THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 1047 OF 2020

(Arising from HCCS No. 020 of 2007)

1. **ERNEST KAKULIRA**
2. **YAYERI KAKULIRA.....APPLICANTS**

VERSUS

MAYANJA SAMUEL

(Administrator of the estate of the late Miriam Nalwoga_**.....RESPONDENT**

RULING

Introduction:

The applicants, Mr. Ernest Kakulira and Ms. Yayeri Kakulira filed this application seeking reinstatement of the main suit ***HCCS No. 020 of 2007,*** and a request to court to hear the case on its merits.

Brief background to the application:

The applicants filed the main suit against Ms Mariam Nalwoga in an action for trespass. They claimed to have bought from her land measuring 6 acres, a claim which she disputed.

The claim in Mariam Nalwoga's defence was that she had sold only 3 acres to the applicants. She however died before the matter could be resolved.

In the supporting affidavit to this application deponed by the 2nd applicant, a wife to the 1st applicant it is averred that following the demise by the defendant, the suit had been adjourned on 17th April, 2014, to give time for the appointment of the administrator of the late Nalwoga's estate. Court later adjourned the main suit to 7th July, 2014 for mention.

They claimed that they were unable to establish from the court record what actually happened on that day. What they however discovered is that on 5th December, 2014 when the main suit came up for hearing court both sides were absent and court went ahead to dismiss the suit under ***order 9 rule 17 of the CPR***.

The applicants blamed the delay for the hearing on the delay to secure the letters of administration, which process they had no control over. That it had not been until 16th June, 2020 that they came to learn that the respondent, Mr. Samuel Mayanja had been appointed administrator of the estate of his mother, who had been the defendant in the head suit.

That since they were still interested in prosecuting the matter, the lapses by their former counsel: ***M/S Kateera & Kagumire Advocates*** should not to be visited on them. They prayed therefore that in the interest of justice the main suit be reinstated and heard on its merits.

The respondent on his part averred that the application was incompetent, misconceived and barred in law, an abuse of court process and should be dismissed.

That his deceased mother had in a letter dated 1st March, 2006 admitted to having sold to the applicants only three acres of the land. In that letter, annexed as ***RB',*** she had asked them to rectify the error appearing in the sale agreement between them so as to reflect the 3 acres as the actual size of the land sold to the applicant.

That the said error had been made by their own lawyer who did not translate the contents of that agreement to her. The respondent's claim was that the applicants never responded to that letter.

The applicants filed the suit in 2007 and 7 years later it had been dismissed by court, after it had failed to take off.

The applicants were represented by the firm of ***M/S Mpanga Advocates,*** while the respondent was represented by ***M/S Mujurizi, Alinaitwe & Byamukama Advocates.***

Resolution by court:

I have carefully read the pleadings and submissions made by both, which I need not repeat here. According to the applicants, a *bona fide* claim of a litigant should not be blocked from being tried based on the default of his professional adviser who in this present application was indicated as ***M/S Kateera & Kagumire Advocates.***

Once a suit is dismissed under ***order 9 rule 17 of the CPR,*** as happened in this case, the remedy would lie under ***order 9 rule 18 of the CPR,*** that is, subject to the law of limitation, to either bring a fresh suit or apply to court to set aside the dismissal and restore the suit.

The applicant must also demonstrate sufficient cause for nonappearance, to the satisfaction of court. ***(Kibugumu Patrick, alias Munakukaama vs Asha Mulungi & Anor. MA No. 455 of 2014).***

For the applicants, the argument was that they learned about the order in June, 2020 and that no explanation from former counsel as to why they were not able to attend court on the day the case was dismissed, a claim which they could not prove.

A perusal of the court record indicates that a date of 23rd May, 2008 had initially been fixed by court for hearing, having been secured by counsel for the defendant: ***M/S Nampandu, Mugwanya, Muwawu & Co. Advocates,*** who were at the time representing the defendant.

In their letter filed in court on 20th July, 2007, the defendant's counsel had drawn the attention of this court to the fact that it had been 5 months since they had filed their defence and no action had been taken by the plaintiffs/applicants to prosecute the case.

From that correspondence, the defendant was at that time 80 years and sickly. Her fear as per the contents of that letter was that she was likely to die before receiving justice. Counsel therefore implored court to fix a date for the hearing of the case, which court had done.

On another occasion it was again the counsel for the defendant who took it upon himself, two years later to secure the date as per their letter to court dated 14th November, 2008.

By that time the defendant was 82 years and the claim was that the plaintiffs/applicants were deliberately delaying the conclusion of the matter with the objective that the justice she was striving for would be overtaken by the passage of time.

The date of 2nd March, 2009 was secured by learned counsel for the defendant; and as per affidavit of service filed in court on 25th February, 2009, a hearing notice was served to ***M/S Kateera & Kagumire*** representing the defendant, the applicants' counsel who duly acknowledged receipt of the notice on 13th February, 2009.

On 12th January, 2010 the joint scheduling memorandum was signed between the parties. Subsequently on 5th May, 2010, the plaintiffs' counsel wrote to the

Registrar of this court, requesting for the allocation of the file to another judge since judge Magezi Anna Mary who had been handling the matter was in the process of retiring. The file thereafter went through the hands of several judicial officers.

Against that backdrop, on 17th April, 2014 court was informed about the death of the defendant. It is on that day that court had given the family time to pursue the process of securing letters of administration. While it would be correct to state that the applicants had no control over that process they had a right to complain about the delay in securing the grant, which right they never exercised.

It was neither the defence side nor this court therefore to be the ones to remind the plaintiff, to make the follow up about the progress of the matters pending before court.

It was incumbent upon that party who was seeking relief- the one which had to move court to take up the next appropriate step and ensure that the matter was duly fixed and heard.

A vigilant litigant could have achieved this through a formal or informal inquiry from court, even without having to wait for counsel's action. The defence of mistake or lapses by counsel may have been the convenient excuse, but not the panacea for all laches.

It took the respondent in this application, upon his obtaining letters of administration to write to the applicants, and it is only during that process that the interests of the applicants had been rekindled ***(refer to RD1).*** This was six

years after the defendant had passed on. In the process, the deceased had been denied the right to defend herself in this suit.

To compound the problem, there is nothing on record to show at what stage of the proceedings when the new counsel for the applicant ***M/S A.F Mpanga Advocates*** had taken over the management of the suit- this court having failed to find any notice of change of instructions by that firm or any withdrawal of instructions in respect of the previous counsel.

In light of the above findings I accordingly dismiss the application with costs to the respondent.

Alexandra Nkonge Rugadya

Judge

23rd October, 2020