

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO. 2273 OF 2023

(ARISING OUT OF CIVIL SUIT NO. 0848 OF 2019)

10 **1. ASL HARDWARE LIMITED**
2. TRANSAFRICA ASSURANCE COMPANY LIMITED ::::::::::::::: APPLICANTS
VERSUS
VRL LOGISTICS LIMITED ::::::::::::::: RESPONDENT

Before Hon. Lady Justice Harriet Grace Magala

15

Ruling

Background

This is an application to set aside the Order of this honourable court dismissing Civil Suit No. 0848 of 2019. The Application is supported by an affidavit deposed by
20 Francis Ssekiwunga, the Claims Manager Commercial Lines of the 2nd Applicant. The grounds in support of the application are that:

- a) The advocate that had personal conduct of the matter left the law firm on the 15th September 2023;
- b) The minutes on the file by the previous advocate, a one Nassaazi Sandra
25 Juliana indicated that on the 23rd May 2023, the matter came up for



- 5 summons for directors before H/W Juliet Harty Hatanga and it was
adjourned to the 18th September 2023 for further directions;
- c) Neither Respondent nor her lawyers were present in court on the 23rd May
2023;
- d) On the 18th September 2023, the lawyers for the Applicants were present at
10 the Court House to attend to the Chambers of the learned Registrar only to
be informed that the Registrar had been transferred and the matter was
yet to be re-assigned to another registrar;
- e) Unknown to the Applicants, on the 18th September 2023 the matter was
coming up for hearing before the learned trial judge and the same was
15 dismissed for non-appearance of both parties;
- f) The main suit was dismissed as a result of the mix up regarding which
judicial officer had been allocated the matter;
- g) It was the first time the main suit had been called before the learned trial
judge;
- 20 h) The Applicants are still interested in prosecuting the main suit to the end
and all pre-trial documents had been filed; and
- i) It is in the interest of justice and equity that the main suit is reinstated and
heard.

Representation and Hearing

25 The Applicants were represented by M/s Nakiranda & Co. Advocates. The
Respondent despite being served neither appeared in court nor filed an affidavit
in reply to the application. The Applicants filed written submissions along with the
application.



5 Issues

1. Whether the Order dismissing HCCS No. 0848 of 2019 should be set aside and the suit reinstated.
2. What remedies are available to the parties?

Determination

10 **Whether the Order dismissing HCCS No. 0848 of 2019 should be set aside and the suit reinstated.**

The powers of this court to exercise its discretion to set aside and reinstate a dismissed suit for non-appearance are found under **Section 98 of the Civil Procedure Act, Cap 71 and Order 9 Rule 17 & 18 of the Civil Procedure Rules S.I No. 71-1 as amended**

Section 98 of the Civil Procedure Act Cap 71 on Saving of inherent powers of court states that:

20 *“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

Order 9 Rule 17 & 18 of the Civil Procedure Rules S.I No. 71-1 as amended

“17. When neither party appears suit dismissed.

Where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed.

25 ***18. Plaintiff may bring fresh suit or court may restore suit to file.***

Where a suit is dismissed under rule 16 or 17 of this Order, the plaintiff may, subject to the law of limitation, apply for an order to set the dismissal aside;

5 *and if he or she satisfies the court that there was sufficient cause for his or her nonappearance, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.”*

The Applicant/Plaintiff has the burden of proving to this court on the balance of probabilities even where the matter is not defended as stated by Hon. Lady Justice
10 Flavia Senoga Anglin in the case of *Mwesigye Warren vs. Kiiza Ben (HCCS No. 320 of 2015)* and according to **Section 101 & 103 of the Evidence Act Cap 6**. The Applicant subsequently has to satisfy the court that there was sufficient cause for its non-appearance which relates to failure by the Applicant to take a necessary step at the right time to prosecute her case.

15 The Kenyan case of *Gideon Mosa Onchwati vs. Kenya Oil Co. Ltd & Anor [2017 KLR 650]*, described what constitutes sufficient cause as follows;

“...In this context, sufficient cause means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have
20 been not acting diligently or remaining inactive. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”

The principles to be followed by courts in determining a case with sufficient cause
25 were enunciated in the case of *Florence Nabatanzi vs. Naome Binsobodde, SCCA No. 6 of 1987*, where court stated that:

“(a) First and foremost, the application must show sufficient reason which relates to the inability or failure to take some particular step within the

5 *prescribed time. The general requirement notwithstanding each case must
be decided on facts;*

*(b) The administration of justice normally requires that substance of all
disputes should be investigated and decided on their merits and that errors
and lapses should not necessarily debar a litigant from pursuit of his rights;*

10 *(c) Whilst mistakes of counsel sometimes may amount to an error of
judgment but not inordinate delay or negligence to observe or ascertain
plain requirements of the law;*

*(d) Where an Applicant instructed a lawyer in time, his rights should not be
blocked on the grounds of his lawyer's negligence or omission to comply
15 with the requirement of the law;*

*(e) A vigilant Applicant should not be penalized for the fault of his counsel
on whose actions he has no control.”*

The Applicants' averments which were also reechoed in their written submissions
are that they are keen on prosecuting the main suit to the end and all pre-trial
20 documents are on the court file. The mix up or confusion based on the notes
appended on the file by the previous lawyer was that the matter was before the
learned registrar for summons for directions. That on the scheduled date, the matter
was adjourned to the 18th September 2023 for further directions only for the
applicants to learn that the registrar had been transferred. The Applicants were also
25 informed that once their matter was reallocated; they would be accordingly notified.
Unknown to them on that very day, the 18th September 2023, the matter had been
called for hearing and dismissed for non-attendance of both parties.

Court noted that the Respondent although served, their Affidavit in reply was not
filed as at the date of hearing this application and as such the matter was heard to



5 the exclusion of the Respondent. The Applicants' averments and submissions
remain unopposed and presumed to be accepted by the Respondent. This fact was
explained in the case of *Serefaco Consultants Ltd vs. Euro Consults and Arcadis*
Euro Consult CACA No. 16 of 2007 where Kavuma JA relied on the case of *H.G.*
Gandesha and Kampala Estates Ltd & G.J. Lutaaya SCCA No. 14 of 1989 and
10 stated that:

*“It is settled law that if the Applicant supports his application by affidavit or
other evidence and the Respondent does not reply by affidavit or otherwise,
and the supporting evidence is credible in itself, the facts stand as
unchallenged.”*

15 In my considered view, I find that the Applicants have satisfied court that there was
a sufficient reason for their nonappearance at that time; and they are still interested
in prosecuting their case. I further find that allowing this application would not in
any way prejudice the Respondent.

Issue 2: What remedies are available to the parties?

20 The Application is allowed and the order dismissing the Main suit is hereby set aside
and the suit reinstated.

Pursuant to **Section 27 of the Civil Procedure Act Cap. 71**, costs shall be in the
cause.

Dated and signed at Kampala this 8th day of July 2024.

25 

Harriet Grace MAGALA

Judge

Delivered online (ECCMIS) this 9th day of July 2024.