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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 0768 OF 2023

(Arising from Civil Suit No.0075 of 2016)

- 5 1. PAUL MWESIGWA
- 2. MUGISHA MOSES NICHOLAS
- 3. MUHWEREZA JACQUELINE
- 4. MUTAWE PATRICK (*Administrators of*
the estate of the late MUTEGEKI JOHN)::.....:APPLICANTS

10 **VERSUS**

- 1. MUTABAZI JOSEPH
- 2. KIRENGA FRED
- 3. TROPICAL BANK (U) LIMITED:.....:RESPONDENTS

Before Lady Justice Alexandra Nkonge Rugadya.

15 **Ruling.**

This application brought by motion under **Article 126 (2) (e) of the 1995 Constitution of the Republic of Uganda, Section 33 of the Judicature Act cap. 13, Section 98 of the Civil Procedure Act cap.71, and Order 9 rules 17 & 18, and Order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1** seeks orders that the order of this court dated 22nd October, 2020 dismissing **Civil Suit No. 75 of 2016** be set aside and the suit be reinstated. It also seeks orders that costs of the application be provided for.

Grounds of the application.

The grounds upon which this application is premised are contained in the affidavit in support thereof deponed by **counsel Kwemara Kafuzi**, an Advocate of the High Court practicing with **m/s Rwakafuuzi & Co. Advocates**, the applicants' lawyers, but briefly they are that the applicants who are the children of Mutegeki John, who ordered him to recover the deceased land comprised in **Kyadondo Block 243 plot 1811** (*hereinafter*

referred to as the 'suit land') and that counsel then instituted **Civil Suit No. 75 of 2016** against the respondents seeking among others declarations that that the plaintiff is the lawful, and sole proprietor of the suit land, the 1st and 2nd defendants were fraudulently registered thereon, and that the defendant
5 took no lawful interest in the same. The applicants also sought orders for cancellation of the 3rd defendant's names from the register, and restoration of the deceased names thereon.

That while the respondents filed their respective written statements of defence, Mutegeki John died on 8th July, 2019 before the suit was disposed
10 of, and that upon the advice of counsel, the applicants commenced the process of obtaining the grant of letters of administration, and a certificate of no objection was issued by the office of the Administrator General on 30th April, 2021 vide, **Admin Cause No. 3191 of 2019**, and the grant of letters of administration was granted by court on 29th March, 2022.

That the applicants then filed **Miscellaneous Application No. 1362 of 2022**
15 seeking to substitute the deceased and that because efforts to have the same fixed were in vain, a decision to have the main suit fixed for hearing was made, and a letter requesting a hearing date was written on 13th March, 2023 but after numerous follow ups, it was discovered that the main suit had on 22nd
20 October, 2020 been dismissed for want of prosecution as the hearing of the same had been fixed but the applicants were not informed.

That while at the time of the dismissal, the applicants were still in the process of obtaining the grant of letters of administration for their late father's estate which had not yet been issued, the applicants are now ready to prosecute the
25 suit, thus it is not only just, but also equitable and in the interest of justice that this application is granted, and the matter is heard on its merits, since no one shall be prejudiced.

2nd respondent's reply.

The 2nd respondent opposed the application through his affidavit in reply
30 wherein he stated *inter alia* that the trial judge rightly dismissed the main suit since the plaintiff was not present to prosecute the matter and that because

the plaintiff was given a chance to prosecute his matter and he failed to utilize the same, it is in the interest of justice that this application is dismissed with costs to the 2nd respondent since the applicants did not take the necessary steps to prosecute the same.

5 The 1st and 3rd respondents did not oppose the application despite having been served with court process through their respective counsel as directed by this court.

Representation:

10 The applicant was represented by ***m/s Rwakafuuzi & Co. Advocates*** while the 2nd respondent was represented by ***m/s Pearl Advocates & Solicitors***. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

Consideration by court:

15 I have carefully perused the evidence, and read the submissions of counsel, the details of which are on court record, and which I have taken into account in determining whether or not this application demonstrates sufficient cause so as to warrant the grant of the prayers sought.

20 It is trite law that powers to set aside dismissal order are in the discretion of the court, however, the applicant should furnish sufficient reasons to enable the court exercise its discretionary power.

25 The courts have established various tests as to what amounts to good or sufficient cause to warrant the setting aside of a dismissal and reinstatement of a suit dismissed for want of prosecution. It is now a settled legal position that sufficient reason must relate to inability or failure to take a particular step in a matter.

30 In the case of ***Captain Phillip Ongom vs Catherine Nyero Owoto, SCCA No. 14 of 2001*** it was held that what amounts to sufficient cause includes a mistake by an advocate, illness of a party or advocate and ignorance of filing procedure by the party or their advocate. ***(See also Felix Tumbo Kisima vs TTCL Limited & Anor Civil Application No.1 of 1997; Miscellaneous***

Application No. 1371 of 2022 Patrick Mulondo versus Freight Forwarders)

In the case before me, it is the applicants evidence that the late Mutegeki John passed on in 2019 before **Civil Suit No. 0075 of 2016** was disposed of, and that although the process of obtaining the grant of letters of administration had been commenced as early as 2019, it was not completed until 29th March, 2022 when the grant was issued.

What is not clear however, is why the issue of death of the plaintiff was never brought to the attention of court, or why counsel did not proceed under the provisions of **Section 222 of the Succession Act** so as to obtain a grant for purposes of prosecuting the suit. This was clearly an oversight on the side of counsel who was well aware of the date of hearing for the matter but chose to sit back.

It is clear from the ECCMIS however that the applicant filed **MA NO. 1362 of 2022** for substitution of the applicants in place of Mutegeki John who died before the disposal of the main suit **HCCS 075 of 2016**.

As per letter dated 16th August, 2022 counsel for the applicants from the firm of **M/s Rwakafuuzi & Co. Advocates** wrote to the Deputy Registrar of this division, drawing the attention of this application that seeks the substitution of the name of the deceased with the names of the applicants.

The affidavit in support of that application was deponed by the 4th applicant, Mr. Mutaawe Patrick who averred that the letters of administration, which were attached to that application, had been issued to the applicants as joint administrators vide **HCT-00-FD-AC-0970-2021**, on 29th March 2022.

The said application was however never brought to the attention of this court so it remained pending. From the time the applicants' counsel wrote to court on 16th August, 2022 he never made any other follow up on the response from the Deputy Registrar.

It is now an established principle of law that a litigant's interests should not be defeated by the lapses of his counsel. In **Godfrey Mageze & Brian**

Mbazira vs. Sudhir Ruparelia SCC Application No. 10 of 2002 Karokora, JSC, it was held that the omission, mistake or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of his appeal there by denying him justice. In this instance, the failure to have the application
5 fixed was largely attributed to the failure by the Deputy Registrar to allocate it to the trial judge. The suit was dismissed before giving the applicants a chance to be heard in relation to the application.

In the premises, **Civil Suit No. 0075 of 2016** is hereby reinstated. Since the applicants were granted letters of administration this court would, in the
10 interest of justice and in exercise of its discretion, allow the substitution of the name of the deceased with those of the applicants; the applicants should then file the amended plaint within two weeks from the date of delivering this ruling.

MA NO. 1362 of 2022 has therefore been overtaken by events.

15 Each party to bear its own costs.

I so order.


.....

Alexandra Nkonge Rugadya

20 **Judge**

13th May, 2024.