THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS APPLICATION NO. 0178 OF 2023)

(ALL ARISING OUT OF CIVIL SUIT NO. 004 OF 2020)

BAGONZA EDWARD (ADMINISTRATOR OF THE ESTATE OF THE LATE ZABULONI DAKI BYEGARAZO ..... APPLICANT

VERSUS

10 **1. DR. JOHN NSASI KUNUNKA**
2. MASINDI DISTRICT LAND BOARD..... RESPONDENT

BEFORE: Hon. Justice Isah Serunkuma

RULING

The application was filed by Notice of Motion under Article 126(2)(e) of the Constitution, Section 33 of the Judicature Act Cap 71, Order 46 rule 1(b) and Order 9 rule 23, and Order 52 rules 1,2 and 3 of the Civil Procedure Rules as amended seeking the following orders.

20 1. The Court reviews and/or sets aside its orders issued on the 20th day of September 2022 wherein HCCS no. 004 of 2020 was dismissed for want of prosecution.
2. HCCS No. 0004 of 2020 be reinstated and heard on its merits.
3. Costs of this application be in the cause.

The grounds of the applications were outlined in the affidavits sworn by the Applicant, Bagonza Edward, and Janet Murungi, the advocate in Nyanzi Kiboneka and Mbabazi Advocates.

Bagonza Edward deponed the following evidence.

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1. He is the Applicant herein and the Plaintiff in Civil Suit No. 0004 of 2020 which he instituted against the Respondents for various orders.
2. On 17th of June 2022 the suit came up for mention and the matter was adjourned to 20th and 21st September 2022.

3. That his former Counsel, Ms. Murungi erroneously recorded the dates as 21st and 22nd instead of 20th and 21st September 2022.
4. That on 20th September, he received a call from his lawyers informing him of the upcoming hearing on 21st and 22nd September 2022.
5. That amidst the preparations he received another call from his lawyers informing him that the matter was called on 20th September 2022 at 9:00 am and when neither himself nor his counsel was in court, the matter was dismissed for want of prosecution.
6. That he has always been vigilant and shown keen interest in pursuing his claim and has never missed a court appearance.
7. That he was informed by his lawyers, that the mistake of the lawyer should not be visited on him.
8. That he brought the current application promptly without delay.
9. That he has been informed by his lawyers, which information he verily believes to be true that there is sufficient reason for this honorable court to review and set aside its orders as the suit was dismissed for want of prosecution without due regard to the amended provisions of Order XVII of the Civil Procedure Rules.
10. That he was informed by his lawyers that they have never filed a Joint Scheduling Memorandum as one of the elements of dismissing a suit for want of prosecution.
11. That it would be just if the court invoked its inherent powers to grant the application to relieve the applicant from being judged on a technicality.

The 2nd Deponent, Ms. Janet Murungi deponed the following.

1. She was practicing at Nyanzi Kiboneka & Mbabazi Advocates and was Counsel in personal conduct with the applicant's matter.
2. That the main suit came up for hearing on the 17th day of June 2022 whereafter it was adjourned to the 20th and 21st September 2022, but she erroneously recorded in her diary 21st and 22nd September 2022.
3. That in September 2022, she left Nyanzi Kiboneka & Mbabazi Advocates and submitted a report reflecting that the main suit was coming up for hearing on the 21st and 22nd of September as it was recorded in her diary.
4. That on 20th September 2022, the counsel assigned to the matter contacted the applicant to prepare for the hearing.

5. That amidst the preparations counsel made a call to confirm whether the matter would proceed, and he was informed by one Mr. Tembo that it had come up on 20th September 2022 and been dismissed for want of prosecution.
6. That the erroneous recording of the dates led to the non-attendance.
7. That the order is an order on the face of the record in so far as the matter was dismissed for want of prosecution.
8. That for a dismissal for want of prosecution to occur, one must demonstrate before court conditions as prescribed in Order XVII Rule 5 as amended in 2019 as hereunder.
    a. That no application and/or step has been taken by either party for a period of 6 months.
    b. That a mandatory joint scheduling memorandum must have been conducted before the computation of the time.
12. That she is aware that the Joint Scheduling Memorandum was not on the record.
13. That the applicant always has been vigilant and shown keen interest in pursuing his claim and has never missed a court appearance and brought the current application promptly without delay.
14. That there is sufficient reason for the court to review its decision, set aside its orders, and have the matter reinstated.

The Respondents also filed their affidavits in reply which were as follows.

The 1st Respondent deponed that.

1. Upon the guidance of his lawyers, he established that the application was full of falsehoods, frivolous, vexatious, bad in law, and an abuse of the court process.
2. That the applicant never served him or his lawyers with the application and it should be dismissed for want of service.
3. That he got to know about the application through rumours which prompted him to go to court and get a photocopy on 26th May 2023 and it is this that he shared with his lawyers who informed him that this was dilatory behavior.
4. That he was informed by his lawyers that the application having been given out by the court on 8th April 2023, the applicant was out of time for service.

5. That the applicant purported to have applied on 25th November 2022 but never bothered to have it endorsed by the court, fixed, or served on the Respondent.
6. That the main Suit No. 0004 of 2020 was mediated upon and mediation ended on 15th September 2020.
7. The applicant never fixed the matter until 2022 when it was fixed by the 2nd Respondent.
8. When the matter came up for hearing on 17th May 2022, the court gave directions on filing the Joint Scheduling Memorandum and witness statements, and the matter was fixed for hearing. The Respondent complied and filed a Joint scheduling Memorandum but could not file witness statements because no case was presented against him in the form of witness statements by the applicant.
9. When the matter came up for hearing on 20th September 2022, the applicant and his counsel were absent, and the court dismissed the case for want of prosecution.
10. The applicant and his lawyer were in court when the matter was adjourned on 17th May 2022 but chose not to appear on 20th when the case came up for hearing of the Plaintiff's case.
11. That the applicant is equally guilty of negligence as he too was in court and heard the scheduled dates.
12. That the application does not have any merit.

The 2nd Respondent deponed the following.

1. That upon the guidance of his lawyers, he established that the application is full of falsehoods, frivolous, vexatious, bad in law, and an abuse of court process.
2. That the applicant filed a suit against the Respondents which was dismissed for want of prosecution on the 17th day of September 2022.
3. That the current application was made 3 months after the dismissal.
4. That the applicant has not explained why he was not in court and why his suit was dismissed and yet he was in court on 17th May 2022 when the dates for the hearing were set.
5. That the present application has no merit and should not be allowed.
6. That the failure of the applicants to follow up on their matter in court amounted to abuse of the court process.

Representation

The Applicant was represented by **M/s Nyanzi Kiboneka and Mbabazi Advocates,** the 1st Respondent was represented by **M/s Lubega Babu & Co. Advocates,** and the 2nd Respondent was represented by **M/s Kasangaki and Co. Advocates**. All the parties filed their written submissions which have been considered in making this ruling.

Submissions of the parties

Applicant's submissions.

Counsel for the applicant submitted that Civil Suit No. 0040 of 2020 was not lawfully dismissed and the Respondent shall not be prejudiced by the reinstatement. That the law under which it was dismissed cannot be ascertained. The law on dismissal for lack of interest or want of prosecution used to be Order 17 Rule 5 of the Civil Procedure Rules but with the coming of the amendment, Order XVII was amended to provide that the dismissal for want of prosecution shall arise where no application is made or step taken for a period of 6 months by either party with a view of proceeding with the suit after the mandatory scheduling conference, the suit shall abate. It was further submitted while relying on the authority of Seruwu **Jude v. Swangz Avenue; Civil Appeal No. 0039 of 2021** that the court must consider all circumstances before deciding that a suit abated. The main suit was dismissed on 20th September 2022 before the filing of the mandatory joint scheduling memorandum and after a mention on 17th June 2022.

Counsel further submitted that the matter had serious triable issues which can only be determined if the matter is heard on its merits. That the law requires matters to be investigated and determined on their merits as opposed to the extraneous or technical points and for this they referred to the case of **Banco Arabe Espanol v. Bank of Uganda [1999]2 EA 22.**

Counsel submitted that the dismissal of the main suit was contrary to Order XVII rule 5 as amended which made it a dismissal that is an error apparent on the face of the record whose cure would be the grant of the current application to ensure proper application of

justice. They cited **Edison Kanyabwera v. Pastori Tumwebaze; SCCA No. 006 of 2004** on the fact that error does not need to be based on facts but can also be based on the law.

On the issue of sufficient cause, they relied on **Order 9 rule 23** and **Order 46 rule 1(b)** to submit that the aggrieved party may apply to have an order reviewed and set aside and the matter proceeds on merit where there is sufficient reason or cause. They referred to **The Registered Trustees of the Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Ors** to define sufficient cause as being that a party had not acted negligently or there was want of bonafide on its part given the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". They concluded with the prayer for the court to find that there is reason for the order to be reviewed so that the matter is determined on its merits for the ends of justice to be met rather than mere technicalities and that the dismissal was unlawful.

Respondent's submissions

1st Respondent's submissions

Counsel submitted that the application is intended to create a backlog and endless litigation at the expense of the Respondent as he failed to follow up on his suit since it was filed in 2020 and to fix the case for hearing for over two years. When the 2nd Respondent finally set the matter for hearing on 17th May 2022, it was then that the applicant and his lawyer turned up. The matter was adjourned to 20th September 2022 and the applicant refused to turn up, thus leading to the dismissal. The applicant too is guilty of negligence and cannot rely on the mistake of counsel. He is not illiterate, and he too heard the dates of the hearing.

Preliminary objection

Counsel submitted that the 1st Respondent was never served with the application. The first Respondent found out about it on his own whereafter he acquired a photocopy from the Court and filed a reply on 29th June 2023. The applicant then served the application on 3rd July 2023 and did not explain why summons which were dated 18th April 2023 were

being served 3 months later. This was contrary to Order 5 rule 3(1) of the Civil Procedure Rules which requires summons to be served within 21 days from the date of issue except where there is an extension of time and in the absence of which, the matter is dismissed without notice. They prayed that the application would be dismissed for lack of service.

Whether the applicant has shown sufficient cause for reinstatement of the Civil Suit no. 0004 of 2020.

For two years, the applicant did not fix his suit for hearing and when it finally came up on 17th May 2022, the court gave directions to file witness statements and a joint scheduling memorandum. The applicant refused to participate in the preparation of the Joint scheduling memorandum and thus the 1st and 2nd Respondent filed its own. They did not file witness statements because the applicant had not filed any to be responded to. When the matter came up on 20th September 2022 and the applicant and his lawyers still did not turn up, the court dismissed the matter for want of prosecution.

Counsel relied on the authorities of **Kibuuka v. Uganda Catholic Lawyers Society & 2 Ors; HCMA No. 0696 of 2018** in which it was held that the term "sufficient cause" ought to receive a liberal construction to advance substantial justice when no negligence or inaction or want of bona fides is imputed on the appellant. That in this case, the applicant acted negligently when he did not fix his case for hearing. That even if the court were to consider a mistake of Counsel, even the applicant had acted negligently by not following up on the relevant dates and accordingly, prayed for the matter to be dismissed.

2nd Respondent's submissions

Counsel referred to Order 9 rule 23 CPR on the power of the court to reinstate a suit that has been dismissed for non-appearance where sufficient cause for the non-appearance has been given. However, it was submitted that the inherent powers of the court under section 98 of the Civil Procedure Act cannot be invoked where there is a clear provision of law relating to a certain matter as is the case herein.

Counsel further submitted that the Applicant has not given sufficient cause as to why the order should be set aside and the main suit reinstated. The applicant turned up for the

hearing on 17th June 2022 but thereafter did not return on the adjourned date of 20th September 2022 and with no explanation thus resulting in the dismissal.

They referred to the case of ***National Insurance Cooperation v. Mugenyi & Co. Advocates 1987 HCB 28*** to submit that the main test for reinstatement is whether the applicant honestly intended to attend the hearing and did his best to do so. The applicant herein did not give a plausible reason for failure to attend court and is instead shifting the blame to the lawyer and yet he too was available when the matter was being adjourned and this shows a lack of interest in the matter by him. That after three months he is attempting to resurrect the matter on allegations that his advocate gave him the wrong date. He took over two months to file this application for reinstatement which shows that it was an afterthought, and a close consideration of the matter shows that he had ignored it even before until the Respondents got it fixed for hearing. That the Respondent is guilty of dilatory behavior and thus the application has no merit.

Law on review of judgments

Counsel referred to the case of **F.X Mubuuke v. Uganda Electricity Board; HCMA No. 0098 of 2005** to define review as the reconsideration of the subject of the suit by the same court under specific conditions set by law. Section 82 of the Civil Procedure Act allows a party to apply for review from the court that made an order and Order 46 provides that the person ought to be aggrieved due to some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree passed or order against him. They referred to the case of **Edison Kanyabwera v. Pastori Tumwebaze; SCCA No. 006 of 2004** in which the court held that ***", mistake or error apparent on the face of the record"*** must be an evident error which does not require any extraneous matter to show its incorrectness. Further, it must be an error manifestly clear that no court would permit such an error to remain on the record. The error should not require any long-drawn reasoning to identify.

On the issue of mistake or error apparent on the face of the record; there was no error when the applicant's case was dismissed for want of prosecution on 20th of September 2022. The applicants were available when the suit was adjourned and then absent without a proper reason on 20th September 2022. This was not an error on the side of the court.

About any other sufficient reason, Counsel referred to Muller to define sufficient reason as one that is sufficient to the court to which the application for review is made and cannot be held to be limited to the discovery of new and important matter of evidence, or the occurring of a mistake or an error apparent on the face of the record. There is no irregular judgment that permits the applicant to seek a remedy of review analogous to any error apparent on the face of the record. There is no sufficient reason as to why the applicant did not attend court.

10 ***Submissions in rejoinder.***

The applicants filed submissions in a rejoinder in which they reiterated their position that the order of dismissal was granted in contradiction to Order 17 Rule 5 as amended. Regarding the issue of service, it was submitted that though the Registrar had signed the application, they were not given a hearing date and thus would not proceed to serve without a hearing date and thus it was not due to the applicant's laxity that the Respondents were not served.

Resolution of court.

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The Applicant has applied for review and set aside the court order dismissing Civil Suit No. 0004 of 2020 and for reinstatement of the suit so that it is tried on its merits.

The law on review

Review was defined in **FX Mubuuke v. Uganda Electricity Board HCMA** as a reconsideration of the subject of the suit by the same court under specific conditions set by law. **Section 82 of the Civil Procedure Act** provides that.

30 ***"Any person considering himself or herself aggrieved.***

- ***a. By a decree or order from which an appeal is allowed by this Act but is not preferred; or***
- ***b. By a decree or order from which no appeal is allowed by this Act.***

may apply for a review of judgment in the court that passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit".

However, for one to apply for review, they must have either of the three grounds as set out in **Order 46 Rule 1 of the Civil Procedure Rules** and these are either.

i. On discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced in court at the time the decree or order was made.
ii. Or on account of some mistake or error apparent on the face of the record.
iii. Or for any other sufficient reason.

The applicant premised his application on two grounds which are discussed herein below.

a. A mistake or error apparent on the face of the record.

The applicant submitted that the court was in error when it dismissed the main suit without regard to the current considerations of Order 17 Rule 5 as amended in 2019. The said Order provides that.

"5. Dismissal for want of prosecution.

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

The applicants have submitted that there was an error because the matter was dismissed for want of prosecution, yet they had not yet even filed the joint scheduling memorandum. However, the Respondents submit that the applicant failed to follow court directions thus the scheduling memorandum was filed by only the Respondents.

The court has had the opportunity of considering the record of proceedings from 17th May 2022 when the matter had last come up for hearing. On the said date, the parties were directed to file a joint scheduling memorandum by 31st May 2022 and their respective

witness statement by 1st July 2022. The matter was adjourned to 20th September 2022 for the Plaintiff's case and 22nd September 2022 for the Respondent's case. It is also true that there is a joint scheduling memorandum filed on 31st May 2022, which from the submission of the parties, did not have the applicant's input because he neglected to participate. Besides the allegation of the case being dismissed without filing their joint scheduling memorandum, Counsel for the Applicant has not offered any explanation as to why they did not heed the court's directions to file a Joint scheduling memorandum by 31st May 2022 nor their witness statements as had been directed by the court.

I agree with the Respondent's submission that a mistake or error on the face of the record of the court ought to be so clear that there is no space for a divided opinion to the extent that there was an error. **Order 17 rule 5** refers to abatement of a suit where no step is taken six months after the filing of the joint scheduling memorandum by either party. In this case, the Respondents filed their scheduling memorandum and even appeared in court on the day of the hearing, therefore the matter was no longer an issue arising under this provision. The court then proceeded to dismiss the matter for want of prosecution.

Order 17 rule 5 is in respect to abatement of the suit and abatement has been defined in the **Blacks Law Dictionary** as, ***"the act of eliminating or nullifying" or "suspension or defeat of a pending action for a reason unrelated to the merits of the claim"***. However, the possibility of abatement under Order 17 rule 5 as amended does not preclude the power of the court to dismiss the suit for want of prosecution where parties fail to appear on the date that is fixed. Order 17 rule 3 provides that where any of the parties fails to turn up on the date fixed for the hearing, the court may dispose of the suit in the manner in Order 9, and among those is dismissal. I find that there was no error on the side of the court to necessitate a review of the orders.

b. Any other sufficient reason.

The applicants have submitted that the error was on the applicant's counsel who recorded the wrong dates for the hearing, and as a result, they were not in court on the right date for the hearing. In the case of **Yusuf v. Nokorach 1971 EA 104**, it was held that sufficient reason ought to be read as meaning sufficiently of a kind analogous to the first two

grounds for review. The Respondents have submitted that the applicant cannot rely on the negligence of Counsel for the error of not turning up in court thus resulting in the dismissal.

It is trite as has been determined in cases such as **Mutaba Barisa Kweterana Limited v. Bazirakyeyeremiya; C.A.C.A No. 0158 of 2014** that the mistake or negligence of an Advocate should not be visited on the litigant. It is expected that once a litigant duly instructs his or her lawyers, they have selected a representative to handle their matter efficiently and professionally. The failure of the counsel to act on their duty accordingly cannot be faulted to the litigant. The applicant pleads that he attended court with the advocate who ought to have overseen the matter and cannot be blamed for not remembering the dates as that was the advocate's duty.

Irrespective, a vigilant litigant also must keep a keen interest in their matter and the reason of Counsel's negligence ought to have a limit. In the case of **Matovu Kidimbo v. Lukwata Yusuf & Ors; Misc. Application No. 0040 of 2017,** the court held that there should be a limit to the extent to which one relies on a mistake of counsel before the dilatory conduct is imputed on the litigant himself. In this case, following the realization of the missed dates, the applicant took reasonable steps with a period of two months to file the current application. Whereas the Respondents have submitted that the applicant was variously negligent as witnessed by issues such as not fixing the matter for hearing over a period of over two years and missing the hearing of the matter on 20th September, the court is cognizant of the fact that all these actions were the duty of the advocate.

In the case of **Captain Philip Ongom versus Catherine Nyero Owota; SCCA No. 014 of 2001,** the Supreme Court held that a litigant's right to a fair hearing in the determination of civil rights and obligations is enshrined in article 28 of the Constitution and should not be defeated on the ground of his or her lawyer's mistakes. In the case of Banco **Arabe Espanol versus Bank of Uganda SCCA; No. 008 of 1998** the Supreme Court held that an error on the part of Counsel in the form of a mistaken belief should not be visited on the Applicant and it would amount to sufficient cause for setting aside a dismissal of the suit. Considering the above, the negligent nature of counsel is considered a sufficient reason for review of the order and reinstatement of the matter so that it is heard on its merits.

Regarding the issue of non-service, the court considers the same to be thoroughly important, however, it cannot defeat the purpose of the application as the intention of service was fulfilled despite the negligence of counsel by not carrying out the relevant service. The purpose of service is to bring to the notice of the opposite party the pleadings as was held in **Western Uganda Cotton Uganda Ltd versus Dr George Asaba; HCCS 253/2009**. In that case, the written statement of defence and counterclaim had been filed but had never been served and the Plaintiff's Counsel picked a copy of it from the court file. It was held that the object of service had been achieved by the action of the Plaintiff's Counsel.

Further, in the case of ***Mukasa Anthony Harris versus Dr Bayiga Michael; Election Petition Appeal No. 018 of 2007*** where the appellant had helped himself to a copy of the petition, the Supreme Court held that the omission to serve was immaterial as the appellant got the petition within the time prescribed. Therefore, given the fact that the Respondents received the application by whatever means and managed to file their pleadings herein, the purpose of service was fulfilled, and the matter can proceed on its merits.

Application granted.

DATED and Delivered this 29th Day of February 2024.

Isah Serunkuma
JUDGE