THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 641 OF 2019

(ARISING FROM CIVIL SUIT NO. 527 OF 2017)

1. KAKOOZA JUMA

2. NABBANJA MERABU :: APPLICANTS

VERSUS

1. BWANIKA EDWARD LUGEMWA

2. MILDMAY UGANDA LTD

3. UAP INSURANCE UGANDA LTD :::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Article 28 of the Constitution of the Republic of Uganda 1995, Section 98 of the Civil Procedure Act and Order 9 rule 18 of the Civil Procedure Rules seeking for;

a) An order setting aside the dismissal of HCCS No. 527 of 2017.

b) An order for reinstatement of HCCS No. 527 of 2017 for hearing and determination on the merits.

c) Costs of the application.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit sworn in support of the application by **Kenneth Gideon Munungu**, an advocate and partner with the firm representing the Applicant. Briefly, the grounds are that none of the partners at the law firm had knowledge that the matter had been fixed for hearing at the court's own initiative and counsel in personal conduct had not accessed the cause list on the Civil Division WhatsApp group chat and only got to know that the case had been dismissed

after sending their clerk with hearing notices to seek a hearing date. The deponent stated that the parties had engaged in a mediation that failed and were waiting for the matter to be fixed for hearing. He further stated that there is sufficient cause to set aside the dismissal and reinstate the main suit.

[3] The 2nd Respondent opposed the application through an affidavit in reply deposed by **Okori Lawrence**, the Support Services Manager of the 2nd Respondent, in which he stated that the application falls short of disclosing valid and sufficient cause for both the Applicants and their Counsel's failure to attend court on the day fixed for hearing. The deponent stated that the main suit lacks merit and has minimal chances of success; that the 2nd Respondent will suffer prejudice if the suit is reinstated since it was brought with undue delay and that it is in the interest of justice that the application is dismissed with costs.

[4] The 3rd Respondent opposed the application through an affidavit in reply deposed by **Maximilia Byenkya**, the Legal Manager and Company Secretary of the 3rd Respondent, who stated that it is a routine and well established practice of the Court to notify all advocates by way of a weekly cause list of all matters to be heard in any given week upon which the Applicants' Counsel ought to have established that the matter had been fixed for hearing; failure of which was not only negligent but dilatory and does not amount to sufficient cause. The deponent stated that the Applicants did not take any effort to fix the case since its institution in 2017. She further stated that the dismissal of the main suit could only be remedied by institution of a fresh suit under Order 9 rule 18 of the CPR and not reinstatement. She prayed that the application should be struck out.

[5] The Applicants filed affidavits in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[6] At the hearing, the Applicant was represented by **Mr. David Gureme Mushabe** and **Mr. Kubakurungi Eric** from M/s Mushabe, Munungu & Co. Advocates; the 1st and 2nd Respondents were represented by **Mr. Mukiibi Ssemakula** from M/s MMAKS Advocates; while the 3rd Respondent was represented by **Ms. Josephine Muhaise** from S&L Advocates. Counsel agreed to make and file written submissions, which were duly filed and have been taken into consideration in the determination of the matter before Court.

Issue for Determination by the Court

[7] One issue is up for determination by the Court, namely; **Whether the application discloses sufficient cause for setting aside the dismissal and for reinstatement of Civil Suit No. 527 of 2017?**

Submissions by Counsel for the Applicants

[8] It was submitted by Counsel for the Applicants that under Order 9 rule 23 of the CPR, the court may on application of the plaintiff make an order setting aside a dismissal made wholly or in part under rule 22 if the court it is satisfied that there was sufficient cause for non-appearance when the suit was called for hearing. Counsel relied on the case of *Tourvest WWL Limited v McLeay [2020] UGHCD 42* to the effect that courts do not exist for the sake of discipline but for determination of matters in controversy and that the administration of justice normally requires that the substance of all disputes be investigated and decided on their merits and errors or lapses should not necessarily debar a litigant from the pursuit of their rights. Counsel submitted that the circumstances in the application disclose sufficient cause for the Applicants' non-appearance when HCCS No. 527 of 2017 was called for hearing. Counsel stated that the Applicants' Counsel had tried to fix the case for hearing in vain and were not aware that the Court had taken the initiative

to fix the case for hearing because counsel in personal conduct had not accessed the cause list via the Civil Division WhatsApp group chat. Counsel further stated that the Applicants' Counsel exercised due diligence when he sent his law clerk to court with notices seeking a hearing date and filed the instant application two days later. Counsel prayed to the Court to find that the Applicants and their Counsel were prevented by sufficient cause from appearing when the suit was called for hearing, set aside the dismissal and reinstate HCCS No. 527 of 2017.

Submissions by Counsel for the 1st and 2nd Respondents

[9] Counsel for the 1st and 2nd Respondents cited the case of *Farm Engineering Industries v Kitaka Muhammad [2021] UG CommC 98* to the effect that the test for sufficient cause for non-appearance is that the applicant has to show that they had an honest intention of attending the hearing, they did their best to attend the hearing and exercised due diligence and that sufficient cause must relate to the failure by the applicant to take the necessary step at the right time. Counsel submitted that the Applicants in this case had failed to demonstrate sufficient cause on the basis that the main suit was filed on 1st November 2017 and by 2019, it had never been set for hearing; that no evidence in form of a letter or document was adduced to show attempts to fix the suit for hearing, mediation having failed on the outset. Counsel prayed that the application be dismissed with costs.

Submissions by Counsel for the 3rd Respondents

[10] Counsel for the 3rd Respondents cited the cases of *National Insurance Corporation v Mugenyi and Company Advocates [1987] HCB 28* and *Nakiride v Hotel International Ltd [1987] HCB 85* for the position of the law on applications of this nature and argued that the Applicants have not demonstrated sufficient cause to warrant the setting aside of the dismissal of the main suit. Counsel submitted that the Applicants have not adduced any evidence to demonstrate

steps taken to prosecute the case since 2017 in form of moving court to fix the matter for hearing or mediation notice. Counsel prayed that the Court finds that the Applicants' lawyers were guilty of inexcusable dilatory conduct in prosecuting the matter and prayed that the application be dismissed with costs.

Determination by the Court

[11] The suit herein was dismissed by Court for non-appearance of the Applicants (plaintiffs) and or their advocates when the matter came up before Court on 27th June 2019. The suit was dismissed pursuant to the provision under Order 9 rule 17 of the CPR. The Applicant thus seeks the setting aside of the dismissal and reinstatement of the suit for hearing inter partes in accordance with Order 9 rule 18 of the CPR. Although the Notice of Motion correctly stated that the suit was brought under Order 9 rule 18 CPR, in their written submissions, Counsel for the Applicants relied on the provision under Order 9 rule 23 CPR. Since the suit was dismissed for non-appearance of both parties under Order 9 rule 17 of the CPR, the correct rule to be relied on, as indicated in the Notice of Motion, is Order 9 rule 18 of the CPR, which states as follows;

> ***"Plaintiff may bring a fresh suit or court may restore suit to file***
>
> *Where a suit is dismissed under rule 16 or 17 of this order, the plaintiff may, subject to the law of limitation, bring a fresh suit or 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 his or her not paying the court fee and charges, if any, required within the time fixed before the issue of the summons or for his non-appearance, as the case may be , the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit".*

[12] What amounts to sufficient cause for purpose of reinstatement of dismissed suits has been subject of consideration by the courts in a number of decided cases. In *Kyobe Senyange v Naks Ltd [1980] HCB 31*, it was stated that for sufficient cause to be disclosed, the court should be satisfied not only that the applicant had a reasonable excuse for failing to appear but also that there is merit in his or her defence to the case. In *National Insurance Corporation v Mugenyi and Company Advocates [1987] HCB 28*, the Court of Appeal held that the "… main test for reinstatement of a suit is 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 defence to that case". In *Nakiride v Hotel International Ltd [1987] HCB 85*, it was held thus;

"In considering whether there was sufficient cause why counsel for the applicant did not appear in court on the date the application was dismissed, the test to be applied in cases of that nature was whether, under the circumstances, the party applying honestly intended to be present at the hearing and did his best to attend. It was also important for the litigant to show diligence in the matter."

[13] In the present case, it is claimed by the Applicants that their counsel was unable to attend the Court when the suit was called for hearing because they were not aware that the case had been fixed for hearing on the Court's own initiative on that date. It was claimed by the Applicants that their counsel attempted on several occasions to set down the suit for hearing without success. When the matter was fixed by the Court, counsel never accessed the cause list through the Civil Division's WhatsApp group and, through the clerk who had gone to seek for a hearing date, Counsel found out that the matter had been dismissed by the Court. Counsel argued that the above circumstances amount to a mistake of counsel which constitutes sufficient cause for failure to attend court.

[14] From the record, I am unable to establish the form of notification that was given to the Applicants or their Counsel when the suit was fixed for the date when it came up in their absence. I have not seen any evidence indicating that the Applicants or their advocates were aware of the day of hearing when the suit was dismissed. In absence of evidence of such notification, I am prepared to give the Applicants a benefit of doubt. There is nothing to make me think that if the Applicants' advocates had been alerted of the hearing date, they would not have attended the Court. Such, in my view, amounts to sufficient cause for their failure to appear when the case was called up by the Court and was dismissed. Although the Applicants' advocates ought to have done better in following up the prosecution of the case, the settled position is that negligence on the part of an advocate should not be visited on an innocent litigant. I have not seen circumstances that implicate the Applicants personally in failing to follow up their matter.

[15] Where a party has a genuine grievance that requires investigation by the Court, the law encourages that such a party is not closed out on technical grounds. In *National Enterprises Corporation v Mukisa Foods, CA Civil Appeal No. 42 of 1997*, the Court held that denying a subject a hearing should be the last resort. In *Banco Arabe Espanol v Bank of Uganda, SCCA No. 23 of 1999 [2000] UGSC 3 (19 April 2000)*, the Supreme Court held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and lapses or errors should not necessarily debar a litigant from pursuit of his or her rights.

[16] In the present circumstances, I am satisfied that the Applicants and/or their advocates were prevented by sufficient cause from appearing before the Court when the matter was called for hearing. The Applicants are, therefore, entitled to an order setting aside the dismissal and reinstatement of the main suit. In the premises, the application is allowed with orders that;

a) The order dismissing HCCS No. 527 of 2017 is set aside and the suit is reinstated for hearing and determination on its merits.
b) The reinstatement shall be effected through ECCMIS and the case shall be allocated a new file number according to the system.
c) The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered by email this 27th day of February, 2024.

Boniface Wamala
JUDGE