

[2016] UGCommC 74

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The matter was put before Justice Wangutsi of this court and the parties had one audience before him. Later he was served with a hearing notice for 13th April 2015.

He turned up at Court at the right time and checked to confirm the time of hearing the application and the name of Justice Wangutsi did not appear anywhere on the cause list.

He went to the registry and was informed by the clerk that there was no hearing fixed before the Judge that day.

The applicant went in the hope that he would be notified of the new hearing date but was surprised when he was served with a notice to show cause why execution should not issue.

The applicant discovered that on 27th August 2014 the file was transferred by Justice Wangutsi to Justice Kainamura which he was never aware of.

There was no way the applicant would have known that the case was proceeding before Justice Kainamura and as a result the case was dismissed in his absence.

The affidavit in reply was deposed by Peter Mukidi Walubiri who deposed that;

The applicant was never interested in pursuing Misc Application No.815 of 2013 but rather kept lodging administrative complaints to delay the disposal of his own application.

The applicant took no further step to have the matter reinstated until execution proceedings against him commenced.

The applicant has not given any good reason to justify the reinstatement of MA. 815 of 2013.

In a further affidavit Mr. Peter Mulira deposed that;

He just wants to be given his constitutional right to defend himself and if the application is not granted the respondent will execute a decree which does not represent the true position.

In his submission, the applicant cited the case of ***National Insurance Corporation Vs Mugenyi & Co Advocates (1987) HCB 28*** where court held that the test for reinstatement of a suit is whether the applicant honestly intended to attend and did his best to do so. He argued that he did not turn up because he was misled to think the application was before Justice Wangutsi whereas it was before Justice Kainamura. He submitted that in view of this, court should hold that he satisfied the test for absence and sufficiency. In conclusion he prayed that the application be granted and costs be in the cause.

Counsel for the respondent submitted that the issue was whether the applicant discloses sufficient grounds warranting the reinstatement of M. A 815 of 2013. Counsel argued that the applicant did not have an honest intention of attending the hearing and even when the respondent fixed it for him, he still did not have the intention of attending the hearing of the application leading to its dismissal by court. Counsel cited the case of ***Winnie Ddungu T/A Ddungu Winnie Traders Vs Stanbic Bank (U) Ltd, Misc Appl. No.902 of 2013 at 11*** where court held that a litigant's right to hearing is vitiated if the litigant is guilty of dilatory conduct in the instruction of his lawyer. Counsel averred that the applicant in this matter was at all times guilty of dilatory conduct in the prosecution of M. A 815 of 2015 and the application ought to be dismissed with costs. Counsel further argued that the applicant took two months to apply for the

reinstatement which was exactly two months after realising that execution proceedings had been commenced against him. Counsel further stated that the applicant does not show sufficient cause why the application should be reinstated and as such ought to be dismissed with costs.

In rejoinder, the applicant submitted that bringing the application under Order 9 rule 27 is a mistake which should be overlooked in the interests of justice. He argued that the respondent did not deal with the issue of the affidavit which Mr. Walubiri swore to oppose the application without proof of authorisation. Counsel added that in view of this the Court must disregard the contents of the said affidavit. Mr. Mulira also argued that he was not guilty of dilatory conduct and therefore prayed that the application be allowed.

Decision of Court

The application was brought under Order 9 rule 23 (1) of the CPR and section 98 of the CPA. The facts as already stated are that the applicant seeks to set aside the order in H. C. M. A No. 815 of 2013 and the application be reinstated. I have analysed the submissions of both the applicant and Counsel for respondent.

I will address the issue of procedure first that were raised in submissions.

The applicant raised an issue regarding the affidavit in reply sworn by Counsel for the respondent. His contention was that counsel deposed the affidavit on behalf of the respondent but did not adduce proof of authorisation.

In the case of ***Julius Rwabinumi Vs Hope Bahimbisomwe SCCA No. 14/2000***, the Supreme Court held that it would be a great injustice to deny an applicant the pursuit his rights merely on the blunder of his lawyers when it is well settled that an error of counsel should not prejudice the case of the client.

That said, the client's intention was to have its case heard. However I agree that it is not proper to have the advocate depone on the client's behalf without filling in court his client's authorisation to do so; but that is a technicality that should not prejudice the case of the client.

On the other hand Counsel for the respondent objected to the filing of the application under **Order 9 rule 27** instead of **Order 9 rule 23(1) of the CPR**. I am of the opinion that since Counsel for the applicant admitted that it was an error and cited the right law in the submissions; it is in the interest of justice that this Court proceeds with the matter.

Further i will refer to the case of ***Re Christine Namatovu Tebajjukira [1992-93] HCB 85*** which was cited in the ***Kingstone Enterprises Ltd & 2 Others Vs Metropolitan Properties Ltd HCT-CC-CS-129-2011*** where Court held that;

“The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that lapses should not necessarily debar a litigant from pursuing his rights.”

It is my considered opinion that the procedural errors in this application are not fatal and the matter should be heard on merit. Accordingly i will proceed to consider the merits of the application.

This is an application filed under Order 9 rule 23(i) of the Civil Procedure Rules which provides as follows:

“23. Decree against Plaintiff by default bars fresh suit.

1. *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 the dismissal aside, 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 to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. (emphasis mine)*

In the case of ***Mumello Vs Bank of Tanzania (Civil Appeal No. 12 of 2002) [2006] TZCA 12** *addressing the issue of what amounts to sufficient cause, the court of appeal quoted the decision of a single Judge of the court in ***Tanga cement* *Company Limited Vs Jumanne D. Masangwa and Amos A. Mwalwanda Civil Application No.6 of 2001 (unreported)*** where Nsekela J A had this to say;

“What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant.”

In the affidavit in support of the application deposed by the applicant, he stated that;

“ There is no way i would have known that the case was proceeding before Mr Justice Kainamura when i turned up at Court and as a result of my absence the case was dismissed at the instance of Counsel for the respondent/ defendant and an order was duly extracted by the said Counsel.”

The above assertion is in my opinion not tenable. It is common knowledge that the court has an electronic notice board where all business for the day is beamed. The applicant is not an ordinary litigant but a reputable practicing Advocate who no doubt know about the notice board at the entrance of the court premises. A causal check on the notice board would surely have easily indicted where his file was and before whom.

This to my mind places the conduct of the applicant squally within the factors which do not amount to sufficient cause as set out in ***Tanga Cement case (supra)***.

Counsel for the respondent in his submissions highlighted the fact that the applicant seeks to reinstate a matter he seemed not to have interest in. Counsel pointed out that he was the one who fixed the applicant's matter for hearing, and the applicant was notified but he did not turn up hence the dismissal of the application. Counsel further argued that the applicant filed this application two months after the dismissal. Counsel added that the applicant responded after the commencement of execution proceedings which showed a lack of diligence.

Taking the above into consideration, it is my considered opinion that the applicant did not show diligence in the pursuit of his application. According to the affidavit of the applicant, he stated that he was shocked that there was a ruling already entered yet he was not aware. It is my considered opinion that the applicant displayed a lack of diligence and has not demonstrated any reasonable cause to warrant court reinstating H. C. M. A No. 815 of 2013.

I therefore accordingly dismiss the application with costs.

I so order.

B. Kainamura

Judge

2.03.2016

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