THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 386 OF 2022

(ARISING FROM CIVIL SUIT NO. 512 OF 2019)

ABDU KIWANUKA YIGA :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

ABUBAKER KADDU KIBERU :::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE JOHN EUDES KEITIRIMA

This is an application brought by way of Notice of Motion under **Order 52 Rules 1, 2, & 3 of the CPR and Section 98 of the CPA, Section 33 of the Judicature Act and Article 126 (1) of the Constitution of the Republic of Uganda 1995 (as amended).**

The applicant is seeking for order that:

(i) The order of dismissal of **H.C.C.S No. 512 of 2019** involving the parties herein be set aside and the suit be heard on merit.

(ii) That the costs of the application be paid by the respondent.

The application is supported by the affidavit of the applicant who deposes inter alia:-

(i) That the applicant was never served with a hearing notice for 30th day of March, 2021 when the main cause came up for hearing.

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(ii) That the main suit was dismissed without his knowledge and he was deprived of his right to be heard in court.

(iii) That by the time the case was dismissed by 30th day of March, 2021, he had changed his lawyers from Nshimye & Co. Advocates to M/s Tishekwa Rukundo & Co. Advocates and their notice of instructions had been filed on court record on 11th November, 2020 and served on the previous counsel.

(iv) That any hearing notice for the day should have been served by the court process server on his current lawyers but not his former lawyers who never informed him though on record there is no proof of service.

(v) That he has always been interested in prosecuting his case as evidenced by many letters requesting for a hearing date on record dated 18th November, 2020 and 4th June 2021.

(vi) That he was frustrated in prosecuting his case by the disappearance of the court file which left several hearing notices he put on record not acted on and after the Deputy Registrar noticed this, she ordered for reconstruction of the duplicate file which was done and the case was allocated to Hon. Lady Justice P. Basaza.

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(vii) That he has submitted several hearing notices and summons for directions to the said trial Judge on the duplicate file which are pending fixing.

(viii) That on the 24th January, 2022 when he and his lawyers met the Deputy Registrar to ask why the case could not be fixed for hearing, he was surprised to find that the main case had been dismissed on the 30th March, 2021 on the original court file which got lost in 2020.

(ix) That the dismissal of the main case was erroneously done without his knowledge and having been fixed by his former lawyers who had no instructions and upon an original file that has got lost.

(x) That he was busy pursing a hearing date on the duplicate file before a different Judge and the said dismissal has not created a solution between the two parties on the suit land.

(xi) That it is in the interest of justice and without prejudice to any party herein if the application is granted.

In his affidavit in reply sworn by Kasim Muwonge an Advocate of the High Court, he deposes inter alia:-

(i) That the application is misconceived as the suit under which it arises in any event abated the applicant having failed to take out summons for Directions in time as stipulated under the law.

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(ii) That the respondent shall seek for the application and the suit to be dismissed with costs.

(iii) That the applicant is guilty of dilatory conduct in prosecuting this application as the same was filed over a year from the date of the dismissal.

(iv) That the hearing notice fixing the suit for hearing on 30th May, 2021 was served on the respondent on 18th February, 2021.

(v) That on 30th May, 2021, the applicant nor his lawyers on record did not turn up whereupon the case was dismissed.

(vi) That it is inconceivable that a court file can be said to be lost for close to three years and the averments contained in the applicant's affidavit are merely lies which this court should not accept.

(vii) That he is aware that wherever a file is reconstructed, the court system will indicate the file and the Judicial Officer handling the matter and therefore it is a lie to say that the matter was before Justice Basaza and there could never have been a fresh re-allocation when the sitting Judge was still at the station.

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(viii) That in any event the Deputy Registrar always sends out cause lists to Advocates on a weekly basis in addition to displaying the same on the court user's Notice Board and therefore neither the applicant nor his Advocates should be seen to feign ignorance of none service of the hearing notice for 30th March, 2021.

(ix) That the firm of Nshimye and Co. Advocates have never been officially discharged from the record as required by law.

In his affidavit in rejoinder the applicant deposes inter alia:-

(i) That he has been advised by his lawyers that the main case has never abated for failure to take out summons for directions.

(ii) That he is advised by his lawyers that he is not guilty of any dilatory conduct in prosecuting this application as he was pursuing a hearing date before Justice Basaza on a duplicate file after the Deputy Registrar of this court allowed it due to the loss of the original court file and following the re-allocation.

(iii) That had the respondent served him with a hearing notice of 30th May, 2021 as alleged on the alleged date of 18th February, 2021, he would have annexed returns of service to his affidavit in reply from his lawyers which he never attached.

(iv) That Kasim Muwonge is not a party to this application and hence this application stands unopposed by the respondent.

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Counsel for the applicant and counsel for the respondent filed written submissions the details of which are on record and which I have considered in determining this application.

The issue to determine now is whether the order dismissing H.C.C.S No. 512 of 2019 involving the parties herein should be set aside and the suit heard on its merit.

O.9 rule 23 (1) of the Civil Procedure Rules provides that "***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 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 proceedings with the suit.***"

The applicant's reason for having failed to attend the hearing on 30TH May, 2021 was that he was not served with a hearing notice.

The respondent raised preliminary points of law which I will first address. The respondent submitted that the suit had abated the plaint having been filed on the 12th June 2019 and the defence filed on 4th July, 2019. Counsel for the respondent submitted that under **Order 11A of the Civil**

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Procedure Rules (as amended), Summons for Directions are required to be taken out within 28 days from the date of any such last reply.

It is true that the written statement of defence was filed on **4th July, 2019.** **Order XIA Rule 1(2) of the Civil Procedure Rules (as amended)** provides that "***where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for directions within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these rules".***

Order XIA Rule 1(6) of the said rules provides that "***If the plaintiff does not take out a summons for directions in accordance with sub rule (2) or (6) the suit shall abate.***"

The above provisions are couched in mandatory terms.

It is therefore evident that even at the time the main case was dismissed on the 30th March, 2021 it had abated as the plaintiff had not taken out summons for discretions within the required time frame.

On this ground alone, this application cannot be entertained as the suit had abated by the time it was dismissed.

The only recourse the applicant has is to file a fresh suit subject to the law of limitation as provided for under **Order XIA Rule 1(7) of the CPR.**

The preliminary objection to that effect is sustained and disposes of the entire application as there is no need to resolve other issues raised as that would be superfluous.

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The application will be dismissed with costs to the respondent.

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HON. JUSTICE JOHN EUDES KEITIRIMA

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