THE REPUBLIC OF UGANDA

IN THE HIGH COURT AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 711 of 2021

ARISING OUT OF CIVIL SUIT NO. 376 OF 2016.

ANDREW KAGGWA SEMIKWANO

(suing through Professor Justinian Tamusuza,

donee of powers of Attorney)**.....PLAINTIFF/APPLICANT**

VERSUS

NABWIRE ELIZABETH.....DEFENDANT/RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

Introduction:

The applicant filed this application seeking to set aside a ruling and orders in ***Civil Suit No. 376 of 2016;*** order for reinstatement of the suit; and costs of this application.

The affidavit in support was deponed by Ms Sarah Banenya Mugalu, an advocate of the courts of Judicature, and counsel with personal conduct of the suit. She states that Mr. Andrew Kaggwa Semikwano , her client is the owner and registered proprietor of the land comprised in ***Busiro Block 427 plot*** 126which he had bought in 2008, free of any encumbrances.

He filed the suit for trespass, illegal eviction of his caretaker and illegal construction of a house thereon in 2016 while this suit was already instituted against her.

The gist of her contention in this application, as detailed in her affidavit in support, is that the date of hearing was slated for 21st April, 2021 at 9.30 am but the cause list indicated time of 10.00 am. The matter was dismissed at 9. 40 am under ***order 9 rule 22 of CPR,*** in the absence of the plaintiff.

Her learned colleague, Ms Eunice Nabafu had earlier called and intimated to her at 8.46 am and sent message to her that she would be late for the hearing fixed for that day.

Counsel blamed herself for the mistake she made to advise her client not to attend court on that day but to proceed with his classes since the matter was due for scheduling, an error which should not be visited on her client.

That they had pursued the case with vigilance for three years, without securing a date; and that substantial loss will be occasioned unless the application which has been brought without due delay, is granted.

In her reply the respondent Elizabeth Nabwire however argued that the plaintiff/applicant had acquired the legal interest in the suit property subject to her equitable interest and that notification was in respect of the time in the hearing notice and not in the cause list which was not in communicated in the message.

That the application lacks sufficient cause for failure to appear and should this court therefore be inclined to grant the application, the applicant should first pay costs of the dismissed suit and of this application.

The applicant was represented by ***M/S Sarah Mugalu Banenya Advocates,*** while the respondent was represented by ***M/S Nabwire & Co. Advocates.***

I have carefully read the pleadings, evidence and submissions by either side and I have taken all arguments into consideration.

The law applicable is set out under ***order 9 rule 23 (1) of the CPR.***

> ***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 aside the dismissal, and if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.***

The main test for reinstatement of the suit was whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a *prima facie* defence to that case. (***National insurance Corporation vs Mugenyi and Co. Advocates [1978] HCB 28).***

Counsel for the applicant relied on several documents as proof that on several occasions efforts had been made to have the case heard. She relied on a number of documents: by her communication dated 2nd February, 2018 *(annexture D)* she reported to court that mediation had failed. She thereupon requested court to secure the date for hearing the case. *Annexture F* is another letter to court, dated 27th August, 2020. It refers to an earlier date of 16th March, 2020 fixed by court, where hearing however did not take off, on account of other court engagements.

Counsel took the trouble to avail court with a copy of the cause list which indeed indicated the matter was for mention at 10.00 am. *Annextures E and B* are hearing notices for 17th October, 2019 and 21st April, 2021 respectively. In the latter case to which this application particularly relates, the time indicated for the hearing is 9.30 pm, while the time appearing on the cause list for that day was 10.00 am.

I would fault counsel Banenya for not finding out the correct time from court when she had the chance to do so; and for assuming that this court was under obligation to start hearing the matter on the time as agreed upon between counsel, rather than that fixed by court.

As admitted in *paragraph 9* of the affidavit of the respondent, counsel did in fact appear for the hearing after the case was dismissed. She further took trouble to secure several hearing dates. The above clearly demonstrate that the applicant/plaintiff through his counsel honestly intended to attend the hearing and did her best to do so, thereby passing the first test as set out in ***National insurance Corporation vs Mugenyi and Co. Advocates (supra).***

As for the second test, I would consider the fact that the matter was specifically for mention but not for hearing on that day. This is a matter that had been filed by the applicant as the registered owner of the suit property as early as 2016, having spent 5 years in court, only to be dismissed summarily while the determination of the interests of the parties still remained hanging.

Finally for the third test, the absence of the WSD by the respondent places her in a precarious situation. It makes her vulnerable to the belief held by the applicant that there was no *prima facie* case against him as the registered owner.

In light of the above findings, this court having taken due consideration of the objections by the respondent and having carefully weighed the same against the points made by the applicant, I am more inclined to accept than not, the argument that rejecting the application would occasion an injustice to the applicant.

I also do agree that a mistake, lapse or oversight by counsel ought not to be visited to the litigant. Accordingly, sufficient cause does exists to justify the setting aside the ruling of this court and have ***HCCS No.376 of 2016*** reinstated.

Costs in the cause.

Alexandra Nkonge Rugadya

Judge

28th August, 2021

Delivered by email

1/9/2021