THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-CV-CS- 247-2015

NARENDRAKUMAR V. PATEL ::: PLAINTIFF

VERSUS

1. **MUTENDERWA FADDY**
2. **KISAMO JONATHAN**
3. **KISAMO WILBER:::DEFENDANTS**

Preliminary Points of Law

Held-*Preliminary Points of Law overruled and suit to be heard to its logical conclusions on conditions set forth in this Ruling.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

RULING

This Ruling follows a Preliminary Point of Law raised by learned counsel for the Defendants Mr. Gregory Byamukama that the matter before court be dismissed under **Order 17 rule 44 of the Civil Procedure Rules S1 71-1, CPR (as amended)** for failure by the Plaintiff to prosecute his case and present his evidence.

REPRESENTATION

When this matter came for hearing before me, learned Counsel Mr. Juma Noah Oundo of M/S. Arcadia Advocates, while learned counsel Mr. Gregory Byamukama for M/S. Kian Associated Advocates was for the 1st Defendant.

THE LAW

Order 17 Rule 5 of the Civil Procedure Rules (as amended) provides that;-

*"**4 Amendment of Order XVII.***

The principle Rules are amended in order XVII by substituting for ruled 5 and 6 the following-

"5. Dismissal of the suit for want of prosecution.

(1) In any case , not otherwise provided for, in which no application is made or step taken for s period of six months by either party with a view to proceeding with the suit after the mandatory scheduling conference, the suit shall automatically abate; and

(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".

BACKGROUND

The background according to learned counsel for the 1st Defendant is that the Plaintiff filed the instant suit against the Defendants for recovery of money in the year 2015 and when the matter came up for hearing 13/03/2023 nearly 8 years later Court vehemently reprimanded counsel for the Plaintiff and Counsel for the 1* Defendant on the progress of the suit as save for filing Pleadings and a few adjournments nothing had been done to further the hearing of the matter.

That Court reluctantly issued the parties with Orders (schedules) to file Witness Statements and trial bundles and also file a Joint Scheduling Memorandum by the 28/03/2023 and fixed the matter for hearing for 6/06/2023 without fail. Court proceeded to Order the Plaintiff counsel to ensure that service of the schedules and hearing notices is effected on the 2nd and 3rd Defendants.

That on the 15/03/2023, they sent an email to Counsel for the Plaintiff to share the draft JSM for their input and despite not having a response from the Plaintiff's Counsel, the 1st Defendant proceeded to file his witness statement and Trial Bundle so as the comply with the Orders of Court. (**A copy of the email sent to counsel Noah is hereto attached marked A).**

EVENTS OF 6/6/2023

That on the 6/6/2023 Plaintiff Counsel simply prayed for an adjournment on the basis of the absence of the 2nd and 3rd Defendants he had not served and didn't even bother to pray for enlargement of time to his the Plaintiffs witness statements.

They fervently opposed the prayer by counsel of the Plaintiff for an adjournment and prayed that the instant suit be dismissed with costs for disobedience of Court Orders and failure of the Plaintiff to prosecute his case under **Order 17 rule 4 of the Civil Procedure Rules** as the Plaintiff had

failed to avail his evidence despite being given time to do so. Court Proceeded to fix the matter for a Ruling on 13/06/2023.

Unfortunately, the court recordings for the proceedings for 06/O6/2023 were lost and court directed that we reiterate our oral submissions in writing for court's consideration and reserved the Ruling for 13/O7/2023.

On the other hand, the background according to learned counsel for the Plaintiff is that the Defendants are dishonest and devious people who took money from the Plaintiff in the pretext of selling to him land and failed and or refused to deliver the land to the Plaintiff. The factual background can be written as follows:

That the Plaintiff advanced money to a tune of UGX 152,178,000 (Uganda Shillings One Hundred Fifty-Two Million One Hundred Seventy-Eight Thousand) to the Defendants. The money was to facilitate the purchase of 25 Acres of land at Mutai Namakoko, Kagoma Parish, Buwenge Subcounty, Kagoma County, Jinja District and delivery of vacant possession of the same. The Defendants however did not deliver the land which they purported to sale to the Plaintiff. The Plaintiff then filed **Civil Suit No. 247 of 2015**, for the recovery of UGX 152,178,000 (Uganda Shillings One Hundred Fifty-Two Million One Hundred Seventy-Eight Thousand) being money had and received from him by the Defendants.

In reply to the events of 06/06/2023 are that the 1st Defendant has chosen to deliberately misrepresent the proceedings of 06/06/2023: That when the matter came up for hearing on the 06/06/2023, the Plaintiff's counsel requested for an adjournment to enable him comply with the Court's directions to file and serve a witness statement and trial bundle on the account that the Plaintiff was indisposed due to a chronic illness and on the account of the absence of the 2nd and 3rd Defendants. The 1st Defendant opposed the adjournment and further made an application to dismiss the suit on account of disobedience of court orders.

That the proceedings for 06/06/2023 were not lost as the 1st Defendant has represented in his submissions, the learned Trial Judge communicated to the parties and counsel that the proceedings of that day were so faint as such nothing would be discerned from them and that the state of events impeded the Judge from completing her Ruling. It is on that basis that the Judge requested the parties to file the written submissions addressing the Court on the issues which the Court was concerned with on the 06/06/2023.

Further, that it is not entirely true that the Plaintiff's counsel prayed for an adjournment on the basis of the absence of the 2nd and 3rd Defendants. The Plaintiff's counsel informed court that he had personally set out to serve the 2nd and 3rd Defendants and that the 2nd Defendant could not be found while the 3rd Defendant had contacted him and said that he was unable to come to Court because he had an accident and was admitted in Kamuli Hospital.

That Counsel further informed Court that the Plaintiff who was in India had developed a Cardiovascular chronic illness which prevented him from providing documents and executing a Witness Statement. It is on this basis that a prayer for adjournment was premised.

That the 1st Defendant's counsel resisted the Plaintiff's prayer for adjournment that there was no evidence of the Plaintiff's illness, nor an affidavit of service to explain the absence of the 2nd and 3rd Defendants and hence the Plaintiff's prayer for adjournment should not be granted. Before the Honourable Court would rule on the Plaintiff's prayer for adjournment, the 1st Defendant's Counsel additionally raised a Preliminary Point that the Plaintiff was had not filed his Witness Statement and Trial Documents as had been directed by the Court. On that basis, they prayed for a dismissal of the suit.

The primary questions at the time in court were:

a) Whether the Plaintiff should be granted an adjournment to file the witness statements and trial bundle?
b) Whether the Plaintiff's suit should be dismissed for disobedience of Court directions to file a witness statement and trial bundle.

They urged the Court to keenly look at the written notes of the Judge and dispel the blatant misinformation which the 1st Defendant has chosen to proliferate in his submissions.

Issue

The only issue for determination herein is whether the Plaintiff has proved sufficient cause to hear the merits of the case in **Civil Suit No.247 of 2015?**

RESOLUTION

Whether the Plaintiff has proved sufficient cause to hear the merits of the case in Civil Suit No.247 of 2015?

It was submitted by learned counsel for the 1st Defendant that on 6/06/2 023 Counsel for the Plaintiff informed court that he had allegedly served the 2nd and 3rd Defendants as ordered by this court but that one of them had gotten an accident and that both couldn't attend the hearing.

That counsel also further informed court that the Plaintiff was sick and out of the country. There was however no proof of service of the 2nd and 3rd Defendants (as it is trite law that proof of service is only by way of an Affidavit of service) nor was there any medical or travel documents availed to court to persuade court on the whereabouts of the Plaintiff. That the said averments were clearly lies from the bar intended to further waste courts time. To make it worse, nearly 3 months after court ordered the Plaintiff to file witness statements and a trial bundle, the Plaintiff had filed nothing or refused to do so for a matter that has been the judicial system for the last 8 years.

Further, that as mentioned earlier Court issued "an Order" that the parties file a Joint Scheduling Memorandum by 28/03/2023, and that the Plaintiff files his Witness statement and Trial Bundle by the same date (28/03/2 023) and the Defendant by the 14/03/2023 and that 2nd and 3rd Defendants be served. That just a few hours to the hearing scheduled for 6/06/203 on the 5/06/2023 at midday we received an Email from counsel for the Plaintiff wherein he shared a "scanned PDF formatted" draft JSM with only agreed facts to which they requested him to share one in word format, but blatantly refused.

That this clearly shows the Plaintiffs were hell bent on frustrating the hearing of the matter. (**A copy of the Emails and the draft JSM is hereto attached marked B and C respectively).** That the failure to comply with the filing of a JSM (despite being requested by opposite counsel), service of the 2nd and 3rd Defendants and failure to file witness statements are clear violations of clear and direct court orders that cannot be taken lightly and for that reason that the suit ought to be dismissed with costs. They cited the Court of Appeal ***Civil Application No.109 of 2004 - Amrit Goyal v Harichand Goyal and 3 others***, while faced with similar facts, the Court of Appeal held that;

"*A Court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart of all judicial systems.*"

That in the above-mentioned case, the Court of Appeal allowed the prayer to dismiss the Appeal for disobedience of court orders as the party at fault failed to take an essential step like it is the case before you.

In addition, that what is rather disturbing is that it was the Plaintiff who brought the Defendants to court, it was therefore in the Plaintiff's interest that the matter is heard. **Order 8A r 5 of the Civil Procedure Rules (as amended)** has a mandatory requirement that where the court orders Witness Statements to be filed, on a particular date, then the deadline must be complied with. That it is true that the Parties were given a schedule within which they were to file witness statements. That the filing of Witness Statements is regulated by **Order XVll rule 5 of the Civil Procedure Rules (as amended).**

Sub rule (6) of the Rule 5A of Order XVll stipulates that Witness Statements shall be filed on the date fixed by the trial Judge. This is in tandem with **Order XVll rule 4** which provides;

"*Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately*".

That it's on the basis of the above provisions that they pray that court proceeds to determine the matter immediately by dismissing the suit for failure of the Plaintiff to avail his evidence after being giving time to do so and for being in disobedience of a Court Order. They cited the case of ***Balaba Robinah & Anr. v Hussein Mohamad & Registrar Land Registration, Civil Suit No. 109 of 2017*** learned J. Michael Elubu while at Jinja on 12/9/2019 held that;

"*It is true that the parties were given a schedule within which they were to file witness statements. As it stands the Plaintiff didn't comply with the order of court giving directions on how evidence shall be adduced in this matter. It is trite law that court orders must be complied with unless varied or set aside... This court therefore finds and holds that the Plaintiff have failed to produce their evidence after being given time to do so and shall therefore proceed, under Order XVIĨ rule 4 to decide the matter by dismissing the Plaintiffs case with costs*."

In conclusion, they argued that the instant case has been in the judicial system for over 8 years and cannot no longer be allowed to be the judicial

statics as an on-going file yet it has even never been scheduled. They therefore prayed that you be pleased to follow the above precedents and dismiss the instant case for disobedience of a court order to file Witness Statements and Trial Bundle as explained above.

In reply, it was submitted for the Plaintiff that Counsel for the Plaintiff that when the matter came up on the 6th June 2023, the Plaintiff's Counsel Mr. Omollo prayed for a short adjournment to enable the Plaintiff explore alternative means to adduce his evidence. That it is notable that this Honourable Court did not rule on the Counsel's prayer for the adjournment and reserved the point for its ruling.

Further, that the Plaintiff's chronic illness constitutes and was sufficient reason for the Plaintiff to seek an adjournment on the 6th June 2023 when the matter came for hearing; and that adjournments are provided for under **Order 17 Rule 1 &2.** The rule is couched as follows:

“(1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the court shall fix a day for the further hearing of the suit, or may adjourn the hearing generally and may make such order as it thinks fit with respect to the costs occasioned by that adjournment;

That the import of the above provision is that an adjournment will be granted for sufficient cause. They relied on the case of ***The Registered Trustees of the Archdiocese of Dar es Salaam v the Chairman Bunju Village Government& others***, where Court ably held in quoting ***Mosa Oncwati v Kenya Oil Co. Ltd & Another [2017] KLR*****,** that;

"*It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence is imputed*. "

That in ***Star Mineral Water and Ice Factory (1961) E.A, 454*** cited in the Supreme Court decision of ***Captain Phillip Ongom vs Catherine Nyerowoota, SCCA No. 14 of 2001***, illness by a party constitutes sufficient cause.

That on the 6th June 2023, the Plaintiff's counsel sought an adjournment, it was on grounds that the Plaintiff was sick and thus unable to complete his Witness Statement or to appear in person or to produce documents to be put

in his trial bundle in compliance with **Order 18 Rule 5A of the Civil Procedure Rules**. Although Proof of the Plaintiff's sickness was not readily available at the time of the hearing, it has since been placed on the record of the Court in an Affidavit deponed by Juma Noah Omollo **(A copy is attached hereto and marked as "PA ").**

That the Plaintiff has in fact already complied with the directions of the Court and filed his Witness' Statement, his Trial Bundle and Scheduling Memorandum. He has also served the same on the 1st Defendant even if the 1st Defendant has not served his documents on the Plaintiff.

They therefore submitted that there was/is sufficient reason for the court to grant an adjournment for the Plaintiff to file his Witness Statement and Trial Bundle and in any case, since they have been filed already, there is sufficient cause for this Honourable Court to admit the Plaintiff's pre-trial documents and proceed to set down the suit for hearing.

ISSUE 2: WHETHER THE SUIT OUGHT TO HAVE BEEN DISMISSED?

The Plaintiff also submitted that the 1st Defendant has not made any case warranting the dismissal of the Plaintiff's suit and the allegations of delay in prosecuting the suit cannot be blamed on the Plaintiff, but on the Defendants themselves; and rebut their premise in detail as follows:

Further, in countering the Plaintiff's prayer for adjournment, the 1st Defendant prayed that the court should dismiss the Plaintiffs suit for non-compliance with Court Orders. That the 1st Defendant hinged his prayer on the present case's delay. He further stated that the Plaintiff had not filed his Witness Statement and Trial Bundle as directed.

Delay in hearing the case

They contended that the 1st Defendant submitted that the hearing of the Plaintiff's case has delayed. Whereas that is true, it is not true that the delay in hearing of this suit has been occasioned by the Plaintiff. That the delay in hearing this case has at all times been occasioned by the Defendants. That when the suit first came up, it was subjected to Compulsory Court Mediation as evidenced by the record, the entire pre-trial discourse was abused by the Defendants critically contributing to the delay of the case as follows:

That on the 1st March 2016 when the case was first fixed before the Registrar, only the Plaintiff attended, without reason, the Defendants were not available. The matter was adjourned. On the adjourned date, the 24th March 2016, all the parties were present and the Plaintiff was represented by

Mr Kinyera Jordan, the 1st Defendant was unrepresented and the 2nd & 3rd Defendants were represented by MS. Esther Adikini. The Defendants had not complied with the Court orders to file their Mediation notes and summaries and an adjournment was given.

On the adjourned date of 21st April 2016, the 2nd and 3rd Defendants were not present. The Plaintiff and 1st Defendant were present but the Defendants had not complied with the requirements to file mediation notes as ordered by the Registrar the previous hearing. The matter was consequently again adjourned.

On adjourned date June 2016, the Plaintiff attended and was represented by Mr. Justus from Arcadia Advocates, the Defendants had still not complied with the directions of the registrar to file mediation notes and the matter was adjourned.

On the 1st December 2016 when the matter next came up and upon the Plaintiff noticing that there was no progress with the mediation, the Plaintiff requested the Registrar to close the mediation and forward the matter to the Judge for hearing. On the first date of the hearing, 24th January 2017, the case came before the Registrar because the Judge was absent. Again, the Defendants didn't come to court.

Further, that the Mediation Report was not ready and on the above account, the case was adjourned. On the 10th August when the case came for mention, the Plaintiff was represented by Mr. Henry Nyegenye and there was an affidavit of service filed on the record showing that the Defendants had been served, but the Defendants were not present. In the interest of disposing off the case inter-parties, the suit was adjourned again on the account of the Defendants.

On the 10th June 2019 when the case came up, again, the Plaintiff was represented by Mr. Henry Nyegenye and the Defendants were not represented. The matter did not take off again because of the Defendant's' own doing.

That on all the above dates, the Plaintiff diligently attended to his case. The only reason there were numerous adjournments was because of other factors not of his own making including the absence of and non-compliance of the Defendants themselves. That in fact, after the COVID 19 Pandemic which further delayed the case, the Plaintiff fixed the case promptly. **(See letter dated 7th December 2021 and 29th August 2022)** demonstrating his diligence in prosecuting the suit.

They prayed that this Honourable Court finds that there was no delay caused by the Plaintiff in prosecuting this matter. That any delays were instead caused by the Defendants; and the 1st Defendant should not be allowed to benefit from delays which he has partly caused.

Order 17 Rule 4 of the Civil Procedure Rules SI 71-1

They claimed that the 1st Defendant states that the plaintiff failed to prosecute his case as per **Order 17 rule 4 of the Civil Procedure Rules**. Suffice to note that this point was not raised during the hearing on 6/06/2023 and it is therefore an afterthought.

Be that as it may, they submitted that it is not true that the Plaintiff has failed to prosecute its case as the 1st Defendant wants this Honourable Court to believe. That on the 6/06/2023 when the Court convened, the Plaintiff was represented. The Plaintiffs advocate explained that the Plaintiff had not executed and served a witness statement and trial bundle because he is nursing a chronic illness (evidence of the illness has since been filed on the court record- See Afidavit marked **"PA")**; he then requested Court for a short adjournment to allow time for the Plaintiff to file the required documents.

Further, as shown above, that the Plaintiff has always been available and taken steps to prosecute his case and there is no single incident where his advocates have failed to attend to Court. Thus far, adjournments and delays have been occasioned by events other than those of the Plaintiff's doing.

In fact, that the Plaintiff has also filed an Application **Miscellaneous Application No. 149 of 2023** in order for this Honourable Court to allow and regularize the Plaintiff's Trial Bundle, Witness Statement and Scheduling Memorandum. The Application has already been fixed and served on the Defendants.

They submitted that considering the manner in which the Plaintiff has been conducting himself in the present suit, there is no evidence of a failure to prosecute the Plaintiff's case and as such **Order XVII Rule 4 of the Civil Procedure Rules SI 71-1** cited by the 1st Defendant is not applicable. The Plaintiff's conduct is demonstrative of the willingness to prosecute his case. The Plaintiff sickness is an inadvertent event which should not be manipulated by the 1st Defendant to cast the Plaintiff in bad light.

Compliance with Time Limits set by the Court

The Plaintiffs claimed that the 1st Defendant has submitted that the Plaintiff has not complied with the time limits set by the Court's directions and as

such his suit should be dismissed; unabashed, the 1st Defendant has not fully complied with the Court's directions too as he has not served his Witness Statement or Trial Bundle nor made an input in the Scheduling Memorandum within the time limits set by the Court.

They submitted that having not fully complied with the Court's directions and time limits to0, the Plaintiff cannot invoke this Court's discretionary power to dismiss the Plaintiff's suit. That the Plaintiff, albeit belatedly has complied with the Court's directions given on the 6th June 2023 and filed and served the Plaintiff's Witness Statement and Trial Bundle hence it is just and equitable for the hearing of the case to be continued, unlike the 1st Defendant who has not fully complied with the Court's directions. Whereas the 1st Defendant claims to have filed his Trial Bundle and Witness Statement, he deliberately refused to make an input in the Scheduling Memorandum up to date.

Further, that he has not served any of his documents which was part of the directions of the Court; suffice to note that the dismissal of a suit when the Plaintiff fails to strictly comply with court's direction to file a Witness Statement is not a statutory remedy but a discretionary remedy left to judicial discretion. Being a discretionary remedy, the Court is enjoined to order that the hearing of the case proceeds if such a course would be equitable and just for the case.

They therefore submitted that dismissing the present suit on the motion of the 1s Defendant where he himself is guilty of non-compliance of court directions would be unjust and unequitable since the 1st Defendant has sought a discretionary remedy with unclean hands.

Further, that dismissing the suit will permanently preclude the Plaintiff from having his dispute resolved which would result into the unjust enrichment of the Defendants let alone impinge on the Plaintiff's right to be heard.

They argued that a similar prayer for dismissal was made in the case of ***Elimu John v. Akello Helen Misc. Appln No 0152 of 2018*** and the Court used its discretion to allow the appeal to be fixed for hearing despite the Appellant's delay in compliance with the Court's orders and time limits. The judge among other things considered whether the Defendants were at fault and whether there was sufficient reason for the delay. The Court also considered that there is a need to hear a case inter- parties and give the parties a second chance to present their cases.

That in the case of ***The Executrix of the Estate of the Late Christine Tebajjukira & Anor v. Mary Namatovu & Anor SCCA NO, 8 OF 1988,*** the Supreme Court also had the occasion of considering whether the Appellant's appeal should be struck out for non-compliance with the timelines set by the Court and in the law. The Court stated as follows:

"I agree with what George C.J. said in Essaji v Solanki (supra) that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights."

They reiterated in their submission that the 1st Defendant is at fault for delaying the present case and that the Plaintiff has sufficient reason for the delay in complying with Court's directions; and urged this Honourable Court to follow the position in the ***Elimu Case (Supra) and Executrix of the Estate of the Late Christine Tebajjukira Case (Supra).***

Further that the decision of ***Amrit Goyal v Harichand Goyal & 3 Others Civil Application No.109 of 2004*** is deliberately cited out of context by the 1st Defendant. The facts in that case are different and the context is which the law is applied is different from the present Context. In the Arit Case, depositing of security was a condition precedent to the hearing of the case while the filing of witness statements in not a condition precedent in hearing cases and the Court can proceed without the witness statements.

That on the strength of the above submissions, prayed that this Honourable Court dismisses the 1st Defendant's claims in respect of the second issue, admits the Plaintiff's documents and sets down the suit for hearing.

The Sharing of the Joint Scheduling Memorandum

That in his background, the 1st Defendant has made a total misrepresentation of the facts regarding the sharing of a Joint Scheduling Memorandum; and submitted that the delay in concluding the Joint Scheduling Memorandum was occasioned by the 1st Defendant's Counsel himself. That when the suit came up for hearing on the 15th March 2023, Mr. Juma Omollo told court that the Plaintiff had put together a draft Scheduling Memorandum. Court directed that the same be forwarded to the Defendants and the parties conclude a Joint Scheduling Memorandum before the next hearing date.

That when Mr. Omollo gave the Draft Joint Scheduling Memorandum to the 1st Defendant's Counsel, Mr Byamukama Gregory the 1st Defendant's counsel rejected it and asked Mr. Omollo to give him a soft copy. That on Mr. Omollo's own volition, he forwarded the soft copy PDF of the Joint Scheduling Memorandum to the 1st Defendant's lawyer Mr. Gregory Byamukama by e-mail. The 1st Defendant's lawyer responded by requesting a soft copy in a format which Mr. Omollo didn't have. Mr. Omollo expressed himself about the lack of a DOC format and asked him that if he couldn't edit the PDF Doc, then he would offer to edit it for Mr. Gregory. Mr. Gregory was adamant. He then deliberately refused to make a contribution to the Joint Scheduling Memorandum. (See the e-mail correspondence trail attached and marked "PB'").

That in fact as of to date, the only Scheduling Memorandum filed on the Court record is a Plaintiff's Scheduling Memorandum and this is so because the Plaintiff cites the 1st Defendant's adamant conduct towards making a contribution to the earlier draft Joint Scheduling Memorandum. **(A copy of Plaintiff's Scheduling Memorandum is attached as "PC").** The purported copy of the e-mail marked A" and attached to the 1st Defendants submissions is unknown to the Plaintiff as that e-mail was never ever received by their Mr. Omollo.

In the premises, they argued that the 1st Defendant should not be allowed to benefit from his own relapse. He declined to make a contribution to the Joint scheduling memorandum and he cannot seek to make the Plaintiff pay for his adamancy.

Turning to Remedies, they submitted that in order to persuade the Honourable court cited the case of ***Balemesa v Mugenyi Yesero [2021] UGHCCD 108*** the court noted that as a foundational principle of justice every case, regardless of their merit must be determined on the merits and courts, as vehicles of justice should be slow to turn away a litigant or case without hearing them unless there is good reasons to do so. They maintained that this is the same position which has been stated in the ***Executrix of the Estate of the Late Christine Tebajjukira Case (Supra)*** and submitted that there is no good reason to deny the Plaintiff an opportunity to be heard. Instead, there is sufficient cause and it is in the interest of justice that the Plaintiff's case be heard.

In conclusion, that the Plaintiff invites this Honourable Court to find that there is sufficient cause shown by the Plaintiff for his belated compliance with the directions to file and serve the Witness Statements and Trial

Bundles. That the preliminary objection should be dismissed and the matter should be set down for hearing. They also prayed that the costs for this Preliminary Objection be provided for in the main suit.

In rejoinder, learned counsel for the 1st Defendant reiterated their written submissions filed in court on 15/06/2 023 that the Plaintiff claims to have purchased land from 1st Defendant but there is not a single Sale Agreement between the former and the latter. That all agreements for the purchase of the land are between the 1st Defendant and the 2nd and 3rd Defendant. In summary, the Plaintiffs' counsel claims there was sufficient cause for not filing the Witness Statement and Trial Bundle because the Plaintiff was sick and also claims the failure to file a Joint Scheduling Memorandum is the fault of the 1st Defendant's Counsel. Counsel Proceeds to deny the email from the 1st Defendant's Counsel Dated 15/03/2023 requesting for the draft JSM and categorically states that filing of witness statements is not a condition precedent in hearing cases.

As to whether the suit ought to have been dismissed?; they referred to Compliance with Time Limits set by court that the Plaintiff concedes to having not filed his Witness Statement and Trial Bundle within the time stipulated by this Honourable court. Under paragraph 3.8 of the Plaintiffs submissions, he admits to having filed the same be it without leave of court as required by law under **Order XVIll Rule 5A sub rule (7) of the Civil Procedure Rules** which provides that;

"*A witness who has not filed a witness statement shall not be heard except with leave of Court*".

That the Witness Statement and Trial Bundle filed by the Plaintiff was filed on 12/06/2023, 6 days after the Preliminary Objection was raised and matter fixed for Ruling. The said documents are therefore on court record without leave of court and are meaningless and a belated attempt to defeat the preliminary objection. That Court in line with **Order XVIll Rule 5A of the Civil Procedure Rules** directed that the trial would proceed by way of Witness Statements and proceeded to issue schedules to file Witness Statements, it's rather strange that the Plaintiff can at this point claim filing of Witness Statements is not a condition precedent in hearing cases; and prayed that court interprets this as a clear action of contempt of court.

On Illness of the Plaintiff, that when the matter came up for hearing on 6/06/2023 counsel simply submitted from the bar that Plaintiff was sick and

no proof was furnished and at this point the illness of the Plaintiff was put into question.

Further, that the reason for failure to file a Trial Bundle was because the Plaintiff was not available to furnish counsel with the documents to be included in the Trial bundle. That they find this a very absurd excuse, simply because all documents included in the Trial bundle filed on 12/06/2023 by Plaintiff's counsel are attached to the Plaint on court record. There is no new document that would have needed the presence of Plaintiff to enable Counsel file a Trial Bundle.

That whereas it is true that it has been held, that illness is sufficient cause per the case ***Patel vs Star Mineral Water and Ice Factory (7961) EA 454***, one must furnish proof of illness to court as was done in the said case and all other wherein it has been relied upon which was not done in the present case. Whereas Counsel cites good cases of ***Elimu John v Akello Hellen*** and ***Executrix of the Estate of the Late Tebajjukira v Mary Namatovu,*** the same are distinguishable because said cases were both formal Applications for extension of time which is not the case before this court.

That Counsel attempts to rely on proof of illness attached to Counsel Omollo's affidavit. It should be noted that the said Affidavit was filed 21/06/2023. 2 weeks after the objection was raised. The said alleged proof is also being introduced by Counsel Omollo Noah who is in personal conduct of this matter which is contrary to **Rule 9 of the Advocates (Professional Conduct) Regulations Sl 267-2** which makes it illegal for an advocate to appear before court and give evidence in the same matter on a contentious matters which is the case before Court. They relied on the case of ***Edward Rubanga & 347 ors v Bashasha & Co. Advocates Misc. Appeal No. 15 of 2017*** wherein Justice Stephen Musota as he then was held that:

"*but in this Anthony Bazira Appeared before me for the Appellants on brief for Byenkya and this shows he is still in conduct of the matter. I accordingly reject the Affidavit of Bazira Anthony, As such I would strike out the Appeal for being unsupported by affidavit.*"

They prayed court be pleased to disregard the said affidavit of Counsel Omollo Noah Juma as it's in violation of **Rule 9 of the Advocates (Professional Conduct) Regulations Sl 267 -2_** and since he is personal conduct of the matter can't even be cross examined on the said documents he purports to introduce. That this also disposes the Application filed by

counsel on 21/06/2023 to defeat the preliminary objection and prayed that it also be dismissed with costs; and that Court be pleased to proceed immediately and dismiss the main suit under **Order XVII rule 4** for failure of the Plaintiff to take steps to avail his evidence after being given sufficient time to do so and has failed.

As to the sharing of the Joint Scheduling Memorandum, that under paragraph 4.28 the Plaintiffs' counsel denies having received an email marked "A" attached to the Defendant's submissions however this is false, the email was clearly sent to noah@arcadialaw.cO.ug which the Plaintiff counsel's email. The Plaintiff s counsel dishonestly continues to cover up his hell-bent attempts to frustrate the hearing of the matter and conveniently uses the name Omollo Juma in the submission leaving out his other name "NOAH". (See the Affidavit in support of this Application for the full name). They attached their "hearing notes" where Counsel Omollo personally wrote his email and phone number when requested - marked **A.**

That Counsel shared a "scanned PDF version of the Joint Scheduling Memorandum on 5/6/2023 at 12:09 pm a few hours to the hearing with only agreed facts. It trite practice that Plaintiff's counsel originates the joint Scheduling Memorandum and shares with opposite counsel. That as counsel for the 1st Defendant, they went out of their way to reach out to counsel for the Plaintiff to share the draft Joint Scheduling Memorandum months before the hearing but the Plaintiff vehemently refused to share the same until the last minute. They argued that the conduct of counsel for the Plaintiff is not conduct of someone interested in proceeding with hearing of a case that has been on the Judiciary books for the last 8 years. That Mediation and Covid 19 cannot even justify this conduct that causes further delays.

Turning to Service of the 2nd and 3rd Defendants, they submitted that Court also ordered the Plaintiff to serve the 2nd and 3rd Defendants. That on court record there is no proof of service by way of an affidavit of service. This too is another violation of a clear Court Order. Since there is no proof of service, the Plaintiff cannot even prayed to proceed exparte as against the said Defendants which too further cattails the progress of the suit.

They concluded that the Plaintiff is not ready to proceed with the hearing of the suit since the 2nd and 3rd Defendants were not served and to make it worse the Plaintiff is in clear violation of Court orders on;

1. Filing of Joint Scheduling Memorandum.

2. Filing of the Plaintiff's Witness Statements

3. Filing of a Plaintiff's Trial Bundle

4. Service of the 2nd & 3rd Defendants.

They prayed that court be pleased to follow the case of Court of Appeal ***Civil Application No.109 of 2004*** - ***Amrit Goyal v Harichand Goyal and 3 Others, (determined much later after the Executrix of the Estate of the Late Tebajjukira v Mary Namatovu case)*** wherein the Court of Appeal held that;

"*A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity. This would destroy the authority official orders which is the heart of all judicial systems".*

They also prayed that instant case be dismissed with costs.

In resolving the preliminary point of law, I have carefully heard the submissions of both sides and examined the record of this case. After a careful scrutiny of the court record, it is clear that the Plaintiff filed a Plaint in **Civil Suit No.247 of 2015** on 26th November 2015 and the 1st Defendant filed his Written Statement of Defence on the 23rd December 2015.

The next action taken was on 1/3/2016 when the parties had their first hearing for mediation before the court accrediatated mediator. That subsequent hearings were made on 24/03/2016, 21/04/2016, 2/06/2016, 23/08//2016, 20/09/2016, 15/11/2016 and last mediation occurred on 01/12/2016 on which the mediation failed and was closed.

On the 18th day of April, 2018 hearing notices were issued for scheduling of the mater by a one Joseph Aliganyira of M/S Arcadia Advocates wherein in paragraph 2 of his affidavit of service he deponed that;-

"That on the 22nd day of June, 2018, I received copied of hearing notices from this Honourable court for service upon the Defendants."; which were served unto the Defendants that very day and a return of service was filed on the court file on 7th September 2018. The Plaintiff was absent and was adjourned to 10th August 2019.

The next action taken is that counsel for the Plaintiffs wrote to the Deputy Registrar on 29th August, 2022 requesting for a hearing date and hearing notices were signed on the 6th of August 2022 scheduling the next hearing of the matter to be on 17th November, 2022

The matter came up again before the Deputy Registrar on 12th November 2022 where there counsel Hategeka was holding for counsel Nyegenye Henry and it was adjourned to 14th March 2023 to which the Learned Trial Judge issued schedules for filing of pretrial document to facilitate the hearing wherein JSM was to be filed by 28/03/2023; Trial Bundles and Witness Statements by the Defendants by 14/4/2023 and was fixed for 6/6/2023 for hearing of the Plaintiff's witnesses. The 1st Defendant complied by filing his Witness Statement and Trial Bundle.

On the 6/6/2023, it was stated that counsel for the Plaintiff had got an accident to which counsel for the 1st Defendant raised the Preliminary Objection.

Order 17 rule 5 of the Civil Procedure Rules (as amended) provides for suits to be dismissed if no steps is taken by either party for a period of six months and also enables the courts to satisfy their constitutional mandate to ensure that justice is not delayed in accordance to **Article 126(2) (b) of the 1995 Uganda Constitution**.

I'm also alive to the fact that it is the duty of the Plaintiff to set down his or her suit for hearing in doing so enable court to have the matter brought to trial with reasonable expedition. The law is very clear as cited above; and in this case, scheduling of the main suit was completed 14th March 2023 in open court after a long time without mention of the case or extracting of hearing notices after the mediation closed on 8th December 2019; and since the 6/6/2023 the Plaintiffs failed to avail any evidence they are intending to rely upon taken any action in this suit.

While I agree with the two cases of ***Balaba Robinah & Mwanda Micheal vs Hussein Mohammed & Registrar Land Registration (supra) and Amrit Goyal vs Harichand Goyal & 3 others (supra)*** relied upon by learned counsel for the 1st Defendant in this case; and in the decision of Lord Denning MR in ***Allen vs Sir Alfred McAlpine & Sons Ltd [1968]1 ALL ER 543 at pp 546 & 547*** wherein he held that: *"The delay of justice is a denial of justice...To no one we will deny or delay the right or justice...it is impossible to have a fair trial after a long time".*

Relating the above authorities to the instant case, I find that as per submissions of learned counsel for the Plaintiff, that this case just like all matters that were caught up in the CIVID 19 pandemic when courts were faced with peculiar circumstances that required institutions to be accommodative.

Whereas I see some laxity on the part of the Plaintiffs in following Court Orders, I believe that there is still room for the case to be heard interparty to its logical conclusions. The rules relied upon by learned counsel for the 1st Defendant are not cast in stone, and each case must be looked at in its own circumstances. I therefore agree with the submissions of learned counsel for the Plaintiff and find that the justice of this case demands that the Plaintiffs are given an opportunity to proceed with their case to its logical conclusion.

This does not mean that they should be left scot free to flaunt Court Orders to avail their evidence so that their case can be heard to its logical conclusion. I have found refuge in **Section 33 of the Judicature Act** which provides that;-

"***General provisions as to remedies.***

The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided".

This section is self-explanatory and I believe that it will not serve any purpose at this point to dismiss this suit and in the end create numerous applications that can be avoided. In view of the explanations given by the Plaintiff and the record as I have enumerated above, I believe that there is a panacea that can atone for that kind of behavior, and that is to condemn the Plaintiffs in costs for their laxity.

I find an amount of One Million Uganda Shillings (1,000,000/=) fair and just in this case and these costs must be paid upfront before the next hearing date as a prerequisite for this case to be fixed again for hearing.

Accordingly my final decision is that;-

1. **Civil Suit No.247 of 2015** should continue to be heard to its logical conclusions.
2. The Plaintiff must comply with filing any of their missing documents and or evidence within 14 days of this Ruling so that the matter is heard.
3. The costs of this suit are awarded to the Defendants.

I SO ORDER

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
28/03/2024

This Ruling shall be delivered by the Magistrate Grade 1 attached to the chambers of the Resident Judge of the High Court Jinja who shall also explain the right to seek leave of appeal against this Ruling to the Court of Appeal of Uganda.

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
28/03/2024