

UGANDA / JUDGMENT

Mwanguhya v King Oyo Nyimba Kabamba Iguru (Miscellaneous Application 33 of 2023) [2023] UGHCCD 251 (31 August 2023)

[2023] UGHCCD 251

COURT

HC: Civil Division (Uganda)

BEFORE

Wagona, J

CASE / FILE NUMBER

Miscellaneous Application 33 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 0033 OF 2023 (ARISING FROM CIVIL SUIT NO. 0072 OF
2022) 5 MWANGUHYA FENEHASI ::::::::::::::::::::::::::::::::::: APPLICANT VERSUS
KING OYO NYIMBA KABAMBA IGURU ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA 10 RULING

The applicant brought this application under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 9 rule 18 and Order 52 rule 1 and 2 of the Civil Procedure Rules for orders that:

1. Civil Suit No. 072 of 2022 be reinstated and the order for its dismissal 15 be set aside.

2. That the costs of the application be provided for.

The application is supported by the affidavit of Mr. George Musisi an advocate under M/s Pace Advocates, counsel for the applicant who averred as follows:

- 1. That Court issued summons to file a defense on 3rd November 2022. That he
- 20 instructed a process server Muhairwe Joram attached to this Court to effect service of Court process unto the defendant/Respondent.
- 2. That on the 24th November 2022, the process server went ahead and served the defendant who acknowledged receipt of the same.

- 3. That he kept reminding the process server to file an affidavit of service and was informed that he had done so.
- 4. That he went ahead and filed an application for an interlocutory judgment on 22nd February 2022 against the defendant for having failed to file a defense 5 within the prescribed time.
- 5. That in the process of following up on the interlocutory judgment, he was shocked to be informed that the suit had been dismissed for non-service yet the application for interlocutory judgment was on file.
- 6. That he cautioned the process server about his concern and he simply told him that he had the documents but had forgotten to place them on the file. That he tasked him to look for them and place them on the file.
- 7. That the dismissal would deny the applicant the right to be heard and to ensure that the ends of justice are met. That the applicant has always demonstrated willingness to prosecute his case.
- 15 8. That it was a mistake by the court process server who failed to file a return of service regardless of the several reminders.
- 9. That it is in the interest of justice that the application is allowed and civil suit No. 972 of 2022 reinstated.

The application was opposed by the Respondent through an affidavit deposed by 20 Titus Bitebakezi, the Attorney General of the Respondent who contended as follows:

- 1. That the suit was properly dismissed. That the Respondent filed their defense and paid the requisite filing fees.
- 2. That the reinstatement is an abuse of court process. That the applicant's 25 claim in the head suit has no possibility of success.

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Representation:

Mr. Nuwamanya Brian of M/s Pace Advocates represented the applicant while *M/s Atuhair & Co. Advocates* represented the Respondent. A schedule to file written submissions was issued by court and only the applicant complied.

Issues:

- 1. Whether there is sufficient cause for reinstatement of Civil Suit No. 072 of 2022.
- 2. Remedies available to the parties.

- 10

Submissions for the applicant:

It was contended for the applicant that Section 98 of the Civil Procedure Act gives this court inherent powers to make such order as may be necessary for the ends of justice. That reinstatement can be granted if there is proof of sufficient cause which relates to the inability to take a particular step on time. (See **Isadru Vicky Vs. Perina Aroma & 6 others C. A No. 033 of 2014 & MK Financiers Vs. Natukunda Alice, Misc. Application No. 797 of 2015**).

20 It was submitted that in this case, summons were served save that an affidavit of service was not filed in Court on time by omission of the process server, which should not be visited on the applicant who is innocent. He thus prayed that the application is granted plus the prayers it seeks.

25 CONSIDERATION BY COURT:

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The power to order for reinstatement of a case dismissed under Order 5 of the Civil Procedure Rules lies in the discretion of Court. Such discretion should be exercised sparingly and only in deserving circumstances. Where a part has been guilty of dilatory conduct or where there has been delay in filing an application for re-instatement, court should be reluctant to grant such a reinstatement.

Twinomujuni JA (RIP) in **Tiberio Okeny & Anor V The Attorney General and 2 ors CA 51 of 2001** gave the broad contours within which the discretion is to be exercised where he observed thus:

10 "(a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.*

15 "(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.*

20 "(c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.*

- "(d) Unless the Applicant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.*

- 5 *(e) 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 with the requirements of the law ..."

10 The Hon. Justice Twinomujuni further held that

"it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and* 15 *such other factors ...".*

In the application before me, the suit was dismissed under Order 5 rule 3 of the Civil Procedure Rules for non-service of Court summons. The applicant averred that the summons was served but there was a delay to file the return of service 20 which should not be visited on the innocent litigant.

There is now an affidavit of service on record deposed by Muhairwe Joram a process server attached to this Court which was filed on Court record on 18th April 2023. There is also a written defense filed by the Respondent on 9th December 2022 and an application for an interlocutory filed in Court on 22nd 25 February 2023.

The documents were not on the file when the case got dismissed, through omissions not attributable to the applicant. The applicant presented this application promptly. Further the interests of justice shall be served better when the dismissal is set aside and the case between the parties heard on merits.

The application therefore succeeds with the following orders;

- **1. The dismissal order dated 27th February 2023 is hereby set aside and the suit shall be heard on merits**
- ***2.* Each party shall bear own costs*.***
- 10 I so order.

Vincent Wagana High Court Judge FORT-PORTAL

DATE: 31/8/23

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