**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 301 OF 2014**

**NTALO MUHAMMED:::::::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**STANBIC BANK OF UGANDA LTD::::::::::::::::::::::::::RESPONDENT**

**BEFORE HON. JUSTICE HENRY PETER ADONYO**

**RULING**

1. **Background:**

This is an application by notice of motion for orders that the order dismissing Misc. Application No. 1095 of 2013 to be set aside, for the judgment and decree entered in Civil Suit No. 716 of 2013 to be set aside for To stay or setting aside execution of the decree in Misc. Application No.1095 of 2013 and for the reinstatement of Misc. Application No. 1095 of 2013 so that it can be heard inter parties on its merits with costs of the application to be provided for.

The application lays down grounds which are supported by two affidavits of Muhammed Ntalo (the applicant) who also further makes an affidavit in rejoinder and that of Mr. Katumba Chrysostom, (Counsel for the Applicant)

1. **Brief Facts:**

The Respondent filed a summary suit vide Civil Suit No. 701 of 2013 against the Applicant seeking for recovery of **Ug Shs 56,354,302/=** and costs.

Subsequently the applicant filed Misc. Application No. 1095 of 2013 seeking for unconditional leave to appear and defend the said suit which application came up on 14th March 2013 in the presence of Counsel for the applicant but in the absence of the applicant who is said to have travelled for an interview to Fort portal, and by the consent of both counsel, the matter was adjourned to 14th April 2014 to allow parties work out an amicable settlement and make a report on 14th day of April 2014.

However, on the 14th day of April, 2014, Misc. Application No.1095 of 2013 was dismissed on the grounds that both the Applicant and his counsel were absent and judgment was subsequently entered in favour of the Respondent.

Upon learning that the Misc Application had been dismissed, the Applicant filed Misc. Application No. 301 of 2014 on 29th April 2014 seeking for the above orders.

The Respondent is said to have initiated the process of executing judgment for Civil Suit No. 701 of 2013, then.

1. **Resolution of this Application:**

This Application raises grounds in its support to the effect that the non appearance of the Applicant on the date when Misc. Application No. 1095 of 2013 came up for hearing on 14th April was due to the fact that he was not aware that the matter had been adjourned to the 14th day of April 2014.Additionally, the Applicant states that the non appearance of the Applicant’s counsel in court when the matter came up for hearing on 14th April 2014 was due to the fact that the said counsel had inadvertently forgotten to register the date in his diary and also was appearing in Jinja High Court in Civil Suit No. 89 of 2005; **Zulaika Kyatalimye versus Peter Munira & 2 Others** which was fixed on the same date.

Further the Applicant stated that he has been vigilant in prosecuting Misc. Application No. 1095 of 2013 by immediately bringing this Application after learning of its dismissal since he had a good defence against the Respondent in the main suit and so it was it was in the interest of justice that the said dismissal be set aside and the matter be heard on merits.

The argument of the Applicant is that for an application of this nature to succeed, he has to prove to court that he was prevented by sufficient cause to appear before court when the matter came up for hearing since Order 9 Rule 23 provides that where a suit is wholly or partly dismissed under Order 22, the Plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but may apply for an order to set aside the dismissal and is required to prove to the court that there was sufficient cause for non appearance when the suit was called for hearing. The court then if satisfied then makes an order setting aside the dismissal upon such terms as to costs of otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

In regards to this Application, the Applicant shows in Paragraph 2 of his affidavit in support of the application that when the matter came up on 14th April 2014, he was not in court because his counsel, Katumba Chrysostom had not informed him of the date on which it had been adjourned for hearing. This position is further reflected in paragraph 4 of the Applicant’s affidavit in rejoinder, where he also states that he did not attend court on 14th April 2014 because his counsel neither informed him that the matter was coming up for hearing on that day nor of what had transpired on 14th March 2014 when it had come up and then adjourned to 14th April 2014.

This e Applicant’s lack of knowledge of when the matter was coming up on 14th April 2014 for hearing is also deposed to by Katumba Chrysostom who in paragraphs 3 to 7 of his affidavit, states that the Applicant did not attend court on 14th April 2014 because he as the counsel of the Applicant neither informed the Applicant when the matter was coming up for hearing nor of what had transpired on the 14th March 2014 when it had come up and then it was adjourned to 14th April 2014 further showing that on the date of 14th April 2014 when the matter came up for hearing the applicant was absent from court having gone to Fort portal to attend to an interview and that the matter was then adjourned with the consent of both counsel, to 14th April 2014 to enable the parties work out an amicable settlement and report to court on that date.

The said counsel for the Applicant admits in paragraph 5 of his affidavit in support of the application together with paragraphs 3 and 4 of his affidavit in rejoinder that by inadvertence, he forgot to record the date of the adjournment in his diary resulting in the fact that he ended up appearing in Jinja High Court in Civil Suit No. 89 of 2005; **Zulaika Kyatalimye v Peter Munira and 2 Others** because he had not read the cause list at this court.

The Applicant states in paragraph 3 of his affidavit in support of the application and paragraph 6 of his affidavit in rejoinder that he got to know about the matter having come up for hearing on 14th April 2014 and had been dismissed for non appearance after he and his counsel, one Pamela Nalunkuma visited court registry on 17th April 2014 and upon perusal of the court file found that it had indeed been dismissed.

The Applicant therefore submits that for the aforementioned reasons, he has shown that there is sufficient cause for the applicant’s non appearance when the matter case up for hearing.

The Applicant disagrees with the assertion in paragraph 12(iii) of the affidavit of David Mukiibi, on behalf of the Respondent that knowledge of the hearing date by Counsel was to be implied as knowledge by him as the applicant’s counsel merely forgot to record the date in his diary yet counsel was in court and that mistake or oversight on the part of a legal adviser was not sufficient cause shown.

Counsel for the Applicant urged this Honourable Court to ignore this hard position in that though he was negligent such negligence should not imputed onto the client as it has long since be held so quoting the case of **Zirondomu versus Kyomulabi [1975] HCB 337** where Manyindo J as he then was held that a ***mistake or oversight on the part of a legal adviser though negligent is sufficient cause for setting aside an exparte decree. That this position was further elaborated in the case of* Wanendeya William Giboni versus Giboni Kibale Wambi CACA No. 8 of 2002**, where Twinomujuni J.A stated thus; *“unless guilty of dilatory conduct, a vigilant litigant should not be debarred from the pursuit of his rights on account of the negligence or omission of his counsel and that the administration of justice require that the substance of the dispute should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights”* with the Supreme Court further emphasizing in the case of **Julius Rwabinumi versus Hope Bahimbisomwe SCCA No. 14/2000,** holding 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 be necessarily visited on his client.

Relating the above holdings to the instant matter, it is clear from the affidavit of Counsel Katumba Chrysostom’s that he did in fact fail to inform his client of the hearing date in addition to what even transpired in court on the 14th day of March 2014. This is admission of negligence and hence amounting to mistake of counsel which in consonance with holdings above cannot be visited onto his client in the pursuit of their rights. I would in the interest of justice disregard contrary view of the counsel for the Respondent in that regard as it is clear to me that the lack of knowledge on part of the applicant that the matter was coming up for hearing on 14th April 2014 came as a result of failure of his counsel to inform him of the date otherwise had been informed, he could have attended court in person or even instructed other counsel to take up the matter.

The failure of counsel therefore to give advance information to his client is in my view sufficient cause in proving the reason why the Applicant failed to appear on 14th April 2014 when the matter was dismissed for want of prosecution.

Before I take leave of this matter, I wish to point out in paragraphs 10 and 11 of the affidavit in reply, it is pointed out that this application should be regarded by this court as a nullity as it should have been brought under Order 36 rule 11 and not order 9 Rule 23 of the Civil Procedure Rules.

I note that this application was brought under order 9 rules 23 of the civil procedure Rules which provides thus;;

***“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.”***

On the other hand Order 9 Rule 22 of the civil procedure Order 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 a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder…”***

One of the orders that the applicant sought for in this application is that order to set aside the order which dismissed Misc. Application No. 1095 and for its reinstatement so that it is heard inter parties. From the facts on record Misc. Application No. 1095 was dismissed for non appearance of both the Applicant and his counsel when it came up for hearing on the 14th April 2014.

It seems to me therefore that this application was rightly brought under Order 9 Rule 23 for the setting aside the dismissal of Misc application No. 1095 of 2013

Whereas it is true that the Applicant also sought an order to set aside the decree entered in Civil Suit No. 701 of 2013 and also stay its execution but did not specify the law under which he sought for the said orders, the Civil Procedure Rules provide that an application to set aside an exparte judgment and decree under Order 36 ought to be brought under Order 36 rule 1 and on this I entirely agree with the deposition of counsel for the respondent in this respect. However in I note that failure to cite a law or rule under which a matter should have been brought under is not fatal. This was the position in the holding in the case the case of **Saggu versus Roadmaster Cycles (U) Ltd, [2002] 1 EA**, where it was held that;

***“…where an application omits to cite any law at all or cites the wrong law but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the correct law inserted”***

This position was followed by my brother Hon. Dr. Bashaija, J in the case of **Mahjub Ibrahim versus The Registered Trustees of Kampala Archdiocese, Civil Appeal No. 08 of 2013 arising from Civil Suit No. 51 of 2012** (un reported) when he stated that;

***“The court should not treat any incorrect act as a nullity with the consequences that anything founded thereon is itself a nullity unless the correct act is of the most fundamental nature… Matters of procedure are not normally of a fundamental nature. And that the administration of justice required that the substance of dispute should be investigated and decided on the merits and the error and lapses should not necessarily debar a litigant from the pursuit of his rights.”***

I do concur entirely with the sentiments therein and proceed to add that from the facts adduced before me, it is apparent that the order sought to set aside the decree and judgment in Civil Suit 716 of 2013 rightfully falls within the jurisdiction of this Honorable Court and failure to cite the law under which the said order cannot in any invalidate or nullify the quest for the settlement of the issues between the parties in its entirety where this court to find so through this proceedings that this was the case. In any case, I would seem to think that even if that omission was there, the gist of the instant application is to set aside the orders which dismissed Misc. Application No. 1095 of 2013 and therefore I would seem to think that were the said orders be allowed then the other orders to set aside the judgment and decree of Civil Suit No. 2013 would simply come in as incidental to the reinstatement and hearing of the Application which this matter seeks to have reinstated.

In any event, the Applicant has shown through his deposition in paragraph 4 of his affidavit in support of the application and paragraph 3 and 7 of the affidavit in rejoinder that he has a good defense to the Respondent’s claim.

In my view, the justice of the matter would show that Respondent will not suffer any substantial loss if the matter is set down, heard and determined on its own merits.

I would find that the Applicant has made a case for this Honourable court to set aside the order for dismissing of Misc. Application No. 1095 of 2013 which I find is a matter suitable to be heard on its own merits and by infection, this said order would set aside the judgment and decree which arose as a result of its earlier dismissal.

1. **Orders:**
2. In the premises, I find that this Application has merits and therefore grant the prayers therein by setting aside the order which dismissed Misc. Application No. 1095 of 2013.
3. I further direct that the Applicant to seek within one month from the date of this ruling a hearing date as per Order 9 rule 23 of the Civil Procedure Rules
4. I also set aside the judgment and decree in High Court Civil Suit No. 716 of 2013 and stay of any execution in that respect till this matter is determined or further orders of the court.
5. The costs of this Application to abide the determination of the matter in issue.

I do so order accordingly.

**Henry Peter Adonyo**

**Judge**

**10th October, 2014**