

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

**MISC. APPLICATION NO. 367 OF 2011**

**ARISING FROM CIVIL SUIT NO. 186 OF 2011**

**KALYESUBULA FENEKANSI.....APPLICANT/PLAINTIFF**

**VERSUS**

- 1. LUWERO DISTRICT LAND BOARD**
- 2. NAKANDI JESCA KISUZE**
- 3. LT. KADDU JOHN.....RESPONDENTS/DEFENDANTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application by Notice of Motion brought under Order 9 rule 23, Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act for orders that:-

- i) The dismissal of the Applicant's case vide Civil Suit No. 186 of 2008 be set aside and the same be re instated and heard on merit.
- ii) Costs of the application be in the cause.

The grounds of the application are contained in the affidavit of **Kalyesubula Fenekansi** the Applicant which are briefly that:-

- a) On the 28<sup>th</sup> day of May 2008 the Applicant filed a main suit against the Respondent in the above suit and he subsequently followed up his case with his lawyer and duly attended court on various dates including his last court attendance on 25/11/2009 when he last appeared before Hon Justice Anna Magezi and the case was fixed for hearing on 26<sup>th</sup> and 27<sup>th</sup> April 2010.
- b) On the 26<sup>th</sup> day of April 2010 the Applicant prepared himself for the hearing of the case and moved to his lawyer's chambers at about 8 am ready for the hearing but his lawyer informed him that the trial Judge was retiring and the case was not to be heard until another Judge had been allocated the file.

- c) The Applicant personally moved to the court premises to ascertain for himself whether his case was going to be heard and confirmed that the Judge was going to hear the case on that day.
- d) On the 3<sup>rd</sup> day of May 2010, the Applicant's lawyer Mr. Ambrose Tebyasa wrote to the Registrar of this honourable court for the re allocation of the file as per copy of the letter annexed to the affidavit in support.
- e) The Applicant's lawyers and clerk made several attempts to have the files re allocated and fixed for hearing but the Registry staff that would be notified once the file had been re allocated and fixed for hearing.
- f) Unknown to the Applicant and his lawyers, the case was finally re allocated and fixed for hearing but the Applicant and his lawyer were never notified and or served with any hearing notices on any of the occasions the case came up.
- g) The Applicant has never lost any interest in the case and it is in the interests of justice to have the dismissal set aside and have the case heard on merit and all the issues in controversy determined on merit.

All the three Respondents did not file any affidavit in reply though they were served with the application between June and July 2011 and each acknowledged service by endorsing on the same. There is an affidavit of service to that effect and the endorsed copies of the application are filed on the court record. The hearing notices of the application were also served on all the three Respondents. Though Counsel Turyakira for the 1<sup>st</sup> Defendant/ Respondent and Counsel Ntambirweki for the 2<sup>nd</sup> Defendant/Respondent indicated that they have other obligations on that day they nevertheless had not filed any affidavit in reply to the application yet a very long time had passed since they were served with the application. In the premises, for reasons that will be given at a later stage in this ruling, The Applicant was allowed to proceed *ex parte* by filing written submissions on the application.

In his submissions, learned Counsel for the Applicant, Ambrose Tebyasa, relied on the evidence as deponed to in the affidavit in support by **Kalyesubula Fenekansi** the Applicant. The Applicant's evidence, as can be gathered from the said affidavit and its annexures, is that the Applicant filed the main suit in 2008. He subsequently attended court on various days, the last being on 25/11/2009 when he appeared before Hon. Lady Justice Anna Magezi and the case was fixed for hearing on 26<sup>th</sup> and 27<sup>th</sup> April 2010. The Applicant did appear in court on 26<sup>th</sup> April 2010 to prosecute his case only to find that the Judge was not going to hear his case that day. He then requested his Lawyer Ambrose Tebyasa to ensure that the case was re allocated to another Judge for expeditious hearing. On 3<sup>rd</sup> May 2010 the Lawyer wrote to the Registrar to have the file re allocated (Annexure **A**). He moved to court several times with his Lawyer inquiring about the file but he was informed at the court registry that the file could not be located. He was later told that the case had been dismissed in March 2011. His Lawyer wrote to

court (Annexure B) complaining about the file and the same was subsequently traced on 23/5/2011. When they perused the court record with his Lawyer they indeed found that the case had been dismissed after coming up for hearing in court three times. He or his Lawyer had never been notified of the hearing dates. He has never lost interest in the case and in the interests of justice he wants it to be heard on the merits.

I have perused the court record as well as the application and its supporting affidavit, including all its annexures.

On the issue of not filing a defence, in this case an affidavit in reply to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that:-

*“Where the time allowed for filing a defence...has expired and the Defendant...has... failed to file his or her defence(s), the Plaintiff may set down the suit for hearing ex parte.”*

There are court decisions to the effect that in such circumstances, the Defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37** court held that since the Appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**. This was the reason the case proceeded *ex parte*. However, whether a suit proceeds *ex parte* or not, the burden of the Applicant to prove his/her case on the balance of probabilities remain.

Order 9 rule 10 of the CPR is to the effect that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations. See **Agard Didi V James Namakajjo HCCS No. 1230 of 1988; Tindimwebwa Naris V Mutebi Salim HCT - OO - CV - 0057** unreported. In the instant application, the facts as stated on oath by the Applicant have neither been denied nor rebutted by the Respondents. On the authority of **Samwiri Massa V Rose Achieng [1978] HCB 297; Makerere University V St Mark Education Institute Ltd & Ors HCCS 378 of 1993 [1994] KALR 26; Eridadi Ahimbisibwe V World Food Programme & Ors [1998] KALR 32; Nakityo Miriam & Ors V Jackson Muleele & 7 Ors. HCT - OO - CS - 0052 - 2008 [UGHC] 128**, the facts as adduced in the affidavit evidence of **Kalyesubula Fenekansi** the Applicant is neither denied nor rebutted are presumed to be admitted.

Order 9 rule 23 of the CPR states as follows:-

*“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 court that there was sufficient cause for non appearance when the suit was called 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."* (emphasis mine).

The affidavit evidence adduced by the Applicant stands unchallenged and uncontroverted. The Plaintiff did not appear in court on the scheduled days because he was not served with hearing notices of the case and at all material times he and his Lawyer were under the impression that the file could not be located. Unknown to the Applicant and his Lawyer the file was re allocated and eventually called for hearing without them appearing to prosecute it. In my opinion this amounts to sufficient cause for their non appearance to prosecute the case.

In the premises and on the foregoing authorities, I am satisfied that the Applicant has proved the grounds of his application against the Respondent. I therefore allow this application for the following orders as prayed:-

- i) The dismissal of the Applicant's case vide Civil Suit No. 186 of 2008 is set aside and the same is re instated to be heard on merit.
- ii) Costs of the application will be in the cause.

**Dated this 15<sup>th</sup> day of December 2011.**

Percy Night Tuhaise

**JUDG E.**