THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1003 OF 2022

(Arising out of Civil Suit No. 558 of 2017)

IVAN MUWABINI::APPLICANT

VERSUS

1. **ZION CONSTRUCTION LTD**
2. **SIMOLA ROBERT**
3. **JOHN BOSCO GUMISIRIZA::RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicant brought this application through ***Section 98 of the Civil Procedure Act cap.71, Order 9 rule 23, and order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1*** seeking orders that the order dismissing ***Civil Suit No.558 of 2017*** be set aside, and the suit be reinstated and heard on its merits. It also seeks that costs of the application be provided for.

The grounds in support of the application are contained in the affidavit in reply deponed by **Mr. Ivan Muwabani,** the applicant herein. He states that he was the plaintiff in ***Civil Suit No.558 of 2017*** which he filed through his previous lawyers ***M/s Opyene & Co. Advocates,*** who informed him that they had gone ahead to file all preliminary documents including trial bundle, witness statements, as well as the joint scheduling memorandum as required by law, and that when the matter came up for hearing on 10th March 2022, the applicant was prevented from attending the hearing owing to the fact that he had not been informed about the same by his lawyers.

That while the applicant is interested in expeditiously pursuing ***Civil Suit No.558 of 2017*** to its logical conclusion which involves substantial questions of law for determination by this court, he has also heavily invested in the same by instructing his previous lawyers who did all the preliminary work to ensure the matter was heard except for their mistake of failure to attend the hearing of the matter when it came up for hearing.

Additionally, that the applicant has since withdrawn instructions from their former lawyers, and have since instructed ***M/s Nalule & Co. Advocates,*** who have informed him that it is in the interest of justice and equity that the order dismissing ***Civil Suit No.558 of 2017*** be set aside, and the matter be fixed for hearing on his merits.

The 1st respondent opposed the application through an affidavit in reply deponed by its managing director, **Mr. Genza Godfrey** wherein he stated *inter alia* that; ***Civil Suit No.558 of 2017*** was dismissed on 10th March 2022 for the applicant's failure to produce evidence to proceed with the case, and that prior to that, although this court had already directed that all steps preliminary to the hearing such as filing trial bundles, joint scheduling memorandum and witness statements all be filed on the record, it is not true that the applicant's advocates had done all the preliminary work to ensure that the matter is heard and that they had only filed the joint scheduling memorandum as well as the trial bundle but not witness statements.

In addition, that for more than a year, it was counsel for the respondent who followed up on the matter which prejudiced the respondent by ensuring that its counsel was facilitated, and which led to court issuing repeated directives, and that when the matter came up on 10th March 2022, there was no witness statement on the record as observed by court which prompted court to proceed and dismiss the matter, and that for more than a year.

Further, that the instant application is not only bad in law, and incompetent, it cannot be reinstated as it is *res judicata;* and that without prejudice to the above, should this court be inclined to grant this application, then consideration ought to be given to the prejudice and inconvenience suffered by the 1st respondent in terms of expenses and costs thus it is just and equitable that the applicant bears the costs on the application in any event.

The applicant did not file an affidavit in rejoinder to averments in the 1st respondent's affidavit in reply.

The 2nd and 3rd respondents did not oppose the application. There is however no evidence indicating that they were served with this application, as well as the submissions in support thereof. This application is therefore dismissed against the two in that regard.

Representation.

The applicant was represented by ***M/s Nalule & Co. Advocates*** while the 1st respondent was represented by ***Sseguya & Co. Legal Consultants.*** Both counsel filed submissions in support of their respective clients' cases.

Consideration of the application.

I have carefully read the pleadings, evidence and submissions of both counsel, the details of which are on the court record, and which I have taken into account in considering whether or not this application discloses sufficient cause warranting the grant of the prayers sought.

In his submissions, counsel for the applicant argued that the lapse/mistake of the applicant's counsel of not informing him of the hearing date should not be visited on him, and is sufficient cause for his non-appearance, and that it would be unfair to penalize the applicant because of a mistake of his former counsel.

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.

It is now settled that mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits. ***See: Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998.***

In considering whether or not there was sufficient cause why either the applicant, or his counsel did not appear in court on the date that a matter was dismissed, this court is guided by the reasoning and judgement of court in the case of ***National Insurance Corporation vs Mugenyi & Co. Advocates [1987] HCB 28*** wherein court observed that;

> ***"...the test to be applied in cases of that nature was whether under the circumstances the party applying honestly intended to be present at the hearing and did his best to attend. It was also important for the litigant to show due diligence in the matter."***

In the instant application, the applicant stated that when ***Civil Suit No.558 of 2017*** came up for hearing, he was prevented from attending the hearing by the fact that he was not informed by his previous lawyers on time.

He additionally stated that his previous lawyers had done all the preliminary work to ensure that the matter was heard except for their mistake of failure to attend the hearing when the matter came up for hearing, and failure to inform him of the same.

In as much as the applicant states that he was not made aware of the fact that ***Civil Suit No.558 of 2017*** was coming up for hearing, he does not in any way rebut or deny the averments set out in the 1st respondent's affidavit in reply that it is not true that the applicant had done all the preliminary work to ensure that the matter was heard, and that he had only filed a joint scheduling memorandum and trial bundle, but had not filed witness statements.

No plausible explanation or sufficient cause has been advanced for the applicant's non-attendance on 26th April, 2021, 14th September, 2021 when neither he, or his counsel entered appearance, or why the directives issued by court were never fully complied with.

Apart from blaming his advocates, there was no evidence that the applicants had been vigilant in following the case as expected by a serious litigant. Litigants ought to be vigilant and follow upon their cases.

I am also mindful of the principle that administration of justice normally requires that the substance of disputes should be investigated and decided on the merits, and any errors or lapses should not necessarily debar a litigant from pursuing his rights. ***(See: Francis Bwengye vs Haki Bonera High Court Civil Appeal No.33 of 2009;*** and it is also noteworthy that no prejudice is suffered by a party if it can be compensated in costs.

It is also worth noting as I have done, that if a party instructs counsel, he assumes control over the case to conduct it throughout, the party cannot share the conduct of the case with his counsel. ***See: Hajati Safina Nababi Vs Yafesi Lule Court of Appeal Civil Appeal No.9 of 1998).***

Nonetheless, the dismissal of the suit in this case was made in 2022. That means that no follow up was made by the litigant with his counsel for almost a period of one year. For an application of this nature one cannot afford to wait for that long before taking appropriate action. In short the applicant filed a suit and then went sleep.

I am therefore disinclined to grant the order to set aside the dismissal as there is nothing to prove that such dilatory conduct is wholly attributed to the former counsel.

Costs to the 1st respondent.

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Alexandra Nkonge Rugadya

Judge

19th January, 2023.

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19/1/2023