

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

**HCT-00-CC-MA-203-2013**

*(Arising from MISC. APPLICATION NO. 113 OF 2013)*

*(Arising from HCT-00-CC-CS-0185-2012)*

1. **ARTHUR BUSINGYE**
2. **BUSINGYE PROPERTIES LIMITED:.....:APPLICANTS**

**VERSUS**

1. **GIANLUIGI GRASSI**
2. **DOREEN RUYONDO:.....:RESPONDENTS**

**BEFORE: HON. JUSTICE HELLEN OBURA**

**RULING**

This application was brought under Section 98 of the Civil Procedure Act (CPA), Order 9 rule 23 as well as Order 52 rules 1, 2 & 3 of the Civil Procedure Rules (CPR) seeking for Orders that the dismissal of Misc. Application No. 113 of 2013 be set aside and the said application be reinstated. The applicants also seek for an order that the costs of the application be in the cause.

The grounds of the application are contained in the notice of motion and affidavit in support deposed by Mr. Johnson Njoki, a Legal Assistant in M/S Geoffrey Nangumya & Co. Advocates that represents the applicants in this matter. The brief grounds are that: -

- Misc. Application No. 113 of 2013 was fixed by this court and the applicants' counsel was never notified of the fixed dates and as such the applicants/defendants should be granted their right to be heard by the court,
- there is sufficient cause as to why the application should be reinstated,
- this application has been brought without undue delay,
- the applicants shall suffer irreparable loss if this application is not granted,
- it would be just and equitable that the dismissal is set aside and Misc. Application No. 112 of 2013 proceeds to be heard on its merits as counsel for the applicants was prevented to attend court by sufficient cause.

The application was opposed on the grounds stated in the affidavit in reply deposed by Mr. Johnny Patrick Barenzi who described himself in paragraph 1 thereof as, “...an advocate of the High Court of Uganda and all its subordinate courts and the legal counsel handling personal conduct of the matter in issue..”. The applicants filed an affidavit in rejoinder deposed by Mr. Arthur Busingye, the 1<sup>st</sup> applicant. The respondents also filed an affidavit in surre-joinder deposed by Mr. Johnny Patrick Barenzi after counsel for the applicants had already filed their written submissions.

Before I give the background of this application and the highlight of the submissions, I wish to first deal with the point of law raised by counsel for the respondent on the competence of the affidavit in support of this application and what I have personally observed as regards the affidavit in reply. It was contended by the respondent that Mr. Njoki who deposed the affidavit in support has not disclosed the source of his information regarding Mr. Nangumya Geoffrey’s absence on the date fixed for hearing Misc. Application No. 113 of 2013 yet Mr. Nangumya has not sworn an affidavit to confirm the averments. He contended that this contravened Order 19 rule 3 of the CPR. The case of *Caspair Ltd vs Harry Gandy (1962) EA 414* was cited where court in rejecting the affidavit held that the affidavit did not state the deponent’s means of knowledge of all the ground of his belief in matters as set out in the affidavit.

Conversely, the applicants argued that Mr. Njoki is a legal assistant who is acquainted with the matters he deposed to and so the affidavit in support is not in contravention of Order 19 rule 3 of the CPR. Counsel cited the case of *Life Insurance Co. of India vs Panesar [1967] EA 614 at 615 (CA)* for the holding that unless otherwise provided for in written law the rules of evidence and the best evidence rules do not apply to affidavits. It is the applicants’ contention that the affidavit in support is based on Mr. Njoki’s knowledge and belief and if at all court finds that some paragraphs have any falsehoods they can be severed from the affidavit and the rest of the paragraphs accepted.

Mr. Njoki described himself in paragraph 1 of the affidavit in support that he is a Legal Assistant in the applicant’s lawyers Geoffrey Nangumya & Co. Advocates with authority from the applicants to swear the affidavit. He then deposed in the impugned paragraph 4 that the applicants’ advocate Mr. Geoffrey Nangumya did not appear in court on the date Misc. Application No. 113 of 2013 was called on for hearing and dismissed because he was appearing in another case. It is alleged that the source of this information is not disclosed and it is a falsehood.

On the alleged failure to disclose the source of information, I hold the view that where a law firm is instructed to handle a matter all information regarding progress of that matter would be within the knowledge of the lawyers in that firm because of the common practice of discussing and consulting among lawyers. This means that any lawyer in that law firm can swear an affidavit on the non-contentious aspect of any matter that the law firm is handling. I therefore believe that as colleagues in the same law firm Mr. Njoki would ordinarily know that Mr. Nangumya left for

court in the morning based on their schedule of duties which would be an open secret within the law firm. It therefore follows that the information was within Mr. Njoki's knowledge and so he did not have to state its source. This view is fortified by the fact that instructions are usually given to a law firm but not an individual lawyer in the firm and that is why notice of instruction and/or change of instruction filed in court clearly indicate so. Finally on this point, regulation 9 of the Advocates (Professional Conduct) Regulations S.I. 267-2 only prohibits an advocate in personal conduct of the case from deposing an affidavit in contentious matter. For the above reasons, I find that Mr. Njoki was competent to swear the affidavit and the information was within his knowledge.

As regards the alleged falsehood, I have looked at the averments in Mr. Njoki's affidavit more specifically paragraph 4 and I am of the view that his failure to attach a copy of the cause list does not per se make his averment false unless the affidavit in reply disapproved him by showing that Mr. Nangumya was not in court. Since no such contrary information has been provided I have no basis for finding that it is false. I am not in any way suggesting that attaching the cause list is not important but at the same time it would be unfair to draw a conclusion with far reaching consequences by mere lack of it.

In addition, while I agree that Mr. Nangumya himself should have sworn an affidavit and attached the cause list as proof that the matter actually came up in court, I also do not think that his failure to do so affects the competence of Mr. Njoki's affidavit for the same reason I stated above. Mr. Nangumya's evidence would have only strengthened that of Mr. Njoki and that in my view goes to the merit of the application and does not affect the validity of the affidavit in support. On the whole, the point of law raised by counsel for the respondent as regards the competence of affidavit in support of this application lack merit and they are accordingly overruled.

However, I must observe that while the respondent's counsels were quick at pointing out the defect in the affidavit in support of the application, their own affidavit in reply contravenes regulation 9 of the Advocates (Professional Conduct) Regulations S.I. 267-2 because it was deposed by counsel who has personal conduct of this matter as stated in paragraph 1 thereof and yet it contains contentious matters. Although counsel for the applicants overlooked this irregularity it is the duty of this court to be on the look out for any illegality and if it is found it should not be overlooked. The import of regulation 9 (supra) is that an advocate cannot appear before any court or tribunal in any matter in which he or she is required to give evidence whether verbally or by affidavit. The only exception is where the evidence is on a formal or non-contentious matter or fact.

In the instant case, counsel deposed a 30 paragraph affidavit in reply 10 of which touched on the merits of the defendant's intended defence in the main suit. To my mind these are contentious matters which is the mischief regulation 9 is intended to cure. It is indeed logical that only the parties should give evidence whether verbally or by affidavit on such contentious matters but not

counsel who has personal conduct of the matter like in this case. For that reason, I find the affidavit in reply incurably defective.

It was held in *Jayantilal Amratlal Bhimji & Another v Prime Finance Company Ltd, Misc. Application No. 467 of 2007* that where an advocate swears an affidavit in a contentious matter the affidavit becomes incurably defective and should be struck out. I do not see any other option in dealing with this affidavit having found that it was sworn by counsel who has personal conduct of the matter other than striking it out and it is accordingly struck out. This means there is no affidavit in reply and therefore the aspects of submissions of the respondents which are based on the affidavit shall not be considered by this court. I will only consider the arguments on the points of law.

I will now proceed to determine this application on the merits. The brief history to this application is that the respondents filed Civil Suit No. 415 of 2012 against the applicants. Summons to file a defence were issued to the applicants and served upon their lawyers at the time, M/S Bitangaro and Co. Advocates who acknowledged receipt of the same. The applicants did not file a written statement of defence within the prescribed time and the respondents successfully applied for judgment against the applicants under Order 9 rule 6 of the CPR. Subsequently, the applicants filed Misc. Application No. 113 of 2013 for Orders to stay execution of the ex parte judgment dated 14<sup>th</sup> November 2012, set it aside and allow the applicants to file a written statement of defence. The applicants claim that they were never served or informed that there was a suit against them until their lawyers Geoffrey Nangumya & Co. Advocates informed them of the suit. On 25<sup>th</sup> March 2013 when the application came up for hearing, it was dismissed for non appearance of the applicants and their counsel hence this application.

When this matter came up for hearing Ms. Nakawooya Sarah represented the applicants while the respondents were represented by Mr. Paul Kuteesa and Mr. Johnny Patrick Barenzi. Counsel for the parties filed written submissions but as indicated above, I have only considered the arguments of counsel for the respondents on the points of law. The applicants contended that the power to set aside the Order for dismissal is entirely within the discretion of the court. Counsel for the applicants invited the court to consider the case of *G.W Mulindwa vs Joseph Kisubika [1994] II KALR 72* where court held that for purposes of justice court was empowered under section 98 of the CPA to set aside a dismissal. He also cited the case of *Horizon Coaches Ltd vs James Mujuni & another HCMA No. 55/2011* for the holding that once there is sufficient cause that prevented the applicant/defendant from entering appearance when the suit was called for hearing the suit should be reinstated.

The applicants' counsel submitted that the applicants were very eager to prosecute their application however they had not been informed by their lawyer that the application had been fixed for hearing on the 25<sup>th</sup> March 2013. He submitted further that the application to set aside the dismissal is made bonafide without undue delay with a view to expedite the hearing and

early disposal of the matter on its merits. It is submitted further that the applicants instructed their lawyers to file Misc. Application No. 113 of 2013 without delay and the lawyers did so but the legal assistant failed to pick the application from the registry when it had been fixed for hearing. Counsel argued that negligence of the applicants' lawyer should not be visited on them.

He submitted that in the event that no sufficient cause is found this court should consider the case of *Girado vs ALAM [1971] EA 448* where it was held that although no sufficient cause had been shown nevertheless in order that there is no injustice to the applicant the judgment would be set aside and the application was allowed in the exercise of courts inherent powers.

In answer to those submissions counsel for respondents cited the case of *National Insurance Corporation vs Mugenyi & Co. Advocates [1987] HCB 28* for the main test for reinstatement of a suit. He disputed the applicants' contention that they were not aware of the date when the application was coming up arguing that there was only one copy of the application on record which implies that the other copies had been taken by the applicants for service upon the respondents.

The respondents' counsel further argued that it would not be speculative to expect a prudent litigant to follow up his/her case as was held in the case of *David Kato Luguza and Another vs Evelyn Nakafeero and Another High Court Civil Appeal No. 37 of 2011*. He submitted that it was dilatory conduct and negligence on the part of the applicants not to have been in touch with their lawyers in 27 days showing that they neither exercised vigilance nor diligence in pursuit of Misc. Application No. 113 of 2013. To that end, the respondents believe that the principle that mistake of counsel should not be visited on the litigant stated in the case of *Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998* is not applicable to this case since the applicants' conduct was clearly dilatory and they should share the blame with their counsel.

The respondents also relied on the case of *Stone Concrete Ltd vs Jubilee Insurance Co. Ltd Misc. Application No. 385 of 2012* for the position that whereas a party has been negligent or guilty of dilatory conduct, they cannot rely on the excuse of negligence of counsel as sufficient cause. According to the respondents, the applicants acted casually and negligently while handling their case and therefore it was due to their dilatory conduct that they have never been eager to prosecute their applications arising out of their motions as seen from the checkered history of this case. The case of *Commercial Farms of Uganda Ltd vs Barclays Bank Misc. Application No. 96 of 2008* was cited for the holding that where an application sought to be reinstated has no possibility of success then it cannot be reinstated as it would be a further waste of court's valuable time.

In a brief rejoinder, the applicants' counsel argued that substantive justice requires that a court should entertain a matter on its merits. He submitted that in this case the dismissal of Misc. Application No. 113 of 2013 should be set aside since the ex parte decree did not conclusively

determine the rights of the parties. It was submitted further that it is wrong for the respondent to allege that the applicants' application is poised to derail this court into defeating justice and also allege that the affidavit in support of the application contains falsehoods yet the respondents did not cross examine the deponent. This court's attention is drawn to the case of ***Hikimanywa Kyamanywa vs Sajjabi Chris Court of Appeal Civil Appeal No. 1 of 2006*** where Justice L.E.M Mukasa-Kikonyogo, DCJ stated:- "...for effective administration of justice, the courts are enjoined to investigate all the disputes and decide them on merit. Errors or lapses of the counsel should not be visited on litigants who have no control over advocates."

I have considered the above submissions and the issue before this court is whether there is sufficient cause to warrant setting aside dismissal of Misc. Application No. 113 of 2013 and reinstating the same. Order 9 rule 23 of the CPR under which this application was brought empowers court to make an order setting aside the dismissal of a suit upon such terms as to costs or otherwise as the court thinks fit. However, the applicant must first satisfy the court that there was sufficient cause for non appearance when the suit was called on for hearing.

The Supreme Court of Uganda in ***Nicholas Roussos vs Gulamhussein Habib Virani & Another, Civil Appeal No.9 of 1993*** (unreported), held that some of the grounds or circumstances which may amount to sufficient cause include mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness by a party. Similarly in the case of ***Ms United Office Equipment & Stationary Supply EA vs Uganda Bookshop Ltd [1987] HCB 90*** court held that failure by counsel for the plaintiff to appear was due to negligence of counsel, although sufficient cause may be as absurd as counsel's negligence.

In ***National Insurance Corporation vs Mugenyi and Company Advocates (supra)*** the Court of Appeal held that;

*"The main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a prima facie defence to that case...."*

In the instant case the applicant's explanation for their failure to appear in court is that the clerk to their lawyer failed to retrieve copies of the notice of motion and so they were unaware of the hearing date. I have noted that that application was filed on 21<sup>st</sup> February 2013 and endorsed by the registrar of this court on the 13<sup>th</sup> of March 2013 and fixed for hearing on 25<sup>th</sup> March 2013. The duration between the filing and fixing of the application was 20 days and that between the fixing and hearing date is 13 days. It is therefore possible that the clerk of the applicants' lawyers firm could have kept checking with the court registry whether the matter was fixed and relaxed within the thirteen days the matter had been fixed as averred in the affidavit in support and argued by counsel. I also note that the respondents' were not even served with the

application. I would therefore give them the benefit of the doubt and agree that both the applicants and their lawyer were not aware of the fixture. Of course that does not mean that this court condones sluggishness which in my view accounts for the failure to pick the notice of motion for service on the respondents.

But I am also alive to the now settled principle that mistake of counsel however reckless or negligent cannot be visited on the litigant. The applicants who had instructed lawyers to pursue their application cannot be condemned for not being vigilant in prosecuting their matters. In the case of *Yowasi Kabiguruka vs Samuel Byarufu C.A.C.A No.18 of 2008*, it was held that once a party instructs counsel, he assumes control over the case to conduct it through out, the party cannot share the conduct of the case with his counsel. As such the applicants could not have been expected to follow up their case in court when they had instructed counsel to prosecute their application.

Based on the above principle, I cannot fault the applicants for the omission that led to the dismissal of their application. It was upon their lawyers to follow up with the court registry and ensure that the application was fixed and served on the respondents. It was also the duty of the applicants' lawyers to inform them about the date of hearing to enable them appear in court.

I therefore find that the applicants have shown sufficient cause why they and their lawyers failed to appear in court on the day their application was dismissed. In the result, this application is granted, the dismissal of Misc. Application No. 113 of 2013 is set aside and the application is reinstated. Since counsel for the applicants conceded that they were negligent in handling that application, they shall pay the taxed costs of this application to the respondents.

I so order.

Dated this 30<sup>th</sup> day of May 2014.

Hellen Obura  
**JUDGE**

Ruling delivered in Chambers at 4.00pm in the presence of Ms.Okumu Stella for the applicants and Ms. Kisaka Mable for the respondents.

**JUDGE**  
30/05/14