

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
HIGH COURT MISCELLANEOUS APPLICATION NO. 609 OF 2015  
KYARIMPA EMILY:.....:APPLICANT  
VERSUS  
MK CREDITORS LIMITED:.....:RESPONDENT**

**BEFORE: THE HON. JUSTICE HENRY PETER ADONYO:**

**RULING:**

**1. Background:**

This is an application for orders that the Applicant be granted unconditional leave to appear and defend High Court Civil Suit No. 460 of 2015 and for the costs of this application to be provided for. The Application was filed in this Honorable Court on the 7<sup>th</sup> day of August 2015 and process did issue for its hearing on the 5<sup>th</sup> day of October 2015.

On the 5<sup>th</sup> October 2015 the matter came up for hearing the Applicant was absent nor was she represented. No reason was given for such absence.

In court, however, was a representative of the Respondent one Mr. Male Mabirizi. Mr. Male Mabirizi informed court that he was the managing Director of the Respondent and was ready to proceed with the matter on behalf of the Respondent. The court allowed him to proceed accordingly.

On being given the go ahead to proceed, Mr. Male Mabirizi submitted that this Honourable Court dismiss this Application for want of prosecution under **Order 9 rule 22 of the Civil Procedure Rules** on the basis that the Applicant was absent while the Respondent was present and that were the court to act as requested it should then subsequently enter judgment in the main suit in the favour of the Respondent.

The ruling on the application was reserved for today the 6<sup>th</sup> day of October, 2015 and this is ruling of the court arising from that submission.

**2. Disposal of the Application:**

This application has been brought under **Order 9 Rule 22 of the Civil Procedure Rules** which provides as follows;

**Order 9 Rule 22: Procedure when the defendant only appears:**

**“Where the defendant appears, and the plaintiff does not appear, when the suit is called for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder”**

The above is the provision of the law and is clear.

The court records in regards to this matter indicates that a summary suit was filed in this court on the 20<sup>th</sup> day of July, 2015 as **MK Creditors Limited v Kyarimpa Emily** with the suit number being **High Court Civil Suit No. 460 of 2015**. The Registrar of this court on the same date did issue summons upon the Applicant requiring her to within ten days from the service of the same to apply for leave from the court to appear and defend the suit.

In response to that summons the Applicant did file this instant application which is by way of notice of motion under **Order 36 Rules 3 and 4 of the Civil Procedure Rules** and **Section 98 of the Civil Procedure Act**.

The application has six grounds and is supported by the Applicant. Two grounds in support of the application which stand out are that the head suit is *res judicata* and that there was an appeal pending. This position is supported by the affidavit in support of this application the perusal of which show that under paragraphs 6,7,8, 9 and 10 it is deposed that this matter is *res judicata* having been previously tried on the same facts and issues before a lower court, that is, in the Chief Magistrate's Court of Mengo before a Magistrate Grade I wherein the instant respondent lost and did in fact file an appeal in this very court against the decision of the magistrate. Thus the said affidavit in support of this application which is evidence on record raises allegations of serious illegalities in as far as the main suit is concerned. It is trite law that an illegality once brought to the notice of a court by whatever means overrides all other considerations as was held in the case of the case of **Makula International Ltd v His Eminence Cardinal Nsubuga and Another [1982] HCB 11** and that being the case here but alive to the fact that this court could

have proceeded under **Order 9 rule 22 of the Civil Procedure Rules** to dismiss this Application as submitted for that provision is couched in mandatory terms, the fact that there is on record on oath evidence of an illegality is a narrative enough to require this court to not follow that requirement for indeed it is true that the rules of procedures of court are but hand maidens of justice and as is the command of **Article 126 (e) of the Constitution of Uganda 1995 As Amended**, this court is enjoined to administer substantive justice with undue regards to technicalities and the technicality herein is that while this court is required to dismiss this application on the basis that the Applicant has not appeared to prosecute the same, it is clear to this court that in as far as there is on oath an allegation of an illegality then this court would not be bound to make a decision which would appear to compound an illegality for the allegations that the instant matter is res judicata and that an appeal is even pending before this court based on the same fact would in my view tantamount to an abuse of court process which this court cannot entertain.

Therefore, by virtue of **Section 98 of the Civil Procedure Act** this court would proceed to refuse the request of the Respondent to have this Application dismissed under the rules of procedure as indicated above for it is apparent that the ends of justice would not be met if that particular rule of procedure is followed.

Arising from the above therefore, this court doth directs its request and direct the Registrar to summon the Applicant in this matter to appear in this court to substantiate the allegations contained in this application supported by the affidavit thereof.

I would therefore order so accordingly.

**Hon. Justice Henry Peter Adonyo**

**Judge**

**6<sup>th</sup> October, 2015**