

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00CC-MA-0100-2013
(ARISING FROM CIVIL APPEAL NO. 30 OF 2012)

KAMPALA CAPITAL CITY AUTHORITYAPPLICANT

VERSUS

ZZIMWE ENTERPRISES, HARDWARE

AND CONSTRUCTION LTDRESPONDENT

BEFORE: JUSTICE W. M. MUSENE

RULING:

This was an application filed under S. 33 of the Judicature Act, section 98 of the Civil Procedure Act. O. 9 r. 23 and O. 52 rules and 1 and 2 of the Civil Procedure Rules it is for orders:

- (a) That the order dismissing miscellaneous Appeal No. 30 of 2012 be set aside and the appeal be re-instated for hearing on the merits.
- (b) That the costs of this application be provided for.

The Applicant, Kampala Capital City Authority was represented by Mr. Mugisha Caleb, while the Respondent, Zzimwe Enterprises, Hardware and construction Ltd, were represented by Mr. Kyeyune and Mr. Kagwa David.

The application was supported by an affidavit sworn by Byaruhanga Dennis of the Directorate of Legal Affairs, Kampala Capital City Authority. While on the side of the Respondent was an affidavit in reply sworn by Mr. Edmund Kyeyune. On top of the pleadings mentioned were written submissions filed by both sides.

According to the Applicant's Written Submissions, when Civil Appeal No 30 of 2012 came up for hearing, Mr. Caleb Mugisha, who had personal conduct of the matter was indisposed on that day of 13.12.2013. Mr. Caleb Mugisha is said to have delegated the matter to Mr. Byaruhanga Dennis, with instructions to seek an adjournment. It is further submitted on behalf of the applicant that Mr. Denis Byaruhanga went to a wrong court before Justice Kiryabwire instead of the present court where the case was handled. And by the time Mr. Denis Byaruhanga realized that he had gone before a Judge who was not handling that Application at around 2:00p.m. the same had been dismissed for want of prosecution by this court.

Counsel for the Applicant further submitted that on 18.2.2013, the Applicant filed an application seeking to set aside the dismissal order and reinstatement of the Applicant's appeal. Counsel for Applicant also submitted that in an application for reinstatement, the Applicant has to show and satisfy the court that there was sufficient cause for non appearance. And that the sufficient cause was the false impression by Mr. Denis Byaruhanga who appeared in a different court of Justice Kiryabwire instead of this court. He quoted the case of **Wanendeya William Gibon Vs Gaboi Kibale Wambi, Court of Appeal Civil Appeal No 8 of 2002**, where it was held that unless one is guilty of dilatory conduct, a vigilant litigant should not be debarred from pursuit of his rights on account of negligence or omissions of his counsel.

It was concluded on behalf of the Applicant that they have diligently pursued this application, and that the error or omission of Mr. Dennis Byaruhanga of going to a wrong court should not be visited on the Applicant.

In reply counsel for the Respondent submitted that on 16.11.2012 when this court dismissed the Application to set aside an Arbitration award, Mr. Denis Byaruhanga was there to receive a ruling on behalf of the Applicant. Counsel for the Respondent then wondered how the same Mr.

Denis Byaruhanga could have mistakenly appeared before the Hon Justice Kiryabwire. It was further submitted that no sufficient cause had been shown for re-instating the Appeal as Mr. Denis Byaruhanga's affidavit was false and intended to mislead court in view of the cause-list of that week having been circulated in advance to all Advocates.

Counsel for the Respondent further challenged the alleged nature of indisposition by Mr. Caleb Mugisha on the date the application was dismissed. It was also submitted that since both Caleb Mugisha and Denis Byaruhanga are employees of Kampala Capital Authority, then they could not benefit from the excuse that their negligence should not be visited on K.C.C.A. as they are not external Advocates for K.C.C.A. Counsel for the Respondent quoted the case of **Commercial Farms of Uganda Ltd Vs Barclays Bank of Uganda, M.A No 96 of 2008**, where my brother Judge Lameck Mukasa held that where an application sought to be re-instated has no possibility of success, then it cannot be re-instated as it would be a further waste of courts' valuable time.

They therefore reiterated that since the Applicant did not attach The Registrar's Order and the Taxation Certificate, then the Application be dismissed. Finally, counsel for the Respondents submitted that the Applicant has engaged in delaying tactics to defeat the award of costs to the Respondent's counsel by filling frivolous and vexatious Applications.

I have carefully considered the submissions by both sides on record and the pleadings as a whole. The law is now settled and there are a line of authorities to the effect that where an applicant shows sufficient cause for the non-appearance, the Application for re-instatement can be allowed. And sufficient cause has been defined as the inability or failure to take a particular step within prescribed time. The law also is that where a party has been negligent for guilty of dilatory conduct, they cannot rely on the excuse of negligence of counsel to amount to sufficient cause.

The cases referred to include:-

1. Marisa Vs Uganda Breweries (1998 – 90) HCB 131
2. Wanendeya William Giboni Vs kabala Wambi, Court of Appeal Civil Appeal No 8 of 2002.
3. Stone Concrete Ltd. Vs Jubilee Insurance Co. Ltd. Commercial Court MM No 358 of 2012
4. Ggolooba Godfrey Vs Harriet Kizito Supreme Court Civil Appeal No 70 of 2006.

In the present case, the main thrust of the Application is that Mr. Denis Byaruhanga who was supposed to hold brief for Caleb Mugisha who was indisposed, mistakenly went to another court of Justice Kiryabwire instead of this court. I am unable to agree with the above reasoning because it is a routine feature and practice of the Commercial Court Division and indeed other divisions of the High Court that cause-lists are supplied to Advocates on a weekly basis with copies on court Notice boards. It is indeed strange that Mr Denis Byaruhanga an advocate of the High Court of Uganda and all court sub-ordinate there to, and an Advocate who has been making several appearances at the Commercial Court and before the various Commercial Court Judges, could on that particular day get lost.

Mr. Denis Byaruhanga in his affidavit in support of the Application has not alluded to the absence of the weekly cause lists which shows which cases are before which Judge on a daily basis. He has also not in his affidavit stated that it was a mistaken identity of Justice Masalu Musene (myself) for Justice Kiryabwire Geoffrey or that they are twin brothers. So now on earth such a high profile Advocate could get lost between the court of Justice Kiryabwire and this court is not only strange, but unbelievable and therefore unacceptable to this court. If the person who got lost between the various court halls of the three storied building of the Commercial Court was a peasant from Kisoro or Iganga, it would be understandable.

But for a city based Advocate, who know the presitincts of the court very well, such an excuse is not acceptable and does not in any way constitute sufficient cause for non-appearance. At worst, for an officer of court to allege an apparent falsehood is negligence of the highest order. In the

case of Stone Concrete Ltd Vs Jubilee Insurance (ibidi), my learned sister Judge Hellen Obura emphasized that whereas a party has been negligent or guilty of dilatory conduct, they cannot rely on the excuse of negligence of Counsel to amount to sufficient cause. I entirely agree with her Lordship and dismiss the submission by Counsel for the Applicant that the mistake of Counsel for the Applicant attending the wrong court should not be visited on the Applicant. And neither does it constitute sufficient cause. I accordingly find and hold that the applicant and their employees, notably Mr. Denis Byaruhanga was guilty of dilatory conduct and the averments in his affidavit amount to delaying tactics to defeat the cause of Justice.

In the premise, and without going into the other detailed submissions on both sides, I find and hold that no sufficient cause has been shown in the circumstances to warrant setting aside the dismissal. The application is accordingly hereby dismissed with costs.

Judge

11.4.2013

Mr. David Kagwa for Respondent present

Mr. Dennis Byaruhanga for Applicants

Mr. Ojambo Court Clerk present

Court: Ruling read out in open court

Hon. Justice W. M. Musene

HIGH COURT JUDGE

11.4.2013