



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR MISC. APPLN. NO. 165 OF 2023
(ARISING FROM LABOUR DISPUTE REFERENCE NO. 177 OF 2021)

NILE ENERGY LIMITED.....APPLICANT

v

KURAISHI GOROBA.....RESPONDENT

Before:

Hon. Ag. Head Judge, Linda Lillian Tumusiime Mugisha

Panelists:

1. Hon. Rose Gidongo,
2. Hon. Harriet Mugambwa Nganzi &
3. Hon. Charles Wacha Angulo.

Representation:

1. Mr. Kazibwe Wilberforce of Bluebell Legal Advocates for the Applicant.
2. Ms. Nakamaya Stella of M/s Rwakafuzi & Co. Advocates for the Respondent.

RULING

BACKGROUND

- [1] On 28/03/2021 the Respondent lodged a complaint against the Applicant before the KCCA Labour Officer, for breach of contract, unlawful suspension, and termination. The Labour officer invited the Parties to resolve the matter amicably through mediation which failed. Having failed to resolve the matter, the Labour

officer referred it to the Industrial Court at Kampala, where Labour Dispute Reference No.177 of 2021 was registered.

- [2] The Claimant filed his memorandum of Claim on 15/09/2021 and the same was served onto the Applicant, who duly responded by filing a memorandum of reply. The Respondent Filed a rejoinder, following which both parties filed a joint scheduling Memorandum, pre-trial documents, and their respective trial bundles in accordance with the court's directives, and the matter was fixed for hearing on 2/10/2023 at 9.30 am. On 2/10/2023, when the matter came up for hearing, the Respondent did not enter appearance and no reason was tendered to court for their absence. When Counsel for the Respondent applied for the matter to proceed *ex parte*, the Court granted him leave to do so because it had been adjourned for hearing in the presence of both Counsel.

The Application

- [3] The Application is made by notice of motion under Section 98 of the Civil Procedure Act cap 71, Order 9 rule 21, Order 52 of the Civil Procedure Rules SI 71-1). The Applicant seeks that an order granted to the Respondent to proceed *ex parte* in the hearing of LDC No.177 of 2021, be set aside and for the Applicant to be granted an opportunity to cross-examine the Respondent's witnesses.

The Grounds of the application are stated in the Affidavit in support deponed by Mr. Kazibwe Wilberforce, Counsel for the Applicant, together with additional affidavits in support deponed by Birungi Juliet, the Applicant's Administration Manager, and Abdulswamad Mohammed, the Applicant's Regional Representative Central, summarized as follows:

- [4] Whereas the Applicant was aware that LDC. No.177 of 2021 was filed in the Industrial Court and it complied with all Court's directives during the scheduling of the matter, and it was aware that it was fixed for hearing in Court Room 1 on 2/10/2023, Counsel inadvertently recorded the scheduled time as 2.30 pm instead of 9.30 am hence the Applicant's absence on 2/10/2023 when the file was called for hearing. This led to the Court granting leave to the Respondent to proceed *ex parte*. According to them, this mistake should not be visited on the Applicant because it has always been ready to defend itself in the matter which cannot happen if it is not allowed to proceed interparty. Therefore, in the interest of justice,

the order to proceed *ex parte* and the directives thereunder should be set aside. In any case, the Application was filed without any delay.

Respondent's Reply

- [5] In reply, the Respondent in an affidavit deposed by the Respondent himself stated opposed the application on grounds that the Applicant instituted criminal proceedings against him but they were dismissed for want of prosecution on account for the none appearance of the Applicant and on all the 6 occasions when this matter came up for hearing the Applicant and its lawyers only appeared once. He contested the Applicant's assertion that although Their lawyer was served with the hearing notice, it did not clearly state that the hearing would commence on 2/10/2023 at 9.30 am because he ought to have checked the time. He insisted that the Applicant did not enter appearance and they have not justified their absence, to warrant the Order for proceeding *ex parte* to be vacated.
- [6] In any case, the Respondent's witness a one Jonan Ninsiima was very sick and yet the evidence is on the record, that he had to be transported from the Kigoma ward – Bushenyi in his poor health condition together with a medical attendant which was very expensive. In any case, the main claim was filed in 2021, and the matter is pending the issuance of an award initially scheduled for 22/12/2023, therefore this application is only intended to delay its delivery.

The Submissions of the Applicant

- [7] Counsel filed his submissions in this court on 29/03/2024 and in his submissions addressed this court as Magistrates Court and the Judge as "*your Worship*" Court in the interest of the justice of this case, we chose to consider the merits of the application and it disregarded Counsels failure to comprehend the hierarchy of this Court which has powers of the High Court as provided under section 8(2a) of the Labour Disputes (Arbitration and Settlement) (Amendment) Act, 2021.
- [8] He submitted that the Applicant should be granted an opportunity to cross-examine the Respondent on his witness statement in LDC No. 177 of 2021. He argued that section 98 of the Civil Procedure Act provides that nothing shall limit the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court and the right to a fair trial in civil matters is guaranteed under Article 28 of the Constitution of Uganda. He also relied

on (*Isadru Vicky v Perina Aroma & 6 Others (Civil Appeal No. 0033/2014 2018)*), for the legal position that courts are enjoined to deal with all matters before them justly, proportionate to the amount of money involved, and the interests and rights involved, the importance of the case, complexity of the issues and the financial position of each party.

- [9] He also cited (*Joseph Sengendo and Anor v Semakula Muganwa Charles*) and (*Musitwa Joseph T/a Muganwa Nanteza & Co Advocates HCMA No. 157 of 2011, Lucas Marisa v Uganda Breweries Ltd (1988-1990) HCB 131, Abi T. K Hairora v Robert Alinda Misc. App. No. 24 of 2021, Hikima Yamanywa Sajjabi CACA No. 1 of 2005*), where it was stated that “sufficient cause” related to failure by the applicant to take the necessary step at the right time depending on the circumstances of each case. According to Counsel, where sufficient cause was shown the court had discretion over the matter.
- [10] He further relied on (*National Insurance Corporation v Mugenyi and Company Advocates CA No. 14 of 1984*), in which it was held that the main test in the application for reinstatement of a suit is whether the Applicant honestly intended to attend the hearing and did his best to so. It was his submission that the Applicant has demonstrated its intention to prosecute the case but for the error of Counsel who recorded the time for the hearing as 2.00 pm instead of 9.30 am. According to him, the Respondent went to Court on the fateful day and even inquired with the Registry about the case and whether it would proceed on that day and this was sufficient cause warranting the order to be set aside.
- [11] He cited (*Banco Arabe Espanol v Bank of Uganda SCCA No. 8 of 1998*), for the legal proposition that the mistake or misunderstanding of a party’s legal adviser even if negligent may be accepted as a proper ground for granting relief. He contended that not granting this Application would amount to denying the Applicant an opportunity to defend itself, therefore the mistake, negligence, oversight, or error on the part of Counsel should not be visited on to the Applicant. In any case, the Application was brought without delay, having filed it the order to proceed *ex parte* having been issued on 2/10/2024. He prayed that the court finds merit in the application in accordance with Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act.

The Submissions of the Respondent

- [12] In reply, Counsel contended that, whereas the court on 17/11/2023, gave directions for the Applicant to file its submissions on 17/12/2024, it only filed on the 29/02/2024 after a period of 2 months, which he construed to be a delaying tactic on the part of the Applicant, yet this is a 2021 matter. Although he did not refute the argument that a party in such an application had to prove sufficient cause in accordance with Order 9 rule 21 of the CPR and as stated in Attorney General & Anor v Human Rights Awareness and Promotion Forum HCMA No. 482/2020, which cited with approval (*Deported Asians Property Custodian Board v Isa Bukenya T/a New Mars Ware House SCCA No. 18 of 1991*).
- [13] He contended that, whereas in the instant case, the hearing date was consented to by the parties but Counsel for the Respondent did not enter appearance on grounds that he forgot, the Supreme Court did not find this sufficient cause. He further contended that although Counsel states that he inadvertently recorded the hearing date as 2.00 pm instead of 9.30 am, he was subsequently served with a hearing notice indicating the correct time for the hearing as 9.30 am and he did acknowledge receipt of the hearing notice, therefore he had an opportunity to cross-check and correct the time. In any case, the Applicant instituted criminal proceedings against the Respondent which were dismissed for want of prosecution, and the matter was referred to this court because of the Applicant's uncooperative stance. In addition, given the cost of transporting the Respondent's sickly witness, the Application should be dismissed with costs.

Decision of Court

- [14] The issue for determination is whether there is sufficient cause to set aside the Order to proceed *ex parte*.

Order 9 rule 20(1) provides that:

"(1) Where the plaintiff appears, and the defendant does not appear when the suit is called on for hearing-

(a) If the Court is satisfied that the summons or notice of hearing was duly served, it may proceed ex parte, ..."

- [15] It is not in dispute that the Applicant was aware that LDR. No.177 of 2021, was fixed for hearing on 2/10/2023, and this was demonstrated in the Affidavit in support of the Application. Counsel did not deny that the Respondent served him with another hearing notice which was duly received by the Applicant. We had an

opportunity to peruse the main file and established that when the matter was called on for pre-session hearing on 17/06/2022, both Counsel were in Court and the Court issued timelines for them to file pre-trial documents, and do scheduling on 07/09/2022. On 07/09/2022, Ms. Claire Kahunde was on brief for Mr. Kazibwe' Wilberforce for the Applicant but Counsel for the Respondent and the Respondent did not enter appearance on the date. Unfortunately, the Judge was indisposed, so the Hon. Panelists adjourned the matter to 8/11/2022. On 8/11/2022, Ms. Stella Nakamya was for the Claimant/Respondent, and no one appeared for the Respondent.

- [16] Although the Judge was still indisposed, Counsel notified the Court that the file was trial-ready. The Hon. Panelists adjourned the matter again to 20/12/2022. On 20/12/2022, Ms. Stella Nakamya appeared for the Claimant together with the Claimant, but the Respondent was absent. Counsel notified the Court that both parties complied with the Court's directives to file a Joint Scheduling Memorandum and their respective trial documents, following which the Court fixed the case for hearing on 2/10/2023. The record of the main suit indicates that the Respondent received a hearing notice for hearing the main claim in LDC No. 177 of 2021 scheduled for 2/10/2023, and served it on to Bluebell Legal Advocates, the Applicant's lawyer.
- [17] Although we noted that the receiving stamp was dated 12/01/2022, and not 12/01/2023, Counsel for the Applicant and the 2 persons who filed additional affidavits in support of the Application did not deny that the hearing notice was duly received by the Applicant. Counsel Kazibwe under paragraph 9 of his affidavit in support categorically stated that *"I know that on the 12th day of January 2023, the Applicant's Counsel was served with notices for hearing of the dispute scheduled for 2/10/2023 at 9.00 am."* and under paragraph 10 that, *"... Though the hearing notice specified the time as 9.00 am, the Counsel in personal conduct of the matter erroneously recorded the date for the hearing as 2/10/2023 at 2.00 pm"*.
- [18] We found it peculiar that Counsel could have recorded 2.00 pm instead of 9.00 am which is so far apart and moreover, the notice stated the time as 9.30 am. We are not convinced that this is a sufficient reason for Mr. Kazibwe's non-appearance on 2/10/2023. This is because Counsel was in possession of the hearing notice which was served by the Respondent from 12/01/2023 and he did not furnish to this court any evidence to prove that he did appear at Court on 2/10/2023, at the time he purportedly recorded erroneously, that is at 2.00 pm.

[19] In the absence of any evidence to the contrary, we are inclined to agree with Counsel for the Respondent that the Applicant has not demonstrated sufficient cause for this court to be moved to set aside the order for the Respondent to proceed *ex parte* and for the Applicant to be allowed to cross-examine the Respondent. Even if Courts are enjoined not to visit the mistakes of Counsel on to the litigant, we are not satisfied that Mr. Kazibwe has demonstrated sufficient cause to warrant setting aside the order for the Respondent to proceed *ex parte* especially because the hearing of the matter was fixed in the presence of Counsel for the Applicant and Counsel did not deny that the Applicant was effectively served and it duly received a hearing notice on 12/01/2023, for the hearing scheduled for 2/10/2023.

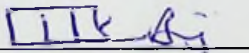
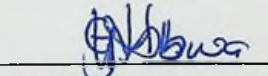
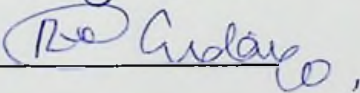
In conclusion, we find no merit in this application. It is dismissed with no order as to costs.

Signed in Chambers at Kampala this 15th day of **March 2024**.

Hon. Justice Linda Lillian Tumusiime Mugisha,
Ag. Head Judge

The Panelists Agree:

1. Hon. Charles Wacha Angulo,
2. Hon. Harriet Nganzi Mugambwa &
3. Ms. Rose Gidongo.

15th March 2024

9:30 am

Appearances

1. For the Applicant: - Ms. Bangulu Diana.
2. For the Respondent. - Ms. Nakamya Stella.
3. Court Clerk: - Mr. Christopher Lwebuga.

Delivered and signed by:

Hon. Justice Linda Lillian Tumusiime Mugisha,
Ag. Head Judge, Industrial Court

Industrial Court of Uganda