

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO .359 OF 2020
ARISING FROM MISCELLANEOUS APPLICATION NO .874 OF 2020
(ARISING FROM H.C.CS NO 483 OF 2019)
DEOX TIBEINGANA.....APPLICANT
VERSUS
GODFERY KIRUMIRA RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under section 82 and 98 of the civil procedure Act cap 71, Order 46 Rules (1), b ,4 and 8, 52 Rules 1 & 3 of the civil procedure Rules as amended for order that:

(a) A ruling allowing the application for reinstatement of the H.C.C.S No 483 of 2019 delivered on 13th day of February 2021 by Honorable Mr. Justice Musa Ssekaana be reviewed on account of mistake, error apparent on the face of the record for mistakenly reinstating a suit which had automatically abated.

(b) Costs of the application provided for-

The grounds for this application briefly are set out in the Notice of Motion and also in his affidavit of Mr. Deox Tibeigana the applicant herein but briefly are the following;

(a) There being no action taken by the Plaintiff for over 3 weeks, it took 3 months, and the Court dismissed the said suit for want of prosecution.

(b) The applicant applied for reinstatement of the above suit and the Respondent filed his affidavit in reply which was deposed by Jacob Kalaabi,

an advocate in the law firm representing the applicant and dully authorized to act on the applicant's behalf.

- (c) That Since there was no action taken by the applicant for a period of three (3) months the suit automatically abated and thus cannot be reinstated as per order 17 Rule 5 (1) and 2 of the Civil Procedure Rules SI 71-1 as amended.
- (d) When the matter came for hearing the Respondent counsel misled court to proceed as if no reply had been filed yet he was supposed to formally prove his case so that court makes a ruling based on the evidence before court.
- (e) That the application for reinstatement was thus incompetently before this honorable court.
- (f) The court proceeded in the absence of the Respondent allowed the application and ordered for reinstatement of the main suit as if no reply had been filed.
- (g) That there was sufficient cause for non- appearance of the Respondent 's counsel who was attending a court session in another matter but be as it may it is just and fair that the mistake of counsel should not be visited on the innocent litigant.
- (h) The court thus omitted to rule that the suit had automatically abated and thus cannot be reinstated as per Order 17 Rule 5(1) and (2) of the amendments of the rules SI 71-1
- (i) That this was an error apparent on the face of the record since the suit had abated automatically and could not be re-instated by court rather to file a suit subject to the law of limitation.
- (j) That the court should therefore, rectify the said error apparent on the face of the record so that the end of justice is met.

The respondent filed the written affidavit in reply and stated that;

1. I am informed by my stated lawyers, whose advice I verily believe to be true that when they tried to fix the main suit for mention upon closing of the court sanctioned mediation on 5th October 2020 they were informed by the court that the matter was dismissed for non-appearance of the parties.
2. I am further informed by my stated lawyers whose advice I verily believe to be true that they proceeded to peruse the court record and discovered that indeed the main suit was dismissed for non-appearance of the parties when the matter was called for hearing before the Hon. Justice Musa Ssekaana on 15th September 2020.
3. The respondent's lawyers promptly filed H.C.M.A No. 874 of 2020 for orders to set aside the dismissal order and reinstate the main suit since there was sufficient cause for non-appearance when H.C.C.S No.483 of 2021 was called for hearing on 15th September 2020.
4. On the day the main suit was called for hearing my stated lawyers and I were attending a mediation session in the same matter before Her Worship Jolly Nkore at the High court Civil Division.
5. I am informed by my stated lawyers whose advise I verily believe to be true that applicant was duly served through his lawyers with the application for an order to set aside the dismissal order as indicated in Affidavit of service filed in court on 19th January 2022.
6. I am further informed by my stated lawyers whose advise I verily believe to be true that hearing of H.C.M.A No. 874 of 2020 proceeded in the absence of the Applicant because his lawyers were not in court and the Application was duly allowed on the basis of sworn Affidavit on record.
7. I am informed by my stated lawyers whose advise I verily believe to be true that there are no mistakes to be rectified by this court since the main suit

was not dismissed after abating under the amendment of order 17 rule 5 (1) & (2) of the civil procedure Rules as amended.

8. I am informed by my stated lawyers whose advise I verily believe to be true that according to the court record this court has never held a scheduling conference in the main suit as provided for under order 12 and the amendment of order 17 of the civil procedure Rules as amended.

The applicant was represented by *KSMO Advocates* and never appeared in court while the respondent was represented by *Amos Matsiko* holding brief for *Simon Peter Kinobe* and *Benon Makumbi*

Whether there are any sufficient grounds for review?

The Respondent/Plaintiff filed a civil suit No. 483 of 2019 before this Honorable court. The Applicant filed their written statement of defence the matter was mediated upon and closed

That being no action taken by the respondent/plaintiff for 3 months' court dismissed the said suit for want of prosecution. The Respondent filed an application for reinstatement of the suit vide High court Miscellaneous Application No.874 of 2020 and the Respondent filed his affidavit in reply which was deponed by Jacob Kalaabi.

The application was allowed and court ordered for reinstatement of the main suit in total and the applicant contends that there are two fundamental errors on the face of the record, the first being that court granted the application for reinstatement without recourse to the Applicant's affidavit evidence on record and secondly the suit had abated and could not be reinstated thus this application.

The Applicant's counsel submitted on section 82 of the civil procedure Act cap 71 which 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 review of Judgement to the court which passed the decree or

made the order, and court may make such order on the decree or order as it thinks fit.

Further counsel for applicant in their submission they submitted of Order 46 of the civil procedure Rules SI71-which is provides grounds on which a review is allowed that review may be allowed on 3 specific grounds:

Discovery of new and important matter or evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed and the mistake or error apparent on the face of the record.

That the application was allowed and court ordered for reinstatement of the main suit in total disregard of the Application/Respondent's affidavit in reply yet the suit had abated

The Applicant contends that there are two fundamental errors on the face of the record, the first being that court granted the application for reinstatement without the recourse of the applicant's affidavit evidence on record and secondary, the suit had abated and could not be reinstated thus this application.

In the case of ***Nyamogo & Nyamogo Advocates v Kago [2001] 2 EA*** It was stated that; a review *should not seek to challenge the merits of a decision but rather irregularities in the process towards the decision, some instances of what constitutes a mistake or error apparent on the face of the record are where the applicant was not served with hearing notice, where the court has not considered the amended pleadings, where the court has based its decision on ground without giving the applicant an opportunity to address the same and violation of the principle of natural justice.*

In the respondent's affidavit in reply he stated that on the day the main suit was called for hearing the respondent were attending a mediation session in the same matter before Her Worship Jolly Nkore at the High Court-civil Division.

According to the respondent affidavit in reply states that the lawyers filed H.C.M.A No. 874 of 2020 for orders to set aside the dismissal order and reinstate the main suit since there was sufficient cause for non- appearance when H.C.C.S No 483 of 2019 was called for hearing on 15th September 2020.

Analysis

According to the law under order 46 of the Civil Procedure Rules SI 71-1 the above evidence does not amount to the discovery of a new and important matter or evidence.

That the application is premised on section 82 and 98 of the civil procedure Act cap 71 Order 46 Rules (1), 4 and 8 of the Civil Procedure Rules SI 71 -1 as amended.

(a) Any person considering himself or herself aggrieved

(b) By a decree or order from which an appeal is allowed but from which no appeal is allowed by this Act, may apply for review of judgement to the court which passed the decree or order as it thinks fit.

Order 46 (1) is to the effect that Any person considering himself or herself if 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 when the decree was passed or the order made against him or her, may apply for a review of Judgment to the court which passed the decree or made the order

(2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and appellant, or when, being respondent, he or she can present to the appellant court the case on which he or she applies for the review.

The applicant contended the reinstatement of the main suit which had abated was a mistake or error apparent on the face of the record. However, this court does not agree with above submission. This court dismissed the suit for want of prosecution after the same had been fixed and none of the parties appeared in court. The issue of abatement cannot arise and the court parties had not yet

taken out any summons for directions in order to trigger the new timelines under the new Civil Procedure Rules.

It is a total misapprehension of the new rules to extent of submission for case for review premised on abatement of the suit. In the case of ***Edison Kanyabwera v Pastori Tumwebaze, Supreme Court Civil Appeal No. 6 of 2004*** the Supreme Court noted that;

“In order an order that an error may be ground for review it must be one apparent on the face of the record i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on record, the error must be of fact but not limited to matters of facts and also a matter of law”

That Order 17 rule 5 of the civil procedure Amendments Rules of 2019 provides that:

- (1) That in case not otherwise provided for a period of six months by either party with a view to proceeding with the suit after the mandatory scheduling conference the suit shall automatically abate and:
- (2) Where a suit abates under sub rule (1) of this rule the plaintiff may subject to the law of limitation bring a fresh suit.

Applicant’s Affidavit in support clearly stated that according to the court record, this court has never held a scheduling conference in the main suit as provided for under Order 12 and amendments of Order 17 of the Civil Procedure Rules so the court is in agreement with this submission and the contention of abatement cannot arise since no scheduling conference has been done by the court.

What the applicant submitted is not within the purview of the grounds for review since it was an application of the law and it is not an error apparent on the face of the record.

Access to Justice is a basic principle of the rule of law; the court will therefore strive to ensure that everyone who has a legitimate claim has the opportunity to have their complaint heard in court. The order to set aside the dismissal order and reinstate the main suit was in the interest of justice to bring an end to the dispute between the parties.

So in the interest of Justice as to the above the Applicant has failed to raise sufficient grounds that warrant a review because this court did not see any apparent error on the face of the record. What the applicant raised was merely his misapprehension of the law on abatement of suits.

The application for reasons stated herein above is dismissed with costs to the Respondent.

I so order.

SSEKAANA MUSA

JUDGE

15TH AUGUST 2022 .