

UGANDA / JUDGMENT

# Nsamba v Civil Aviation Authority and Another (Miscellaneous Application 791 of 2023) [2023] UGHCLD 396 (10 November 2023)

[2023] UGHCLD 396

## COURT

HC: Land Division (Uganda)

## BEFORE

Naluzze Aisha Batala, J

## CASE / FILE NUMBER

Miscellaneous Application 791 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA LAND  
DIVISION MISC APPLICATION NO. 791 OF 2023 ARISING FROM CIVIL SUIT NO.471  
OF 2019

NSAMBA MICHAEL ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

CIVIL AVIATION AUTHORITY UGANDA LAND COMMISSION ::::::::::::::::::::::::::::::  
RESPONDENTS

BEFORE: HON. JUSTICE NALUZZE AISHA BATALA RULING

**\*Introduction;\***

- 1. \*Nsamba Michael\* hereinafter referred to as the Applicant brought this Application against \*Civil Aviation Authority\* and \*Uganda Land Commission\* hereinafter referred to as the Respondents by way of Miscellaneous Application under Sections 82 and 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13, Order 46 Rules 1 and 2 of the Civil Procedure Rules SI 71-1, Order 52 Rules 1 & 2 of the Civil Procedure Rules SI 71-1, for the following orders and or reliefs:
  - a) The order by the court dismissing the suit for want of prosecution be reviewed, varied, and set aside.

- b) The Applicant's head suit \*vide\* High Court Civil Suit 471 of 2019, Nsamba Michael versus Civil Aviation Authority and Uganda Land Commission be reinstated and heard on merit inter parties.
- c) The costs of the Application be in the cause.

### **\*Background;\***

**The background of this Application as can be discerned from the court record is as follows: -**

- 2. The Applicant filed HCCS No.471 of 2019 against the Respondents, the Applicant served the Respondents with a plaint and the summons to file a defense however the said defenses were not filed in the required time frame. When the matter was fixed for mention, counsel for the Applicant conceded and prayed to the court to exercise leniency and accept the Respondents/Defendants to file their defenses out of time since he wanted the matter to proceed interparty.
- 3. When the matter was fixed again on the 2nd of March 2022, the Applicant was represented by counsel Kabega Musa where counsel for the 1st Respondent prayed for an adjournment since the 2nd Respondent was not present in court. The matter later came up on the 11th of May 2022 where the Applicant was

represented by Mr. Mpagi Sunday and Atulinda but the matter did not proceed.

- 4. That the Applicant missed court on the 14th of April 2023 because he had lost a relative and being the adult member of the family, he had to go for burial. On the day when the suit was dismissed for want of prosecution, the Applicant was represented by his lawyers in court.
- 5. The Applicant filed his witness statements and scheduling memorandum which is yet to be adopted, hence this application.

### **\*Applicant's evidence;\***

- 6. The Application is supported by the Affidavit in support deposed by Nsamba Micheal the Applicant in which he states the following grounds;
- i) That the Applicant filed HCCS No. 471 of 2019 against the Respondents through his Lawyers of Kabega, Bogezi & Bukenya Advocates at the time, the Applicant served the Respondent with the Plaint and summons to file a Defence on the 30th and 31st days of May 2019 respectively.
- ii) That despite serving the Defendants now Respondents with the Plaint and the summons to a defence per the evidence in the affidavit of service, none of them filed a defence to the suit.

- iii) That having adduced proof of service of court process upon the Defendants now the Respondents, court on the **17th day of October 2019** granted the Applicant/ Plaintiff an order to proceed ex-parte and prove the case formerly.
- iv) That still on the **17th October 2019**, the Applicant gave evidence as PW1 and Mr. Moses Opito also gave evidence in support of the Applicant as PW2.
- v) That the suit was adjourned to the **21st August 2020** to enable the Applicant to produce to court the certified copies of documents from the land office and on that day the Applicant was represented by Kayanja Smith from Kabega, Bogezi & Bukenya Advocates but no one appeared for the 1st and 2nd Respondents.
- vi) That having been served with Court process on the **31st of May 2019 at 12:44hrs**, the 1st Respondent through Mr. Peter Walubiri on the **29th Day of October 2022** appeared in court **after the lapse of 18 months** and still with no defense on the court record.
- vii) That on the said date, the Applicant was represented by Mr. Abasi Bukenya from Kabega, Bogezi & Bukenya Advocates, and during the said mention the Applicant advised his lawyer to concede to the late

filing of the 1st Defendant's written Statement of defense since he wanted the matter to be heard inter parties on merit.

- viii) That the Applicant here invited the court to note that during the hearing of the **29th of October 2020** still the 2nd Defendant now the 2nd Respondent had not filed his defence despite having been served.
- ix) That notwithstanding the 2nd defendant's intentional refusal to file the defense to the suit, but due to the importance of hearing this matter inter parties, Counsel for the 1st Defendant now Respondent though with no instructions pleaded to the court to exercise its **lenience** by allowing the 2 nd defendant to file his defence after 18 months from the date of service of the Plaint upon the 2nd defendant.
- x) That the Applicant did not oppose the prayer by counsel for the 1st Defendant because he wanted the matter to be heard inter parties with the 2nd Defendant now 2nd Respondent on board.
- xi) That on the **12th day of February 2021**, the Applicant's lawyer and Mr. Peter Walubiri appeared in Court but still the 2nd Defendant/2nd Respondent had not filed a Defense to the suit despite counsel for the 1 st Defendant/Respondent having told the Court previously that he was pushing the 2nd Defendant to participate in the trial.
- xii) That on the **7 th day of April 2021**, the matter came up for scheduling and the 1st Respondent/defendant was dully represented but still the 2nd defendant/2nd Respondent had not filed a defense and/or appeared in court.

- xiii) That the 2nd Defendant now the 2nd Respondent only filed a Defense to the suit on the **20th day of August 2021** after the lapse of 29 months from the date of service of the Plaint and summons to file a Defense without leave of court but the Applicant did not object to the late filing of the Defense because he wanted the suit to be heard inter parties on merit.
- xiv) That on the **2 nd day of March 2022**, the Applicant was dully represented by Counsel Kabega Musa and he was ready to proceed but the 2nd Respondent was not represented by any person and the counsel for the 1st Respondent applied for an adjournment to give the 2nd Respondent an opportunity to be heard and the Applicant in the interest of justice did not oppose the application.
- xv) That on the **11th day of May 2022**, the Applicant was represented by Mpagi Sunday and Atulinda Magida but the Matter did not proceed because the Applicant was still pursuing some documents from the land office which documents he had not obtained by that date.
- xvi) That the Applicant in light of the above states that he always appeared in court personally and sometimes through an advocate. That even on the day of the dismissal of his suit, he was dully represented by Counsel Mpagi Sunday and that at the time this suit was dismissed he had done all the essential steps to ensure that the matter proceeds for hearing such as witness statements he had lodged, signed and the scheduling memorandum had been filed but the same had not been adopted since he had not obtained some documents from the land office.
- xvii) That the Applicant did not attend the hearing on the **14th of April 2023** because he had lost a relative a one Margaret Nayiga, the burial was at Masaka, and the Applicant being a senior member of the family was the one in charge of the burial hence he could not attend but sent an advocate who dully informed court the sufficient reason why he was unable to appear.
- xviii) That the Applicant further depones that on the day his suit was dismissed, he did whatever was necessary to appear in court and he indeed appeared through his advocate duly instructed.
- xix) That the dismissal of his suit was unfair and unjust by the court based on the grounds that Mr. Kabega Musa did not give reasons why he informed his Co-Counsel about the hearing of the case on that exact

morning of the hearing date yet he had been served with the hearing notice long before. Here he states that he has no professional control over the conduct of his lawyers.

- xx) That the dismissal of his suit for want of prosecution under Order 17 Rule 4 of the Civil Procedure rules on grounds that he had not appeared on the previous three occasions including the day the suit was dismissed is an error and a mistake since based on the advice of his Counsel the considerations for dismissal of a suit for want of prosecution and nonappearance of the Plaintiff under Order 17 rule 4 are different.

- xxi) That the Applicant prayed that it was an injustice to dismiss his suit for want of prosecution while he had filed all the relevant documents required to hear the matter.
- xxii) That he did not delay in filing the current application, that the suit be reinstated and heard inter parties because it involves land as a subject matter where the court needs to investigate the issue, that no prejudice will be suffered by the Respondents if the dismissal is set aside, the suit reinstated and heard inter parties on merit.
- xxiii) He lastly prayed that the court exercises its lenience by granting this application.

**\*1 st Respondent's evidence;\***

- 7. The application is responded to by an affidavit in reply deponed by Mr. Joseph J. Okwalinga on behalf of the 1 st Respondent which states the following grounds;
- i) That the Applicant's affidavit in support of the Application dated **28th April 2023** contained deliberate falsehoods intended to mislead this Honourable court.
- ii) That the 1st Respondent filed its written statement of defense in HCCS No. 471 of 2019 on **13th March 2020** with the consent of the Applicant under a pretext that the Applicant was interested in having the matter heard to its logical conclusion whereas not.
- iii) That after filing the written statement of Defense, the Applicant and his lawyer realized the serious difficulty of prosecuting the suit and began absconding from court thereby rendering the progress of the trial difficult.
- iv) That on **3 rd March 2023** when HCCS No. 471 of 2019 came up for hearing before the trial judge, the 1st Respondents' advocates were present in court but the Applicant and his advocates were absent without any explanation.
- v) That due to the Applicant's default in attending court on **3 rd March 2023**, the trial judge adjourned the matter to **18th April 2023** for hearing and

directed that the 1st Respondent's advocates extract hearing Notices and serve the Applicant.

- vi) That the 1st Respondent's advocates extracted the hearing notices on **6 th March 2023** and served the same on the Applicant on 13th March 2023.
- vii) That on **18th April 2023** by letter, the 1st Respondent's advocate wrote to us and informed us that when the suit came up for hearing one Counsel Sunday Mpagi who was jointly representing the Applicant with Counsel Kabega Musa appeared in court without a file to seek an adjournment on the grounds that he had just been informed of the matter that morning.
- viii) That the Applicant was absent from court on **18th April 2023** without excuse.

- ix) That on the **18th January 2022**, this Honourable court had issued a temporally injunction which was restraining the 1st Respondent from enjoying its constitutional rights from the suit land and causing it serious hardships until final disposal of the suit.
- x) That the Applicant and his lawyer were ceaselessly and deliberately absconding from court with the sole purpose that the temporary order stays longer in force, to inconvenience the 1st Respondent, and to waste this Honourable Court's valuable time.
- xi) That even if the Applicant had filed witness statements, the same could not be relied upon because the Applicant was not in court to tender them in, and to be cross-examined, the same is expunged from the record.
- xii) That the allegation that the Applicant absconded from court on **18th April 2023** because he had lost a relative is an afterthought and deliberate falsehood.
- xiii) That if the Applicant had lost a relative his advocate would have informed the court when he appeared on the **18th of April 2023**, the Applicant's Counsel sought an adjournment on grounds of having known about the suit that morning yet the Applicant was served on **13th March 2023**
- xiv) That the suit was rightly dismissed under Order 17 rule 4 because the Applicant failed to cause the attendance of his witness in court.
- xv) That want of the prosecution is a phrase to mean all factors envisaged under Order 17 Rule 4 of the Civil Procedure Rules.
- xvi) That the trial judge did not intend to dismiss the suit under Order 17 rule 5 but under Order 17 rule 4 as she rightly did.
- xvii) That this is not a proper application for review or reinstatement of the suit.
- xviii) That there is no single error apparent on the face of the record and that the application does not disclose any valid grounds for review or reinstatement of the suit.
- xix) That the suit dismissed under order 17 rule 4 leads to a decree and the only remedy to the aggrieved party is an appeal.
- xx) That the court is a *functus officio* in HCCS NO. 471 of 2019 and does not have the jurisdiction to entertain this matter.
- xxi) The 1st Respondent prays that the application be dismissed with costs.

The Applicant filed an affidavit in rejoinder which is summarized as hereunder;

- 8. The Applicant in his affidavit in rejoinder stated that on the date his suit was dismissed, he was represented by counsel Mpagi Sunday because counsel Musa Kabega had delayed in another matter, that his lawyer informed the court that he had not appeared because he had lost a relative thus it's not true that his lawyer never informed court why the Applicant had missed court.
- 9. The Applicant in further rejoinder states that on the date his suit was dismissed, the same was not coming up for hearing because the scheduling had not been concluded since he was still pursuing some documents from the land office which documents were required before the hearing could commence, further that court only has powers under order 17 rule 4 to determine the matter immediately upon the Plaintiff failing to bring witnesses or upon failing to do a particular thing as the court had directed.
- 10. The Applicant states that his suit was dismissed for want of prosecution based on the misconceived nonappearance on 3 occasions which nonappearance is

under Order 9 Rule 22 Civil Procedure Rules, further that the none appearance of a Plaintiff and dismissal for want of prosecution are both not provided for under order 17 rule 4 of the civil procedure rules, but under order 17 rule 5 of the Civil Procedure Rules as amended

- 11. The Applicant thus states in rejoinder that the dismissal of his suit for want of prosecution and nonappearance under order 17 rule 4 instead of order 9 rule 22 or order 17 rule 5 is an error and a mistake apparent on the face of the record which calls the review of the dismissal and court has the powers to review the said decision, that the words used by the 1st Respondent in asking for the dismissal of the suit should be given their literal meaning and interpretation and lastly that the Application be granted with costs.

#### **\*Representation\*;**

- 12. The Applicant was represented by **M/S Kabega, Bogeza & Bukenya Advocates**, and **Mpagi Sunday & Co Advocates** while the 1st Respondent was represented by **KBW Advocates** and the 2nd Respondent by **Attorney General**. Both parties filed able submissions which I have considered in the determination of this application. However, when parties appeared before me on the **11th of October 2023**, I realized that the 1st Respondent filed his submissions first before the Applicant could file his submissions; I thus resolved that the Applicant will file his submissions and no party will be entitled to file submissions in rejoinder

#### **\*Issues for determination by Court\*;**

- 13.. It should be noted that both parties in their submissions raised issues which in common invite this Court to determine issues whether the Applicant's application raises grounds for review. If yes, whether the Order of Dismissal of Civil Suit No. 471 of 2019 be set aside and the suit be reinstated.

- 14. In the determination of this application, this honorable court resolved to adopt the issues raised by the Applicant which are as follows:
- \*i) Whether the Application raise grounds for review of the dismissal order in Civil Suit No. 471 of 2019, delivered on 18th April 2023?\*
- \*ii) Whether there are sufficient grounds for setting aside the dismissal of Civil Suit No. 471 of 2019 and reinstating the same for hearing inter parties?\*

**\*Resolution and determination of the issues;\***

- i) **Whether the Application raises grounds for review of the dismissal order in Civil Suit No. 471 of 2019 delivered on 18th April 2023.**
- \*15.\*Review of court judgments, decrees, and orders is provided for under Sections 82 and 98 of the Civil Procedure Act supra and Order 46 rules 1 & 2 of the

Civil Procedure Rules, Section 82 of the Civil Procedure Act supra provides that; \*Any person considering himself or herself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order and the court may make such orders on the decree or order as it thinks fit\*

- \*16.\*Under Order 46 rules 1 & 2 of the Civil Procedure Rules, it is provided therein that; \*Any person considering himself or herself aggrieved-a)by a decree or Order from which an appeal is allowed but from which no appeal has been preferred; or b)by a decree or Order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any sufficient reason, desires to obtain the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or order\*
- 17. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party...
- 18. The Applicant in his Affidavit in support of application and rejoinder depones that Counsel for the 1st Respondent on the **18th of April 2023** made an oral application in which he asked the court to dismiss the Applicant's suit on grounds that the Applicant's advocate of M/S Kabega, Bogezi & Bukenya Advocates were served with the hearing notices fixing the case for hearing on the **18th April 2023** but the said advocate and the Applicant chose not to appear on the **18th day of April 2023** when the suit came up for hearing.

- 19. He further in his application informed the court that the non-appearance of the Applicant/Plaintiff was evidence that the Applicant/plaintiff was no longer interested in prosecuting the matter and for that reason, the matter ought to be dismissed with costs and in the alternative, that if the court declines to dismiss the application, the Applicant be directed to pay to the 1st Respondent the day's costs.
- 20. That the Applicant averred that court upon the said prayer by counsel for the 1<sup>st</sup> Respondent, made a ruling dismissing the suit for want of prosecution under Order 17 rule 4 on grounds that the Applicant had not appeared on three(3) previous occasions, and further that Counsel Kabega Musa for the Applicant was served in time but did not advance reasons why he chose to inform his Co-counsel about the hearing on the very morning when the case was coming up for hearing.
- \*21.\*In support of the above averments, Counsel for the Applicant in his submissions in regard to the dismissal of the suit submitted that according to the prayer made by counsel for the 1st Respondent particularly the grounds upon which he sought the suit to be dismissed namely "the suit be dismissed because the Plaintiff's counsel was served in time but the Plaintiff has decided not to appear despite being served", that the said words and the whole application clearly depicted that the 1st Respondent sought to dismiss the suit for non-appearance of the Plaintiff under **Order 9 rule 22** of the Civil Procedure Rules supra which provides that: "Where the defendant appears, and the Plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim or part of it, in which case the court shall pass the decree against the defendant upon such admission, and where part only of the claim had been admitted, shall dismiss the suit so far as it related to the remainder"
- \*22.\* In counsel's view, considering the words used by the 1st Respondent's counsel in asking for the dismissal of the suit, the proper order under which the judge could have dismissed the case in order 9 rule 22 hereafter quoted which empowers the court to dismiss a suit for the non-appearance of the Plaintiff, thus it is the Applicants submissions that the dismissal of the suit

under Order 17 rule 4 was a mistake and an error apparent on the face of the record which this court has powers to review.

- \*23.\*Counsel for the Applicant further submitted that even if the court had intended to dismiss the suit for want of prosecution as per the ruling of the court, it was a mistake and an error apparent on the face of the record for the trial judge to dismiss a suit for want of prosecution under **Order 17 rule 4**, yet a dismissal of a suit for want of prosecution is provided for under **Order 17 rule 5** of the Civil Procedure Rules supra which provides that;"... if the plaintiff does not within 8 weeks from the delivery of the defense, or, where a counterclaim is pleaded, then within 10 weeks from the delivery of the counterclaim, set down the suit for hearing, then the Defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on the hearing of

application, the court may order the suit to be dismissed accordingly or may make such other orders, and on such terms, as to the court may seem just."\*

- \*24.\*I need to emphasize that the aforementioned rule has since been amended by The Civil Procedure (Amendment) Rules, 2019.
- \*25.\*Counsel for the Applicant further maintains that, still the trial judge based on the application and prayer made by the 1st Respondent's counsel asking for the dismissal of the suit, could not dismiss the suit for want of prosecution

because in the said prayer/ application there was nothing to suggest that the Plaintiff had failed to set down the suit for hearing within 8 weeks from the delivery of the defense, or within 10 weeks from the delivery of the counterclaim. He thus maintains that the dismissal of the suit for want of prosecution under Order 17 Rule 4 contrary to Order 17 Rule 5 is an error apparent on the face of the record and a cause sufficient to review the order and set it aside.

- \*26.\* In support of his submissions, counsel for the Applicant relied on the case of *\*Comtel Integrators Africa Ltd vs National Social Security Fund HCMA 772 of 2022\** in which Justice **Christopher Madrama Izama** held that want of prosecution is provided for under Order 17 rule 5 of the Civil Procedure Rules, while making no application or steps for two years by either party to proceed with a suit is provided for under Order 17 rule 6 CPR. \*The two rules do not deal with the same circumstances for dismissal and I will set them out for ease of reference. [underlined for emphasis\*].
- \*27.\*Here the Applicant emphasizes that when granting a dismissal order, the words used by the Applicant to make the prayer of dismissal must be considered to help the court determine the order and the rule under which the application to dismiss a suit has been made because the considerations under each rule are different.
- \*28.\*Still on the case of *\*Comtel Integrators Africa Ltd\** supra, the court further emphasized that a suit can only be dismissed for want of prosecution under Order 17 rule 4 that the Application must be a formal application and that in the absence of a formal application, the dismissal of a suit for want of prosecution is not tenable.
- \*29.\*Based on the above submissions Counsel prayed that there are errors apparent on the face of the record upon which the court can review the order dismissing the suit on the **18th of April 2023**, in support of his assertion that the application raises grounds for review. The Applicant relied on the case of *\*Mushabe Appollo Vs Mutumba Ismail HMA No. 8 of 2020\** in which Justice **Musa Ssekaana** defined an error or mistake on the face of the record to mean\*; "...a mistake or error apparent on the face of the record refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on record. It may be an\* **error** \*of law, but the law must be definite and capable of ascertainment. It must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake."\*

- 30. The Applicant further relied on the case of **Kinyara Sugar Limited Vs Hajji Kazimbiraine Muhamad and 4 others HCMA No. 003 of 2020** for a holding that the Court can review its judgment under Section 82 of the CPA

supra on grounds as the court thinks fit and that under Section 82 the Applicant is not required by the court to prove that there is an error apparent on the face of the record but only that there is a just cause to set aside the judgment or order under review, dismissing a suit under a wrong procedure and basing on wrong considerations is a reason which court ought to deem fit and review its decision with a view of setting it aside.

- 31. On the other hand, the 1st Respondent by his submission dated **5 th July 2023** cited order 17 rule 4 of the CPR which I will not repeat, and asserted that the Applicant/Plaintiff was served with a hearing notice on the **13th March 2023** per the affidavit of service attached as annexure A and that he declined to appear in court on the 18th of April 2023 when the matter came up for hearing, and that his lawyer attended court albeit without the file of the case.
- 32. That the lawyer asked for an adjournment on grounds that he learned about the matter that morning and yet the service had been effected on the **13th of March 2023**. That the trial judge upon listening to the 1st Respondent's application to dismiss the suit was compelled to immediately determine the matter under order 17 rule 4 of civil procedure rules and dismissed the same.
- 33. The 1st Respondent proceeded to define want of prosecution based on the **Black's Law Dictionary, 9th Edition page 1719** to mean failure of a litigant to pursue a case and concluded that the circumstances envisaged under order

17 rule 4 can all be summarized to mean want of prosecution because they all mean failure of litigant to pursue a case.

\*34.\*He also relied on the case of **Comtel integrators Supra** in which a suit was dismissed under Order 17 rule 6 for want of prosecution, here the Respondent emphasized that the court held that **"want of prosecution" can be termed as a misnomer because the corrected rule was cited**, he emphasized that there is no error apparent on the face of the record because the judge rightly dismissed the suit under Order 17 rule 4 for want of prosecution. He cited a case of **\*Farm Inputs Care Centre Limited vs Klein Karoo Seeds Marketing Ltd MA No. 0861 of 2021\*** in which the court defined an error and mistake hereunder as **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error that has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record."** \*Again, if a view adopted by the court in the original record is a possible one, it cannot be

an error apparent on the face of the record even though another view is also possible, mere error or wrong view is certainly no ground for a review although it may be for an appeal."\*

- 35. Based on the above interpretation and cases cited, the 1st Respondent submitted that the Application at hand raises no grounds for review and ought to be dismissed.
- 36. I have analyzed the submissions of the parties above, I have perused the record of court particularly on the **18th of April 2023** and I have not come across any prayer and application that was made by Counsel for the 1st Respondent under order 17 rule 4 of the civil procedure rules supra as suggested by counsel for the 1st Respondent on the first page of his submissions under paragraph 5. Therefore, it is my finding that the 1st Respondent never made any prayer to dismiss the suit under order 17 rule 4 as submitted by the counsel.
- 37. On the submissions by the Applicant that the prayer and the words used by Counsel for the 1st Respondent in asking the court to dismiss the suit exhibited that the 1st Respondent sought an order to dismiss the suit for non-appearance of the Plaintiff under Order 9 ruler 22 of the CPR, I have perused the record of court on **18th April 2023**, I have considered the averments of the parties and their affidavits and I agree with the Applicant that the 1st Respondent on

the 18th April 2023 made an oral application to dismiss the suit on grounds that the Applicant's lawyer had been served with a hearing notice on the **13th of March 2023** and that the Applicant/Plaintiff had not appeared despite being served with a hearing notice.

- 38. It is thus misleading for the Respondent in his submission and affidavit in reply to assert that the Applicant had failed to produce witnesses and/or to appear to tender in court his witness statement yet on perusal of the record of the **03rd March 2023**, there is no specific order by which court directed the Plaintiff/Applicant to bring his witnesses with a view of commencing the hearing of evidence. Therefore, it is my finding that although the 1st Respondent did not cite any order of the civil procedure rules under which he applied for the dismissal of the suit, on perusal of the record where an oral application was made and the words used by the 1st Respondent particularly that the suit be dismissed for non-appearance of the plaintiff. It is clear that the application made by the 1st Respondent intended to invoke the provisions of Order 9 Rule 22 of Civil Procedure Rules not under Order 17 Rule 4 of the Civil Procedure Rules supra because the consideration under the two rules as I have already exhibited in my analysis above are completely different.
- 39. The 1st Respondent in his submissions relied on the case of \*Comtel Integrators Africa Ltd Vs National Social Security Fund, HCMA No. 772\*

\*of 2016\* for a holding that **"the words 'want of prosecution' can be termed as a misnomer because the correct rule is cited"**, the same case was cited by the Applicant and I have had an opportunity of reading the same and I wish to state the following in respect to the said case.

- \*i) In the case of Comtel Integrators Africa Ltd Vs NSSF (supra), the Defendant applied for the dismissal of the suit by a letter and strictly quoted Order 17 rule 6 of the Civil Procedure Rules as the order under which he sought to dismiss the suit. (emphasis on the underlined statement)\*
- \*ii) Secondly, the contents of the letter were to the effect that the plaintiff had not prosecuted the case for a period of two (2) years or more.\*
- \*iii) Despite having cited Order 17 rule 6 in the letter, the Registrar dismissed the case for want of prosecution.\*
- 40. In the instant case, Counsel for the 1st Respondent did not cite any rule under which he brought the application which is completely contrary to the case of \*Comtel Integrators Ltd Vs NSSF (supra)\* in which the Applicant cited, the rule under which the 1st Respondent brought his application seeking to dismiss the suit and the reason being that the Plaintiff/Applicant had not prosecuted his suit for a period of two years, nevertheless court in the case of Comtel distinguished the consideration to be followed and considered if the suit is to be dismissed for want of prosecution under Order 17 rule 5 of the Civil Procedure Rules (as it was before the amendment of 2019) which required the Applicant who is to prove that the Plaintiff had not set down the suit for hearing for a period of 8 weeks from the date of the delivery of the defense and 10 weeks from the date of delivery of counterclaim.
- 41. The court in the case of \*Comtel Integrators Ltd Africa Vs NSSF (Supra)\* concluded by holding that since the letter was clear that the suit be dismissed for failure to take a particular step for a period of two years hence the suit was dismissed for that reason and not for want of prosecution.
- \*42.\*I agree with the submission of Counsel for the Applicant that the scope of Section 82 of the Civil Procedure Act is wider than that of Order 46 of the Civil Procedure Rules. \*(See; Kinyara sugar limited Vs Hajji Kazimbiraine Muhamad and 4 others HCMA No. 003 of 2020)\*
- 43. Given the above and having already made a finding that there was no application and prayer on record to dismiss the suit for want of prosecution under Order 17 rule 5 and the fact that the application by the 1st Respondent did not meet the taste to dismiss the suit for want of prosecution, further that there is no any other application to dismiss the suit under Order 17 rule 4 on grounds of failure to produce witnesses or to do any particular act basing on a previous express direction/ order of court to do so.
- 44. I do find in light of the authorities cited, the law on review, and the submissions made by the parties, that this is a proper case for review since it's obvious on perusal of the record that there is a mistake and error apparent on the face of the record and the said mistake or error does not need extraneous reasoning to show its incorrectness.

- 45. The error is an error of law and fact, the same is so manifest and clear and this court cannot permit the same to remain on its record I hereby review the dismissal order dated **18th April 2023** and set it aside.
- \*ii) Whether there are sufficient grounds for setting aside the dismissal of Civil Suit No. 471 of 2019 and reinstate for hearing inter parties.\*
- \*46.\*Having granted issue (one) 1 in the affirmative, I hereby hold that there is sufficient cause to reinstate Civil Suit No. 471 of 2019 particularly because the administration of justice requires that suits must be duly investigated, determined on merit and inter parties.
- \*47.\*Further a mistake of counsel by failing to execute his duties after being dully instructed should not be vested in the litigant in this case who did not have professional control over the matter. (See\*; the case Bishop Jacinto Kibuuka\*

**\*Vs Catholic Lawyers Society & 2 Or's HCMA No. 696 of 2018)\*.**

\*48.\*The Applicant further deponed and submitted that he was duly represented on the 18th of April 2023 by Counsel Mpagi Sunday who was his authorized agent under **Order 3 rules 1 & 2 of the civil procedure rules** supra and per the case of \*Emmanuel Lukwaju vs Myers Muchunguzi & 2 Or's HCMA No. 862 of 2011\*, having appeared through his advocate.

- \*49.\* I find that the dismissing of the Applicant's case under the circumstances discussed herein above for his suit for non-appearance yet he was dully represented is also sufficient ground to set aside the dismissal of the suit and reinstate the same for hearing on its merit. Section 33 of the Judicature Act, Cap 13, and Section 98 of the Civil Procedure Act that bestow unto this honorable court wide discretionally powers to make such others whether interim or final to meet the ends of Justice, courts cannot slum their doors to litigants, this will be breading social unrest and abrogating from the very core purpose of Courts of Judicature which inter alia includes administration of substantive justice to all manner of people in Uganda. enjoins this Honourable court
- \*50.\*Accordingly, it is the finding of this honorable court that the application succeeds with the following orders;
- i) The order by the court dismissing **High Court Civil Suit No.471 of 2019** for want of prosecution is hereby reviewed and set aside.
- ii) **High Court Civil Suit No. 471 of 2019, Nsamba Michael Vs Civil Aviation Authority and Uganda Land Commission** is hereby

reinstated and the same shall be fixed for hearing and disposal interparty on its own merit.

iii) Each Party is to bear its own costs.

Hamlegy

\$10^{th}\$\,/11/2023\$

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