

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
MISC. APPLICATION NO. 30 OF 2015  
(ARISING OUT OF CIVIL SUIT NO. 496 OF 2013)**

1. **DR. LIVINGSTONE KITYO SEMAKULA**
2. **ROBERT KUSASIRA SEMAKULA.....APPLICANTS**
3. **DR. ELIZABETH NABATANZI LUGIDDE-KATWE**

**VERSUS**

1. **JEFFREY KAMYA SEMAKULA**
2. **EASTLAND AGENCY LTD.....RESPONDENTS**
3. **CHARLES ROBERT KABUGO-MUSOKE**
4. **MOMI FLOWERS LTD**

**RULING**

**BRFORE HON. LADY JUSTICE EVA K. LUSWATA**

This application was brought under O.9 r.23, 0.52 r.1 & Section 9 CPA seeking an order to set aside the dismissal of CS.496/2013 and its re-instatement on the record as well as costs. The grounds of the application are well enumerated in the motion and I shall not repeat them here. The application is supported by the affidavit of Dr. Elizabeth Nabatanzi Semakula Lugudde Katwe the 3<sup>rd</sup> applicant, and affidavits in reply were filed by Jeffreys Kamyia Semakula the 1<sup>st</sup> respondent, Wamimbi Emanuel, and Mukasa Fred Eddy Lugalambi. The 3<sup>rd</sup> applicant made a rejoinder on 7.7.15.

The law allowing an applicant to seek reinstatement of a suit dismissed under 0.9 r 22 is now well settled. He or she must satisfy that there was sufficient cause for non-appearance when the suit was called up for hearing. Reinstatement of the suit is at the discretion of the court which may do so on terms it deems fit, and with or without payment of costs.

The meaning of ‘sufficient cause’ has been interpreted by different courts in accordance with the facts as they are presented in different actions. I do agree with counsel for the applicants that the general interpretation is that sufficient cause would relate to failure by the applicant to take the necessary steps at the right time. I would therefore agree with the finding in **Joseph Sengendo & Anor Vs Semakula Muganwa Charles & Anor. HCMA. No.167/11** that the test is whether

the applicants honestly intended to be present at the hearing and did their best to attend but were prevented by sufficient cause from doing so. Further, according to the Court of Appeal authority of **NIC Vs Mugenyi & Co. Advocates (1987) HCB 29**, the court should in addition consider the nature of the case and whether there was a *prima facie* defence to the case.

The main reason advanced for the applicant's absence on 9/12/14 was the negligence, error of judgment, mistake and omission of their former lawyers M/s Mukasa Lugalambi Advocates and Solicitors, in particular, Counsel Mukasa Lugalambi. That as had been the usual practice, the 3<sup>rd</sup> applicant called Mr. Lugalambi on the morning of 9/12/14 to confirm the hearing. He advised her that her absence would not be required as the matter would not take off owing to the absence of the judge, who was stated to be on vacation. That for that reason, the applicants failed to appear and prosecute the suit and its dismissal should be faulted against Mr. Lugalambi. They submitted further that they had previously diligently attended court.

Much of what was contained in the affidavit of the 3<sup>rd</sup> applicant was reiterated in the written submissions filed on behalf of the applicants only to add that there was some confusion and/or misunderstanding between the applicants and their former counsel. Counsel also argued that there were serious issues in controversy which if not decided interparties, would prejudice the applicants yet the inconvenience if any, occasioned against the respondents, and could be readily atoned for by an order of costs. In this, counsel relied on **Christine Namatovu Tebajjukira (1993/93 HCB95** cited in **Kingstone Enterprises Ltd & 2 Ors Vs Metropolitan Properties Ltd. HCT-MA-314/12**. In conclusion, that the right to be heard is a fundamental right and denial of this application would end the rights of the applicants to any relief in respect of the dismissed suit.

In response, the 1st respondent in his affidavit stated that the 3<sup>rd</sup> applicant having been in court on 11/9/14 when the matter was fixed for hearing had not advanced any sufficient cause for the non attendance of the applicants on 9/12/14. That her evidence was full of false information making the application frivolous and only intended to deny him the fruits of the taxed costs of the dismissed suit. Counsel Wamimbi agreed with all those contentions and added that the suit cannot stand even if it were reinstated as the application is shrouded with material falsehoods and summons in the main suit having been served upon the 4<sup>th</sup> defendant, outside the prescribed time.

Mr. Mukasa Fred Eddy Lugalambi also filed an affidavit in reply to the application. Admittedly, he was not a party to the suit but it was an agreed fact that he previously represented the applicants who through the 3<sup>rd</sup> applicant had mentioned facts directed against him as their former advocate and thereby required his response. He is in agreement with the 3<sup>rd</sup> applicant that he was presenting court on 11/9/14, when the matter fixed for hearing. He denied prevent in the applicants from attending court on 9/12/14 and explained that on 8/12/14, the 3<sup>rd</sup>, applicant had visited his law firm in his absence and with rage, demanded and carried away her files. That she informed his secretary one Viola Nampewo that she had instructed another lawyer since she was not satisfied with the services of Mr. Lugalambi. That for several hours before the hearing date, Mr. Lugalambi tried to contact the 3<sup>rd</sup> applicant to be informed of her intentions but she refused to take his calls. He denied the averments of the 3<sup>rd</sup> applicant that she withdrew instructions from him on 15/12/14 and stated that as far he was concerned, he lost contact with the applicants from 8/12/14 when the 3<sup>rd</sup> applicant carried away the applicants' file from his chambers. He concluded that the evidence of the 3<sup>rd</sup> applicant only intended to embarrass him and injure his reputation as an advocate.

Counsel Serunjogi made the bulk of the oral submissions for the respondents. Briefly, he stated that the 3<sup>rd</sup> applicant was present in court when the matter was adjourned and even knew the different orders made in court on 11/9/14. That Counsel Lugalambi should be believed because he presents un rebutted evidence that since September 2014, he had tried to contact the respondents in order to compile their trial bundle but in vain. That in that regard, the applicants had disobeyed or defied a court order and could thereby not seek its protection. In this, he relied on **Mugume Ben& Anor Vs Akakwansa Edward HCB 2008 159**. He argued further that nothing was shown by the applicant that she did contact Mr. Lugalambi on the morning of 9/12/14 and therefore, the latter should not be faulted but instead believed on his affidavit. Instead, the affidavits sworn by the 3<sup>rd</sup> applicant should be rejected for containing falsehoods and facts related in an argumentative manner.

Dr. Byamugisha for the 3<sup>rd</sup> respondent, agreed substantially agreed with the above arguments but in addition, noted that the evidence of Lugalambi was not shaken in cross-examination. He also briefly touched on the strength of the defence put forward by the 3<sup>rd</sup> defendant and argued that the claim which had been dismissed could not in any event be sustained against the 3<sup>rd</sup> defendant.

Counsel Wamimbi did not deviate much from the submissions of his colleagues in defence to the motion, save to add that the suit was bad in law for late service of summons.

Briefly, in rejoinder, Counsel Kyazze argued that there was a marked variance between the affidavits of the 3<sup>rd</sup> applicant and that of Mr. Lugalambi which would not automatically point to falsehoods being presented by the applicants. He also faulted Mr. Lugalambi for failing to file a notice of withdrawal or at least to appear in court to report his disagreements with his clients and instead chose to file a belated affidavit. He explained that he was not comfortable to put Lugalambi on the stand for cross-examination because of his marked strained relationship with the applicants. He stressed the need for court to administer justice by allowing reinstatement of the dismissed suit.

I did read the application and the submissions filed on behalf of the applicants and also considered the submissions presented for the respondents. However, before I consider their merits, I find it necessary to first address the objection raised by counsel Wamimbi that the 4<sup>th</sup> respondent was served with summons out of time and the suit even if reinstated, would not stand. I do agree with that submission in that, under O.5 r.2 and 3 CPR, a suit for which summons is served out of the prescribed time, is bad in law and must be dismissed without notice.

I noted that a written statement of defence was filed for the 4<sup>th</sup> respondent on 11/4/14 and an objection raised therein for late service of the summons. Beyond that, it is not clear from the record when that defendant was actually served, and save for counsel's submissions, nothing was put before me in this application as evidence of late service of summons. What is clear is that, counsel for the 4<sup>th</sup> defendant continued to participate in the proceedings and was by September 2014 still prepared to involve himself in scheduling of the main suit. Thus without clear dates of service *visa vis* the date summons were issued, I would be reluctant to impose the strict provisions of O.5 CPR to make a finding that the suit against him is bad in law. However, the fate of the plaintiff's claim is still incumbent upon my decision on whether or not I shall allow this application, and to which I now turn my due attention.

I do agree with previous authorities and arguments made with respect to the cardinal principles that would guide the court that is set to allow or decline reinstatement of a dismissed suit.

It is not in dispute that both the 3<sup>rd</sup> applicant and counsel Lugalambi were present in court on 11/9/14 when this matter was re-fixed for hearing on 9.12.14. The one reason advanced for non attendance of the applicants was that their lawyer was negligent, and omitted to properly advise them to attend the hearing of 9/12/14. Counsel Lugalambi vehemently denied those averments and gave his reasons. On the other hand, the 3<sup>rd</sup> applicant stuck to her story and stated that the strained relationship by then pertaining between her and Mr. Lugalambi could have informed his decision to depart from what actually transpired between them on the morning of 9/12/13. 4.

I have noted that despite his detailed description of what transpired between the months of September and 8/12/14, Mr. Lugalambi was never put on the stand for cross-examination to challenge his averments. In my view, the claim by the 3<sup>rd</sup> applicant that there was now ill will between her and Mr. Lugalambi would not be sufficient ground to exclude the much stronger evidence that cross-examination could have supplied as a way of challenging his evidence. However, there is an affidavit in rejoinder to Mr. Lugalambi's evidence. Its strength or lack of it cannot be the determinant of which party is to be believed on what transpired on the fateful morning or thereafter. What is evident is that, Mr. Lugalambi remained on record as counsel for the applicants until 7/7/15, the day he filed an affidavit to indicate that the applicants had withdrawn instructions from him by the conduct of the 3<sup>rd</sup> applicant on 8/12/14. Thereby, he still had the legal duty to report to court his misunderstandings with the applicants and intention to withdraw from conduct of the suit. In my view, had there been filed a notice of withdraw by Mr. Lugalambi or his presence in court on 9.12.14 to confirm his discharge from the suit, there would have been no doubt as to his status in the suit and relationship with the applicants.

The above notwithstanding, the applicants would not be exonerated from not attending hearing of the suit on 9/12/14 when they knew of that date, save, for the 3<sup>rd</sup> applicants averments which the court cannot verify one way or another. This is because, beyond the averments of the 3<sup>rd</sup> applicant and Mr. Lugalambi in their affidavits, (and which contained contradicting versions), the court has no other direct evidence to confirm the truth of what transpired in the few days directly preceding the hearing of 9/12/14. Under such circumstances, I would be reluctant and in fact unable to decide this application on the ground of 'sufficient cause' by non appearance of an advocate. Instead I choose to consider the other grounds relating to the nature of the suit and its merits.

The claim in the main suit is one involving land in Mbabuli Entebbe with a value of over Shs.50million/=. The applicants claim that it is family land in which they had a vested interest and allege fraud against the respondents and claim for an order of cancellation. These are important matters that would require a decision arrived at *interparties*. With respect to submissions of Dr. Byamugisha, I would at this point not wish to descend into the merits or lack of it of the claim which in my view cannot be reasonably and fully addressed by the pleadings alone. What is evident is that the applicants presented this application in good time and have exhibited an interest in having it heard. It is a cardinal constitutional right for a party to be heard by the court on a claim. I would therefore prefer to disregard the arguments and counter arguments between the applicants and their former advocate with respect to the applicants' non appearance on 9/12/14, in preference to this important cardinal rule which would entail reinstatement of the suit.

Order 9.r 23 CPR allows the court discretion to allow reinstatement of a dismissed suit with appropriate terms. Counsel for the 1<sup>st</sup> applicant argued that if a reinstatement is allowed then it should be with both the taxed costs of the dismissed suit and the application. Counsel for 4<sup>th</sup> respondent was content to allow the application with costs. Counsel for the 3<sup>rd</sup> respondent strongly disagreed. In his view, the falsehoods in the 3<sup>rd</sup> applicants' affidavit are so extreme that they could not be simply purged by costs. He preferred the application to be dismissed.

My understanding of Order 9. R. 23 CPR is that the court's discretion would extend to an order for costs that suits the facts of the case. In my view, such facts would interalia entail the nature of the claim and the diligence exhibited by the applicant in pursuing reinstatement of the suit. Such facts are presented in this matter in that the application was filed just over a month following the dismissal of the suit, and which could have been even earlier had it not happened just before the Christmas season.

The Judge in **East Africa Hyper Market Ltd Vs Dragados Construcciones HCMA. 1333 198** reported in (1999) Kalr 828, chose to impose the condition of costs being paid by the applicant in both the dismissed suit and application. He did not give reasons for that decision indicating that it was clearly the exercise of his discretion. The facts before me do not compel me to make a similar decision. In any case, I am not bound by it.

Instead, I will allow the application with costs to the respondents.

I so order.

**EVA K. LUSWATA**

**JUDGE**

**16/10/2015**