THE REPUBLIC OF UGANDA

IN THE HIGH OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS CAUSE NO. 443 OF 2014

(ARISING FROM CIVIL SUIT NO.356 OF 2013)

1. **POPINA GENERAL SUPPLIES**
2. **INNOCENT MUGISHA**
3. **JACKIE BAYONGA**

…….....APPLICANTS

VERSUS

1. **STANBIC BANK UGANDA LTD**
2. **WAMALA RICHARD……..RESPONDENTS**
3. **COMMISSIONER FOR LAND REGISTRATION**
4. **KALWANA EMMANUEL**

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

The applicants presented this motion under the provisions of and Order 9 rule 23(1) Order 51 rules 1 and 3 CPR and Section 98 CPA seeking for an order to set aside the dismissal of Misc. Application No. 714/14 (hereinafter referred to as the application) and for the restoration of both that application and the interim orders issued under Misc. Application Nos. 952/13 and 715/14 on the record. They in addition sought for costs of the application.

The main grounds of the application were that the applicants' counsel was for sufficient cause prevented from appearing to prosecute the application which was in fact fixed for hearing by the

2nd respondent's counsel without their counsel's knowledge, and in disregard of the earlier directives of court to schedule HCCS No. 350/2013 (hereinafter referred to as the head suit). That the application needs to be heard on its merit to prevent a miscarriage of justice and illegality and that, the head suit has high chances of success. Those grounds were supported by the affidavits of Enos K. Tumusiime, counsel in personal conduct of the application and Jackie Bayonga, a director of the 1st applicant.

An affidavit in reply was filed by the 4th respondent to oppose the application and both counsel filed written submissions. For reasons of space and time, the contents of the affidavits and submissions will not be reproduced here but have been keenly studied and will be considered in my deliberations.

Order 9 rule 23 permits a plaintiff/applicant to apply for an order to set aside dismissal of their suit upon satisfying court that there was sufficient cause of non appearance when the suit was called for hearing. Courts have previously held that sufficient reason must relate to the inability or failure to take a particular step. See for example **Mugo Vrs Wanjiri (1970) EA 481.**

Basically, the reasons advanced by Counsel Enos Tumusiime for his non appearance are enumerated in his affidavit in support of the application. He claims that on 24/1/14, at a hearing inter parties, court gave time lines for filing a scheduling memorandum and witness statements in the head suit and set it down for mention for 28/4/14. That instead, and without his knowledge, counsel for the 2nd applicant, fixed the application for 23/4/14. That Mr. Tumusiime protested that fixture in writing to the Registrar and requested him to delist the application from the cause list. The Registrar did not respond to his request, and on 23/4/14, while in attendance at a hearing in the Commercial Court, he came to learn that the application had been dismissed. His greatest fear is that if the application is not reinstated, the orders of court in M/A 715/14 and M/A 952/13 would abate with it and there would be no restriction against the 4th respondent to deal with the suit property which is a valuable one, to the detriment of the applicants. On the other hand, the 3rd applicant in her affidavit stated that she was only informed of the mention date of the head suit and supported counsel Tumusiime's fears that if the respondents are not restricted from dealing in the suit property, the main suit would be rendered nugatory and the 1st applicant stood to lose valuable property as a result of illegal and fraudulent acts of the respondents.

On his part, the 4th respondent argued in his affidavit that the reasons for non attendance are false since applicant's counsel was duly served with the hearing date of the application but instead protested their attendance for the reason that the application had been overtaken by events, and with a request that it should be delisted. In his view, this was an act of disrespect to the court and it meant that even the interim order was thereby overtaken by events. That by writing a letter stating that the application was overtaken by events, the applicants are thereby estopped from applying for its reinstatement. Mr. Kalwana also stated that over time, there had been a subdivision and creation of adverse interests over the suit land in the form of mortgages in favour of the Standard Chartered Bank. That in addition, there had already been compensation for part of the suit land by Government, meaning that the suit land has ceased to exist. For that reason, that the application is overtaken by events and according to counsel for the 2nd respondent, a decision on the application would be academic and moot.

I am well aware of the events that took place in this court on 30/3/13. On that date, I extended the interim order in favour of the applicants and then gave a road map for hearing the main suit which was fixed for mention on 28/4/14. It may have been an oversight by this court and the counsel present that day that nothing was said or done to account for the existence of the application for the temporary injunction or its fixture. Therefore, in spite of my directives on that day, that application remained in existence and indeed, counsel for the 2nd respondent took the trouble to have it fixed it and duly notified counsel for the applicant in that respect. All these facts were well traversed in my ruling of 23/4/14, when I dismissed the application for want of prosecution.

Again, counsel for the applicant wrongly concluded that the communication by the applicant's lawyers dated 7/3/14 was not brought to my attention. On 23/4/14 am fully aware of that communication which bears witness that they were fully aware of the hearing of the application but chose to stay away for the reason that they believed it had been over taken by events. I did think then, and have not changed my mind that, this was indeed a wrong presumption or understanding of the law and procedure of this court. I also did find fault in the manner that they attempted to side step those proceedings especially when Mr. Tumusiime admitted in his affidavit that they was no formal response from the Registrar indicating that the application had been delisted and all parties duly notified. According to **Motor Mart (U) Ltd Vs Yona**

Kanyomozi SCCA No.6/99, evidence must be present to show that the applicant had a serious intention of attending to prosecute the claim. If I were to go by the above facts, Mr. Tumusiime or his firm have not presented any new facts to show that them as lawyers were interested and serious in attending the hearing of 23/4/14 but were for sufficient reason prevented from doing so.

Much has been adduced by for the 4th respondent that the application has been overtaken by events. I have already enlisted these and will not repeat them save to note the observations of Mr. Kalwana (on the advice of his lawyers) that the interim order granted in MA 715/13 was only a temporary protection and contingent upon hearing the application which was rightly fixed by counsel for the 2nd respondent. I fully agree with that observation. However, I do not agree entirely to his submission that the communication by the applicant's lawyers of 7/3/14 was an indication of "abandonment" of the application. I prefer to believe that when they wrote that communication, counsel for the applicant believed (albeit quite wrongly) that by my fixing the main suit for mention, the application was rendered unnecessary and the interim order would continue to act as the protection against further dealings in the suit land, until final determination of the main suit.

I also do appreciate the averments of Mr. Kalwana in paragraphs 4 and 5 of his affidavit that the physical and legal status of the suit land has now changed to the extent that the application is rendered nugatory. I am not persuaded however that, this should prevent the applicant from seeking protection against any further dealings in the suit land before the main suit is disposed of. I am also equally concerned by his averment that the application is bound to fail because it was filed with the wrong presumption or belief that the suit land was still in the applicants' names which was not the case. This is a matter that the applicant will have to grapple with should I allow this application especially, when they have argued that part of the suit land remains in the names of the 4th applicant who is now party to the application and main suit. Also the counter accusation by the applicants that there was fraud on the part of the respondents in transferring the suit land, should be left as an issue to be decided upon in the main suit.

So far, I have found that counsel for the applicant has not advanced reason to merit a reinstatement. However, I cannot close my eyes and indeed ears to the fact that this application

was presented for the applicant, a lay person who entrusted his rights of appearance to a lawyer. The 3rd applicant swore an affidavit indicating that she did follow up progress of her suit and that the last communication from her lawyer was that she was to appear in court on 28/4/14 for mention of the main suit. In paragraph 6 of her affidavit, she has strong belief in the strength of her suit and the need of an injunctive order to prevent further dealings in the suit land.

Counsel for the applicants have in their submissions owned up to their mistake. There is a wealth of authorities supporting the notion that the acts of a negligent advocate should not be visited on his/her client. See for example, **NIC Vs Mugenyi & Co., Advocates (1987) HCB 28 and Nicholas Roussors Vs Gulam-Hussein Habib Virani & Anor SCCA.No.9/93.** I am inclined to believe and hold that the applicants relied on the professional advice of their lawyer, and were for that reason not present when the application was called to hearing on 23/4/14. They were for sufficient reason absent on that day. I will for that reason alone allow this application and order that the dismissal of MA. 714/14 is set aside and hearing of the application on its merits be restored. I would also order that the interlocutory and interim orders granted under MA. 952/13 and MA.715/13 is also being restored.

I hasten to add however that, much or little may have happened since dismissal of the application and abatement of the interim order. In law, I would have no powers to reverse such transactions by the respondents or indeed any other entities who are not party to this suit. My observation is specifically addressed to the mortgages in favour of the Standard Chartered Bank Uganda Ltd which were registered after dismissal of the application. Thus, reinstating the interim order would mean that there should be no further transactions in respect of the suit land by the respondents from the date of this ruling until, MA. 714/14 is disposed of.

I have said much (and indeed had much to say previously) about the communication of Tumusiime Kabega Advocates dated 7/3/14. With respect, the contents of that communication bordered on contempt by the authors to believe that a mere letter would discharge an existing application. Indeed, before dismissing the application, I did comment that it would have been an act of courtesy to this court for counsel for the applicants to have been present at the hearing of 23/3/14 to explain their understanding of the effects of what took place at the hearing of 30/3/13. Inevitably, upon their submissions, a consensus would have been reached on how to deal with

the application in a manner that would be fair and workable for all the parties concerned. Their commission above and their failure to attend a hearing for which they had notice, has cost their client dearly in time and expense. Going by the authority of **Phillip Ongom Vs Catherine Owora SCCA. 14/01**, the applicants ought not to bear the consequences of their advocate's default. I would hold therefore that although I am allowing the reinstatement of both MA 714/14 and the orders issued under MA. 952/13 and MA. 715/13, the costs of such reinstatement shall be met by the firm of M/s Tumusiime Kabega & Co. Advocates.

I so order.

EVA K. LUSWATA
JUDGE
24th June 2015