



**Background;**

2. That on the 15<sup>th</sup> day of December 2022 Court fixed HCCS No. 14 of 2013 for hearing on the 6<sup>th</sup> and 7<sup>th</sup> day of February 2023 at 9:00am. Counsel for the Applicant informed Counsel for the Respondent who was not in Court that day about the said dates and time as fixed by Court.
3. However, Counsel for the Applicant informed the Applicant that the matter was fixed for 2:00 pm and they both appeared at Court at that time. To their dismay, they were informed that the matter was heard at 9:00 am and the same had been dismissed against them and an exparte judgement was entered in respect of the Respondent's counterclaim.
4. The Applicant seeks to have the order dismissing Civil Suit No. 14 of 2013 set aside, the exparte judgement and decree on the counterclaim be set aside and the Applicant be heard on her defence of the same and costs.

**Applicants' Evidence;**

5. The grounds of the application are contained in the affidavits in support of the application deposed by **AGUTI ROSE** the Applicant and **GILBERT NUWAGABA**, the Advocate in personal conduct, and are briefly that: -



- i) That the Counsel for the Applicant informed the Applicant that the matter was coming up on 6<sup>th</sup> February 2023 at 2:00 pm.
- ii) That the Applicant and her witness went to Court at 1:30 pm and met her Lawyer Gilbert Nuwagaba who asked them to wait at the reception as he went to talk to the clerk to the judge.
- iii) That he came back and informed them that he was mistaken as to the time and the matter had been called in the morning session and dismissed because they were absent.
- iv) That the failure to attend Court was due to the negligence and carelessness of Counsel who misconstrued the time for hearing and accordingly gave the applicant wrong information and as such mistake of counsel should not be visited on her.

***Counsel Gilbert Nuwagaba's evidence.***

- i) That on 15<sup>th</sup> December 2022 when the matter came up for hearing I was indisposed and I requested Mr. Wacha Moses to appear on my brief and take Court Directions.
- ii) That Mr. Wacha Moses communicated the directions as received from Court onto Counsel for the Respondent who was not in Court that day. That I also called the Applicant and informed her that the matter was to be heard on 6<sup>th</sup> February 2023 at 2:00pm.

- iii) That due to the mix up with other cases in my diary I inadvertently informed the plaintiff/ applicant that the case was to be heard at 2:00pm and omitted to record the time in my diary.
- iv) That on 6<sup>th</sup> February 2023, I had a matter before the chief Magistrates Court of Mpigi and another at High Court Civil division with an honest belief that the Applicant's matter was to be heard at 2:00pm.
- v) That after dismissing the plaintiff's case, the defendants' counter claim was heard and determined exparte yet we believed that it had been dismissed too.
- vi) That the Respondents ought to have served our firm with witness statements and notified us about the hearing.

**2<sup>nd</sup> Respondent's evidence;**

6. The 2<sup>nd</sup> Respondent opposed the application by filing an affidavit in reply deposed by **BEN KAVUYA** and briefly states as follows;

- i) That on 6th February 2023, when the matter came up for hearing, neither the applicant nor her advocates were present in court. As a result of the non-attendance, the applicant's case was dismissed.



- ii) And on 7<sup>th</sup> February 2023, when the matter came up for hearing the counter claim, the Applicant and her Advocate did not attend Court.
- iii) The Court proceeded to hear and determine my counter claim and on the 28<sup>th</sup> day of February 2023, this Honourable Court delivered judgement in my favour.
- iv) That my Lawyers issued a notice requiring the Applicant to vacate the suit land as was ordered by Court but the applicant did not comply hence my lawyers filed an application for execution vide Misc. Application No. 241 of 2023. Court issued a notice to show cause why execution should not issue and the Applicant was served twice but did not appear.
- v) That from 6<sup>th</sup> February 2023 to August 2023, the Applicant did not take any steps to reinstate her case.

**Representation;**

7. The Applicants was represented by Mr. Wacha Moses of M/s KGN Advocates whereas the Respondents was represented by Asimwe Chrispus of M/s Mwesigwa Rukutana & Co. Advocates. The parties filed written submissions which I have considered during the determination of this Application.



**Issues for determination;**

8. The parties did not frame issues in their submissions but this Court has considered the pleadings and the submissions and hereby raised issues for proper determination of this application in accordance with **Order 15 Rule (1)(5) of the Civil Procedure Rules** as follows;

- i) Whether the order dismissing HCCS No. 14 of 2013 should be set aside?**
- ii) Whether the exparte judgement and decree on the counter claim in HCCS No. 14 of 2013 should be set aside?**

**Resolution and determination of the issue;**

**Issue one**

**Whether the order dismissing HCCS No. 14 of 2023 should be set aside?**

10. Section 98 of the Civil Procedure Act empowers Court to make such orders as may be necessary for the ends of justice and also Order 9 rule 23 of the Civil Procedure Rules SI 71-1 vests Court with power to set aside a dismissal where sufficient cause has been shown.

11. That the Applicant must satisfy that there was sufficient cause for non-appearance and such cause must relate to the failure to take

necessary steps at the right time **(See NIC V Mugenyi & Co Advocates [1987] HCB 28)** and must not be guilty of inordinate delay or any dilatory conduct.

12. Sufficient cause is defined to mean an expression which has been used in a large number of statutes. That the meaning of the word sufficient is adequate or enough in as much as may be necessary to answer all purposes intended. Therefore, the word sufficient embraces no more than that which provides a platitude which when the act is done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. **(Gideon Mosa Onchwati v Kenya Oil Co. Ltd & Anor [2017] KLR 650 and Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers Society & Anor MA No.696 of 2018).**

13. In the instant Application, The Applicant with her witness Alice Okiro came to Court at 2:00pm as communicated by Counsel only to be informed that the case was called at 9:00 am and in their absence the same was dismissed.

14. I find this to be an issue of miscommunication since Counsel for the Applicant (GILBERT NUWAGABA) thought the matter was fixed at



2:00pm and not 9:00am and that's the communication he passed on to the litigant.

15. It is trite law that parties are not visited with punishment arising from the mistake or inadvertence or negligence of Counsel when the mistake or inadvertence or negligence is in respect of procedural matters in which case, the Court would lean towards accommodating the parties' interests without allowing mere procedural irregularities brought about by Counsel, to preclude the determination of the case on its merits. The Court must however be satisfied that the allegation of inadvertence of Counsel is true and genuine. ( Edirisa Kanonya & Anor v Asuman Nsubuga & 3 others MA No. 373 of 2022)
16. The Applicant was ready and willing to prosecute that case and that's why on that particular day she appeared with her witness had it not been a miscommunication of time which was entirely the mistake of Counsel and the same cannot be vested on the litigant.
17. However, this Court finds that since 6<sup>th</sup> February 2023, when the Applicant got to know about the order dismissing the case and this particular application was filed in August 2023.
18. I find the Applicant guilty of inordinate delay or dilatory conduct. It is a common celebrated principle that delay defeats equity. The





Respondents have long started the execution process vide Execution Miscellaneous Application No. 241 of 2023 and the Applicant was duly served with a notice to show cause twice but did not heed to any.

19. The Applicant ought to have filed her Application to set aside the dismissal order as fast as she heard about the dismissal order. Furthermore, the Applicant raises an issue of mistake of Counsel but she still goes ahead to instruct the same lawyers to bring this Application, I find this rather disturbing to digest. On that ground, I find that setting aside the dismissal order is over taken by events since the suit already proceeded to its final stages and thus this issue fails.

## **Issue Two**

### **Whether the exparte judgement and decree on the counter claim in HCCS No. 14 of 2023 should be set aside?**

20. A counter claim has the effect of a cross action. It is an independent suit. A counter claim enables Court to pronounce a final judgement in the same action where the counter claim can be conveniently disposed of **(Otto Justine v Tabu Richard & 7 others HCCA No. 23 of 2015)**.
21. Suffice to say, counterclaims have an independent status and it can continue despite the dismissal of the primary suit.

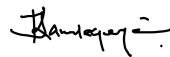


22. In the instant application, the hearing of the counter claim had been fixed for 7<sup>th</sup> February 2023, however the Applicant and her Counsel still made no Appearance.
23. Counsel for the Applicant avers that the respondents ought to have served him with the witness statements and informed him of the date for the hearing of the counter claim.
24. Counsel ought to have known best that a Counter claim is an independent suit and accordingly followed up the matter. It was well within his knowledge that the matter had been fixed for hearing for two days that is 6<sup>th</sup> and 7<sup>th</sup> of February 2023. He ought to have appeared at Court on the 7<sup>th</sup> and followed up in case of any action on the same matter.
25. From the 6<sup>th</sup> of February 2023, the Applicant sat on her rights until August 2023 when she was inconvenienced by the execution process and hence filed this application.
26. I find that setting aside the exparte judgement and decree on the counter claim in HCCS No. 14 of 2023 is rather inconsequential since Court doesn't operate at the convenience of litigants and the same Courts will not deny parties justice who have done all the necessary steps to

enjoy the fruits of justice. The Applicant's conduct paints Court with a picture that it's because of inconvenience caused by the execution process that she comes to Court today hence this issue fails as well.

27. It is to the finding of this court that this application lacks merit and is hereby dismissed with costs of the application provided to the Respondents.

**I SO ORDER.**



**NALUZZE AISHA BATALA**

**JUDGE**

**12/02/2024**