**THE REPUBLIC OF UGANDA,**

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

**(EXECUTIONS AND BAILIFFS DIVISION)**

**MISCELANEOUS APPLICATION NO 1137 OF 2017**

**(ARISING FROM MISCELLANEOUS APPLICATION NO 2881 OF 2016)**

**(ARISING FROM EMA NO 2372 OF 2016)**

**(ARISING FROM CIVIL SUIT NO 1174 OF 2015)**

**KWESIGA DERRICK}........................................................................................APPLICANT**

**VERSUS**

**PROF. JOHN KIGGUNDU}..........................................................................RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

This ruling arises from an application for reinstatement of High Court Miscellaneous Application No 2881 of 2016.

The application was heard on 26th of September 2017 when the Applicant was represented by Muhame Alam and the Respondent by Counsel Eriya Micah and the court was addressed on the application.

According to the Applicants Counsel, the gist of the application is that the Applicant had a matter which was dismissed for want of prosecution. On the day it came for hearing on the 9th May 2017, the Applicant had gone for burial in Kasese and indeed communicated to the court about his absence on 9th May 2017. The letter is dated 8th of May 2017. Counsel with personal conduct communicated to court about his absence and the letter reached court on 9th May 2017. There was a representative from the Applicant who brought the letter. It is unfortunate that the clerk who was to serve the letter from the firm reached late after court had started. The Applicant is interested in prosecuting the application for stay of execution. The Applicant filed an application in the trial court of Mengo in MA No 782 of 2016 awaiting hearing. He prayed that the application for reinstatement is granted to pave the way for hearing the dismissed application and hearing of the trial court application. He submitted that if the application is not granted the Applicant will suffer injustice as he will not be heard. He will be evicted from the house. The judgment was for him to be evicted from the premises where he is a tenant. The second order was for him to pay Uganda shillings 8,750,000/- being arrears of rent. His right of hearing would be affected and he would have been evicted. He also has a counterclaim against the Respondent for renovation of the house amounting to Uganda shillings 50,000,000/-.

In reply Counsel Eriya Micah relied on the affidavit in reply to the application which states the grounds for opposing application. He submitted that there are three main reasons for opposing the application. These include the fact that there was undue delay of the Applicant to fix the application for stay of execution for hearing (HCMA 2881 of 2016). The Applicant filed the application for stay of execution towards the end of December 2016. He filed it and abandoned it on court record. No effort was made to fix it for prosecution. The Respondent’s lawyers made an effort to have the application fixed on 9th May 2017 before Hon Justice Flavia Anglin and served the Applicant but the Applicant did not attend court. Now they intend to reinstate when they did not exercise due diligence in the matter. Secondly, the Applicant has not shown sufficient cause for the reinstatement of the application. Thirdly, and in the alternative, if the court grants the application, it should be on condition that the Applicant deposits in court security for due performance of the decree. Counsel informed court that the condition in the lower court was to pay 50% of the Plaintiff’s claim. He prayed for security for due performance of the decree amounting to Uganda shillings 8,500,000/= to be the condition for grant of the application. Otherwise the main prayer is that the application should be dismissed with costs to enable the Respondent evict the Applicant who is a tenant and has not paid rent for three years. He further submitted that there was no pending suit or counterclaim against the Respondent.

In rejoinder Counsel Muhame Alam submitted that it is not true that the Applicant never followed his application for stay of execution. They had on several occasions approached the court to fix the application (HCMA 2881/2016) and it was fixed only that when it came for hearing Counsel and the Applicant did not attend. It is not true that the Respondent fixed the application. The matter was fixed when the Applicant was aware and not that it was fixed by the Respondent. He contended that in some circumstances the Respondent through an agent made the file disappear (he referred to annexure D).

On the issue of conditional grant of reinstatement, the reason for filing MA in the trial court was the conditions imposed for leave to defend which led to the default order. The Applicant’s Counsel prayed that the application is granted unconditionally.

Lastly the Applicant’s Counsel contended that it is not true that the Applicant did not pay rent for three years. He used to pay rent to the agent of Respondent and maybe the agent did not pass the money to Respondent and that is an issue in the trial court in MA 782 of 2016.

**Ruling**

I have carefully considered the Applicants application and the submissions of Counsel. I will straight away refer to the grounds of the application for reinstatement. Firstly it is averred that the Applicant is also the Applicant in Miscellaneous Application No 2881 of 2016 which was dismissed on 9th May, 2017. Secondly, the Applicant had travelled for burial in Kanunga on 9th May, 2017 and informed the court in writing. It was for the burial of his brother. Lastly it is just and equitable in the circumstances for the application to be granted.

The application is supported by the affidavit of Kwesiga Derrick, the Applicant who is also a Resident of Natete, Rubaga Division Kampala district who deposes to the following facts. He had travelled to Kanunga through Fort portal, Kasese & Ishasha Road for the burial of his brother and had duly notified the court in writing according to annexure "A". Annexure "A" is a hand written document dated 8th of May 2017 informing the trial judge that he had lost his mother and he would be travelling to Kanungu district for burial. Paragraph 1 of the letter reads as follows:

"This is to inform this honourable court that the suit is coming for 09/05//2017, but unfortunately I lost my mother and I am off in Kanungu district for burial. It is my humble prayer this honourable court gives another date. Sorry for any inconveniences caused".

He further deposed in paragraph 3 that he would prove his travel to the court. Also attached to the affidavit is annexure "B" which is a letter from Messieurs Shwekyerera, Kalera, Muhame Advocates which indicates that Counsel Muhame Alam who has personal conduct of the application went for burial of his brother and could not be present to prosecute the matter.

The affidavit in reply is that of David Semakula Mukiibi, an advocate of the High Court practising with the MMAKS advocates who deposed that he read the notice of motion and affidavit in support. He contended that the Applicant filed a frivolous application for stay of execution in Miscellaneous Application Number 2881 of 2016 as a deliberate attempt to frustrate the Respondent's efforts to evict the Applicant from the suit property. The application was duly fixed for hearing before honourable Justice Flavia Anglin on 9th May 2017 but neither the Applicant nor his lawyer attended the hearing and the application was dismissed with costs. Furthermore the Applicant has not shown any good reason as to why he failed to attend the hearing of the application but rather relied on a letter that was delivered to the court after the application had been dismissed. The Applicant’s Counsel ought to have notified the Respondent’s Counsel of their inability to attend court on 9th of May 2017.

Generally he contended that the Applicant has no interest in prosecuting HCMA 2881 of 2016 even if it was to be reinstated. The application was filed on 22 December 2016 and was never fixed for hearing by the Applicant. It is the Respondent who took the initiative and fixed the application on 9th of May 2017 and duly served the Applicant.

I have carefully considered the Applicant’s application and the first troubling issue relates to the apparent contradiction concerning travel for burial of a relative by the Applicant on the day when Miscellaneous Application Number 2881 of 2016 was dismissed on 9th of May 2017. It is clear that under paragraph 2 of the affidavit in support of the application the Applicant deposed that he travelled to Kanunga through Fort portal for the burial of his brother and that he duly notified the court in writing according to annexure "A" attached. This letter was written to the court and was received on 9th of May 2017. I have perused the copy of the original letter dated 8th May 2017 and filed on court record on 9th May, 2017. It clearly indicates that the Applicant had lost his mother and had travelled for burial. The application for reinstatement was filed on the 16th of May 2017 after the dismissal on 9th May 2017 of HCMA 2881 of 2016. In the affidavit in support of the application, the Applicant indicates that he had travelled for the burial of his brother. Was this a drafting error by the lawyers? However the affidavit is not drawn by any lawyers. The notice of motion was drawn and filed by Mutambi – Mushega & company advocates.

Miscellaneous application number 2881 of 2016 indicates that it was dismissed for want of prosecution and not for want of appearance. The ruling of the court clearly indicates that the application was filed on 22nd December, 2016 and no further step had been taken to fix the application for hearing. The application had been fixed on the insistence of Counsel for the Respondent. Furthermore the court noted that the Applicant wrote indicating that he had lost his mother and went off to Kanungu for burial. The court also noted that the advocates had not appeared to prosecute the application which they could have done in the absence of their client.

I have accordingly considered whether a dismissal for want of prosecution can be set aside. The dismissal is made under Order 17 rule 5 of the Civil Procedure Rules which provides as follows:

"If the Plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten 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 the application the court may order the suit to be dismissed accordingly, or make such other order, and on such terms, as to the court may seem just."

I cannot sit on appeal or review of the decision of the honourable judge dismissing the Applicant's application for want of prosecution. There is no specific provision for setting aside the dismissal for want of prosecution and indeed, the Applicant seemed to have moved under no known provision of the law since none is cited. Presumably the Applicant is invoking the inherent powers of the court under section 98 of the Civil Procedure Act. No ex parte decree had been issued against the Defendant as envisaged by Order 9 rule 27 of the Civil Procedure Rules. The said rule envisages an ex parte decree against the Defendant passed where the suit proceeded ex parte. Furthermore, Order 9 rule 22 of the Civil Procedure Rules provides that where the Defendant appears and the Plaintiff does not appear when the suit is called for hearing, the court shall make an order that the suit be dismissed unless the Defendant admits the claim or part of it. The subsequent Order 9 rule 23 provides that where a suit is wholly or partly dismissed under rule 22, 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 upon satisfying the court that there was sufficient cause for nonappearance when the suit was called for hearing.

In this particular case, the Applicant was absent and his Counsel was absent when the suit was called for hearing. The court was aware that the Applicant had written a letter indicating that he had lost his mother. On the other hand his lawyer had also written a letter which may not have been on court record indicating that he had lost his brother and that he had travelled for burial. The court went ahead and dismissed the application for want of prosecution based on the antecedents in the conduct of the Applicant’s application. A dismissal for want of prosecution is not based on non-appearance of the Plaintiff or Applicant but on failure to take the necessary steps to fix the application for hearing within the stipulated time under Order 17 rule 5 of the Civil Procedure Rules. A dismissal under Order 17 rule 5 of the Civil Procedure Rules does not called into operation an application made under Order 9 rule 23 of the CPR for setting aside a dismissal for sufficient cause.

Last but not least, even if the application had been dismissed for want of appearance, the judge was alive to the fact that the Applicant had lost his mother and his firm of advocates ought to have in the very least sent a representative. Applications for adjournment should not be made by letter. There are two decisions which make this point.

In the case of **Sherief Yusuf vs. Philip Kioko Civil Suit No. 1072 of 1951 (1951) 24 (2) K.L.R. 75**, the plaintiff had telegraphed the court that he was sick in hospital. It was held that a court cannot grant an adjournment requested for by letter of a Plaintiff who does not appear. In **Acaali Manzi vs. Nile Bank Ltd HCCS No. 87 of 1993 Reported in (1994) KALR 123** an application for adjournment by letter was not accepted by Justice Tsekooko judge of the High Court as he then. He held at page 126 of the report that applications for adjournment by letter would not be accepted under normal circumstances.

The application by letter of Messrs Shwekyerera, Kalera, Muhame Advocates filed in the court registry on 9th of May 2017 at 9.30 am seeking an adjournment of the application on whatever ground and praying for alternative dates of 19th or 22nd of May 2017 could not be accepted. I further note that the affidavit of service of Yusuf Cocoga a process server dated 4th May 2017 indicates that the hearing had been fixed for 9.00 am. The letter of the Applicants Counsel in this matter was filed on court record on at 9.30 am on 9th May 2017 when hearing should have started at 9.00 am. The notice of motion indicates that it had been fixed for 9th May 2017 at 9.00 am. Though the record does not show at what time the application was called for hearing, the letter of the Applicant’s Counsel seeking an adjournment of the dismissed application came too late at 9.30 am when hearing was fixed for 9.00 am. Last but not least on the same point, the letters on court record seeking adjournment demonstrate that both the Applicant’s lawyers and the Applicant were aware of the hearing date and time of the hearing of MA 2881 of 2016.

On the same point the Applicant’s Counsel ought to have briefed another lawyer to appear. Because a court has discretionary powers whether to grant a prayer for adjournment or not, a brief should be to handle the application in case adjournment is refused. A brief to appear on behalf of another lawyer ought to be to handle the whole matter and not just an application to adjourn which can be refused.

The court, before dismissal for want of prosecution, blamed the Applicant’s lawyers. I note that on 16th of May 2017 the Applicant’s new Counsel Mutambi Mushega & Co. Advocates filed a notice of change of Advocates from Shwekyerera, Kalera, Muhame advocates. It is Messrs Mutambi Mushega & Co. Advocates who drew and filed the application to reinstate the dismissed application for stay of execution pending application in the Magistrates Court. However, in a surprising twist of events Counsel Muhame of Messrs Shwekyerera, Kalera, Muhame advocates appeared and argued the application while Messrs Mutambi Mushega & Co. Advocates who drew and filed the current application for reinstatement of the dismissed suit did not appear.

Having considered all the above factors and taking into account the fact that the application was for stay of a decree issued in default of meeting conditions for leave to defend a summary suit, wherein the Plaintiff claimed rent from the Defendant/Applicant. I have also noted that in this court there was failure by the Applicant to fix Miscellaneous Application No 2881 of 2016 so as to prosecute it.

Furthermore the Applicant still has a pending application to set aside execution under Order 36 rule 11 of the Civil Procedure Rules and for leave pending in the trial court; I find no merit in the application in this court. Let the Applicant prosecution his omnibus application under Order 36 rule 11 of the Civil Procedure Rules in the trial court.

In the premises the Applicant’s application for reinstatement of MA No 2881 of 2016 is hereby dismissed with costs.

Ruling delivered on 27th of September 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Muhame Alam for the Applicant

Eriya Micah for the Respondent

Parties are absent

Rose Obote: Court Clerk

**Christopher Madrama Izama**

**Judge**

**27th September 2017**