**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL COURT DIVISION)**

HCT-00-CC-MA-096-2008

(ARISING FROM HCT-00-CC-CS-024-2008)

COMMERCIAL FARMS OF UGANDA LTD……....APPLICANTS

**VERSUS**

BARCLAYS BANK OF UGANDA…….……..……RESPONDENTS

KABIITO KARAMAGI (RECEIVER)

BEFORE: HON MR. JUSTICE LAMECK N. MUKASA

**RULING**

This is an application by Notice of Motion brought under Order 9 rule 23, Order 52 rules 1 and 2 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act for orders that:-

1. Dismissal of Misc. Application No 681 of 2008 be set aside it be re-instated and heard on its merit.

2. Costs be provided for.

The grounds for the application are briefly that:-

1. Counsel misapprehended the hearing date to be Tuesday 3/3/2009 at 2:30 p.m. and recorded it as such in his diary.

2. Mistake of Counsel should not be used to prejudice the applicant who has been keen on its application and has serious issues of Commercial interest therein.

3. The application for re-instatement has been brought timely and without delay.

4. It is equitable and just that this application be allowed as the dismissed application raised serious issues for consideration of court.

The brief background to this application is that Misc. Application No. 681 of 2008, was on 2nd February 2009 at the request of Counsel for both parties adjourned to 2nd March 2009 at 2:30 p.m. The adjournment was in the presence of Mr. Kwemara Kafuzi, then Counsel for the Application, and Ms Ruth Sebatindira, Counsel for the Respondents. On 2nd March 2009 the file was called for hearing at 2:55 p.m. Present was Ms Ruth Sebatindira, Counsel for the Respondents. Counsel for the Applicant was absent and there wasn't any form of representation for the Applicant. The Application was dismissed under Order 9 rule 22 of the Civil Procedure Rules. Thus this application to set aside the dismissal filed on 3rd Mach 2009.

The Application is supported by two affidavits. One sworn by Mr. Kwemara Kafuzi, then Counsel for the Applicant wherein he avers that he failed to appear in Court on 2nd March 2009 because he had misapprehended the date and entered 3rd March 2009 in his diary. That to the best of his knowledge negotiations were still going on between the parties. The second was sworn by Mr. Chris Balya a director of the Applicant company. He therein avers that neither him or any other official of the Applicant was aware that the applicant was aware that the application was coming on Monday 2nd March 2009. They were, according to information from Mr. Kwemara Kafuzi, aware that it was coming on Tuesday. That negotiations were ongoing between the Applicant and the Respondent and if this applications not allowed the Respondent will not continue with the negotiations.

Order 9 rule 23 of the Civil Procedure Rules allows a plaintiff whose suit has been dismissed under Rule 22 of the Order to apply for the dismissal to be set aside, if he/she satisfies Court that there was sufficient cause for non appearance when the suit was called for hearing. Among

circumstances which Courts have accepted as sufficient cause has been mistake by an advocate. In *William Gubanza Vs Uganda Electricity Board HCCS-571/93 (1996) VI KALR 10* it was held that under the rule Court has discretion to consider whether a mistake of Counsel may be treated as sufficient for non appearance of the plaintiff when his case was called for hearing.

The Applicant's ground for non appearance is Counsel's misapprehension of the hearing date to be 3rd March 2009 when it is was 2nd March 2009. However that reason is disputed by the Respondents. The 2nd Respondent, Kabiito Karamagi, in his affidavit in reply avers:-

> " 3 That on 2nd March 2009 at around 5:30 p.m. I received a telephone call from Mr. Kwemara Kafuzi on telephone number, 0392965775 where he inform me that had been unable to attend Court that afternoon when Misc Application 681 of 2008 came up because his mother had been admitted in hospital.
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> 4.That on 3rd March 2009, I was informed by my lawyers Ms Ruth Sebatindira and Mrs Olivia Kyalimpa Matovu that the same Mr. Kwemara Kafuzi had also telephoned them the same evening pleading for their indulgence on the grounds that he had been unable to attend court that afternoon because he was attending to his sick mother."

The above averments on oath are neither denied nor rebutted by Mr. Kwemara Kafuzi. Thus presumed admitted t be true facts. See *Massa Vs Achen (1978) HCB 297*.

So which of the two versions is the true reason for the applicant's counsel's and officials absence. It is gross professional misconduct for counsel to misinform court on oath. However, as was observed by Hon Justice Mukasa-Kikonyogo, DCJ in *Andrew Bamanya Vs Shamsherali Zaye CAC Application No. 70 of 2001*, mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant. See also *Banco Arabe Espanol Vs Bank of Uganda SCCA 9/98 (1999) KALR 354*.

I also appreciate the fact that this application was brought a following day the dismissal of the application. Therefore indicating the interest the Applicant had in the prosecution of the application. However, if re-instated what was the intention of the applicant! In paragraph 7 of Mr. Chris Balya's affidavit the Applicant's intention is clearly shown being to keep the negotiations between the Applicant and Respondent going. He avers:-

> "7. If this application isn't allowed and the main application and its injunction restored the bank will not negotiate and will sell all the applicant's property to its prejudice yet it had performed its bargain under the consent."

The Application in Misc Application No 681 of 2008, sought to be re-instated was for:

1. An order to be issued to restrain the respondents from selling and or disposing of the Applicant /plaintiff's land comprised in LRV 1427 Folio 22 Plot 18-24 Nyenga Road Njeru Mukono, motor vehicles Reg. No UAG 316 V Toyota Caldina and Toyota Hilux Pick-up Reg. No UAG 894Y.

2. An order that the receivership against the applicant be lifted.

This application arises from Civil Suit No 247 of 2008 where in the Applicant, as plaintiff had sought inter alia a permanent injunction restraining the Respondents (defendants) from breaching their contract with the applicant by pulling the applicant off under receivership and selling the Applicants properties comprised of LRV 1427 Folio 22 Plots 18-24 Nyenga Road, Njeru Mukono , LRV 1865 Folio LRV 1865 Folio 11, Pot 1 and 1A Second Street Kasese and any other properties of the plaintiff. In their Written Statement of Defence the Respondents Counter-claim for Ushs3,275,883,257/=. A consent Decree was recommended 6th October 2008 whereby it was, inter alia, ordered and decreed that:-

1. The applicant shall pay arrears amounting to Ushs305,000,000 within 45 days from date of the decree.

2. Upon payment of the above sum the receivership shall be lifted.

3. In the event of default by the Applicant to pay the arrears the Respondent/defendant shall be at the liberty to enforce its rights as provided for in the mortgage and debenture deeds.

Ms Ruth Sebatindira, Counsel for the Respondent, submitted that the application sought to be re-instated had no merit as it sought to stay the terms of the consent judgment. She argued that the Applicant should have either sought to vary the term of the consent judgment or if they genuinely believed that the Respondent had abused the consent order moved court for contempt of the court order.

I entirely agree with counsel for the Respondent that the application sought to be re-instated was neither an application for setting aside or review of the consent judgment, nor for contempt of the court for abuse of the consent order. Nor was it for stay of execution of the consent order. The applicant was seeking an injunction against the enforcement of the consent order. Mr. Bwiruha, Counsel for the Applicant, in his submission actually did concede that the procedure which the Applicant had adopted in the application sought to be re-instated was not proper. Considering all the above it is my considered view that the application sought to be re-instated has no possibility of success. Its re-instatement would be further waste of court's valuable time.

The application is therefore dismissed with costs to the Respondent.

Hon Mr. Justice Lameck N. Mukasa

**Judge**

11th March 2010