THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCMA NO 477 OF 2012

(ARISING FROM HCMA NO 82 OF 2011)

(ARISING FROM HCCS NO 30 OF 2010)

STANDARD CHARTERED BANK (U) LTD}.....APPLICANT

VS

MWESIGWA GEOFFREY PHILIP}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant's application is for leave to file and serve its written statement of defence out of time in HCCS No. 30 of 2010. Secondly that a default judgement entered in civil suit number 30 of 2010 is set aside and for the costs of the application to be provided for.

The Applicant is represented by Counsel Joseph Matsiko of Messieurs Kampala Associated Advocates while the Respondent is represented by Counsel Dr James Akampumuza of Messieurs Akampumuza and Company Advocates jointly with Counsel Simon Tendo Kabenge of Messieurs Simon Tendo Kabenge Advocates.

Applicant's Submissions

The written submissions of the Applicants Counsel, Counsel Joseph Matsiko makes reference to the grounds and affidavit evidence of Paul Kuteesa, Ojambo Makoha and that of Emily Gakiza, which evidence has been set up below.

The Applicants Counsel submitted that section 33 of the Judicature Act gives the High Court very wide powers to exercise its jurisdiction to grant remedies to

obtain the ends of justice so that all matters in controversy between the parties may be completely and finally determined and to avoid multiplicity of suits. The provision enjoins the court to look at the substance of disputes so that they are finally and completely determined on the merits.

As far as the evidence in this matter is concerned, the written statement of defence of the Applicant had been filed in time but there was a mistake in thinking by the Applicant's Counsel that taking of a copy of the written statement of defence by someone who signed as having received a copy from the High Court registry on 23 February 2010 for Messieurs Akampumuza and Company Advocates was sufficient or effectual service on the Plaintiff through its Counsel.

Appropriate orders should be granted to enable the innocent Applicant who has demonstrated that it has a defence to complete its answer to the Respondents claim so that in terms of section 33 of the Judicature Act as far as possible all matters in controversy between the parties are completely and finally determined. Furthermore section 98 of the Civil Procedure Act saves the inherent powers of the court for purposes of obtaining the ends of justice. It provides that nothing shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The central theme of this section is the ascertainment of the ends of justice for the purpose of which inherent powers of the court have been retained. Counsel submitted that the Applicant's case is a fit and proper case for the court to use its inherent powers for the ends of justice by enlargement of time for the filing and service of a written statement of defence.

The Applicant's Counsel further invited the court to consider section 96 of the Civil Procedure Act which gives the court power to enlarge time fixed or granted by court for the doing of any act prescribed or allowed by the Civil Procedure Act. The discretion ought to be exercised judiciously. It ought to take into consideration the circumstances of the case. In the Applicants case a written statement of defence had already been filed in time but there was no service because of the mistaken belief that the purpose of service was accomplished by

William Ouni who signed for and on behalf of the law firm that had filed the plaint.

Order 8 rule 1 (2) of the Civil Procedure Rules allows the court to extend time within which to file a written statement of defence. It provides that where a Defendant has been served with summons in the form provided for by rule 1 (1) (a) of Order 5 of the Civil Procedure Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within 15 days after service of the summons. Order 51 rules 6 of the Civil Procedure Rules gives the court power to enlarge time upon such terms, if any as the justice of the case may require for doing any act or taking any proceedings under the rules.

The sum total of the legal provisions is that the court has power to extend or enlarge time for filing a written statement of defence beyond the time prescribed by the rules. Secondly the facts in the Applicant's case call for the exercise of the powers and discretion of the court to enlarge time in favour of the Applicant. Counsels further made reference to the evidence which is uncontroverted that the Applicant filed its written statement of defence in time. The court only found that it had not been served in time and struck it off. Briefly the Applicant filed a written statement of defence within time on 19 February 2010. It was struck out on 27 July 2011. The evidence of Ojambo Makoha is that the written statement of defence was picked on behalf of the law firm which represents the Respondent by one Ouni William. The evidence is reflected on a copy of the written statement of defence where there is an acknowledgement signed by William. It may be the case that the same Ouni William was not in possession of a process server certificate and his testimony is not on court record. However based on the testimony of Ojambo Makoha and the documentary evidence showing endorsed on the written statement of defence the words "Received a copy from the High Court registry 23/02/2010 for Akampumuza and Company Advocates". The Applicants Counsel Mr Paul Kuteesa was led to a mistaken belief that there had been effective service of the written statement of defence. Counsel submitted that the mistake of Counsel should not be visited on the Applicant especially as

the Applicant has a credible defence worthy of hearing. Secondly the Applicant was not privy to the mistake of Counsel.

Counsel further invited court to consider the decisions of the court with regard to the effect of no service of the written statement of defence and to exercise leniency in favour of the Applicant because the effect of a late service of a written statement of defence has not yet been settled. To illustrate the point the Applicants Counsel makes reference to **HCMA 623 of 2010 Simon Tendo Kabenge versus Barclays Bank and another** in which honourable justice Zehurikize considered several authorities inclusive of **HCMA 82 of 2011 Mwesigwa Philip versus Standard Chartered Bank.** He concluded that the filing of a defence is complete upon compliance with Order 8 rule 1 of the Civil Procedure Rules and there was no authority for saying that it is only complete when it has been served on the Plaintiff within the time allowed for the Defendant to file his or her defence. Counsel prayed that because the written statement of defence had been filed on time, the court should allow the Defendant to file afresh and serve the Plaintiff out of time.

Counsel further submitted that there was in any event effective receipt of the written statement of defence and therefore service. The purpose of service is to bring to the notice of the opposite party the pleadings according to the cases of **Western Uganda Cotton Uganda Ltd versus Dr George Asaba HCCS 253/2009**. In that case the written statement of defence and counterclaim had been filed but had never been served and the Plaintiff's Counsel picked a copy of it from the court file. It was held that the object of service had been achieved by the action of the Plaintiff's Counsel. Further reference can be made to the case of **Mukasa Anthony Harris versus Dr Bayiga Michael, Election Petition Appeal No 18 of 2007** where the appellant had helped himself to a copy of the petition and the Supreme Court held that the omission to serve was immaterial as the appellant got the petition within the time prescribed.

Furthermore the Applicants was prevented from filing the application earlier because Counsel misunderstood the orders of the court in miscellaneous application number 200/2011 and he was waiting for the court to fix

miscellaneous application number 82/2011 which was an application for striking out the written statement of defence. He got a wrong brief from his colleague and admits his mistake.

As far as the mistake of Counsel is concerned, it should not be visited on the Applicant because firstly the Applicant is anxious to defend the suit according to timely written instructions given to Kampala Associated Advocates. Secondly the Applicant maintains that it has received no money on behalf of the Respondent and cannot pay the Respondent money it has not received from Citibank.

The Applicant has a plausible uncompleted defence to the suit. In the case of the **Executrix of the estate of Christine Mary Tebajjukira versus Mary Namatovu (1992 – 1993) HCB at page 85** the Supreme Court held that the mistake or negligence of Counsel is not necessarily a bar to obtaining extension of time. It would be wrong to penalise the Applicant for the mistakes of the court, Counsel for the Respondent, and their Counsel. Furthermore administration of justice should normally require that the substance of disputes should be investigated and decided on the merits and errors and lapses should not necessarily debar a litigant from the pursuit of his rights. In the case of **Captain Philip Ongom versus Catherine Nyero Owota SCCA No 14 of 2001,** the Supreme Court held that a litigant's right to a fair hearing in the determination of civil rights and obligations is enshrined in article 28 of the Constitution and should not be defeated on the ground of his or her lawyer's mistakes. In the **Banco Arabe Espanol versus Bank of Uganda SCCA number 8 of 1998** the Supreme Court held that an error on the part of Counsel in the form of a mistaken belief should not be visited on the Applicant and it would amount to sufficient cause for setting aside a dismissal of the suit.

Counsel further submitted that in pursuit of the ends of justice, the Applicant should not be condemned unheard. Because the Applicant has a good defence, the dictates of article 126 (2) (e) of the Constitution requires that substantive justice shall be administered. The Applicant never received Uganda shillings 12,994,762 on the Plaintiffs account. Secondly the Applicant bank also did not act as a collecting bank. Citibank London did not remit any money but sent through

the free-form MT199 SWIFT messages which are not acceptable. Evidence is that MT199 is not to be used for payment. To the extent that the Applicant did not receive payment from Citibank it does not owe the Respondent any money. Furthermore the bank of Uganda handled the matter and advised the Applicant, Standard Chartered bank Uganda limited is not liable to effect payment in the absence of authentic payment instructions.

Lastly the Applicant's Counsel submitted on the evidence in cross examination of the Applicants witnesses by the Respondents Counsel and concluded that the Applicant's case remained strong even after cross examination. In conclusion the Applicant has demonstrated there are sufficient grounds for extension of time to file and serve its written statement of defence out of time. The Respondent on the other hand vehemently opposed the application and went to the extent of cross examining all the Applicant's witnesses on the affidavits, on an interlocutory application for enlargement of time. Having picked the written statement of defence from the court, the Applicant should not have opposed this glaring fact and conceded to the application. Counsel sought for costs of the suit or in the alternative that they should abide the outcome of the main suit.

Submissions of the Respondent's Counsel

In reply the Respondent's Counsel strongly opposed the application. The Respondent's Counsel generally submitted that the Respondent relies on the affidavit in reply of Mwesigwa Philip filed on 19 September 2012 and Dorothy Atukunda filed on the same day as well as another affidavit filed on 28 September 2012 which evidence remained un-assailed. Counsel submitted that averments in an affidavit which are not rebutted are deemed to be admitted. He contended that the Applicant had a duty to prove the conditions for the grant of the application by establishing sufficient cause for enlargement of time which it failed to do.

The Respondent's Counsel maintains that the Applicant's application is grounded on conjectures and unsubstantiated hearsay evidence. For instance the deposition of Paul Kuteesa is that on 19 February 2010 Messieurs Kampala

Associated Advocates duly filed a written statement of defence and he instructed the law clerk one William Mukasa to pick it for service upon Counsel for the Plaintiff/Respondent. However William Mukasa informed him that somebody from the Respondent's advocate's law firm had picked a copy from the court record and acknowledged receipt thereof. The Respondents Counsel admitted that it is true that the written statement of defence annexed to the affidavit of Paul Kuteesa bears the words "Received a copy from the High Court registry 23rd/02/2010 for Akampumuza and Company Advocates" signed by one Ouni William. He submitted that there are several flaws in the Applicant's submission. Firstly the averment contradicts the grounds in support of the very application it supports. Ground (ii) avers that Counsel for the Applicant erroneously believed that a person from the law firm of Counsel for the Respondent had picked the WSD from the court and service and accordingly been effected in accordance with the law. (iii) Accordingly the non-service of the WSD was occasioned by the mistake of Counsel which should not be visited on the Applicant. He suggested that one of the two contradictory accounts must be a falsehood. Secondly he suggested that there cannot be two contradictory accounts which is perjury and false swearing to support the application based on the blatant lies. Having admitted that there was no service of the WSD, the Applicant proceeds to tell another falsehood. Additionally Paul Kuteesa deposes that he reasonably understood from his knowledge of the law that picking a copy of the WSD from the court was effective for purposes of service upon the Respondent. This is submitted was a completely departure from the Applicant's own pleading quoted above to the effect that non-service was occasioned by mistake of Counsel which should not be visited on the Applicant.

From the above submissions the court should find that the Applicant knowingly filed false and contradictory pleadings and told lies on oath to validate failure to serve the WSD. The court's jurisdiction cannot be invoked on that basis for the exercise of its discretion based on law or equity. Counsel invited the court to read **Supreme Court Civil Appeal Number 1 of 2007 between Attorney General and KTM Lutaaya** where the Supreme Court struck out an affidavit for containing falsehood and non-compliance with the law whereupon the application

supported by the affidavit was also dismissed. He further relied on **Musinguzi Garuga James versus Amama Mbabazi Election Petition Number EPA 0003 of 2001**.

Whereas Counsel Paul Kuteesa alleges that the firm of Kampala Associated Advocates on 19 February 2010 filed a WSD and that the same was signed and sealed by court, he does not claim to be the person who filed it or witnessed it being sealed by the registrar and this evidence is hearsay evidence. Whereas the WSD was filed on 19 February 2010, the Respondent's Counsel submitted that there was no reason why it should not have been taken and served the same day when the registrar signed and sealed and endorsed on the written statement of defence.

The Respondent's Counsel further submits that Mr Paul Kuteesa's evidence is on contentious matters and does not indicate where he derives his authority. There is no affidavit filed by the purported process server Mr William Mukasa to support the application. In the absence, Paul Kuteesa's evidence is hearsay and inadmissible according to the case of **Eric Tibebaga vs. Fr. Narsensio Begumisa and 3 Others Civil Application Number 18 of 2002**.

Furthermore there is abundant evidence that the law firm of Messieurs Akampumuza and Company Advocates has never employed the alleged Ouni William as a law clerk and this fact has been admitted by the Applicant in the grounds of the notice of motion. The fact is proved by the affidavit of Dorothy Atukunda in reply. Consequently it is a falsehood to state that service was done by the firm serving itself through a certain Ouni William as its law clerk. There is no evidence as to where the Applicant was from 2010 to 9 March 2011 without serving a written statement of defence after the Respondent's application for default judgement and striking out the written statement of defence was granted. The long delay is inexcusable and demonstrates that the Applicant had no interest in filing and serving the WSD. None of the Applicant's witnesses mentioned the name Ouni William in the affidavits. The Applicant is therefore culpable and guilty of dilatory conduct. The Applicant has a legal Department and should not hide behind the doctrine of mistake of Counsel which should not be visited on the

client. The Applicant is bound by the actions of its Counsel. The Applicant knew that the case had been filed many years ago and were tired of reporting it to the management without updates according to the testimony of Emily Gakiza. She further testified that the case had been filed many years ago and nothing had happened and they made a request for the case to be removed from the record. This was an admission of dilatory conduct on the part of the Applicant.

The Applicant had a mission to adduce evidence to reverse the findings of the court on matters of fact in the ruling of the court in Miscellaneous Application Number 200 of 2011 which ruling is dated 27th of July 2011. He invited the court to dismiss the Applicant's attempt to mislead the court on its failure to serve the written statement of defence which was struck out and find that the application is an abuse of the process of court within the meaning of section 98 of the Civil Procedure Act.

Regarding the information given by the Applicant's lawyer Jet Tumwebaze to Mr Paul Kuteesa concerning the ruling of the court on 27 July 2011 as concerning only orders for reinstatement of the Respondent's application number 82 of 2011, the submission is deliberately misleading. Firstly it is based on hearsay because Mr Jet Tumwebaze never made any affidavit before this honourable court. When the ruling of the court was delivered, Mr Jet Tumwebaze was the only lawyer present in court and certainly received a copy of the ruling. To claim lack of knowledge of the striking out of the WSD does not arise at all. Thirdly Mr Jet Tumwebaze acting for the Applicant actively participated and made submissions in opposition of Miscellaneous Application No 82 of 2011 for striking out the written statement of defence but was overruled by the court based on evidence on record. The Applicant cannot pass through another lawyer of his firm to feign the alleged ignorance of the orders of the court as clearly appears in the written ruling. The Applicant's instructions were to the Law Firm not personal to Mr Paul Kuteesa and they were fully discharged by Mr Jet Tumwebaze who was the lawyer that conducted the Applicant's case at the hearing. Attempts to hide behind another lawyer of the same firm are therefore without any legal basis.

It is also untruthful for Mr Paul Kuteesa to aver that he had personal conduct but instructed Jet Tumwebaze to be present in court for a whole year and did not try to find out what transpired. Counsel contended that this is pure perjury in a bid to mislead the court that there was sufficient cause to warrant the instant application. In cross-examination Counsel Paul Kuteesa admitted that Jet Tumwebaze received the ruling in time.

The written statement of defence was struck out because the process server did not even know the identity of the person who allegedly signed for the WSD from Messieurs Akampumuza and Company Advocates. The court further ordered that the suit shall proceed in the manner provided for under Order 9 rule 10 of the Civil Procedure Rules and the matter was clearly res *judicata*. (I need to note that the Respondent objected to this application on the ground of res judicata and the court overruled the objection. In those circumstances I will make no reference to the submissions which raises the matter again. Furthermore the Respondent has appealed against my ruling).

Additionally Counsel argues that the Applicant's Counsel bound the Applicant and the principal is liable for the actions of the agent under the Latin maxim of *qui facit per alium facit per se* ('He who acts through another acts himself').

The Respondent's Counsel further submitted that the evidence of Paul Kuteesa exposed inconsistencies in the Applicant's evidence. Emily Gakiza, head of legal of the Applicant testified that they did not receive updates. The Applicant's lawyers were negligent and assumed that as officers of court they should be telling the truth. The Applicant got to find out one year after the event that something had happened yet the lawyers had been advising them that the case was not proceeding. That the lawyers told them that nothing was happening in court and this was not the truth. It was a case of negligence and the head legal of the Applicant testified that they told the Firm to remedy the wrong. This evidence is inconsistent with that of Paul Kuteesa that Kampala Associated Advocates always appeared in court with the Applicant's official.

The Respondent's Counsel further submitted that the Applicant cannot hide behind the doctrine that the negligence of the advocates in which they actively participated absolved them.

Again the Applicant's Counsel submitted that the affidavit Ojambo Makoha failed to show court that he went to commission the affidavit before Semakula (the Commissioner for oath) when Counsel Semakula had been suspended. He relied on the case of **Prof Syed Huq versus the Islamic University in Uganda Civil Appeal Number 47 of 1995**. He submitted that the clerk Makoha Ojambo took sides and was used by the litigant and told lies to this court. Counsel further attacked the affidavit of Emily Gakiza on several grounds which appear in the submissions. He concluded that from the evidence the Applicant was not interested in pursuing this suit as it has tried to maintain in this application. Secondly that the Applicant failed to lead evidence which discloses a sufficient cause ground for granting of the remedy sought in this application. Last but not least the granting of the application would be objectionable when the written statement of defence had been struck out.

As far as the law and evidence is concerned Counsel submitted that section 33 of the Judicature Act, section 96 and 98 of the Civil Procedure Act as well as Order 8 rule 1 (2) and Order 51 rules 6 of the Civil Procedure Rules are inapplicable in the circumstances of the case. He submitted that the section is only applicable to an Applicant in the situations where the court had not already made findings of law and fact on a given matter thereby leaving it with a residuary jurisdiction to exercise its discretionary and inherent powers. He contended that the remedies sought in the application are not available in the circumstances of the Applicant's case.

He submitted that the Applicant never appealed the decision holding that it had not served its written statement of defence for over three years. The Respondent's Counsel maintained that this was in ordinate delay caused by the Applicant's dilatory conduct of taking no steps to prosecute its alleged defence. Counsel relies on the case of **Bagala Handicrafts Ltd versus NPART Civil Application No 32 of 2002**. The Applicant had not sought for an order to review

the court's earlier ruling for setting aside and striking out. The court is *functus officio* and the matter is *res judicata*. The application ought to be dismissed with costs.

The Respondent's Counsel further submitted that the Applicant's application is a clear attempt to appeal the findings of the court in the same court in disguise of an application filed out of time. The court had held that the Applicant failed to serve the WSD and struck it out. The question of fact was established that there was no service of the written statement of defence in the previous ruling of the court. In the previous ruling the court made a clear finding on law and fact that there was no service based on the alleged taking of a copy of the written statement of defence by someone claiming to be from Messieurs Akampumuza and Company Advocates. Counsel still reiterated submissions that the matter was *res judicata*. In the premises the cases of the **Executrix of the Estate of Christine Mary Tibaijuka versus Mary Namatovu (1992 – 1993) HCB 85, Captain Philip Ongom versus Catherine Nyero Owota SCCA 14 of 2001** and the case of **Banco Arabe Espanol versus Bank of Uganda SCCA Number 8 of 1998** are not applicable to the facts of the Applicant's case. In those cases there was evidence of a genuine sufficient cause which justified the granting of the orders. In those cases the Applicants had not been part of the mistakes of their lawyers and had changed instructions to new and effective lawyers to pursue their cause. The Respondent's Counsel maintained that in the Applicant's case there is no single justification given by the Applicant for not taking the positive actions in time nor is there sufficient cause and there exists an order striking out the WSD unlike in the cases cited by the Applicant's Counsel. Moreover the Applicants through Emily Gakiza testified that it is happy with the services of Kampala Associated Advocates and its lawyers confirming that it is part of the alleged mistakes which do not in fact exist.

It was contemptuous of the Applicant's Counsel to submit that the WSD was filed and served. This amounted to a direct attack on the very court which found that there was no service of the WSD before striking it out. Counsel suggested that it should not be dropped into the Applicant's scheme to open an already concluded

matter which is *res judicata*. As far as the Applicant invoked the aid of article 126 (2) (e) of the Constitution, it is not available to the Applicant as a sword because it is subject to law. It is clear from the court ruling that Order 8 rule 19 of the Civil Procedure Rules was breached in **Miscellaneous Application Number 82 of 2011 Mwesigwa Geoffrey Philip Versus Standard Chartered Bank**. For authorities on the proposition of law that article 126 (2) (e) of the Constitution is subject to law the Respondent relies on the cases of U**TEX Industries Ltd vs. Attorney General Supreme Court Civil Application Number 52 of 1995**, and **Kasirye Byaruhanga and Company Advocates versus UDB Supreme Court Civil Application No 2 of 1997** quoted by this court in **Stop and See (U) Ltd versus Tropical Africa Bank Ltd Miscellaneous Application No 333 of 2010**.

Counsel refrained from submitting on the merits of the Applicant's intended defence on the ground that it is a clever stratagem by the Applicant. This is because the Plaintiff has already testified in the main suit and application was filed to illegally undermine the Respondent's case.

Going back to the cross examination of Ojambo Makoha, he submitted that he was not as steadfast as the Applicant's Counsel submitted but was shaky and untruthful and tried to cover this by claiming that it was his first time to testify in court. Testifying in court for the first time is not a licence for telling lies on oath. Mr Ojambo Makoha is a court clerk and familiar with the court processes and had every ground to be steadfast. He alleged that he swore the affidavit before Semakula (Commissioner for oath) when he had been suspended by the Uganda Law Council at that time and therefore could not legally swear an affidavit. The affidavit purported to be drawn and filed by Kampala Associated Advocates but in cross examination he testified that he drafted it from the computer of the court secretary. In short it was not his affidavit and it ought to be struck out or disregarded because it is full of lies.

As far as the testimony of Counsel Paul Kuteesa is concerned, he admitted dilatory conduct, and negligence. These are neither shortcomings nor mistakes of Counsel.

The evidence of Emily Gakiza was shaky and full of admitted lies on cross examination as a review of the transcript of the record clearly shows. She does not show anywhere how they striking out of the WSD can be an anomaly. Paul Kuteesa has no basis of swearing about persons working with Messieurs Akampumuza and Company Advocates whom he did not know. During cross examination he admitted that he normally comes to court with his clients. Consequently the Applicant was always aware of the order and evidence to the contrary by Emily Gakiza is a lie. Counsel Paul on cross examination showed that he did not attend to the Commissioner for oath and therefore his affidavit should be struck out. Besides the Commissioner for oath Counsel Semakula was on suspension. This made both affidavits incurably defective.

Consequently, the Applicant's affidavits deposed to by Counsel Paul Kuteesa, Ojambo Makoha, and Emily Gakiza or offends Order 19 rule 3 of the Civil Procedure Rules and should be struck out with costs. The deponents were never physically present before the Commissioner for oath. The Respondent relies on the decision of JSC Bart Katureebe in **Supreme Court Civil Appeal Number 1 of 2007 Attorney General versus KTM Lutaya** and the **Election Petition Appeal Number 11 of 2007 Kakooza John Baptist versus Electoral Commission and Yiga Anthony.**

Furthermore the Respondent's Counsel submitted that the claims of a good defence were not brought out in the cross-examination and it would not suffice in a case where the WSD was struck out. The WSD which has been struck out can never be or have a good defence. Consequently the application is without basis.

In conclusion the Respondent's Counsel submitted that the court should take the Respondents unchallenged evidence in the affidavit in reply, additional affidavits in reply and affidavit in 'surjoinder'. Consequently the Applicant's application should be dismissed with costs.

Rejoinder of the Applicant's Counsel

In rejoinder the Applicant's Counsel submitted that the general flow of the Respondent's submissions is mainly the alleged dilatory conduct of the

Applicant's lawyers which the Respondent wrongly argues binds the Applicant itself. The Respondent had relied on the Latin maxim *qui facit per alium facit per se* to support the proposition that the mistakes, negligence or dilatory conduct of Counsel for the Applicant should be visited on the Applicant. To the contrary it is well settled that the mistakes, negligence or dilatory conduct of Counsel cannot be used to bar a litigant from being given an opportunity to defend himself. It is the holding of the Supreme Court that a lawyer's mistakes should not be used to defeat a litigant's right to a fair hearing enshrined in article 28 of the Constitution. In the case of **Philip Ongom versus Catherine Nyero Owota**, the facts are that the Applicants advocate did not, unlike the present case, file a defence to the suit and did not inform the Applicant of the hearing date. The Supreme Court, inter alia, held that there was no reason to suggest that the appellant was privy or otherwise responsible for his former advocate's default. On the contrary the advocate misled his client and made him believe that he was defended whereas not. He was therefore prevented from appearing by sufficient cause. The cause cannot be less sufficient merely by reason of the fact that it resulted from the advocate's gross professional negligence. The Supreme Court cited with approval its decision in **Sepiria Kyamulesire vs. Justine Bagambe Civil Appeal Number 20 of 1995** and the decision echoes that the errors or omissions by Counsel should not be visited on the client and unless there is evidence that the Applicant was guilty of dilatory conduct in the instruction of his lawyer. Furthermore the litigant's right to a fair hearing and in determination of civil rights and obligations enshrined in article 28 of the Constitution should not be defeated on the ground of his or her lawyer's mistakes.

The Respondent's Counsel submitted that the evidence on record shows that the Applicant was not privy or responsible for the mistake of not serving the defence in accordance with the law. On the contrary the Applicant gave instructions in time to file a defence. The Applicant even gave details of the background that led to the dispute and suggested the main lines of defence. The Applicant's right to a fair hearing in the determination of civil rights and obligations enshrined in article 28 of the Constitution cannot be defeated on the ground of its lawyer's action in relation to the service of the defence or taking steps to file this application.

On the submission of the Respondent's Counsel that the affidavits of Mwesigwa Philip and Dorothy Atukunda are unchallenged, this is incorrect because the affidavit in rejoinder of Emily Gakiza is an affidavit in reply thereto. In paragraph 12 she deposes that the affidavit was sworn in support of the application as well as in rejoinder to the affidavit in reply sworn by the Respondent and therefore the affidavits of Philip Mwesigwa is specifically contested. As far as the affidavit of Dorothy Atukunda is concerned, it deals mainly with averments contained in the affidavit of William Ouni which is not part of the court record. The affidavit is therefore redundant. The other affidavits of Paul Kuteesa, Emily Gakiza and Makoha Ojambo contain evidence that is mainly uncontroverted and deals with how the defence was picked from this registry and how and why the Applicant's lawyers (labouring under a mistaken belief) did not serve the defence on to the Plaintiff's Counsel. Consequently it is erroneous to submit that the affidavit of Dorothy Atukunda is unchallenged.

Throughout the affidavit of Dorothy Atukunda makes no reference to the written statement of defence. She merely denies knowledge of Ouni William and practice of the clerks in the law firm of Akampumuza and Company Advocates. Yet the gist of the application is to bring the court's attention to the existence of sufficient reasons for extension of time. Evidence on record proves that one Ouni William picked the defence from the court registry and acknowledged service by signing on copy. A copy of the defence annexed to the affidavit of Counsel Paul Kuteesa has the words "received a copy from the High Court registry 23/02/2010 for Akampumuza and Company Advocates". The evidence which is corroborated and cogent evidence is that Ouni William picked the defence and wrote having done so on behalf of the Plaintiff/Respondent's lawyer's firm. The Applicant's Counsel honestly believed that this was sufficient for purposes of service. The belief of the Applicants Counsel was a mistake. This mistake should not be visited on the Applicant who has a good defence to the Respondent's claim.

Counsel further submitted that there are no contradiction between the application and the affidavit of Paul Kuteesa. He states that the WSD was picked from the court but concedes that there was no service of the WSD on the

Plaintiff's Counsel. The non-service was occasioned by a mistaken belief of Counsel and therefore there are no falsehoods or inconsistencies rendering the decision in **Attorney General versus KTM Lutaya SCCA No 1 of 2007** and the decision in **Musinguzi Garuga James versus Amama Mbabazi Election Petition Number HCT 05 EPA 0003 of 2003** inapplicable. The capacity in which Paul Kuteesa makes his affidavit is that of Counsel having personal conduct of the main suit and being well conversant with the case according to paragraph 2 of his affidavit. The affidavit clearly shows that there were timely instructions to file the WSD the main suit, and there is a letter from the Applicant bank to this effect attached to the affidavit. Secondly the facts of the date of the filing of the defence which is annexed are also brought out. Thirdly he makes reference to the fact that he instructed the law clerk to pick and duly serve the WSD. He was handed a copy of the file the WSD by one Mr Mukasa and it had been endorsed with the signature from Messieurs Akampumuza and Company Advocates acknowledging having taken the WSD.

Contrary to the Respondent's submissions that Mr Kuteesa deposes to hearsay evidence is that the WSD was filed and signed and sealed by the court on 19 February 2010. As Counsel handling the matter or any other person, it cannot be hearsay to state what is on the face of the WSD.

The submission that Ouni William is employed by Messieurs Akampumuza and Company Advocates is not evidence of the Applicant. The Applicant's contention is that Counsel for the Respondent had picked the WSD from the court and the Applicant's Counsel erroneously thought that service had been effected in accordance with the law. The mistake of Counsel should not be visited on the Applicant and the case of **Banco Arabe Espanol versus Bank of Uganda SCCA number 8 of 1998** is applicable. A mistake of Counsel is sufficient cause for enlargement of time.

Furthermore the Applicant is not guilty of dilatory conduct as alleged by the Respondent. Evidence of the affidavits in support of the application by Paul Kuteesa clearly shows this. There was a mistaken belief that there was effective service of the WSD and Mr Paul Kuteesa did not understand that the WSD had

been struck until the 9th of July 2012. On the other hand Emily Gakiza deposes that whatever errors may have occurred in the conduct of the Applicant's defence, they were merely technical and due to the Applicant's advocates of which the Applicant was not aware at the time of filing of the application and the error should not used to deprive the Applicant a chance to present its defence. The Applicant has always been anxious to defend against the suit and has a good defence to the claim.

The allegation that the Applicant knew that the WSD had been struck out because Mr Paul Kuteesa stated that he appeared in court with Claire Ankunda, an official of the Respondent, are baseless. Paul Kuteesa appeared with the said Respondent's official in 2011 and the Respondent's application to strike out the WSD in **Miscellaneous Application Number 82 of 2011** was dismissed on that day. No evidence was led at any point to show that the Applicant knew that it obviously had been struck out and thereafter did not act. To the contrary the evidence of Emily Gakiza clearly deposes that the Applicant was not aware of any problems until around the time the present application was filed. The Applicant found out about striking out of the WSD in 2012 and did immediately give instructions for the current application to be filed. The Applicant's evidence discloses sufficient grounds for the grant of the application.

The Applicant acknowledges that they were errors committed by the Applicant's lawyers. The Applicant should not be held liable for the conduct of its advocates. Order 8 rule 1 (2) of the Civil Procedure Rules allows court to extend for filing and serving a defence out of time. Order 51 rules 6 gives the court power to enlarge time upon such terms if any as the justice of the case may require. The sum total of these legal provisions is that the court has power to extend or enlarge time to file a WSD beyond the time prescribed by the rules. Furthermore the court still has jurisdiction and discretion after striking out the WSD to enlarge time to have it filed and served out of time. In the rejoinder counsel further reiterates submissions on questions of fact about the taking of the WSD as written on the WSD.

On the submission that Counsel Jet Tumwebaze had personal conduct of the suit, and that the Applicant's Counsels were negligent, the submissions are wholly speculative and without evidence. The evidence is that contained in the affidavit of Paul Kuteesa that on 9 March 2011 when **Miscellaneous Application Number 82 of 2011** came for hearing, it was dismissed for non-appearance of the Applicant's (now Respondent's) Counsel. On 15 April 2011 the Respondent filed another application to set aside the dismissal of **Miscellaneous Application Number 82 of 2011**. This was **Miscellaneous Application Number 200 of 2011** and when it came up for hearing, Mr Paul Kuteesa was in Gulu and asked Counsel Jet Tumwebaze an advocate with Kampala Associated Advocates to hold his brief and application was adjourned to 29 June 2011. On 29 June 2011 Counsel Paul Kuteesa was appearing before Honourable Justice Irene Mulyagonja when Counsel Jet Tumwebaze appeared on his behalf and submissions were made in the application. Subsequently Counsel Jet Tumwebaze briefed Counsel Paul Kuteesa on the outcome of **Miscellaneous Application Number 200 of 2011** and his understanding was that the said application (for reinstatement of **Miscellaneous Application Number 82 of 2011**) had been allowed and he was awaiting the fixing of **Miscellaneous Application Number 82 of 2011** for striking out the WSD. Paul Kuteesa learnt of the striking out of the WSD on the date when he perused the court file with a view to ascertaining the status of the suit and then discovered that **HCMA No 200 of 2011** came for ruling and the Applicant's WSD was struck out and the Respondent was permitted to proceed in default of filing a defence by a Defendant. In those circumstances Counsel Jet Tumwebaze was merely holding brief for Paul Kuteesa as disclosed by the evidence. The person having personal conduct of the case was Mr Paul Kuteesa as opposed to the wild allegations in the Respondent's submissions in reply.

As soon as the Applicant learnt about the anomaly, the Applicant gave its lawyers instructions to go ahead and rectify the anomaly. Finally Counsel reiterated that the errors of Counsel of which the Applicant was not aware after the filing of the application should not be used to deprive the Applicant a chance to be heard in the defence. Secondly the Applicant should not be condemned unheard because

of the anomaly of the Applicant's advocates. In the premises the application ought to be granted.

Ruling

I have carefully considered the Applicant's application as well as the affidavit evidence in support and in rejoinder and the affidavits in reply which contain the grounds of opposition to the application by the Respondent. I also read through the written arguments of both Counsels of the parties as well as the authorities cited.

The Respondent's Counsel raised some preliminary issues which particularly relate to whether the Applicants application is *res judicata* and whether the court is *functus officio* as far as the orders sought in the application are concerned. Furthermore the Respondent's Counsel raises issues as to whether the affidavit of Ojambo Makoha is defective on the ground that it was commissioned before Augustine Semakula (a Commissioner for oath/advocate) who had been suspended by the time Ojambo Makoha took oath before him. In addition the issue is whether the affidavit of Paul Kuteesa and Emily Gakiza are defective on the same and other grounds.

On the question of whether the application or the issues raised in the application are res judicata, I have carefully considered the arguments of Counsel set out above. There are two matters to be considered on the issue of whether the bar of *res judicata* can be applied in the circumstances of this case. The first aspect of *res judicata* relates to the entire application itself and the fact that the statutory bar of *res judicata* had been raised by the Respondent and the court made a ruling on the issue. The question of *res judicata* in this respect relates to the striking out of the written statement of defence by the court in its ruling delivered on 27 July 2011. The argument of the Respondent's Counsel was that the court cannot hear an application for enlargement of time on the ground that the matter is *res judicata* and the court is *functus officio* having struck out the defence for want of service. That the court cannot reconsider whether there was proper service on the Plaintiff's advocates. The objections were raised in Miscellaneous Application

Number 477 of 2012, the current application, as preliminary points of law. The ruling of the court was delivered on 9th of November 2012 and the objections were overruled.

The second aspect of res judicata relates to the submission of the Applicant's Counsel to the effect that the written statement of defence in contention had been duly filed in time and served on the Respondent according to the evidence adduced on record. The second aspect of the statutory bar relates to a ground of the application. I can only consider the second aspect as to whether the issue of service of the written statement of defence by the purported endorsement of somebody claiming to have signed on behalf of Messieurs Akampumuza and Company Advocates, Counsel for the Respondent/Plaintiff can be considered in light of the previous ruling of the court striking out the defence from the court record for want of service.

As far as this second aspect of the doctrine of *res judicata* is concerned, I agree with the Respondent's Counsel that in the ruling of the court delivered on 27 July 2011 the court made very clear findings about service of the written statement of defence, which findings have not been appealed. For emphasis I will quote from the ruling at pages 8 and 9 thereof:

> "In this case I need to address a more fundamental question. That is whether the Defendant can assume that the defence has been served on the Plaintiff merely by noting that somebody came and signed for the defence from the court record. The onus to serve under Order 8 rule 19 is on the Defendant to serve the defence on the address of service of the Plaintiff provided for in the plaint. Order 8 rule 19 is mandatory. It provides as follows:
>
> > "Subject to rule 8 of this Order a Defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of defence by delivering the defence or other pleading to the court for placing upon the record and by delivering a duplicate of the

defence or other pleadings at the address for service of the opposite party."

In as much as the Applicants Counsel submitted from the bar that he did not know the person who signed for the written statement of defence, I base my decision on the duty of the Defendant to serve the defence. To make matters worse paragraph 9 of the affidavit of William Mukasa filed in reply leaves a lot to be desired. To quote:

"that when I went back to the court registry on the 23rd of February 2010 to obtain the filed copies of the Written Statement of Defence, I found that the written statement of defence had been signed and sealed by the registrar and I also found that someone whose identity I could not ascertain had picked one copy of the Written Statement of Defence on behalf of Akampumuza and company advocates, whom I knew as being Counsel for the Plaintiff in the suit and had acknowledged receipt thereof by signing on one of the copies on the file. See ANNEXTURE "A" above."

The process server did not even know the identity of the person who allegedly signed for the written statement of defence. In the circumstances, there was no service of the written statement of defence on the Plaintiff as required by order 8 rule 19 of the civil procedure rules. Following the two authorities cited above the written statement of defence is struck out and the Plaintiff may proceed to have the suit tried in the manner provided for under order 9 rule 10 of the Civil Procedure Rules." (Emphasis italicised)

The court ruled that there was no service of the written statement of defence on the Plaintiff's advocates on 27 July 2011. Having made that ruling, the Applicant never appealed from the ruling and cannot in this application argue that there was proper service of the written statement of defence according to the endorsement on the written statement of defence quoted by both Counsels that purports to acknowledge service on the behalf of Messieurs Akampumuza and Company Advocates. For emphasis the court held that it based its decision that

there was no service of the written statement of defence on the duty of the Defendant's Counsel to have the defence served on the Plaintiff because the process server even did not know who had allegedly picked the WSD from the court record. In that respect the citation by the Applicant's Counsel of several authorities to the effect that where a party to an action helps himself or herself to a pleading is deemed to have achieved the purpose for service by having got notice of the pleadings by self-help cannot be considered again. These authorities include the case of **Western Uganda Cotton Ltd versus Dr George Asaba HCCS 353/2009** decided by my learned sister Honourable Lady Justice Helen Obura. The decision also follows **Mukasa Anthony Harris versus Dr Bayiga Michael Election Petition Appeal Number 18 of 2007**. Whereas I agree with the authorities and one is binding on me, they do not apply to the circumstances of the Applicant's case in the sense that the court based its ruling on the fact that as a matter of fact the process server did not know who helped himself or herself to the written statement of defence and secondly the duty was on the Defendant to serve the defence. As to whether one William Ouni acknowledged receipt of the questioned WSD on behalf of the Plaintiff's Counsel cannot be considered because his evidence was expunged from the record. Lastly having ruled in the previous objection that there was no service, the matter is res judicata and the objection of the Respondent's Counsel on the second aspect of res judicata is sustained.

As far as the first aspect is concerned, it relates to the power of the court to enlarge time to file and serve a written statement of defence after having struck out the written statement of defence on 27 July 2011 irrespective of the ground for striking it out. The question of whether the court had jurisdiction to hear the application was raised by the Respondent's Counsel as a preliminary objection to this application and the objection was overruled. The preliminary objection was part of a substantive defence to the Applicant's application. This is because it arose from the pleadings of the parties. The Respondent Mwesigwa Geoffrey Philip deposed that both Miscellaneous Application Number 200 of 2011 and 82 of 2011 were fully determined by this court and the matters in the application are res judicata. Secondly on further advice of his lawyers Mwesigwa Geoffrey Philip deposes that there is no legal or equitable basis on which the application to file

and serve the written statement of defence out of time can be granted because the court is *functus officio*. Furthermore there is no legal or equitable basis on which the court can set aside a default judgement entered after full litigation *inter partes*.

The Respondent's Counsel followed these averments with preliminary objections inter alia on the grounds of the matter is firstly *res judicata* and secondly that the court is *functus officio* and cannot grant the orders sought in the application. Thirdly it was argued that Applicant had not paid court fees and therefore the application could not stand. Fourthly whether the Applicant seeks orders in vain and application is filed out of time. Fifthly whether the application is supported by defective affidavits and therefore rendering the application incurably defective for there being no valid affidavit in support. Sixthly whether there is illegality on the face of the record.

The ruling of the court was delivered on 9 November 2012 wherein the preliminary objections were overruled with costs. The bar of *Res Judicata* and whether the court has exhausted its powers in terms of being *functus officio* was exhaustively considered by the court in the ruling on the preliminary objections between pages 15 and 25 of the ruling of the court delivered on 9 November 2012. The court held that for it to be *functus officio*, its ruling should be on the merits. I have further considered the wording of Order 8 rule 19 of the Civil Procedure Rules which deals with the filing of a defence and provides that it is filed by delivering the defence or other pleading to the court for placing upon the record and delivering a duplicate of the defence or other pleading at the address of service of the opposite party. I also noted that the Respondents who had objected had emphasised that the filing of the defence is completed by a delivery of the duplicate at the address for service of the opposite party. When the defence was struck out on the basis of the doctrine relied on by the Respondents Counsel, it was as if the defence had never been filed. I held that the application does not revisit the application to strike out but is a new matter since it seeks extension of time to file a defence. As far as the doctrine of res judicata is concerned, it is a statutory bar and I further held that a ruling on a preliminary

point of law which is not on the merits does not render the main matter res judicata according to the authorities of **Isaac Busulwa vs. Ibrahim Kakinda [1979] HCB 179; Frederick Sekyaya Sebugulu vs. Daniel Katunda [1979] HCB 46.** I further noted that a Plaintiff whose plaint has been dismissed for failure to serve summons is allowed to file a fresh suit subject to the law of limitation and wondered whether a Defendant should not be accorded the same right under the equal protection clause of the Constitution (Art 21).

In the case of **Andrew Babigumira Vs John Magezi HCMA No. 538 of 2013 (arising from HCCS No 344 of 2013)**, I applied the principles in the above two cases and overruled an objection to a fresh suit on the ground of *res judicata* when the previous suit had been dismissed under rule 7 of The Constitution (Commercial Court) (Practice) Directions for non-compliance with directions of a Commercial Division Court judge on the ground that the dismissal was not on the merits of the suit. I held that:

> "Order 9 rule 19 (2) permits a Plaintiff whose plaint has been dismissed for failure to serve summons and who fails to apply for a fresh summons within a year, to file a fresh suit subject to the law of limitation. The dismissal does not operate as a bar to the bringing of a fresh suit. I do not see a difference in the quality of the dismissal under rule 7 of the Constitution (Commercial Court) (Practice) Directions from cases in which a suit is dismissed for nonappearance of a Plaintiff."

The issue of whether the current application is *res judicata* cannot be revisited. The Respondent's Counsel obtained leave to appeal the decision and commenced the appeal process by filing a notice of appeal against the decision on 12 February 2013 indicating that leave to appeal against the decision was given on 6 February 2013. Leave to appeal was granted in a formal application namely in **HCMA NO 742 of 2012 Geoffrey Mwesigwa Philip versus Standard Chartered Bank**. The Respondent cannot indirectly raise the same question of whether the court is *functus officio* or whether the application is *res judicata* before the same court again.

Applications to strike out a defence by way of a preliminary objection to strike it out under Order 8 rule 19 of the Civil Procedure Rules on the ground that the filing of a WSD is only complete when it is placed on the record and served on the Plaintiffs address for service have become, for want of a better expression, an anathema in the High Court. I expressed myself on the issue that filing is complete when the officer of the court endorses the written statement of defence with the seal of court as duly filed and as prescribed by Order 9 rule 1 (1) of the Civil Procedure Rules in my ruling in **Protection Security Services vs. Eastern Builders and Engineers HCMA 566 of 2011 arising from HCCS No 101 of 2010** which decision was delivered on the 20th of January 2012. The same matter was raised before Justice Vincent Zehurikize in **HCMA No. 623 of 2010 Simon Tendo Kabenge vs. Barclays Bank and Another** where the decision in **Mwesigwa Godfrey vs. Standard Chartered Bank HCMA No 82 of 2011** was considered and the judge came to the same conclusion. The decision in **Mwesigwa Godfrey vs. Standard Chartered Bank HCMA No 82 of 2011** from which the current application seeks enlargement of time had been extensively revisited in **Protection Security Services vs. Eastern Builders and Engineers HCMA 566 of 2011 arising from HCCS No 101 of 2010.**

Finally in my ruling in an application for leave to appeal the overruling of the several preliminary objections in this application, I clearly indicate the points of law which I considered to be meritorious for consideration by an appellate court. I will quote from a transcript of the ruling for leave where I held that:

> "I have carefully listened to your able submissions. It is true that you are raising very serious points of general importance in that they affect the conduct for filing defences and serving defences in this court. It will affect the practice of the bar and I would like to recount the several issues that arise.
>
> ***1.*** The first one deals with the filing of a Written Statement of Defence. Justice Zehurikize in the decision that has been quoted has held that, and agreeing with my earlier decision in **Eastern Builders vs. Protection Security Services, that** a defence is filed when it is endorsed by the officer; that is the Registrar. Whereas the earlier decision of Justice

Lameck rules that a defence is only filed when it is placed on the record. They use the word "placed" and then left at the place for service of the Plaintiff. In other words, it's not filed until when it is placed and served on the Plaintiff. And that raises an in interesting point of law.

2. The 2nd one deals with the time within which to file and serve. Whereas it is very clear that the time to file and serve a Written Statement of Defence is 15 days, the rules are very explicit. Prior to that, that is prior to 1998 before the Civil Procedure Amendment of 1998, it would be entering appearance, after entering appearance, a Defendant has an opportunity to proceed under O.9 to object to jurisdiction or to have the summons struck out on the grounds of non-service, etc. An entry of appearance was within 15 days when the Rules Committee did away with entry of appearance. We come to the primary rule O.8, r.19 on which the diverse opinions of this court have come.

That rule has never been amended or harmonized and in my ruling I pointed out that it has not been harmonized, so a Defendant who files the defence on the 13th day and does not serve it would be out of time if we go by the previous ruling of Hon. Justice Lameck Mukasa. Because one would hardly have two or three days within which to serve the defence. So indeed there are matters of public importance that have been raised in the application for leave to appeal.

The problem, which Counsel Matsiko has raised is that that application for leave to appeal is premature, because the objections which were raised to the application in MA **No 477-2012** dealt with the competence of the application itself. They were preliminary objections to the application for extension of time in which to file and serve. In **Eastern Builders vs. Protection Security Services,** such an application had been allowed and I did not depart from it. What I am trying to say is that the very essence of the application has not yet been heard. Whereas the points of law that have been raised could have been better raised, if there was an extension of time within which to file the defence, a matter that is still pending."

And because it was on the competence of the application itself, the ruling and it was by agreement of Counsel of the Applicant that he will not. He felt that the objections would go to the substance of the application and it would not be heard if the objection succeeds. He did not touch on the merits and the court could not pronounce itself on the merits of the application as to whether to grant the application for leave to file a WSD out of time.

Similarly, the Defendant's Counsel restricted themselves to the objections itself but did not deal with the basics of the matter which is whether in that application, the court should exercise its discretion. Now what this application for leave to appeal does is to bar the Applicant, (that is the Defendant) from being heard in the application, without dealing with the suit itself. On the other hand if the court were to wait to hear that application, it would be very easy to grant leave because there are very many important points of law that arise and which are reflected in various diverse opinions on the subject.

So the court has been placed in a very difficult situation, because you have made the application before any order of the court. The Court just disallowed the preliminary objections to hear the application, whatever the grounds (whether it is res judicata or...) whereas the gist of the application for leave is on the points of the law that arise from the filing and placing of the defence on record and service of the defence. And that is how I have understood your initial points for leave to appeal which actually would merit consideration by an Appellant court.

On the basis of that, it is my ruling that leave to appeal, the decision of the court is granted. However, there will be a stay of proceedings of the suit itself on the merits. That is the 2nd order."

The court in the ruling on application for leave held that the ruling on the preliminary points was not on the merits of the application itself but on whether it could be heard on the merits.

I have further considered what amounts to further preliminary objections on the competence of the Applicant's application. The first objection as indicated above relates to the competence of the affidavit of Ojambo Makoha on the ground that the Commissioner for oaths had been suspended from practicing as an advocate by the Law Council and according to the letter of the Chief Registrar attached to the submissions of the Respondent's Counsel dated 16th of June 2014. In that letter the Chief Registrar wrote that the Law Council has decided to suspend Augustine Semakula from practising as an advocate is required under section 17 (b) and (c) of the Advocates Amendment Act, No. 27 of 2002 for a period of two years effective 31st of August 2012. He writes that "I hereby enforce the decision as required under section 14 (2) of the Advocates Act Cap 267". The Respondents Counsel advanced the same argument against the affidavit of Paul Kuteesa and Emily Gakiza. The affidavit in rejoinder of Emily Gakiza was sworn on 24 September 2012. That of Paul Kuteesa was commissioned on 16 August 2012. That of Ojambo Makoha was commissioned on 14 September 2012.

Strangely the affidavit of Dorothy Atukunda in reply to the application was commissioned on 18 September 2012 by Augustine Semakula. Furthermore the affidavit of Mwesigwa Geoffrey Philip was commissioned on 18 September 2012 by Augustine Semakula. Finally the further affidavit of Dorothy Atukunda was commissioned on 28 September 2012 by Kasaija. The affidavit is in reply to the further affidavit of William Ouni in rejoinder. The affidavit of William Ouni was expunged from the court record on the application of the Respondent's Counsel rendering the affidavit in reply thereto by Dorothy Atukunda which was commissioned on 28 September 2012 redundant.

If the submissions of the Respondent's Counsel have merit and are upheld, a matter that will be concluded at a later stage, its effect would be that the Respondent likewise had no valid affidavit in reply to the application because they were commissioned by the same Commissioner Counsel Augustine Semakula after his suspension from practice as an advocate.

I have carefully considered the matter and the Respondent's Counsel advanced one judicial precedents on the issue. In the case of **Attorney General versus**

AKPM Lutaya Civil Application No. 1 of 2007, the affidavit in question had not been commissioned by a Commissioner for Oaths and the decision is inapplicable. The relevant case is that of **Prof Syed Huq vs. the Islamic University in Uganda Supreme Court Civil Appeal No. 47 of 1995** and particularly the judgment of Wambuzi C.J on the Issue. The Court considered Section 2 of the Commissioner for Oaths (Advocates) Act cap 5 laws of Uganda and held that an advocate who is a Commissioner for oath cannot practice as such if he or she is suspended. To quote at page 7 of the judgement:

> "... his commission to practice as Commissioner for Oaths would be terminated in April when he gives up the practice or when he is suspended and not on the 31st December when his practising certificate expires."

In other words the suspension is effective from the date of suspension and whatever he does as commissioner for oaths is a nullity. As a matter of fact the letter of the Chief Registrar addressed to Augustine Semakula is dated 16th of June 2014. It does not specify when the law Council decided that he should be suspended from practising as an advocate. It merely informs the said advocate that he was suspended for a period of two years effective 31st of August 2012. The affidavit of Paul Kuteesa as a matter of fact was commissioned before 31 August 2012 and specifically on the 16th of August 2012. My first concern was that the decision of the Law Council cannot operate retrospectively if it has the effect of nullifying affidavits sworn before the decision is made suspending the advocate. In other words there is no specific evidence as to when the law Council decided that Augustine Semakula is suspended for two years. If I am to uphold the objection, the affidavit that would survive is only that of Paul Kuteesa which was sworn on 16 August 2012. In other words I would disregard the rest of the affidavits which were commissioned after 31 August 2012 including the affidavits in reply and also cross examination of the deponents to those affidavits. In other words the Respondent would be without any defence to the application and other than that on points of law (if any).

The question of whether the subsequent affidavits are a nullity is a matter of law which must be based on the fact of when the suspension took effect or was made.

The Respondent cannot run away from the import of the submissions of his own lawyers and the binding Supreme Court authority of **Prof Syed Huq Versus the Islamic University in Uganda Supreme Court Civil Appeal Number 47 of 1995,** graciously supplied to the court. For now the letter of the Chief Registrar gives the information that Augustine Semakula was suspended from practice as an advocate for a period of two years with effect from 31 August 2012 and this letter was relied upon by the Respondent's counsel. I agree with the law which is binding on me and would only consider the affidavit in support of the application by Counsel Paul Kuteesa and disregard affidavits commissioned after 31 August 2012 which include the affidavit of Emily Gakiza, the affidavit of Ojambo Makoha and the affidavit of Dorothy Atukunda and Mwesigwa Geoffrey Philip in the reply to the application as well as the cross examination of the applicants deponents mentioned. The further affidavit of Dorothy Atukunda in specific reply to the affidavit of Ouni William cannot be considered because its purpose clearly in all the paragraphs is to reply to the affidavit of William Ouni which has since been expunged from the court record. It is the only affidavit of the Respondent which was commissioned by a different Commissioner, one Kasaija.

The Respondent's Counsel in the further preliminary objection submitted that the affidavit of Paul Kuteesa was based on hearsay in terms of the deposition that someone picked a copy signed by a person claiming to be from Messieurs Akampumuza and company advocate. The deposition that someone signed the written statement of defence by way of an acknowledgement thereof is not hearsay evidence to the extent that it has been admitted by the Respondents Counsel that there is an endorsement purporting to have been signed on behalf of Messieurs Akampumuza and Company Advocates. Secondly a copy of the written statement of defence with acknowledgement is attached to paragraph 6 of the affidavit of Paul Kuteesa as annexure "C" and it speaks for itself.

Furthermore the Respondents Counsel submitted that the affidavit is inconsistent with the averment in the notice of motion. It is submitted on behalf of the Respondent that the affidavit is inconsistent because it deposes that there was mistake of Counsel that the WSD was served on the Plaintiff according to the acknowledgement written on a copy of the written statement of defence referred to above. Secondly Paul Kuteesa deposes that there was non-service of the written statement of defence which was a mistake of Counsel. The Respondent's Counsel contends that this was a falsehood and contradictory and affidavits which contain falsehoods and contradictory evidence should be struck out.

I do not agree with the submissions for the simple reason that ground (b) of the notice of motion avers that Counsel erroneously believed that a person from the law firm of Counsel for the Respondent had picked the written statement of defence from the court and service had accordingly been effected in accordance with the law. Secondly in paragraph (c) it is clearly averred that accordingly, the non-service of the written statement of defence was occasioned by the mistake of Counsel which should not be visited on the Applicant. These averments in the notice of motion are supported by the affidavit of Paul Kuteesa commissioned by Augustine Semakula on 16 August 2012. The question of mistake of Counsel was generated by the ruling of court after the belief of the Respondent's Counsel which is supported by credible authorities submitted for the proposition that any person who helps himself to a pleading thereby fulfils the purpose for service of that pleading on him or her and the non-service of the pleading by the party charged with the duty to do so would not be prejudicial or cause any injustice since the purpose had been achieved through self-help. It is a matter of interpretation and belief of Counsel notwithstanding that the court has indeed struck out the written statement of defence.

Last but not least, the Respondent ought to have raised the question of inconsistencies in the affidavits once and for all in the first preliminary objection whose a ruling is dated 9th of November 2012. The ruling of the court clearly indicates that one of the objections which resulted in the ruling of 9 November 2012 was whether the application is supported by defective affidavits. The

question of whether the affidavit was defective on the ground of alleged inconsistencies, falsehood or hearsay ought to have been raised when the objection was made.

The defence of res judicata is a statutory bar to any matter which has been concluded or which has been adjudicated upon. Under section 7 of the Civil Procedure Act and explanation 3 thereof, the matter in the former suit must have been alleged by one party and either denied or admitted, expressly or impliedly by the other. In explanation 4 of section 7 of the Civil Procedure Act, any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit. In this particular application there was no former suit. However the Respondent had intimated that it would object to the application on preliminary points on the advice of his lawyers. Indeed it was one of the controversies for resolution by the court whether the application was incompetent on any grounds that could be advanced from the pleadings. Consequently where a matter has been handled as a preliminary point of law and resolved, it should not be raised again in the same proceedings. In other words it can become a ground of appeal when the matter is finally determined where like in this case, the objection was overruled. An objection was raised on the ground of defective affidavits or the competence of the affidavit of Paul Kuteesa. That was the right time to include further grounds on the competence of the affidavit. The Respondent is not entitled to keep on raising objections to the same affidavit on the ground that it is defective unless the matter did not arise from the pleadings. Using the analogy of res judicata, the Respondents Counsel ought to have raised the matter went arguing the first objection on the ground that the affidavit of Paul Kuteesa is defective. The objection therefore on the question of the competence of the affidavit of Paul Kuteesa is overruled.

The grounds of the application in the notice of motion are that this court struck out the Applicant's written statement of defence in HCCS No 30 of 2010 on the ground that it was not served within the time appointed by the law. Secondly the Applicant's Counsel erroneously believed that a person from the law firm of the

Counsel for the Respondent picked the written statement of defence from the court and therefore service had accordingly been accomplished in accordance with the law. Thirdly the non-service of the written statement of defence was occasioned by mistake of Counsel and ought not to be visited on the Applicant. Fourthly the Applicant has always been anxious to defend this suit as envisaged by the timely instructions to Messieurs Kampala Associated Advocates to file a written statement of defence.

Furthermore the Applicant's Counsel filed a written statement of defence in time but mistakenly failed to serve it on the Respondent. Fourthly the Applicant never received any funds to the credit of the Respondent. Fifthly the Applicant has a very good defence to the suit. Sixthly it is the constitutional duty of the court to investigate the merits and substance of the dispute with a view to administering justice which can only be served upon listening to both parties to the dispute. Seventhly the interest of justice would be served by allowing the Respondent to file and serve a written statement of defence. Lastly it would be just, fair and equitable that the orders sought in the application are granted.

The application is supported by the affidavit of Paul Kuteesa of Messieurs Kampala Associated Advocates, an advocate of the High Court who had personal conduct of the main suit and all related matters. He deposes that on 5 February 2010 the Applicant instructed Messieurs Kampala Associated Advocates to file a defence in the suit according to the terms stipulated in the letter annexure "A" from the Applicant. On 19 February 2010 the firm duly filed a written statement of defence in the main suit and it was signed and sealed by the court according to the annexed copy annexure "B". The annexed copy of the WSD was sealed by the court on 19 February 2010. Counsel Kuteesa instructed a law clerk Mr William Mukasa to pick the duly signed and sealed written statement of defence for service upon Counsel for the Plaintiff/Respondent. Mr William Mukasa on checking with the court advised him that a person from the Respondent's advocates firm had picked a copy from the court and signed acknowledging receipt according to a copy of the acknowledgement on the WSD. He understood

that picking a copy of the written statement of defence from the court was effective for purposes of service upon the Respondent.

The Respondent's Counsel however denied service and filed an application to strike out the defence in HCMA No 82 of 2011. On 9 March 2011 when the application came for hearing it was dismissed for non-appearance of the Respondent's Counsel. On 15 April 2011 the Respondent filed another application to set aside the dismissal in HCMA No 82 of 2011 by filing HCMA No 200 of 2011. When it came for hearing on the 18th of May 2011, Counsel Paul Kuteesa was in Gulu handling another matter in the High Court and briefed his colleague Mr Jet Tumwebaze to stand in for him whereupon the application was adjourned to 29 June 2011. On 29 June 2011 while Counsel Paul was before Honourable Lady Justice Mulyagonja in HCCS No 208 of 2011, Counsel Jet Tumwebaze who had his brief appeared in court when submissions were made in the application. However when Counsel Jet Tumwebaze briefed him on the outcome of the application, his understanding was that the application had been allowed and he waited fixing of HCMA No 82 of 2011 for hearing as it was seeking to strike out the written statement of defence. He only learnt of the striking off of the defence on 9 July 2012 when he perused the court file with a view to ascertaining the status of the suit. He discovered from the court record that HCMA No 200 of 2011 came for ruling when the Applicant's written statement of defence was struck off and the Plaintiff was permitted to proceed in default of filing a defence by the Defendant. The no service of the written statement of defence was occasioned by default of the Applicant's Counsel.

Failure to bring the application expeditiously upon the striking out of the written statement of defence was occasioned by Counsel misunderstanding the orders of the court that were handed down and again they should not be visited upon the Applicant. The Applicant has always been and desires to defend the suit as evidenced by the timely instructions to Kampala Associated Advocates to file a written statement of defence. The written statement of defence was filed in time but not mistakenly served on the Respondent. The Applicant has a good defence according to a copy of the WSD. The application was filed immediately upon

learning about the striking out of the WSD by court. The other depositions of Paul Kuteesa repeat the averments in the notice of motion.

Without much ado I have considered the submissions to the effect that there was dilatory conduct on the part of the Applicant's Counsel to which the Applicant is a party. As a matter of fact the written statement of defence of the Applicant was struck out by the court on 27 July 2011. This application was filed on 16 August 2012 13 months later. The Plaintiffs suit proceeded on 19 September 2012 and judgement was supposed to be delivered on 30 November 2012. However pursuant to the filing of the application and arguments in the preliminary objection to the application and the ruling of the court on 9 November 2012, proceedings in this suit were stayed.

Counsel Jet Tumwebaze did not properly brief Paul Kuteesa about the striking out of the written statement of defence. The question is whether their alleged negligence should be visited on the Applicant. I agree with the case of **Banco Arabe Espanol versus Bank of Uganda SCCA Number 8 of 1998** that the negligence, omissions, mistakes and dilatory conduct of counsel should not be visited on his or her client.

I have given careful thought to the negligence exhibited by the Applicant's Counsel in handling this matter. The Applicant is a bank and the matter in question involves the issue of whether the bank received money on behalf of the Plaintiff which it refused or neglected to pay to him without any lawful excuse.

Even if the matter proceeded in the absence of the Defendant/Applicant, the banker's books would be relevant in the resolution of the dispute. Bankers' books under the **Evidence (Bankers' Books) Act Cap 7 Laws of Uganda** and section 1 (b) which is the interpretation section defines it to include ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank.

Section 2 of the **Evidence (Bankers' Books) Act** provides that a copy of any entry in a bankers book shall in all legal proceedings be received as prima facie evidence

of that entry, and of the matters, transactions and accounts recorded in it. Secondly under section 3 which I shall quote hereunder:

> "3. Proof that a book is a bankers' book
>
> (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof may be given by a partner or officer of the bank, and may be given orally or by affidavit sworn before any Commissioner or person authorised to make affidavits."

In other words an entry in a banker's book cannot be received in evidence unless it is proved in accordance with section 3 (1) of the **Evidence (Bankers' Books) Act**. Secondly it has to be proved that the entry was made in the usual and ordinary course of business and that the book is in the custody or control of the bank. The Plaintiff seeks to rely on electronic data by way of e-mails and messages regarding a transaction on the basis of which he seeks to hold the Defendant liable.

However proof of the entries on the electronic data or any other messages regarding his claim may only be given by a partner or officer of the Defendant bank either orally or by affidavit. That would be the procedure if the Defendant was another party other than the bank which is required to prove an entry in a banker's book. For emphasis entries include all the relevant evidence received by the Defendant concerning the transaction, the subject matter of the Plaintiff's claim. In this case the Applicant is the bank and also the Defendant in a legal proceeding which includes civil proceedings.

Under section 4 it is provided that the copy of an entry in a banker's book shall not be received in evidence unless it is further proved that the copy has been examined with the original entry and is correct.

It is therefore necessary for the Defendant to be heard for the production of the necessary transaction documents as a banking official or partner of the bank to prove the transaction in evidence. Having the Defendant defend the suit does the same thing in practical terms by having the documents proved in evidence.

Last but not least Order 51 rules 6 of the Civil Procedure Rules gives the court power to enlarge time upon such terms, if any, as the justice of the case may require even if the application for enlargement is not made until after expiration of the time appointed or allowed. The costs of the application for enlargement of time shall be borne by the parties making the application unless otherwise ordered by the court.

I do not see any prejudice that would be suffered by the Defendant if the transaction is proved according to the Evidence (Bankers Book) Act (or disproved). The truth shall be established. This matter dragged on because the Applicant's application took an extraordinarily long period of time. Delays are among the grounds that I could have considered. With the further delay of about 2 years in the hearing of the application generated by the way this matter was conducted by both Counsel, I do not see what prejudice may be occasioned due to the delay in hearing this suit on the merits in order to have the transaction examined from the requisite evidence to be adduced by the Defendant. Moreover the Respondent appealed the previous ruling of the court on its preliminary objections to hearing of this application. In the application for leave to appeal, the court ordered that proceedings in the main suit were stayed but only this application would proceed.

In the premises the interest of justice would be served if time is enlarged time for the Applicant to file its defence and serve it on the Plaintiff and for the Plaintiff's witness to be cross examined and a defence to be presented within the shortest possible time. In the premises the Applicant's application is granted. The Applicant shall file and serve its defence within 14 days from the date of this order and time is accordingly enlarged to accommodate the event. The costs of this application shall be borne by the Applicant under Order 51 Rules 6 of the Civil Procedure Rules in any event.

This ruling is signed by me and shall be delivered by the registrar on my behalf on 27 January 2015.

Christopher Madrama Izama

Judge

Ruling delivered by the Registrar in the presence of:

Gad Wilson for the Applicant

Respondent absent

Kamuntu Julie: Court Clerk

Opesen Thadeus

ASST REGISTRAR

COMMERCIAL COURT DIVISION

27/January 2015