applicants newly instructed counsel, Mr. Nyamutale. Rather, service was affected on the previous counsel, Mr. Ayiguhugu, who declined service on grounds that the client had withdrawn instructions.

The deceased applicant filed the instant application on 2.9.2003 seeking the order of dismissal to be set aside, but passed away before the application could be heard.

On the 19-11-2004 the present applicants were granted Letters of Administration to the Estate of late Musenene Francis vide Administration Cause No. FPT-00-CV-AC-0057 of 2004. On the 2-12-2004 they filed application No. 0115 of 2004 to be substituted for the deceased Musenene in all suits pending before court. The application was allowed on the 8-12-2004 and they were duly substituted in place of the deceased plaintiff in the main suit (No. 005 of 2002) and other proceedings thereunder.

When the instant application came up for hearing on 7-11-2012, counsel Nyamutale for the applicants informed court that he had lost touch with the son of the deceased (Musenene) who had been pursuing letters of Administration to his father's estate. Counsel prayed for an adjournment which was granted.

On the 29-11-2012, upon scrutiny of the record, court established that it had earlier (8-12-2004) ordered that the applicants be substituted as legal representatives in place of the deceased plaintiff/applicant. Court therefore directed the applicants to file amended pleadings and serve the respondent's counsel before the next hearing on 7.12.2012, hence the present amended Notice of motion.

The affidavit in reply to the original application, dated 27-10-2003, was deposed by Polly Ndyaragahi on behalf of the respondent, who contended that the application for reinstatement of the suit was filed after an unreasonably long period of time. It was also contended that the applicant had not shown sufficient cause for non- appearance when the suit was called for hearing.

The affidavit in reply to the supporting affidavit to the amended Notice of Motion was deposed by James Bwogi Kalibbala, who averred that the applicants were guilty of inordinate delay by filing an amended motion nine years the suit was dismissed, and six years and eight months after the grant of letters of administration.

The affidavit in rejoinder was deposed by Stephen Kapampa.

Representation and hearing

At the hearing, the applicants were represented by Mr. Nyamutale (RIP) while Mr. Mukiibi Semakula appeared for the respondent. Both counsel agreed to file written submissions which they did and the same have been considered in this ruling.

Counsel for the applicants correctly cited **Order 9 rule 23(1) of the Civil Procedure Rules** as the bedrock provision governing applications of this nature. Under the said provision, the applicant had to satisfy the court that there was sufficient cause for non-appearance when the suit was called for hearing. He argued that failure of the deceased applicant and his counsel to appear before court on 6-3-2003 was occasioned by service of the Hearing Notice upon wrong counsel to wit M/s Ayiguhugu and company Advocates, yet the court record revealed that M/s Nyamutale & Company Advocates were the applicant's new counsel. Mr. Nyamutale

argued that non-service of court process upon the deceased applicant and his new advocate constituted sufficient cause therefore.

In reply, counsel for the respondent referred to paragraph 8 of Bwogi Kalibbala's affidavit in reply, were he averred that there was no filed Notice of Change of Advocates on the court record by 5th February 2003. In effect, the respondent's counsel argued, the deceased applicant's known counsel, as per the record, were M/s Ayiguhugu & Co. Advocates upon whom service was effected. Further, that although the said firm declined service citing withdrawal of instructions by the applicant, there was good service since the address of the said firm was the only address of the applicant's Advocate on record, and he had not taken any steps to file any other address of service on court record. Counsel submitted that the presiding Judge dismissed the suit after satisfying himself there was proper service.

In rejoinder, counsel for the applicants argued that the respondent's counsel was well aware that he had taken over conduct of the suit representing the applicant, since the two counsel had appeared before court on 27-8-2002.

A perusal of the record reveals that on 27-8-2002, Mr.Nyamutale appeared for the plaintiff while Mr. Karugaba was for the defendant, the presiding Judge however adjourned the suit *sine die as* he was moving to another circuit on transfer.

The affidavit of service was deposed by James Kalende, a law clerk in the respondent's firm of advocates. In paragraphs 4&5 he averred that on the 10-2-2003 he tendered the hearing notice upon Mr. Ayiguhugu at his chambers but the latter declined service on grounds that the plaintiff had withdrawn instructions. Then in paragraph 6 he averred:-

"6. That on the 5th day of February 2003 while in Fort Portal I perused the court file but did not find a Notice of Change thereon and neither have we ever been served with one".

Given that he perused the court file, the process server ought to have seen the record of 27-8-2002 that indicated the plaintiff was being represented by Mr. Nyamutale but not Mr. Ayiguhugu. The fact that the latter declined service on the 10-2-2003 was a confirmation that instructions were given to another counsel as borne out by the record.

Since Mr. Ayiguhugu no longer represented the plaintiff, the latter could not be said to have had knowledge of the hearing date of 6-3-2003. In the circumstances, there was sufficient notice on record to require that service be effected upon Mr. Nyamutale.

For the foregoing reasons, it is the finding of court that there was reasonable excuse for the absence of the applicant and his counsel on the day the suit was dismissed.

The other argument raised by counsel for the respondent was that the applications were guilty of dilatory conduct in filing and prosecuting the application. He contended that while the main suit (No.23/2002) was dismissed on 6-3-2003, the application to reinstate the suit was filed on 2-9-2003, six months after the dismissal. This, in counsel's view, amounted to dilatory conduct on the part of the then applicant.

Counsel further argued that the present applicants also exhibited dilatory conduct in that, whereas they obtained letters of Administration to the Estate of Late Musenene Francis on 19-11-2004, they filed an "Amended Notice of Motion" to reinstate the dismissed suit nine (9) years thereafter

and six (6) years, eight (8) months from the date they obtained letters of administration.

Court has considered the submissions of both counsel.

In addition to the sufficient cause required to be shown under Order 9 Rule 23 CPR, courts have also established some tests to be applied when dealing with an application of this kind.

In ***National Insurance Corporation Vs Mugenyi & Company Advocates [1967] HCB 28***, the court of Appeal held that:

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

Court did find earlier, that there was reasonable excuse accounting for the absence of the applicant and his counsel on the day the suit was dismissed.

The subject matter of the dismissed suit is property/building situated in Kasese Town. It was mortgaged to the respondent for a loan of UGX 27,000,000= (Twenty-seven million shillings only) extended to the late Bitwire, by virtue of a power of Attorney issued by late Musenene, the registered proprietor. The mortgage deed was executed on 31.7.1997. Bitwire is alleged to have defaulted on the loan obligation whereupon the respondent advertised the suit property for sale, Vide an advert in the New Vision of 13.12.2001.

The registered proprietor (Musenene) filed civil suit No.23/2002 before High court Kampala seeking, inter alia, an order for return of his land title and a permanent injunction restraining the respondent, its

servants/agents from selling the suit property. Upon transfer of the file to the Fort portal circuit, the case was given a new number, civil suit no. 5 of 2002 (the dismissed suit). As earlier mentioned, the suit was dismissed on 6-3-2003 and the instant application seeking re-instatement of the same was filed on 2-9-2003.

Counsel for the respondent cited the case of ***Lucas Marisa Vs Uganda Breweries Ltd [1988-1990] HCB 131***, in support of his argument that filing of the application for re-instatement of the suit six months after dismissal amounted to inordinate delay. In that case the court stated as follows:

> *"........ the application to set aside an order of dismissal must be brought within reasonable time. The plaintiff/ applicant had to wait for over a year and some months to file his application and almost another year to set it down for hearing. All this went to show that the applicant and his counsel were not serious."*

The facts of the instant case are, however, different from the cited case, in that the application was brought six months after dismissal of the main suit. What constitutes "reasonable time" has not been qualitatively laid down or defined by the courts. Rather, the courts have recognized that there is no limitation period within which the application ought to be brought, through it must be within a reasonable time See ***Giruko Vs Acan & Sons (U) Ltd [1971] EA 448.*** In ***Uganda Micro Finance Union Ltd Vs Sebuufu Richard & Another, Misc. Appl.No.0610/2007***, this court allowed an application for reinstatement of a suit that hard be dismissed a year prior to the filing of the application.

In ***Bawa Singh Bhari (Properties Ltd Vs Estate Consultants Ltd & Others, HCCA 331/1997*;** while considering what is inordinate delay

Mukiibi J sought guidance of Order 15 (now 17) Rule 6(1) CPR where the maximum period of delay provided for is two years.

Basing on the foregoing decisions, in the instant case, it cannot be said that the deceased applicant was guilty of inordinate delay when he filed the instant application six (6) months after dismissal of the main suit.

The other aspect of the alleged delay is with regard to the filing of the amended Notice of Motion by the current applicants nine (9) years after the suit was dismissed and six (6) years eight (8) months after obtaining letters of administration.

As mentioned earlier on in this ruling, court upon scrutiny of the record realized that its order of 8-12-2004 directing the applicants be substituted as parties in the applicants in place of the deceased applicant, had not been implemented. Hence court ordered, on 20-11-2012, that the applicants file amended pleadings and service be effected upon the respondents' counsel before the next hearing. That was the genesis of the amendment and its timing could not therefore be attributed to the applicants. Besides, it is trite that pleadings can be amended at any stage before Judgment, provided the opposite party is not prejudiced or suffers an injustice.

In the instant matter, hearing had not taken place by 29-11-2012, when court ordered for the amendment. In effect, the respondent was not prejudiced or suffered any injustice.

Accordingly, court finds no merit in the respondent's contention that the applicants were guilty of dilatory conduct in filing the amendment many years after dismissal of the main suit.

Another argument by counsel for the respondent was to the effect that the application is trained with an illegality, in so far as Musenene's affidavit accompanying the original application was not commissioned as required under **Section 4 of the Commissioner for Oaths** (Advocates) Act, Cap-5, laws of Uganda. He submitted that a Notice of Motion brought under Order 52 rule 2 Civil Procedure Rule is mandatorily required to be supported by a sworn affidavit. In his view, there was no valid application before court to warrant a reinstatement of the main suit, the application was incurably defective which could not be cured by the sworn affidavits of the current applicants, so argued counsel.

Counsel for the applicant, in rejoinder, submitted that court should not treat any incorrect act as a nullity, unless the incorrect act was of a fundamental nature.

It is not in dispute Musenene's affidavit, dated 1-9-2003 that accompanied the Notice of Motion (bearing the same date) was not sworn before a Commissioner for Oaths. It is trite that an unsworn affidavit is not valid and cannot amount to evidence. In ***Eric Tibebaga Vs Begumisa & Others, Civil Application No. 18/2002(SC)***, it was held that an application not supported by a valid affidavit must be dismissed as there would be no evidence to establish the applicant had sufficient reasons for his failure to file the required documents in time.

The same Supreme Court, in ***Attorney General Vs A.K.P Lutaya, Civil Application No. 1/2007***, Katereebe JSC (as he then was) stated as follows:

> *"In my view, the failure by Mr. Matsiko to swear his affidavit is not just a matter of a procedural anomaly upon which this court can exercise its discretionary power under Rule2(2) as invited by counsel*

for applicant. It is a matter of substantive law that what he filed is not an affidavit in law. Court cannot be convinced that it has sufficient reason merely on statements contained in the body of the application, it has to be convinced by sworn affidavit evidence. This was not there in this case."

Section 5 of the Commissioner for Oaths (Advocates) Act, states as follows;

"*Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the Jurat or attestation at what place and on what date the oath or affidavit is taken or made.*"

Section 6 of the Oaths Act also states:

"Every Commissioner for Oaths or notary public before whom any oath or affidavit is taken or made under this Act shall state truly was held that an application not supported by a valid affidavit must be dismissed as there would be no evidence to establish the applicant had sufficient reasons for his failure to file the required documents in time."

The said jurist was totally missing from Musenene's affidavit although he purportedly signed the same.

When one files a formal application to court, i.e Notice of Motion, the grounds for that application must be stated in the body of that motion. The affidavit is evidence of facts that support the grounds that have been stated in the Notice of Motion. The original motion in the instant application stated the grounds on follows:

"1. The Applicant was prevented by sufficient cause for non-appearance when the suit was called for hearing

2. It is just and equitable that the matter be heard and determined on merits."

The facts constituting the "sufficient cause" were to be expounded in the accompanying affidavit. Since Musesene's 'affidavit' was not valid, it meant there was no evidence to prove the stated grounds.

The question, at this juncture, is whether the amended Motion, accompanied by the sworn affidavit of the 1st applicant can be said to have cured the defect in the original application. This is highly doubtful, in that if the original motion was not supported by an affidavit, there would be no other conclusion other than that the said Motion was incurably defective. To borrow the words of Shah JA in the Kenyan case of ***Igweta Vs Methaa & Another [2001] LLR 3502(CAL)*****;**

> "*Yes, if a procedural defect is fundamental to the proceedings, a case of nullity may arise and a nullity, of course, is not curable because what is null and void ab initio remains so".*

Court is alive to the import of **Article 126(2) (e) of the Constitution** which enjoins courts to endeavor to do substantive justice without undue regard to technicalities. However, there is need to draw a distinction between what constitutes/amounts to a technicality and a substantive matter of law. The court is required to resolve a dispute on the basis of evidence before it and the applicable law. Such evidence must be properly received before the court, and, the taking of oath by the witness or deponent of an affidavit is one of the cardinal tenets of proper evidence the court can base itself to determine the matter in dispute. The failure to have Musenene's affidavit commissioned was therefore not a mere technicality to be dispensed with under Article 126. Further, the sworn affidavit of Kapampa

Stephen (1st applicant) accompanying the amended Motion could not cure the original Motion that was supported by a defective affidavit.

Accordingly, and for the foregoing reasons, this application fails and the same is accordingly dismissed. As for costs, given the protracted nature of the entire matter, including the main suit, it is ordered each party shall bear its costs. The ultimate effect of this is that Civil Suit No. 005 of 2003 remains dismissed and is not reinstated.

It is so ordered

Dated at Fort Portal this 17th day of January 2023.   .

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties

Vincent Emmy Mugabo

Judge

17th January 2023.