

- a. The order dismissing Civil Suit No. 50 of 2018 dated 6th April 2021 be set aside.
 - b. Civil suit No. 50 of 2018 and all orders made thereunder be reinstated and the suit be heard on its merits.
 - c. Costs of the Application be in the cause.
2. The application supported by the affidavit deposed by Bisaso George William is premised on the fact that; the Applicant was the 1st Plaintiff in Civil Suit No. 50 of 2018 before this Honourable Court, seeking various orders and a declaration of this Court; the Applicant's then Lawyer served the Respondents, with the Court Process and only the 3rd Defendant filed a Defence whereupon this Honourable Court entered a default Judgment against the 1st, 2nd and 4th Defendants;
3. On the 16th day of October, 2020, the main suit was adjourned to the 6th day of April 2021 in the Applicant's presence and the Applicant informed his former lawyer to that effect; the Applicant's former lawyer informed him that due to the upsurge of the rapid Covid-19 cases, the trial Judge will not be in chambers, on the day the suit was adjourned and that he will get another hearing date;
4. The Applicant did not appear in court on the 6th day of April 2021 on the basis of the information from his former Lawyer; the Applicant kept on inquiring from his former Lawyer and this court's registry on the status of the main suit but the same was frustrated by the Nationwide Covid-19 lockdowns; around August, 2022, the Applicant learnt that this honourable court dismissed the main suit (Civil Suit No. 50 of 2018) for non-appearance of the parties; the Applicant's former Lawyer

has been telling the Applicant that he is liaising with the court together with the 3rd and the 4th Respondents to have the matter settled amicably to no avail; the negligent and wanton behaviour of the Applicant's former Lawyer cannot be visited on the Applicant; It is just and equitable that this application be allowed and the main suit be reinstated and determined on its merits;

The Application is supported by copies of the Notice of instructions and the Notice of Change of advocates.

5. The application is opposed by Dusabe Grace Lisa (Assistant Administrator General (the 3rd Respondent) who through his counsel Mr. Muyomba Simon filed an affidavit in reply and contended that; the applicant in paragraph 4 of his affidavit admits that, in his presence, the suit was adjourned on 16th October, 2020 to 6th April 2021 implying that he was personally aware of the adjourned date of 6th October, 2021; the adjournment was allowed by court on because the parties in the meantime were seeking an out of court settlement in the office of the 3rd respondent; since then, the applicant has never turned up nor notified the 3rd respondent formally or otherwise of his interest or otherwise in pursuing the out of court settlement; on the 6th April, 2021, neither the applicant nor his counsel were present in court and as a result, the suit was rightly dismissed for non-appearance;
6. The excuse advanced by the applicant for non- appearance based on misinformation by his counsel is a falsehood that taints the applicant with unclean hands; in further response to paragraph 5, 7-9 of the applicant's affidavit, the applicant has neither indicated which particular lawyer he dealt with in Messrs. Nsamba and Co. Advocates

and evidence of the mode of communication between him and that lawyer whether by way of data call records, data messages or otherwise and when the alleged communication was exactly made; before accusing the former lawyers for want of diligent service the applicant also ought to demonstrate to this court that he had paid their legal fees; it is the practice of courts that when a Judge is not around, matters may be adjourned before the Registrars or the Judge may leave available dates for the next hearing with the court clerk;

7. If it is true that counsel misinformed the applicant, which is denied, a diligent litigant ought to have confirmed with the registry whether it was true that the Judge was not going to be around much in the same way he purportedly checked with registry to know the status of his case as per paragraph 10 of his affidavit; considering the time it took him to follow up with court as late as August, 2022, the applicant had simply lost interest in the case; the applicant's conduct is that of an indolent litigant making a desperate attempt at a blame game over what he is personally to blame; therefore the application should not be granted.
8. The Applicant filed an affidavit in rejoinder to the effect that; it is not true that the adjournment of 16th October, 2020 was allowed on terms that the parties were seeking an out of court settlement, he personally asked this honourable court for another date after his former lawyer informing him that he could not attend court and the court only encouraged them to meet with the Administrator General to discuss a possible settlement; that since that adjournment, he never got another opportunity to meet with his former Lawyer, Nsamba Geoffrey as he kept on tossing him around and telling him that court programs had been



sabotaged by the Covid- 19 lockdown and the subsequent election matters;

9. It was his former lawyer who was supposed to schedule a meeting with the Administrator General and due to the total lockdown and other Covid-19 restrictions that commenced on June 2021 to September 2021, there was no way he could personally reach out to the 3rd Respondent; that since the onset of the main suit, his former lawyer had never misinformed him and when he informed him that the trial judge will not be around on the 6th day of April 2021 due to the rapid upsurge of the Covid-19 cases, he had no reason to disbelieve him;
10. He always communicated with his former lawyer, Nsamba Geoffrey through his telephone numbers 0704369190 and 0772369190, and at times he would go to his offices at Colline House, Pilkington Road, Kampala and that he paid him all the monies he asked for;he strongly believes that the 3rd Respondent was aware of the circumstances that led to his Lawyer misinforming the applicant, which misinformation led to his non-attendance on the 6th day of April, 2021 because neither the 3rd Respondent nor her assistants nor her Lawyers appeared in Court on the 6th day of April, 2021;
11. That he actually inquired from the court Registry immediately after the lifting of the Covid-19 lockdown in September 2021 whereupon he was informed that the trial judge had been transferred to Masaka High Court for election matters; and this, in a way made he believe all his former Lawyer's information without doubt.

12. Neither the 3rd Respondent nor any of her assistants have personal interests in the subject matter of the main suit and that they will not in any way be prejudiced if the main suit is reinstated by this honourable court; and according to the record of proceedings in the main suit, the suit was already proceeding ex parte against the 1st, 2nd and 4th Respondents and that if the 3rd Respondent has any spirit of settlement, it is fair that the suit is reinstated in order for the main suit and the estate matters subject of the suit to be finally concluded and put to rest; it is in the interest of justice that the application is granted.

Background:

13. The applicant together with Joseph Terebu, Nyanzi Moses Kabanda, and Kato Kibalama George William filed HCCS No.50 of 2018 against the respondents herein; a default judgement was entered against the 1st, 2nd and 4th defendants/respondents; HCCS No.50 of 2018 proceeded against the 3rd respondent/defendant. The applicant and the 3rd respondent appeared in court on 16/10/2020; the applicant/1st plaintiff prayed for an adjournment; court encouraged the parties to mediate, and the suit was adjourned to 6/4/2021; as a result of both parties and/or their respective counsel's failure to show up in court on 6/4/2021, HCCS No.50 of 2018 was dismissed under Order 9 rule 17 of the Civil Procedure Rules. The applicant brings this application to set aside the dismissal order.

Issue:

14. Both counsel filed submissions but did not frame any issues for court's resolution; Court has considered the facts of the case and submissions of counsel and has under Order 15 rule 3 of the Civil Procedure Rules, framed the issue for determination as: -

Whether the application warrants the setting aside of the ex parte order dismissing High Court Civil Suit No.50 of 2018?

15. Counsel for the applicant submits that the non-attendance of the plaintiffs together with their advocate for the hearing that was scheduled for the 6th day of April 2021 was not the applicant's/plaintiff's doing, it was rather occasioned by the applicant's former lawyer's misinformation to the applicant that the trial judge was not going to be in chambers that day should not be visited on the applicant; that bearing in mind the state of affairs of the month of April 2022 caused by the rapid upsurge of the COVID-19 cases during the second wave, the applicant had no reason to disbelieve the information from his former lawyer; that since the applicant has sufficient reason, this application should be allowed and the main suit be reinstated and heard and determined on its merits.
16. Counsel cited Order 19 rule 18 of the Civil Procedure Rules and the case of *Florence Nabatanzi Vs. Naome Binsobedde (SC Civil Application No.6 of 1987)* where the supreme court held that sufficient cause depends on circumstances of each case and must relate to inability or failure to take a particular step in time; and the case of *Nicholas Roussos Vs. Gulamu Hussein Habit Viran & Ors (SCCA No.0 of 1993)*



where court held that a mistake of an advocate though negligent may be accepted as sufficient cause to set aside an *ex parte* judgment.

17. Counsel for the 3rd respondent submits that cases belong to litigants and not advocates; a litigant has a legal obligation to follow up his case; that there is no evidence of negligence by the former lawyers of the applicant and the applicant's effort to squarely put the blame on the former counsel for mistake committed should be disregarded; the applicant has neither indicated which particular lawyer and evidence of the mode of communication by way of data call records, data message of the alleged communication with the lawyer. Counsel cited *National Insurance Corporation V. Mugenyi and Company Advocates [1987] HCB 28*; for the proposition 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; that if at all counsel misinformed the applicant, a diligent litigant ought to have confirmed with the registry; that his conduct was of an indolent litigant hence the application should be dismissed with costs.

18. In rejoinder and reiterating the earlier position; counsel for the applicant charges that the 3rd respondent shall not be prejudiced if the main suit is reinstated for its statutory mandate is to ensure that the properties of the deceased are recovered and properly distributed; whereas the rest of the beneficiaries to the estate of the late Sentongo Muwalabu Salongo Yelimiya will suffer injustice; he cited **Banco Arabe Espanol Vs. Bank of Uganda [1999] UGSC 1 (Civil Appeal No.8 of 1998)**; for the proposition that the circumstances of each case ought to be considered; he quoted court that '*.....the question of whether an "oversight", "mistake", "negligence" or "error", as the case may be, on the*

part of counsel should be visited on a party the counsel represents and whether it constitutes "sufficient reason" or "sufficient cause" justifying discretionary remedies from courts has been discussed by courts in numerous authorities. Those authorities deal with different circumstances; and may relate to extension of time for doing a particular act, frequently in cases where time has already run over; some of them concern setting aside expect judgment or reinstating dismissed suit 'such as in the present case. But, they have the common feature whether a party shall, or shall not, be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default and of his professional advisor or advisor's clerk. The interests of the party who has obtained, or is in a position to obtain, a permanent advantage by reason of such default, and of the unfortunate and perfectly innocent party who has been deprived of a right through no fault of his own..."

Determination:

19. The applicant relies on **Order 9 rule 18 of the Civil Procedure Rules** which provides that; *"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 or her nonappearance, 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."*

20. The discretion to set aside an ex parte judgement is dependent on whether the applicant has adduced a sufficient cause; such discretion must be exercised judiciously. In **Nakiride v. Hotel International Ltd [1987] HCB 85**, it was held that: *“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...”*
21. Courts have found that the expression “sufficient cause” should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned; whether or not sufficient cause has been furnished, can be decided on the facts of a particular case. (see: **Bishop Jacinto Vs. The Uganda Catholic Lawyers Society and 2 others, HCMA No. 696 of 2018; Gideon Mosa Ochwali Vs. Kenya Oil Co. Ltd & Anor. [2017] KLR**)
22. The applicant in his affidavit in support admits that he was in court on 16/10/2020 when civil suit No.50 of 2018 came up for hearing and the matter was adjourned to 6/4/2021; court record shows that his lawyer was not in court on 16/10/2020; the applicant’s act of faulting the former lawyer for misinforming him that the trial Judge wouldn’t be in chambers on 6/4/2021 does not amount to sufficient cause for he was in court during the previous hearing unlike his lawyer; on that account, I find no negligence attributed to the applicant’s former counsel leading to the non-attendance of the applicant.

23. The administration of Justice requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights; (see: ***Essavi v Solanki [1968] EA 218*** see also: ***Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001***).
24. The applicant states that he was informed by his former lawyer that as a result of the COVID-19 outbreak which led to the country's total lockdown in June 2021 to September 2021, court programs were affected; Court in ***Attorney General V. Nabco Enterprises Limited Miscellaneous Civil Application No. 20 Of 2018***; found that; When considering applications in that regard, the court not only considers the reason for nonappearance on the material day, but also the overall impact of the inherent delay involved in allowing the applicant to be heard in answer to the suit as if he or she had appeared on the day fixed for his or her appearance, on the justice of the case.
25. I take judicial notice of the fact that in April 2021, Uganda started facing the second wave of the COVID-19 pandemic, mainly driven by the delta variant; at some point all court hearings and activities were halted unless the matter was urgent. It would not be farfetched for one to believe that there was no hearing; the discretion in deciding whether or not to set aside *ex parte* order is aimed at ensuring that a litigant does not suffer injustice as a result of an excusable circumstance as it is in this case; for court to deny an application like the one at hand, the respondent must demonstrate that granting it would be prejudicial to him/her; the 3rd respondent has not demonstrated any prejudice in a

family matter where his role is to ensure estates of deceased persons are administered in his capacity as a public trustee; I shall in the interest of justice invoke this court's inherent powers under section 98 of the Civil Procedure Act to hold that there exists a sufficient reason warranting the setting aside of the exparte dismissal order vide HCCS No.50 of 2018 issued on the 6th day of April 2021.

In the result, this application has merit and is hereby granted with the following orders.

- I. The order dismissing High Court Civil Suit No.50 of 2018 dated 6th April 2021 is set side.
- II. High Court Civil Suit No.50 of 2018 is reinstated and shall be heard and determined on its merits.
- III. Each party shall bear their own costs.



Ketrah Kitariisibwa Katunguka

Judge

19/09/2023

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