THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL SUIT NO. 0071 OF 2005

ERIC NTUNGURA::PLAINTIFF

VERSUS

JANE MWESIGWA::::::::::::::::::::::::::::::::::::DEFENDANT/COUNTER CLAIMANT

AND

1. **ERIC NTUNGURA }**
2. **JANE NTUNGURA }::::::::::::::::: DEFENDANTS TO OUNTERCLAIM**
3. **KAMADI KAGOLO}**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

When this matter came for hearing before me on 30/08/2010, the defendant (counterclaimant) was in court with her advocate, Mr. Eric Muhwezi. The plaintiff (1st defendant to counterclaim) 2nd and 3rd defendant to the counterclaim, as well as their advocate were absent when the case was called. But before I could entertain Mr. Muhwezi's complaints about the suit, Mr. Kamadi Kagolo, the 3rd defendant to the counterclaim, entered court. He then informed court that his advocate, Mr. V. Magala was indisposed and could not attend the hearing. He prayed that the suit be given another date to enable him to attend.

Mr. Muhwezi objected to the application for an adjournment and raised several points which I thought worthy of consideration. He stated that the plaintiff's advocate who was also the advocate representing the 2nd and 3rd defendants to the counterclaim was served with the hearing notice for the day in good time. He charged that if counsel was indisposed he ought to have informed him by telephone, perhaps to save him the journey from Kampala to Jinja. That in any case, there was no evidence to show that the advocate was ill and therefore could not come to court. He charged that his client's statement about his illness was not satisfactory to justify the grant of an adjournment. Mr. Muhwezi went on to complain about the length of

the period of time between the 28/06/06 when the suit was last called on for hearing and 30/08/10 when he had it set down for hearing. He charged that the plaintiff and his advocates took no action whatsoever to ensure that the suit was listed for hearing until the 27/05/2007 when he fixed it for hearing but that hearing did not take place.

Mr. Muhwezi further complained that after that hearing fell through, the plaintiff and his advocates did not bother to ensure that the case was fixed for hearing again till he moved court and obtained a slot on the 30/08/2010. He said that Mr. Magala was served with a hearing notice on 13/07/10 and there was an affidavit of service deposed by Adam Bunya on the 25/08/2010. He further contended that the information by his client that Mr. Magala was unwell was not satisfactory to explain the plaintiff's failure to attend court.

Mr. Muhwezi went on to challenge the right of the 3rd defendant to the counterclaim to address court in the proceedings. He pointed out that though he was served with the counterclaim on 7/05/05, he (Mr. Kagolo) did not file his reply to the counterclaim till the 30/05/2005. He then submitted that his reply was out of time, in contravention of Order 8 rule 11(1) of the Civil Procedure Rules (CPR). He went on to state that the 3rd defendant to counterclaim also failed to serve his reply on the counterclaimant or her advocate in time because he (Mr. Muhwezi) only received it on 30/05/2006. He asserted that this was contrary to Order 8 rule 11(2) CPR which required the defendant to a counterclaim to file his reply thereto within 15 days of filing it. He then submitted that the reply was incompetent since it was filed and served out of time without leave of court.

Mr. Muhwezi added that serving the 3rd defendant to the counterclaim with a hearing notice for 30/08/10 was only to comply with the provisions of Order 9 rules 10 and 11 of the CPR which require the plaintiff to serve hearing notice on a defendant who has not filed a defence. He contended that though he was in court, the 3rd defendant to the counterclaim had no right to address court due to the fact that he had omitted to file his defence in time. He said that the same would have applied to the 3rd defendant to the counterclaim even if his advocate had attended court. He then prayed that the plaintiff's suit be struck out with costs for want of prosecution under the provisions of Order 17 rule 4 and Order 9 rule 22 CPR, because it was only the defendant present in court when the suit was called on for hearing. I then reserved

my ruling for today because there were a lot of pleadings and correspondence on the court record that I needed to go through before coming to my decision.

Given the bulky record that was before me and the long period of time that the suit had been inactive, I thought that it would be pertinent to set out the background to this long drawn out dispute with a rather chequered history before coming to my decision on Mr Muhwezi's complaints. On the 6/04/2005, the plaintiff sued the defendant in the Chief Magistrates Court at Mukono in C/S No. 001/2005. The defendant filed a defence on the 4/05/2005 but by an order of Justice V. T. Zehurikize dated 22/06/05 in Msc. Application No.92/2005; the file was transferred to the High Court at Jinja due to, among others, the value of the estate being above the pecuniary jurisdiction of the Chief Magistrate. However, due to pressure of work in a Criminal Session at Mukono at the time, Justice Zehurikize could not hear the suit. Following a certificate of urgency that was granted on the 11/08/2005, the file was transferred to the High Court at Kampala to be placed before a judge for hearing during the court vacation.

In his suit, the plaintiff sought the revocation of letters of administration that had been granted to the defendant by the Chief Magistrate at Mukono in the estate of the late Lt. Col. Wycliffe Mwesigwa Ntungura. He also sought for a declaration that other beneficiaries and he were entitled to their respective shares in the estate of the deceased. The plaintiff further sought for an order that the defendant account for the property and funds that had come into her possession while she was the administratrix of the estate, and an order appointing the plaintiff as the administrator in her stead, as well as the costs of the suit.

The plaintiff was the father of the deceased while the defendant was his wife. In his pleadings, the plaintiff claimed that the deceased who died on 25/05/2002 was survived by 7 children, three wives, his parents and very many dependants. That he had substantial assets both in Mukono District and Rukungiri Town, all valued at over shs 200m. Further that the defendant was not a wife of the deceased and she did not obtain a certificate of no objection from the Administrator General before she applied for and was granted the letters of administration. That he only got to know about the grant when the defendant wrote to his wife, Aida Ntungura, demanding that she surrender to her property that was situated in Rukungiri and the title thereto because she had become the administrator of the estate of the

deceased. He therefore complained that the defendant misrepresented the value of the estate to the Magistrate's court but it was far beyond the jurisdiction of that court. The plaintiff further complained that the defendant misappropriated assets in the estate of the deceased. That in addition she was not the mother of all the offspring of the deceased and had failed to take care of the other dependants. Further that he had committed personal funds to the care of beneficiaries to the estate. He thus prayed that he be granted the letters of administration instead of the plaintiff.

In her written statement of defence, the defendant stated that the plaintiff obtained a grant of letters of administration on 10/12/2002 in Administration Cause No. 131 of 2002 at Mukono Chief Magistrate Court, before she did. That it was the said grant that was revoked following a citation issued at her behest, Citation No. 040 of 2003 arising from Administration Cause No. 131 of 2002. She therefore asserted that it was the plaintiff who had earlier misrepresented facts relating to the deceased's estate to court. She further stated that since her assumption to the office of administratrix she had filed two inventories outlining the true account of the deceased's assets. That while he was the administrator the plaintiff sold off substantial assets in the estate of the deceased. She concluded that the plaintiff was not a person fit to administer the estate of her husband and that his suit ought to be dismissed.

The defendant raised a counterclaim against the plaintiff and his wife, Aida Ntungura in WSD in which she sought the rectification/cancellation of a certificate of title for land known as Plot 80 Karegyesa Road in Rukungiri. She claimed that land had been transferred into the names of Aida Ntungura. She also sought for an order directing the defendants to the counterclaim to account for the proceeds from the said property. She also sought an order restraining the defendants to the counterclaim from further interfering in the management of the estate. The counterclaim was later amended to include one Kamadi Kagoro because the defendant claimed he was involved in a fraudulent transaction with the 1st and 2nd defendants to the counterclaim in which he bought one of the assets of the deceased, to wit Block 110 Plot 2225 at Seeta in Mukono District. It was served upon the 3rd defendant to the counterclaim on 7/09/2005 according to an affidavit deposed by Adam Bunya on 8/09/2005.

Aida Ntungura whose advocates complained was not served with a copy of the counterclaim filed a reply to it on the 8/05/2005. An advance copy was served upon the defendant's

advocates on the same day. The 3rd defendant to counterclaim filed his defence on 30/05/2005 and served it on Muhanguzi, Muhwezi & Co., the Advocates for the defendant on the same day. It was received in protest for being out of time.

The suit was called on for hearing on several occasions between September 2005 and June 2006. On the 14/06/2006, Kasule, J held a scheduling conference which was attended by the advocates for all the parties after which the suit was set down for hearing on 28/06/2006. That day turned out to be the day when a funeral service was held for the Hon Justice Oder, JSC (RIP) so the matter was adjourned to 21/08/2006. There is no record for 21/08/2006 but it would appear that after he held the scheduling conference, Justice Kasule was transferred to Gulu. It seems the case file then got misplaced and the matter lost its place on the court calendar.

After almost three years of waiting in vain for the plaintiff or his advocates to take some action, on 24/02/2009 M/s Muhanguzi, Muhwezi & Co Advocates wrote to the Registrar of the High Court at Kampala requesting that a duplicate file be opened to facilitate hearing of the case. Fortunately, the case files were found and on the 19th March 2009, M/s Muhanguzi, Muhwezi & Co., Advocates again wrote to the Registrar requesting that the file be allocated to another judge to dispose of the matter. All the files relating to the matter were then sent back to this court. The matter was then set down for hearing before me at the behest of M/s Muhanguzi, Muhwezi & Co Advocates who then served hearing notices on counsel for the plaintiff and the defendants to the counterclaim.

Turning back to Mr. Muhwezi's objections to the application for the adjournment I will first address the complaint that the reply filed by the 3rd defendant to counterclaim was out of time. The counterclaim was served upon the 3rd defendant to it on 9/05/20005. He filed a reply on 30/05/05 and had it served upon counsel for the counterclaimant on the same day. However, Order 8 rule 11(1) provides that any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him or her of the counterclaim. Kamadi Kagolo's reply to the counterclaim was therefore late by 6 days.

For the reply to be legally on the court record, Mr. Kagolo had to apply for extension of time within which to file it as is provided by Order 51 rule 6 CPR. He could have also requested the defendant to consent to the late filing of the reply under the provisions of Order 51 rule 7 CPR. In the absence of an extension of time as provided for by the rules the reply filed by the 3rd defendant to the counterclaim was incompetent and therefore of no consequence.

It is also true that rule 11(2) of Order 8 provides that the reply to the counterclaim shall be served upon the defendant within 15 days after its filing. Order 8 rule 18 (3) provides that a defence to the counterclaim shall be subject to the rules applicable to defences. Order 9 of the CPR then swings into action. Order 9 rule 10 provides that in all suits not specifically provided for in Order 9, in case the party does not file a defence on or before the day fixed therein and upon a compliance with rule 5 of this Order, the suit may proceed as if that party had filed a defence. Order 9 rule 11 (2) goes on to provide that where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences expires and the defendant or defendants have failed to file their defence(s), the plaintiff may set down the suit for hearing *ex parte*.

Counsel for the plaintiff to the counterclaim in this matter followed the provisions above when he moved for the suit to be set down for hearing on 30/08/10. Mr. Kagolo was therefore not properly before court when he applied for an adjournment because he had not filed a reply to the counterclaim within the time required by the rules. He did not apply for extension of time within which to so and his reply was of no effect. His application could not be entertained in those circumstances.

Having found so, I will now deal with the plaintiff's failure to move court to have his suit set down for hearing. The defendant filed her last defence on 24/05/2005. The suit was transferred to the High Court at Jinja on the 22/06/2006. Since then the plaintiff and his advocates made no effort to have court set down the suit for hearing. It took over 4 years for that to happen and it was finally done at the behest of the defendant's advocates.

It is also clear from the record that it was always the defendant and her advocates that made every effort to have the suit move forward towards hearing and completion. It was defendant's advocate that filed Miscellaneous Application No. 92 of 2005 which resulted in

the case file being transferred from the Magistrates Court at Mukono to this court. On 9/08/2005 the same advocates applied for a certificate of urgency to have the matter heard during the court vacation and that was granted on the 11/08/2005. This led to the case file being transferred to Kampala as an urgent matter because the only judge at Jinja was then engaged in a criminal session at Mukono. Unfortunately the matter was not heard at the time.

Because the plaintiff had all along shown no interest in having the suit set down for hearing, on 6/6/2006 counsel for the defendant filed Msc. Application No. 59 of 2006 under the provisions of Order 6 rules 28, 29 and 30, as well as Order 7 rule 11 CPR to have the suit dismissed. The application was not heard but as a result of it the suit was set down for the scheduling conference which took place on 14/06/2006. It appears that after the conference Justice Kasule was transferred to Gulu. That may be so, but again the plaintiff and his advocates took no steps in the suit till 19/03/2009 when counsel for the defendant moved the Family Division at Kampala to set it down for hearing. The file was then sent back to Jinja in April 2009 because the Family Division was overwhelmed with work. The defendant's advocates again followed up the matter and on the 28/06/10 they took out hearing notices for 30/08/10 and served them upon the plaintiff and defendants to the counterclaim. That was all of 4 years after the 14/06/06 when the scheduling conference took place. From his dilatory conduct and that of his advocates, I came to the conclusion that the plaintiff was no longer interested in the suit.

The courts in East Africa have had occasion to discuss the issue of delay in cases where they are called upon to extend time for taking further steps mostly in applications to extend time within which to appeal. I am of the view that the principles that have been established in such matters can be applied to the situation before me now. I thought that the conduct of the plaintiff and his advocates was negligent and it resulted into delay that was inordinate because the situation here is similar to that in the case of **Martin v. Anderson [2006] 1 EA 168**. In that case the Court of Appeal of Tanzania held that a period of 4 years without applying for leave to appeal out of time no doubt constituted inordinate delay.

In **Juliet Kalema v. Rhoda & William Kalema; C/A Civil Application No. 24 of 2004**, the court observed as the Supreme Court did in **Utex Industries Ltd v. Attorney General, SCCA No.52 of 1995**, that in order to avoid delays, rules of Court provide a timetable within

which certain steps ought to be taken. Further that for any delay to be excused, it must be explained satisfactorily. Though the plaintiff and his advocates were not before me when the suit was called for hearing, I could not deduce any explanation from the record that would be satisfactory to explain the delay of 4 years within which the plaintiff and his advocates took no action whatsoever to move court to set down this suit for hearing. That being the case, I would hold that those 4 years constituted ample time within which the plaintiff/his advocates could have fixed the suit for hearing and adduced his evidence. Since they failed to do so, it is my opinion that the provisions of Order 17 rule 4 of the CPR would apply to the case. Rule 4 of Order 17 provides as follows:

> "Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately."

In conclusion, the circumstances before me leave me with no alternative but to dismiss the plaintiff's suit under the provision above, with costs to the defendant. I also hereby enter judgment in default against the 3rd defendant to the counterclaim, under the provisions of Order 9 rule 8 CPR. Since the defendant's counterclaim alleges fraud against all the defendants to the counterclaim, it is hereby set down for formal proof on the 1st of March 2011, at 9.00 a.m. Counsel for the plaintiff to the counterclaim shall take out hearing notices to be served upon the 1st and 2nd defendant or their advocates for that day.

Irene Mulyagonja Kakooza
JUDGE
16/09/10