

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

MISC APPLICATION NO. 0256 OF 2016

ARISING FROM CIVIL REVISION NO. 14 OF 2014

- 1. MUTESASIRA NOAH
- 2. KABALI GEOFREY
- 3. KASULE SSEBUNYA
- 4. LUGGYA VICTORIA
- 5. KALULE MUKASA JOSEPH
- 6. DUNGU MATOVU
- 7. KAATE ALISTO
- 8. SSEGGAYI JOSEPH
- 9. KALIISA FULUGENSIO



APPLICANTS

VERSUS

NAKALEMA JANE KAYONDORESPONDENT

Before: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicants brought this application by way of Chamber Summons for orders to set aside the dismissal Order of Civil Revision No. 14 of 2014 and that costs be provided for.

The chamber summons is supported by the affidavit of Mr. KABALI GEOFREY, showing that the Appellant was in Court at the time of dismissal and his Lawyer who was also in Court had good cause for non appearance. He further averred that Civil Revision No. 14 of 2014 has higher chances of success and if not re-instated, the Applicants will be prejudiced by eviction from their bibanja.

The affidavit of Mr. Kabali Geoffrey incorporates the said grounds under paragraphs 1 – 20.

In reply, Nakalema Jane Kayondo deponed that the Applicants and their Counsel had lost interest in prosecuting the application for revision No. 14 of 2014, by not setting it down for

hearing (paragraph 4). In paragraph 5 – 7, she averres that, that the Applicant’s affidavit is full of falsehoods. In paragraphs 8 – 13, she depones that the Applicants are not interested in the trial of the case and condoned the lawyer’s mistake.

The Respondent prayed for the dismissal of this application (paragraph 13) or in the alternative pay security for costs of shs. 10,000,000/-

During the hearing, the Applicant’s counsel raised a number of issues regarding this application. He particularly informed Court that Counsel was in Court but excused himself to go rectify his pleadings. He therefore prayed that the mistake of Counsel ought not be visited on the client.

Counsel for the Respondent however, faulted Counsel’s approach of giving evidence across the bar. He raised a preliminary objection regarding the fact that the application was wrongly brought by chamber summons, yet under O.9 r11 and 27 and the application for setting aside should be by way of Notice of Motion. The quoted order, O.9 r29 of the Civil Procedure Rules specifically allows chamber summons for applications brought under O.9 and R4 of the Civil Procedure Rules, which is not the case here.

He reiterated the contents of the affidavit in reply to argue for falsehoods in the Applicant’s averments regarding the fact that he had agreed with Counsel’s alleged amendments. He also faulted the Applicants for using the same Counsel whose mistakes he is asking Court not to visit on him as evidence of condonation. He prayed for the dismissal of the application.

I have perused the above application and the submissions. I do agree with Counsel for the Respondent’s objections to the procedure adopted. The provisions of the law as to the adaptation of correct procedure was considered in the **Uganda Civil Justice Bench Book, 1st Edition January 2016 at page 44**, where it was observed that;

‘in view of Article 126 (2) (e) of the Constitution, rules of procedure should not be ignored but each case must be decided on its own circumstances’.

At page 21 of the Justice Bench Book, (*supra*), its noted that as per O.52 r1 of the Civil Procedure Rules all applications to Court save as otherwise provided, are by Notice of

Motion. However where the procedure of chamber summons is resorted to, it is where the rule requires the Application to be commenced by chamber summons.

Therefore in this application it is procedurally, wrong for the Applicant to bring this application by chamber summons, yet it ought to have been brought by way of Notice of Motion.

I have also gone through the pleadings and the matter raised and I note that the matters that the Applicant raises matters which are not borne out by the record. For example the Applicant alludes to Counsel's mistake, but there is no evidence of such a mistake on record. The record only records that there was inappropriate conduct where Counsel left the client and disappeared whereafter the matter was dismissed. The same Counsel has again come back with this application and in the process gave evidence across the bar regarding what transpired. This was irregular since Counsel did not depone an affidavit to the effect. Furthermore, there is no specific rebuttal of the allegations in Nakalema's affidavit about the allegations. I do not find any proof of sufficient cause necessary to move this Court to set aside the dismissal.

I am aware of the holding in Re: ***Christine Namatovu Tebajjukira (1992) HCB 85*** that;

'justice requires that the substance of disputes be investigated and decided on their merit and lapses and errors should not debar a litigant from the pursuit of his rights'.

However it is also trite law that mistakes of Counsel ought not be visited on the litigant. However, Counsel is an agent of his client and bears a responsibility to appear for the client in Court, to prepare well in advance and to come to Court equipped for the trial.

Where a matter is called for hearing and Counsel who is conducting the case, 'disappears' as in this case (see paragraphs 12, 13, 14 and 15 of the Nakalema Jane Kayondo's affidavit in reply), this amounts to conduct which is inexcusable.

Given the fact that the same lawyer who acted negligently for the Applicant is the same lawyer who commenced this application again under a wrong procedure; the combination of the two errors add up to place this application outside those where Article 126(2)(e) would be of help.

I am inclined to agree with Counsel for the Respondent's submissions that this application ought to be dismissed for being incompetent.

The application fails, and is dismissed with costs to the Respondents.

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Henry I. Kawesa

JUDGE
06/11/2017

30/10/2017:

Mr. Kayemba Aniwa for the Respondent.

Respondent absent

Applicant absent.

Clerk: Irene Nalunkuuma.

Court: ruling delivered in the presence of the above parties.

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Henry I. Kawesa

JUDGE

30/10/2017