**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**MISCELLANEOUS APPLICATION NO. 79 2014**

***(Arising from Civil Appeal No. 87 of 2010)***

**BITAMISSI NAMUDU…….APPLICANT**

**-VERSUS-**

**RWABUGANDA GODFREY…….RESPONDENT**

**CORAM: HON MR. JUSTICE RICHARD BUTEERA, JA**

**HON. MR. JUSTICE KENNETH KAKURU, JA**

**HON. JUSTICE PROF.LILLIAN E.TIBATEMWA, JA**

**RULING**

The applicant brought this application by notice of motion under ***Rule 100 (4)*** of the Rules of this Court and ***Section 98*** of Civil Procedure Act.

The orders sought in this application are set out in the notice of motion as follows;-

a) ***Civil Appeal No. 87 of 2010 be restored and reheard inter parties.***

b) ***Costs of this application be provided for.***

The grounds of the application are set out in the notice of motion as follows;-

1) ***The hearing of the said appeal came on 11th February 2014 at 9.00a.m but the applicant did not attend court since she had already instructed her lawyers of M/s. Abaine Buregyeya and Co. Advocates to do so on her behalf.***

2) ***The applicant's lawyers did not attend the hearing of the appeal as counsel Abaine Jonathan having personal conduct of the matter was indisposed.***

3) ***That the applicant has not been attending court due to her advanced age.***

4) ***That later the applicant filed written submissions accompanied with a letter apologizing for his failure to attend court due to the sickness but the said submissions were rejected by court for failure to seek leave of court.***

5) ***That the abrupt sickness of the applicant's counsel which prevented him from attending court at the hearing date ought not to be visited on the applicant.***

6) ***That the respondent will not be prejudiced in any substantial manner once the appeal is restored and reheard on its merit as the subject matter is land which is sensitive and which belonged to the applicant's late father Musa Muswangali.***

7) ***That this application is not belated as it has been filed within time.***

8) ***It would be fair and in the interest of justice if court granted this application.***

The application is also supported by two affidavits one deponed to by the applicant herself dated 4th March 2014 and the other by Mr. Abaine Jonathan her Advocate. Both affidavits generally expound on the grounds set out in the notice of motion. The respondent did not file an affidavit in reply.

At the hearing of this application learned counsel Mr. Jonathan Abaine appeared for the applicant while Mr. Yese Mugenyi appeared for the respondent. Both parties were absent.

Mr. Abaine submitted that when the appeal came up for hearing he was unable to attend court because he was sick. That his sickness started the night before the hearing because he had spent the whole night reading and preparing for the appeal and as a result he had developed a headache that morning and was unable to appear in court when the appeal was called for hearing.

He submitted that the mistake of counsel should not be visited on the applicant and further that this court has discretion to grant this application.

He submitted that if this application is not granted the applicant would suffer injustice.

Mr. Mugenyi for the respondent submitted that the appeal had been adjourned on four previous occasions.

The last two occasions were at the instance of Mr. Abaine counsel for the applicant.

That Court had made it very clear on 25th March 2013 to the applicant's counsel, that he would not be granted any further adjournment. On that date the appeal was given the last adjournment.

He submitted that counsel for the applicant did not bother to ask anyone to hold brief for him or to ask the applicant herself to attend Court on the 11th February 2014 when the appeal came up for hearing.

He submitted that no sufficient cause had been shown notwithstanding the fact that no affidavit in reply had been filed.

He prayed for this application to be dismissed.

Mr. Abaine, in reply submitted that a mistake of counsel should not be visited on his client. That he had no time to ask anyone to hold brief for him as he is a sole advocate in his Law Firm. And that he had evidence on record by affidavit that he was attending clinic that morning.

This application is brought under ***Rule 104*** of the Rules of this Court.

The Rule stipulates as follows;-

> ***"(4) Where an appeal has been allowed or cross–appeal dismissed in the absence of the respondent, he or she may apply to the court to rehear the appeal or to restore the cross-appeal for hearing, if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called for hearing."***

It is also brought under ***Section 98*** of Civil Procedure Act.

We do not think that the Civil Procedure Act applies to this court.

***Section 1*** of the Civil Procedure Act stipulates as follows;-

> **Application**
>
> ***"This Act shall extend to proceedings in the High Court and Magistrates' Courts."***

The appropriate rule of application in this court would be ***Rule 2(2)*** of the Rules of this Court which stipulates as follows;-

> *2(2)* ***"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or preventing abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay."***

However, proceedings under a wrong Rule does not vitiate this application in view of the provisions of ***Article 126 (2) (e)*** of the Constitution which provides that courts shall administer substantive justice without undue regard to technalities.

The court record indicates that when the appeal came up for hearing on 23rd May 2013, Mr. Abaine counsel for the applicant applied for adjournment.

He said he had not been able to file a list of authorities, that for the whole of that week he was grieved as he had lost three relatives and was therefore unable to proceed.

Mr. Mugenyi who appeared for the respondent on that date opposed the application for adjournment. He stated that the appeal had been adjourned twice before and submitted that authorities could be filed at a later date.

This court on 23rd of May 2013 when this matter came up for hearing noted as follows;-

> ***"We share the concern that this matter has been in the appellate court for a long time. We are however, inclined to grant a last adjournment of the hearing***

***of the same. We also direct the Registrar of this court to ensure that appeal is cause listed for hearing at the next civil session"***

This appeal indeed was cause listed for hearing on 11th February 2014 at 9:30 am. When the appeal was called for hearing the applicant was not in court neither was Mr. Abaine her counsel.

The matter was stood over up to 12:00 noon to allow time for the applicant or his counsel to attend.

When the Court reconvened at 12:05 Pm again both the applicant and Mr. Abaine were still absent.

It is admitted by the applicant and her counsel that they had been duly served with hearing notices by court and that Mr. Abaine was aware of the hearing date. An affidavit of service to that effect was on court record.

The court then allowed the respondent to proceed with the appeal under the provisions of ***Rule 100 (3)*** of the Rules of this court.

The court then adjourned the appeal for delivery of Judgment on notice.

On 14th February 2014, Mr. Abaine wrote a letter to the Registrar of this court seeking to file written submissions in reply. The written submissions were attached to that letter.

The court declined to consider those written submissions as no leave had been sought and no leave had been granted to file them. The law relating to filing of written submissions had not been complied with.

On 26th of February 2014 this court delivered judgment in this appeal in favour of the respondent herein who was the appellant in the main appeal No. 87 of 2010

On 10th March 2014 the applicant filed a notice of appeal, indicating her intention to appeal to the Supreme Court against the Judgment.

She had filed this application on 6th March 2014 and she had also filed an application for stay of execution *vide* Civil Application No. 79 of 2014 and an application for an interim order of stay

of execution *vide* Civil Application No. 78 of 2014. The two applications are pending the disposal of this application.

On 11th March 2014 the applicant filed an application in this court seeking a certificate that the appeal to the Supreme Court concerns a question of great public importance. This application is also pending, as the intended appeal is a third appeal.

We have heard the submissions of both counsel and we have perused the record and the authorities availed to us.

For an applicant to succeed in an application brought under ***Rule 100 (4)*** of the Rules of this court, that the applicant has to satisfy court that he or she was prevented by any sufficient cause from appealing when the appeal was called for hearing.

The power given to this court by the said ***Rule 100 (4)*** is discretionary and can only be exercised after sufficient reason for non appearance by the applicant has been established.

Sufficient reason in this particular case must relate to the inability of the applicant or his counsel to attend court. See ***Rosette Kizito versus Administrator General & others, Supreme Court Civil Application No. 9 of 1986.***

It has been held, and we agree that illness of counsel is sufficient cause. See ***Patel versus Star Mineral Water and Ice Factory (1961) EA 454.*** In this case counsel sought to prove illness.

The applicant's counsel relied on a medical form attached to the supplementary affidavit deponed to on 16th March 2014. The medical form indicates he had *"tension headache due to anxiety"*. It is dated 11th March 2014.

We do not believe that Mr. Abaine could have been so sick on that day as to be unable to attend court. If the fact of his sickness was the basis of this application as it appears to be, evidence of such sickness would not have been adduced by way of a supplementary affidavit filed almost two weeks after this application had been filed. It appears that the submission of a medical form was an afterthought.

Be that as it may, there is on court record a letter written by the Registrar of Titles Mityana dated 7th March 2014 indicating that the applicant has been engaged in process of sub dividing and selling the suit land. That letter states that the last sub-division was caused on 3rd October 2013.

This maybe the reason why both the applicant and her counsel were not keen on having this appeal heard and determined.

The applicant on 10th March filed a notice of appeal giving notice to this court, the respondent and to the Supreme Court of her intention to appeal against the Judgment to the Supreme Court. The appeal is therefore pending. In our view the fact that the applicant has appealed against the Judgment of this court vitiates this application. This court cannot set aside a Judgment against which an appeal lies.

We find that no sufficient cause has been established by applicant for grant of this application.

This application therefore fails and is hereby dismissed with costs

In the result both Miscellaneous Applications No. 78 and No. 79 of 2014 arising from this application have abated and are hereby struck out with no order as to costs.

**Dated** at **Kampala** this 7th day of April 2014.

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**HON. RICHARD BUTEERA**

**JUSTICE OF APPEAL**

**.....**

**HON. KENNETH KAKURU**

**JUSTICE OF APPEAL**

**.....**

**HON. PROF. LILLIAN E.TIBATEMWA**

**JUSTICE OF APPEAL**