THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(LAND DIVISION)

MISCELLANEOUS APPLCATION NO. 904 OF 2021

(Arising out of Civil Suit No. 2112 of 2015)

MUSA NSIMBE.....APPLICANT

VERSUS

SENTONGO KIRIZESTOM AND 11 OTHERS.....RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

Introduction:

The applicant, Mr. Musa Nsimbe in this application seeks an order to set aside the dismissal of the main suit ***Civil Suit No. 2112 of 2015*** and for the suit to be heard on its merits; and for the costs of this application to be provided for.

Grounds of the application:

The grounds of the application are laid out in detail in the supporting affidavit of the applicant.

Briefly, that he had filed ***Civil Suit No. 2112 of 2015*** as ***Civil Suit No. 63 of 2015,*** in Nakawa Division of the High Court, and later it was transferred to this Division. That his former lawyers who were served with hearing notices never attended court and the suit was dismissed for want of prosecution and for non-attendance by him and his former counsel.

He also claimed that he had at all times been vigilant and shown interest in pursuing his case. He accordingly blamed the failure to attend on the mistake, inadvertence and/or negligence of his former counsel and prayed for reinstatement of the case.

Save for the 3rd respondent, Mr. Ssenkinkuse Julius Ceaser and the 11th respondent, Mr. Mugisha Rwebishugi David each of whom filed an affidavit in reply, the rest of the respondents did not make any response to the application.

The two respondents admitted in their respective replies that ***Civil Suit No. 63 of 2015*** had been filed in Nakawa High Court Division but was later on transferred to this division of the High Court.

They raised similar grounds of objection, the gist of which was that the applicant's counsel was duly served with the hearing notices but since both him and his counsel never followed up the case and failed to attend court when the case next came up for hearing, court was justified in dismissing the suit.

That the applicant whose duty it was as plaintiff to prosecute his case, never gave any reason why he failed to attend court and also delayed in filing this application. According to them therefore it would be just and equitable to dismiss this application.

Representation:

The applicant was represented jointly by ***M/s Ochieng Associated Advocates & Solicitors and M/s Busingye & Co. Advocates.*** The 3rd respondent was represented by ***M/s Sabiiti & Co. Advocates***, who also filed his submissions.

The 11th respondent was represented by ***M/s Ssetimba & Co. Advocates,*** and that same firm filed joint submissions in reply, for the respondents.

The applicant however did not file any rejoinder.

Consideration of the issue:

The law:

I have carefully read the pleadings and submissions as presented by each side, which I need not repeat here in detail.

The application was brought under ***section 33 of the Judicature Act, Cap. 13, section 98 of the CPA Cap. 71 and order 52 rules 1, 2, 3 of the CPR.***

As noted by the Court of Appeal in ***Agnes Nanfuka Kalyango and others vs Attorney General & Masaka District Administration: CACA No. 64 of 2000*** the three instances in which court would invoke its inherent powers to dismiss a suit for want of prosecution are where there was inordinate delay; the delay was inexcusable even if credible excuse was made out; the defendant is likely to be seriously prejudiced by the delay; and the balance of justice demands it.

It was further observed in ***Sekyaya Sebugulu vs Daniel katunda [1979] HCB 46*** that once an action has been dismissed for want of prosecution the plaintiff's only remedy is either an appeal against the order of dismissal or commencement of a fresh action, subject of course to the law of limitation.

Dismissal for want of prosecution is provided for under ***order 17 rule 5 (1) and (2) of the CPR,*** (as amended), which state as follows:

> ***Rule 5(1):***
> ***In any case not otherwise provided for in which no application is made or step taken for a period of six months by either party, with a view to proceeding with the suit after mandatory scheduling conference, the suit shall automatically abate.***
>
> ***Rule 5 (2):***
> ***Where a suit abates under sub rule (1) of this rule the plaintiff may, subject to the law of limitation bring a fresh suit.***

It is a fact not in issue that the joint scheduling memorandum in this case had been filed on 16th December, 2015. It is also my understanding that under ***order 17 rule 5 of the CPR,*** (as amended), the six month period would only begin to run after the mandatory scheduling conference has been held.

The framers of that rule could not have intended to absolve a party who fails to turn up in court and take the necessary steps to ensure that scheduling is done from the biting claws of that amendment.

It is to be noted that after filing the Joint Scheduling Memorandum, no further action was taken by the plaintiff to have the case heard and concluded. It took the respondents/defendants counsel, from the firm of ***M/s Okurut & Co. Advocates*** to secure the date of 20th June, 2019 for the hearing. Even then the applicant and his counsel failed to turn up, prompting this court to dismiss the suit. It also took two years for the applicant to wake up and pursue his rights.

Although counsel for the applicant sought to rely on the ***section 33 of the Judicature Act, Cap. 13 and section 98 of the CPA, Cap. 71*** in relation to this application, from his submissions he more or less believed that this was a matter falling within the ambit of ***order 9 rule 22 of the CPR*** which stipulates that where only the defendant appears when the suit is called for hearing, court shall dismiss the suit.

Where a suit is dismissed *ex parte* under that provision, the remedy for the applicant would lie under ***order 9 rule 27 of the CPR*** which stipulates:

> ***In any case in which a decree is passed exparte against a defendant he or she may apply to court by which the decree was passed for an order to set it aside; and if he/she satisfies the court ..... that he/she was presented by any sufficient cause from appearing ....court shall make an order setting aside the decree ....and shall appoint a day for proceeding with the suit.***

That law requires that *sufficient cause* be shown by *the defendant* (as the applicant) in a situation where the case proceeded in his/her absence.

In the present case however, it is the plaintiff who failed to prosecute the case; and it is the respondents/defendants who applied for dismissal of the suit for want of prosecution.

Therefore the law applicable to the defendant who seek to set aside an *exparte* order passed against him/her cannot be the same as that which applies to the plaintiff who fails to prosecute his/her own case.

There is no requirement under the law for a plaintiff /applicant whose suit has been dismissed for want of prosecution to demonstrate sufficient/good cause why he/she never attended court when the case was called for hearing. It is after all, his/her duty to pursue the case to its logical conclusion.

The dismissal for want of prosecution thus seals off the matter and recourse can only be had by the plaintiff to an appeal or commencement of a fresh action, subject to a law of limitation imposed by law.

The attempt therefore to come up with *sufficient causes* therefore would not apply in the present circumstances since the reinstatement sought does not fall under ***order 9 rule 27 of the CPR,*** but rather under o***rder 17 rule 5 of the CPR,*** where a court's hands are tied.

A similar position was held by court in ***Gold Beverages (U) Ltd vsMuhangura Kenneth & Anor HCMA No.674 of 2019,*** (which was on all fours with the present application), and I have no reason to differ from that holding.

The application is accordingly dismissed, with costs to the 3rd and 11th respondents.

Alexandra Nkonge Rugadya

Judge

7th February, 2022

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