

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISCELLANEOUS APPLICATION No. 1428 OF 2022
(ARSING FROM MISCELLANEOUS APPLICATION No. 939
OF 2021, MISCELLANEOUS APPLICATION No. 1241 OF 2018
& CIVIL SUIT NO. 115 OF 2012)

HAJJI IDI LUBYAYI KISIKI :::::::::::::::::::::::::::APPLICANT

VERSUS

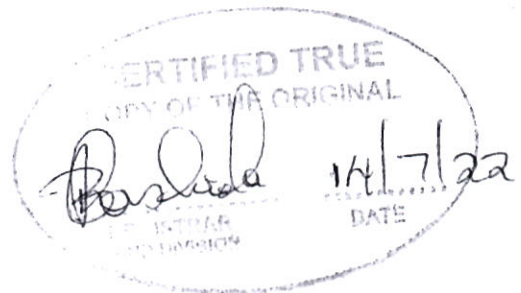
- 1. NALUMANSI IMMACULATE**
- 2. SSENOGA LEONARD**
- 3. NANTEZA MILLY**
- 4. NAKAYIZA KEVINA**

(Administrators of late Kiwanuka

Aloysious.) :::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. JUSTICE TADEO ASHIMWE.

RULING



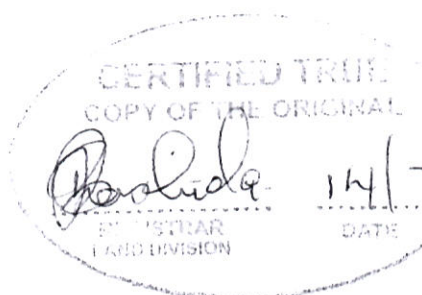
BACKGROUND

This Application was brought under Section 98 of the Civil Procedure Act and Order 46 Rules 1 (a) (b), (2) (8) and Order 52 rules 1,2,3 of the Civil Procedure Rules seeking review of the Order made in Miscellaneous Application No. 939 of 2021 reinstating Civil Suit No.115 of 2012 and costs of the Application.

The background of this Application is that Civil Suit no.115 of 2012 was dismissed under order 9 Rule 22 and Section 17 (2) of the Judicature Act. That the respondent filed Miscellaneous Application No.939 of 2021 for reinstatement of the suit which court allowed. That the applicant was dissatisfied with the order reinstating Civil Suit no.115 of 2012 arguing that court had no jurisdiction to handle the same hence this application seeking for review.

The grounds of this Application are contained in the affidavit dated 22/8/2022 but briefly that;

1. There is an error apparent on the face of record and sufficient cause necessitating a review of the decision made.
2. That the suit was re-instated on a different application.



3. That advocates who appeared for the applicants did not have instructions in the matter. And it just and equitable that orders sought be granted.

At the hearing, only one ground was argued by the applicant's counsel

On the other hand, the respondents filed an affidavit in reply dated 29/9/2022 opposing the Application. At the hearing, the applicant was represented by Counsel Sam Sserwanga while the respondents were represented by Counsel Mugarura Jamil together with Counsel Kigula.

Both Counsel made oral submissions which I shall consider in this Ruling.

RESOLUTION:

Applications for review is governed by Section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules which I shall quote verbatim.

Section 82 of the Civil Procedure Act provides that;

"Any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court

which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.”

Order 46 of the Civil Procedure Rules provides;

“1. Application for review of judgment:-

(1) Any person considering himself or herself aggrieved;

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate Court the case on which he or she applies for the review.

The grounds for review were enunciated in the case of **FX Mubuke Vs UEB High Court Misc. Application No.98 of 2005** to be;

1. That there is a mistake or manifest mistake or error apparent on the face of the record.
2. That there is discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.
3. That any other sufficient reason exists.

This Application is based on the first ground of a mistake or error apparent on the face of the record.

Court in the case of **Edison Kanyabwera versus Pastori Tumwebaze, Supreme Court Civil Appeal No. 6 Of 2004** highlighted the meaning of an error in the face of record as follows;

5

[Handwritten signature: Basinda] 14/10/22 *[Handwritten signature]*

[Circular stamp: OFFICE OF THE ATTORNEY GENERAL, UGANDA]

"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of a fact and includes also error of law."

To support the above ground, Counsel for the applicant in his oral submissions argued that there is need for review of orders made in Miscellaneous Application No.939 of 2022 since there was an error apparent on the face of record. From the record, Civil Suit No.115 of 2012 was dismissed under Order 9 Rule 22 and Section 17 (2) of the Judicature Act. In his view, a suit dismissed under Section 17 of the Judicature Act can only be reinstated on Appeal or by bringing a fresh suit since a dismissal of a case under Section 17 (2) of the Judicature Act creates a final decree of court and cannot be reinstated by the dismissing court.

Counsel for the applicant finally submitted that the suit was improperly reinstated and that the Application should be allowed with costs.

In response, Counsel for the Respondents submitted that court has inherent powers under Section 98 of the Civil Procedure Act to reinstate such suits and that the suit was properly reinstated. He further submitted that Section 17 (2) of the Judicature Act does not refer to a

Rashida 14/10/2022
6

final decree and invited court to dismiss the Application for the same reasons.

From the pleadings by both parties and submissions of both Counsel, the question for court's determination is whether a suit dismissed under Order 9 Rule 22 or and Section 17(2) of the Judicature Act can be reinstated by the dismissing court. To answer this question, I shall consider order 9 rule 22 and section 17 (2) of the Judicature Act.

Order 9 Rule 22 CPR provides as follows;

"Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

When a suit is wholly or partly dismissed under Rule 22 of

Order 9, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action as per rule 23 of order 9 which provides that:-

(1) 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

RECEIVED TRUE
COPY OF THE ORIGINAL
14/10/22
DATE
[Signature]

on 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 proceeding with the suit.

My understanding of the above order is that a dismissal under O.9 Rule 22 doesn't create a final decree so as to bar reinstatement. The remedy is an application for reinstatement under rule 23 of the same order.

My view is that Only cases dismissed for want of prosecution under order 17 are barred from reinstatement since dismissal for want of prosecution creates a final decree and the remedy lays only in appeal or fresh suit as per order 17 sub rule 5 (2) of the CPR.

Dismissal for want of prosecution should never be confused for dismissal of non-appearance. Whereas dismissal for want of prosecution creates a final decree of court, dismissal for non-appearance is not a final decree of court.

In addition, this application was also dismissed under section 17 of the judicature act.

As already stated above, Dismissal for want of prosecution is provided for under order 17 rule 5 of the CPR. This should also not be confused with section 17(2) of the judicature act which is to the effect that;-

With regard to its own procedures and those of the magistrate's courts, the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to

limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.

Unlike order 17 rule 5 whose remedy is explicitly provided under order 17 rule 5 (2), section 17(2) of the Judicature Act is premised on the inherent powers of court and so does the remedy in my view. Therefore dismissal of a suit for abuse of court process equally is not a final decree of court.

Therefore the learned judge in reinstating the original case rightly exercised his inherent powers court to entertain the Application for reinstatement and grant it. I have not found any error apparent on the face of record to warrant a review.

I therefore find no merit in this Application and the same is here by dismissed with costs.


.....
TADEO ASIIMWE

JUDGE

6/10/2022.

