

5 **THE REPUBLIC OF UGANDA**
IN THE HIGH COURT UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISC. APPLICATION No. 1059 OF 2016
(Arising Out Of H.C.C.S-293 of 2016)

10 **ABC CAPITAL BANK LIMITED ::: APPLICANT**
VERSUS
A-I INDUSTRIES LTD
MURAD SAMNANI } ::: RESPONDENTS
RWAMIRU PAISI }

15 **BEFORE: HON. MR. JUSTICE B. KAINAMURA**

RULING

This application was brought by Notice of Motion under Section 98 CPR, Order 52 rr 1 & 3 CPR for orders that the applicant be granted leave to file a reply to the WSD and file a defence to the counter claim in Civil Suit No. 293 of 2016 out of time and that costs of the suit be provided for.

The facts leading to this application are that the respondents are indebted to the applicant bank in the sum of UGX 110,371,650/=. They defaulted in repayment, and the applicant gave instructions to a law firm to file a case for loan recovery from the respondents hence H.C.C.S No. 293 of 2016.

The grounds of this application are stated in the affidavit in support deponed by Sebugwawo Marvin Counsel for the applicant wherein he states that as Counsel he is interested in presenting the merits in the applicant's case through the reply and defence to the counterclaim. However that within the period provided for filing a reply to the 2nd defendant's WSD and a defense to the counterclaim, the applicant's counsel was indisposed yet has a good reply.

In reply, the respondent stated that this application is bad in law as it is already too late having been overtaken by Misc. App No. 840 of 2016 whose pleadings have all been filed and it is

fixed for hearing and must accordingly be rejected. Further the implication thereof is that this court is *functus officio* to entertain this application.

5 In rejoinder, the applicant deponed that court is not *functus officio* to entertain this matter hence court is enjoined to dispense justice without recompense to technicalities and that mistake of counsel should not be visited on the innocent litigant. Further that it is not a statutory requirement to first seek the consent of the respondent to file this application. And that there is sufficient cause to warrant and or grant extension of time within which the reply to the written statement of defence and a defence to the
10 counterclaim be filed and or admitted on court record.

The issue raised in unison was whether there are sufficient grounds to grant leave to the applicant to file a reply to the written statement of defense and a defense to the counterclaim in H.C.C.S 293 of 2016 out of time?

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In his submission counsel for the applicant cited the case of ***Rosette Kizito Vs Administrator General &Ors Supreme Court Civil Application no 9/1996 reported in Kampala Law Reports Vol 5 of 1993 at page 4***, where court held that sufficient reason must relate to the inability or failure to take the particular step in time. In reference to the instant case the
20 applicant' counsel was unwell and diagnosed with pneumonia and high blood pressure. Further that sufficient cause has been shown to warrant court to grant leave to file a reply to a written statement of defense and a defense to the 2ndrespondent's counterclaim out of time.

Counsel also referred to the case of ***Andrew Bamanya Vs Shamsherali Zaver SC Civil Application No. 70/2001***, where the Supreme Court held that the mistakes, faults and lapses
25 or dilatory conduct of counsel should not be visited on the litigant. It was further held that the other principle governing applications for extension of time is that disputes should be heard and decided on merit. In addition court found that it would be a denial of justice considering the circumstances of the case to shut the applicant out from exercising his rights, and that the Supreme Court has inherent powers under its own rules to administer substantive justice.

30 In the case under review Counsel submitted that the applicant's counsel fell ill and upon return

drafted and filed the reply to the written statement of defense and a defense to the counterclaim albeit out of time. That time run out on account of counsel's illness and indisposition. Further that the failure of counsel to file the requisite documents to wit the reply to the written statement of defense and a defense to the counterclaim should not be visited on an innocent
5 litigant.

In addition Counsel for the applicant cited the case of *Mohan Kiwanuka Vs Aisha Chand SCCA no. 14 of 2002*, where court held that no prejudice is suffered by a party if it can be compensated by costs. That in the instant case the respondent is not prejudiced in any way whatsoever and if by any chance such prejudice exists then it can be compensated by costs.
10 Counsel prayed that court uses its discretion and grants the applicant leave to file out of time the reply to the written statement of defense and the defense to the counterclaim in the main suit.

Counsel for the 2nd respondent in opposition to the application submitted that this application is bad in law and a mere waste of courts time. The application is also overtaken by events and
15 as such can not be sustained owing to the fact that the applicant has long filed his reply to the WSD and reply to counter claim and by implication this court is *functus officio* to entertain this application having not disposed of Misc. Application No. 840 of '2016 which was filed before this application was filed. Further that the applicant's affidavit in support of the application is marred with falsehoods and clear fabrication of evidence as such it ought to be
20 rejected and the application dismissed.

Counsel for the 2nd respondent further submitted that the applicant neglected the law and filed her reply out of time without first seeking leave of court as mandated by procedural law. That the applicant ought to have filed her reply to the written statement of defence and reply to counter claim within 15 days of service on her which service she acknowledges was done on
25 30th May, 2016. Counsel cited the case of *Kattuku & Others Vs Kalimbagiza (1987) HCB 75* where court held that a reply to a counter claim filed without leave of court must be rejected.

Furthermore, Counsel submitted that whereas the applicant sought court to invoke its inherent powers under **Section 98 of the Civil Procedure Act Cap 71** to extend time, court's inherent

powers must not be used as a tool to derail justice or condone illicit behavior more so, to infringe and contradict the due process which is intended to serve the ends of justice. That whereas **Article 126 (2) of the 1995 Constitution** regard courts to administer justice with undue rejoined to technicalities court shouldn't be swayed to depart from its duty of throwing
5 out the applicant's affidavit in support of the application due to the blatant falsehoods therein.

After careful scrutiny of the affidavits filed for and against plus submissions of both Counsels, I am prepared to grant the application.

The doctrine of *functus officio* as defined in Osborn's Concise Law Dictionary arises where court has fully excised its powers over a case. Where a decision has been made the court is
10 deemed to have exhausted its powers and cannot act again on the same matter. In my view court is not *functus officio* in this matter as this case has not been heard by this court exhaustively and no ruling or judgment has been entered for that matter.

In the case of ***Philip Ongom Vs Catherine Nyero Owoto, Civil Appeal No. 14 of 2001***, sufficient reason was held to include mistake of counsel, illness and ignorance of filing
15 procedures by counsel. Further in the case of ***Hajati Safina Nababi Vs Yafesi Lule, Civil Appeal No.9 of 1998*** the Court of Appeal held *inter-alia* that if 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. Accordingly the applicant cannot therefore be blamed for the mistake of its counsel in failing to take the necessary steps to file the reply to the written
20 statement of defense and a defense to the counterclaim. In my view, the applicant has given sufficient reason to be given leave to file the reply to the WSD and a defence to the counterclaim out of time.

The application is accordingly is allowed.

The applicant should file its reply to the WSD and defence to the counterclaim within 10 days
25 of this ruling.

Costs will be in the cause.

B. Kainamura

Judge

11.10.2017