

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA
AT KAMPALA**

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 314 OF 2012

ARISING FROM CIVIL SUIT NO. 563 OF 2007

PATRICK OKWIR.....APPLICANT

VERSUS

CHARLES OLWA EKWARO.....RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by notice of motion under Order 9 rule 23 and Order 52 rules 1 & 2 of the Civil Procedure Rules (CPR), for orders that the order issued by this court on 22/02/2012 dismissing High Court Civil Suit No. 563 of 2007 be set aside and the suit be reinstated; and that costs of the application be provided for.

The grounds of the application are that the applicant was not aware that the hearing of the suit had been fixed for 22/02/2012 when it was dismissed; and that this being a land dispute involving land developed with a residential house of quite a substantial value in which the applicant resides with a family, it is in the interests of justice that court hears and determines it.

The application is supported by the affidavit of **Patrick Okwir** the applicant. It is opposed by the respondent through an affidavit in reply deposed to by his counsel **Emmanuel Bakwega**.

The background to the application is that the applicant/plaintiff filed civil suit no. 563 of 2007 against the respondent/defendant for orders that the defendant/respondent's names be cancelled from the certificate of title and replaced with those of the plaintiff/applicant and that the mortgage be regularised by being transferred to the plaintiff/applicant, general damages, and costs. When the suit was called for hearing on 22/02/2012, neither the plaintiff nor his counsel appeared in court. There was an affidavit of service on the court record indicating that the plaintiff was effectively served. Upon application by the defendant's counsel, the suit was dismissed under Order 9 rule 22 of the Civil Procedure Rules. The applicant seeks to have the order dismissing High Court Civil Suit No. 563 of 2007 set aside and the suit to be reinstated.

Order 9 rule 23 of the CPR provides that where a suit is wholly or partly dismissed under rule 22 the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he/she may apply for an order to set the dismissal aside, and, if he/she satisfies the 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.

The applicant's affidavit evidence is that he was not aware that the case had been fixed for hearing on the day it was dismissed, having earlier been informed by his counsel that the case was due to be transferred to the High Court at Lira where the property is situated.

It was submitted for the applicant that the respondent's affidavit in reply through his counsel, particularly paragraph 3, does not rebut the applicant's assertion that he was not aware of the main suit when it was called for hearing. He submitted that the applicant's counsel did not apparently inform the applicant of the hearing date, and that the errors and lapses by counsel in not informing the client of the hearing notice or prosecution of the case should not be visited on the applicant. He cited **Dr. Sheikh Ahmed Kisuule V Greenland Bank HMCA 2/2012** to support his position. He contended that the subject matter of the suit is where the applicant and his family reside and that in the interests of justice the case should be heard on the merits.

The respondent's counsel submitted in reply that it is not in dispute that the applicant's lawyer was served with a hearing notice at the address of service of the applicant given in the plaint. He submitted that the application does not state anywhere that there was any error or lapse of the applicant's counsel, and that since this was not pleaded, it would not be relevant in this application. He cited **Twiga Chemical Industries V Bamusedde [2005] 2 EA 325** to support his position.

I have scrutinised the application and affidavits on this matter, including the submissions of both counsel and the law applicable. I have also considered the circumstances of this case as deduced from the court record on this case.

The affidavit of service filed by **Jude Oduri Ojiambo** a process server of this court reveals that the applicant's counsel was served and he acknowledged service by endorsing on the hearing notice. This was at the address of service indicated in paragraph 1 of the plaint. It is also noted that this is the same firm that represents the plaintiff/applicant in this application. This means the plaintiff/applicant has not changed his lawyers.

Order 3 rule 3 of the Civil Procedure Rules provides that processes served on the recognised agent of a party shall be as effectual as if they had been served on the party unless court directs otherwise. It was held in **Sebagala V Attorney General [1977] HCB 365** that where process was sent by the defendant's counsel to the plaintiff's advocates, and where there was no other address of the plaintiffs on the record, except one through their advocate, service of process was effectual and sufficient. The applicant's contention

that he was not aware of the hearing date therefore would not stand in a situation where he was served through his counsel through an address he provided in his pleadings. Since it is very clear that his counsel was sufficiently served and he accepted service, his claims that the suit had earlier been transferred would be irrelevant, since, by being served and accepting service, his counsel was on notice that the suit had actually not been transferred and was to be heard in Kampala on the dates indicated in the hearing notice served.

The applicant's counsel submitted that there was apparently an error or lapse on the part of the applicant's counsel in that he did not inform the applicant though the said counsel was served and accepted service. This, however, was neither pleaded in the application nor mentioned anywhere in the affidavit. At best, it can be regarded as evidence from the Bar which is not acceptable as evidence in this application. I find that the question of error or lapse of counsel not being visited on the applicant does not arise in this case. This renders the case of **Dr. Sheikh Ahmed Kisuule V Greenland Bank HMCA 2/2012** cited by the applicant's counsel not applicable to this situation.

It was held in **Twiga Chemical Industries V Bamusedde**, already cited that the applicant has to give good or substantial reason to justify setting aside of an *ex parte* judgement. This is in line with Order 9 rule 23 of the CPR which requires sufficient cause to be shown for non appearance of the plaintiff before court can set aside an order dismissing a suit for want of prosecution. In considering whether there was sufficient cause, the test to be applied in cases of this nature is whether under the circumstances the party applying honestly intended to be present and did his best to attend. See **Nakiridde V Hotel International Ltd [1987] HCB 86**.

In this case, the record shows the plaintiff/applicant was sufficiently served through his lawyer but failed to appear in court to prosecute his case when it was called for hearing. The reasons he has advanced in this application have not satisfied me that there was sufficient cause for him or his counsel's non appearance when the suit was called on for hearing. I therefore do not find good reason to set aside the *ex parte* judgement that was passed against him in in civil suit no. 563 of 2007.

I accordingly dismiss this application with costs.

Dated at Kampala this 27th day of June 2013.

Percy Night Tuhaise
JUDGE.