THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISC. APPLICATION NO. 453 OF 2019

(ARISING OUT OF CIVIL SUIT NO. 254 OF 2012)

1. **MOSES BEKABYE**
2. **KAWUMA EDWARD**
3. **LABAN FREDRICK NSEREKO**
4. **HARRIET NAKAMATTE::::::::::::::::::::::APPLICANTS/PLAINTIFFS**

(*Administrators of the estate of the late Leuben Nsereko* Mukasa) **&**

VERSUS

1. **MUSOKE BULASIO**
2. **SENKUBUGE DAVIS**
3. **NAKAGIRI CHRISTINE::::::::::::::::RESPONDENTS/DEFENDANTS**

(*Administrators of the estate of the late Leuben Nsereko Mukasa*)

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This ruling emanates from an application for orders that;

1. The order dismissing Civil Suit No.254/2012 be set aside.
2. Civil Suit No.254/2012 be reinstated on the record for hearing on merits.
3. Costs of this Application be provided for.

The background of this application as seen from the affidavit in support of Laban Fredrick Nsereko (*3rd Applicant herein*) who has authority to swear this affidavit on behalf of others is

that the Applicants instituted Civil Suit NO. 254 of 2012 against the Respondents for recovery of land which falls under the estate of their late father Lauben Nsereko Mukasa, that the suit was coming up on 19th March 2019 at 10.00 am, but subsequently dismissed for want of prosecution due to the non-attendance of the Applicants.

That the 2nd, 4th and 3rd Applicants were present on the due date but standing in the Court corridors among a group of other litigants who were conversing and that as such, they were unable to hear when the suit was called for hearing. That they failed to learn that there had been 3 files coming up at 9.00 am before theirs. That it was after Counsel's inquiry about the suit that the he was informed that the matter was called and dismissed for nonattendance.

That upon further inquiry on why their matter of 10am was called before the cases fixed for 9.00 am, and that they were informed that Court decided to begin with files which had been set for mention and then deal with those fixed for hearing. That the Applicants are interested in pursuing their case to recover their beneficial interest.

The 2nd Respondent; Senkubuge Devis filed an affidavit in reply wherein he depones that the Applicants never served them with hearing notices of the said date (19th March 2019) and that they choose to stay in the corridors when the suit was called for mention and consequently dismissed for want of prosecution.

When the application came up for hearing on 5th June 2019, there was proof of service upon the Respondents but they were absent and un-represented. Counsel for the Applicants prayed to proceed under Order 9 rule 20 of the Civil Procedure Rules and she orally submitted that the application seeks to reinstate CS No.254/2012. That the Applicants on the day they came for Court, a group of other litigants disabled them and found out that theirs was called before. That the Applicants intended to appear for their case but were prevented from entering when their case was not called. Counsel relied on the cases of ***Mugo versus Wanjiri E.A (481)*** quoted in ***Misc 443/14 Pina Bank Ltd versus Stanbic Bank*** where *justice Luswata* relates to take a step. ***Motor Mart versus Kanyomozi SCCA No.06/99*** where it was held that '*evidence must be present to show intent to prosecute*'.

Counsel submitted further that, the Applicants have satisfied that there was sufficient cause and had the intent to prosecute.

Issues for determination.

I have carefully considered the Applicants' application and the oral submissions of Counsel. The grounds for reinstatement are contained in the notice of motion and are as follows.

a. First, the Applicants were prevented by sufficient cause from attending Court on the 19th March 2019 when the suit was called and dismissed for their nonattendance.

b. Secondly, the Applicants are not guilty of dilatory conduct.

c. Lastly it is just and equitable in the circumstances for the application to be granted.

According to O.9 r23 Civil Procedure Rules SI 71-1 under which this application was brought, provides that where a suit is wholly or partly dismissed under r22 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 the order of dismissal to be set aside and if he/she satisfies the Court that there was sufficient cause for non-appearance when the suit was called for hearing, then Court shall make an order setting aside the dismissal upon such terms as to costs and shall appoint a day of proceeding with the suit. Therefore, an order dismissing a suit may be set aside upon proof of sufficient cause by the Applicant.

However, this suit was dismissed under O.9 r17 of the Civil Procedure Rules, which provides that where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. And the remedy is order 9 rule 23 as properly spelt above.

Sufficient cause relates to the failure to take the necessary steps required by law. In ***Crown Beverages Ltd versus Stanbic Bank of Uganda Ltd HCMA No. 0181 of 2005,*** it was noted that;

> "*Sufficient cause is demonstrated by the Applicant showing that he or she had an honest intention of attending Court and was diligent in applying for the reinstatement*".

In ***Florence Nabatanzi versus Naome Zinsobedde Civil application no. 5 of 1997***, it was noted that;

> "*Sufficient cause depends on the circumstances of each case and must relate to the inability or failure to take a particular step in time*".

On sufficient cause, Counsel submits that the Applicants were present in Court corridors, but due to the noise from other litigants, they did not hear when the suit was called for hearing and was hence dismissed for want of prosecution**.** In his affidavit in support of the motion particularly paragraphs 3-7, the 3rd Applicant contends that the suit was for 10am but the Court called it before that time yet the Applicants were in the Court corridors but waiting for their file at 10am. This was corroborated by the 2nd Respondent's affidavit in reply under paragraph 4 when he averred that the Applicants chose to stay in the corridors of Court when the suit was called for hearing.

From the record, it is indeed true through affidavit evidence that the Applicants were in the Court premises when the application came up for hearing on the 19th March 19, however allegations that they failed to hear due to the noise from other litigants when the suit was called for hearing cannot constitute sufficient cause. However, the Applicants have expressed interest in prosecuting the suit. Upon knowing that their matter had been dismissed on the 19th March 2019, the Applicant brought this application on the 28th March 2019, and this application was in my view brought within a reasonable period to set aside the dismissal order.

The order in HCCS No. 254/12 sought to be set aside, the trial Judge noted as follows;-

"Matter was fixed by application, under O.9 r17 of the Civil Procedure Rules, when no parties attend suit is dismissed. It is accordingly dismissed".

The Applicants shall however not be blamed un-heard due to the above order made by Court when the Applicants had all along been vigilant in prosecuting their case, this application therefore succeeds with orders that:-

a) The order dismissing Civil Suit No.254 of 2012 is hereby set aside and the same is hereby reinstated to be tried on its merits.

b) The Applicants to pay costs.

I so order.

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Henry I. Kawesa

JUDGE

9/07/2019

9/07/2019

Aliwala Phina for Kibirango for Applicants.

Applicants present.

Respondents absent.

Matter for ruling for reinstatement.

Ruling delivered

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Henry I. Kawesa

JUDGE

9/07/2019