

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

(ARISING FROM MISCELLANEOUS APPLICATION NO. 118 OF 2023)

(ALL ARISING FROM BULAMBULI CIVIL SUIT 23 OF 2021)

VERSUS

BEFORE: HON. JUSTICE LUBEGA FAROUQ

RULING

2. This application was brought by way of Notice of Motion under section 98 and 79 (1) (b) the Civil Procedure Act Cap 282, order 43 rule 16 of the Civil Procedure Rules SI-71 for orders that-
 - a. The order dismissing Civil Appeal No. 102 of 2022 be set aside;
 - b. Civil Appeal No. 102 of 2022 be reinstated for hearing;
 - c. Leave to serve the memorandum of appeal be granted; and
 - d. Costs of this application be provided for.
3. This application was supported by the affidavit of the Applicant where he averred as follows-
 - a. That he was sued by the Respondent in Civil Suit No. 102 of 2022 in the Chief Magistrates Court of Bulambuli;
 - b. That the trial magistrate H/W Akoko Patrick decided the matter in favor of the Respondent/Defendant;

- c. That the Applicant being dissatisfied with the decision of the trial magistrate, he filed an appeal in this court and instructed counsel Bikala Rogers to prosecute the same;
 - d. That Counsel informed him he was then in position to do everything necessary to make sure that the appeal is fully fixed and prosecuted;
 - e. However, recently, he checked the progress of the appeal after a long time without hearing from his former lawyers and realized that the appeal was dismissed a long time for non-service of the memorandum of appeal to the Respondent;
 - f. That the inability and mistake of counsel cannot be visited on him who is an innocent litigant;
 - g. That his application possesses sufficient cause for the reinstatement of Civil Appeal No. 102 of 2022;
 - h. That his appeal has proper grounds with a high likelihood of success and has been brought without undue delay.
4. This application was opposed by the affidavit in reply of the Respondent where he briefly averred that-
- a. This application is incurably defective, irregular, barred in law, tainted with deliberate untruthfulness, an abuse of court process and waste of court's time and should be dismissed with costs;
 - b. The grounds of this application were already disposed of by this court in Miscellaneous Application No. 118 of 2023 arising from Civil Appeal No. 102 of 2023, all arising from Bulambuli Civil Suit No. 23 of 2021 Wamulukhu Robert Vs Kuloba Charles.

5. Legal representation

6. Counsel Ntuyo Shafiq on brief for Mr. Kisambira Isma represented the Applicant while Counsel Allan Kikwe appeared for the Respondent.

7. Submissions

8. At the hearing of this application, this court gave counsel schedules to file their respective submissions and they both complied. I will consider them while writing this ruling.

9. **Analysis of court**

10. Preliminary Objection

11. Before I derive into determination of the merits of this application, I will first determine the objections raised by the Respondent in his affidavit in reply and submissions.

12. The Respondent in paragraphs 3 and 4 of his affidavit in reply averred that this application is incurably defective, irregular, barred in law, tainted with deliberate untruthfulness, an abuse of court process, waste of court's time because the grounds of this application were already disposed of by this court in Miscellaneous Application No. 118 of 2023 arising from Civil Appeal No. 102 of 2023 Wamulukhu Robert Vs Kuloba Charles and therefore, should be dismissed with costs.

13. Section 7 of the Civil Procedure Act Cap 282 provides-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."

14. On perusal of the court record, it is prima-facie that Miscellaneous Application No. 118 of 2023 was filed by the Respondent herein against the Applicant, for orders that Civil Appeal No. 102 of 2023 be dismissed for non-service of the memorandum of appeal while the instant application is seeking to set aside the dismissal of the said appeal and reinstatement of the same. For that reason, I don't agree with counsel for the Respondent in that regard. The causes of action in the two applications are different.

15. The preliminary objection is hereby overruled.

16. I will now determine this application on its merit.

17. **Issues framed by court**

- a. Whether the application raises grounds or sufficient cause for setting aside the order dismissing Civil Appeal No. 102 of 2022?
- b. Whether the Applicant can be granted leave to serve the memorandum of appeal?
- c. Whether there are remedies available to the Applicant?

18. **Determination of the issues**

19. Issue 1: ***Whether the application raises grounds or sufficient cause for setting aside the order dismissing Civil Appeal No. 102 of 2022?***

20. It is judiciary noticed that order 5 rule 1 (1) of the Civil Procedure Rules requires that whenever a suit is duly instituted, summons must be taken out directing Defendant/Respondent to file defence/response or to appear in court to answer to the claims alleged.

21. Order 5 rule 1 (2) of the Civil Procedure Rules provides that-

"Service of summons issued under subrule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension."

22. Order 5 rule 1 (3) of the Civil Procedure Rules provides that-

"Where summons have been issued under this rule, and-

(a) Service has not been effected within twenty-one days from the date of issue; and

(b) There is no application for an extension of time under sub-rule (2) of this rule; or

(c) The application for extension of time has been dismissed, the suit shall be dismissed without notice."

23. The Supreme Court in **Bitamisi Namuddu Vs Rwabuganda Godfrey Civil Appeal No. 16 of 2014**, it was held-

"Where the rules provide for a consequence upon failure to do a certain act, then the provision is read as mandatory and not directory."

24. In **Victory Construction Company Vs Duggal [1962] EA 697**, it was held-

"Courts are provided with administrative machinery aimed at helping it disencumber itself of case records in which the parties appear to have lost interest."

25. The Supreme Court in **Florence Nabatanzi vs Naome Binsobodde Civil Application No.6 of 1987**, laid down principles to be followed by courts in cases where the applicant relies on mistake/negligence of counsel. It held-

"First and foremost, the application must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. This is a general requirement not withstanding that each case must be decided on its own facts;

A vigilant Applicant should not be penalized for the fault of his Counsel on whose actions he has no control."

26. The Supreme Court of India in the case of **Parimal versus Veena @ Bharti Civil Appeal No.1467 of 2011** held-

"The meaning of the word "sufficient" is "adequate" or "enough" in as much as may be necessary to answer the purpose intended. In this context sufficient cause means a party had not acted in a negligent manner or there was want of bona-fide on its part in view of the facts and the circumstances of each case."

27. This court recently held in **Miscellaneous Application No.430 of 2023 Wk's Hardware Limited and Wamukwe Kadiri vs Stanbic Bank (U) Limited** that-

"The Applicants' averment that they have on several occasions demanded to know the status of their matter from their previous advocate but no information was forthcoming is not sufficient since

they ought to have taken steps beyond just inquiring from their former lawyer but to be vigilant in following up on their matter."

I further added that-

"For a given period of time now, it has been observed by this court that there are several applications and suits where parties fail to comply with procedural requirements and blame the mistake on their advocates but they never tender in court anything to prove that instructions were given to those advocates or that those instructions were still valid as required by the law."

28. In the instant case, the Applicant averred in paragraphs 6, 7, 8 and 9 of his affidavit in reply that his former counsel informed him that he was then in position to do everything necessary to make sure that his appeal is fully fixed and prosecuted but when he checked the progress of the appeal after a long time without hearing from his former lawyers, he found that the said appeal had been dismissed long time for non-service of the memorandum of appeal. He contended that inability and mistake of his counsel cannot be visited on an innocent litigant like him.
29. However, like I found in **Wk's Hardware Limited and Wamukwe Kadiri V. Stanbic Bank (U) Limited (Supra)** the Applicant ought to have attached proof of instructions which he gave to his former alleged advocate. Secondly, if he was a vigilant litigant, he ought not to have waited for that long period like he described it to be, without hearing from his advocate. He ought to be more vigilant in following up his matter than just waiting for the advocate.
30. It should be noted that although advocates have a statutory duty to diligently handle the instructions of their clients, litigants should also be more vigilant in following up their matters so that in cases where an advocate is not on ground, the litigant is able to update him to avoid gaps and unnecessarily dismissals which as a result load court with applications of this nature.
31. This goes without saying that if steps had been taken by the Applicant to thoroughly cross check with the registry, the court clerk and any other

relevant officer at court, there would be no way he would have failed to know that his appeal had not been served to the opposite party and update his counsel about the same.

32. The Applicant has therefore failed to prove any sufficient cause which prevented him from taking out the necessary steps as required by the law to render setting aside the dismissal order in Civil Appeal No. 102 of 2022.

33. The above findings automatically dispose of the entire application and it is accordingly dismissed with costs to the Respondent.

I so order.



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LUBEGA FAROUQ
Ag. JUDGE

*Ruling delivered via the email of the Advocates of the parties on **28th** day of **October, 2024***