

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 1187 OF 2016
(ARISING FROM CIVIL SUIT NO. 165 OF 2012)**

- 1. BARCLAYS BANK OF UGANDA LIMITED}**
- 2. ANGELINA NAMAKULA OFWONO}**
- 3. KISOZI SEMPALA MUKASA OBONYO}**

(KSMO) ADVOCATES}.....APPLICANTS

VERSUS

AYEBAZIBWE RAYMOND}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants application is for leave to file the Applicants witness statements out of time. Secondly, it is for an order to readmit a witness statement sworn by Jacqueline Kagoya. Thirdly it is for orders that the witness statement of Jacqueline Kagoya struck out on 12th December, 2013 be reinstated or admitted and for costs of the application to be provided for.

The grounds of the application are that the court directed the parties to file their witness statements within a given period of time. Secondly, one of the people who participated in the transaction is Ms Jacqueline Kagoya who by the time of the order had been appointed as a magistrate and was working upcountry and the Applicant's desired to bring her as the principal witness for all of them. Thirdly, Jacqueline Kagoya as a former associate with the third Applicant firm is now working as a Magistrate Grade 1 and was only available after the time within which witness statements should have been filed had lapsed. Fourthly, it was difficult to contact Jacqueline Kagoya to obtain a witness statement from her and consequently, the witness statement was signed, commissioned and filed out of time. On the fifth ground the Applicants filed and served the witness statement on the Respondent who acknowledged receipt of the same immediately thereafter and he is not prejudiced in any way since the matter is not yet for the defence. On the seventh ground, it would be prejudicial to the Applicants if the witness statement is not readmitted by the court. On the eighth ground it would be more convenient to trace the witness who signed the same witness statement formally. On the ninth ground it will further delay the trial for the witness to give her evidence viva voce. On the 10th ground, the Respondent

was served with a witness statement long before the trial he would not be prejudiced in anyway if the witness statement already served on him is readmitted. Lastly it is just and equitable that the court grants the orders sought in the application. The application is supported by the affidavit of Counsel Mulema Mukasa

The Respondent in the affidavit in reply sworn by Ayebazibwe Raymond opposed the application. He deposed that the matter was res judicata as far as the orders sought in the orders 1, 2 and 3 are concerned and that the court is functus officio. He further deposes that he knows that there is no witness statement by Jacqueline Kagoya sworn on 12th December, 2013 that was filed and served as falsely alleged and he attached a copy of the witness statement filed on court record on 1st July, 2016. Other grounds in opposition were raised but suffice it to refer to the submissions of Counsels.

The Applicants Counsel relied on the facts as contained in the affidavit in support of the application and submitted that the decision to file and serve witness statements out of time frames set by the court was beyond the Applicant's control and therefore the Applicants should be accommodated in the interest of justice. He relied on article 126 (2) (e) of the Constitution of the Republic of Uganda that substantial justice should be done without undue regard to technicalities. He prayed that the court adheres to the principles under the said article to administer substantial justice and admit the witness statement in the interest of justice. He contended that the Respondent was served and received the above witness statement long before he testified. Consequently he contended that the Respondent's objection is based on other grounds other than the interest of justice. The Respondent would not in any way be prejudiced if the witness statement is admitted. Because the Applicant has demonstrated sufficient cause, he prayed that the witness statement is admitted out of time.

In reply the Respondents Counsel submitted that on 30th October, 2013 and on 17th December, 2013 respectively, court ordered all parties to file witness statements and the Respondent did not comply and filed by 23rd of December 2013. The Applicant's witnesses were available but never made or filed any witness statements. Court further ruled that it would be prejudicial to listen to a witness testifying when there was no witness statement of the other party and thus the suit was not ready for hearing. Time was extended for the witness statements not filed and served to be done by 10th of June 2016 without fail. The Applicant did not comply yet they never raised any reason for not complying and after giving them a hearing, the court struck out the witness statement by which the Applicants contemptuously disregarded the court order.

He submitted that a mere glance at the heading of the Applicant's submission shows that it relates to the first and third Applicants and leaves out the second Applicant which makes the application itself a lie that it was brought on behalf of all the three Applicants. Based on that ground alone, the application is an abuse of the court process; is frivolous and vexatious and should be dismissed.

The Respondents Counsel without prejudice submitted on whether the Applicants were in contempt of court and can be heard in this application.

He submitted that the Applicants were in contempt for failure to file their witness statements in disobedience of the previous orders of the court. Court had warned the Applicants that the court order had to be respected and complied with and cannot simply be vacated without cause and again ordered for filing of all witness statements by 10th of June 2016 without fail.

Counsel submitted that the Applicant knowingly committed contempt of court and cannot be heard to rely on article 126 of the Constitution. In the case of Housing Finance Bank Ltd and another versus Edward Musisi Miscellaneous Application Number 158 of 2010 it was held that a party in contempt of court by disobeying an existing court order cannot be heard in a different but related cause or motion unless and until such a person has purged himself or herself of the contempt. He further relied on the case of **Amrit Goyal vs. Harichand Goyal and three others Civil Application Number 109 of 2004** for the proposition that a court order is a court order and must be obeyed unless set aside or varied. Therefore it is not a mere technicality that can be ignored. To ignore the court orders will destroy the authority of judicial orders which is the heart of all judicial systems. As far as article 126 of the Constitution is concerned, the question was whether failure or refusal to comply with a court order is a technical irregularity which can be cured. A court order is not a mere technical rule of procedure that can be simply ignored. Court orders must be respected and complied with and those who chose not to comply with it do so at their own peril.

With regard to issue number two, the Respondent's Counsel submitted that the Respondent opposes the application because it is devoid of merit. He deposes that Counsel Mulema Mukasa has no basis to swear to matters that took place in court in his absence without attaching any record of proceedings or court order of what transpired and his evidence is pure hearsay and false. That it is a falsehood to depose that the Respondent would not be prejudiced by the Applicants disobedient and negligent failure to comply with court orders after repeated court orders were made but the Applicants failed to comply. With reference to factual matters, Counsel submitted that there is no witness statement by Jacqueline Kagoya sworn on 12th December, 2013 that was filed and served as falsely alleged.

I have further considered the other submission in support of the above contention and authorities to the effect that article 126 (2) (e) of the Constitution is not a magic wand in the hand of defaulting litigants with reference to the case of **Kasirye Byaruhanga and Company Advocates vs. Uganda Development Bank Civil Application Number 2 of 1997** and **UTEX Industries Ltd vs. Attorney General Civil Application Number 52 of 1995**.

I have carefully considered the submission and it is imperative to consider the court record as to what transpired in relation to the court proceedings. On 30th October, 2013 the court directed

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both Counsels to file witness statements of their witnesses on 21st of November 2013 and serve the opposite Counsel. The suit had been fixed for hearing on 17th of December 2013. On 17th December, 2013 the Plaintiff's Counsel came late after court had been convened. The court noted in its ruling in an application to have the suit determined under Order 17 rules 4 of the Civil Procedure Rules that by the time court was convened, none of the parties had filed witness statements according to the record. The court was forwarded witness statements which appear from the received stamp to be filed on 16th December, 2013 on behalf of the fourth and first Defendant. There appeared to be no witness statements filed by the other Defendants. The court noted that both parties disregarded the filing of witness statements as directed by the court and they were barred by estoppels from complaining about non-compliance by the Plaintiff. In the circumstances it was directed that witness statements shall be filed by both parties by 23rd December, 2013 without fail. Hearing was fixed for 7th of April 2014 at 9:30 AM and also on 10th April, 2014.

On 7 April 2014, the Plaintiff's lawyers informed the court that he had filed an application for contempt of court in this court which the registrar referred to the judge for determination. Thereafter the file went missing. The matter proceeded notwithstanding the pendency of any contempt proceedings. PW1 Mr Ayebazibwe Raymond took the witness stand and his witness statement was admitted on oath. However, the Plaintiff's Counsel Simon Tendo Kabenge expressed great discomfort for KSMO Advocates representing the first and second Defendants. Ruling of the court was delivered and the hearing of the suit was adjourned to 25th June, 2013 at 9:30 AM. Subsequently for one reason or another, the suit did not proceed. The record shows again that the suit came for hearing on 17th of May 2016 when Counsel Sempala appeared for the fourth and second Defendants. There was an application for adjournment of the suit on the ground that the Defendants had not filed their witness statements. The ruling of the court is clear that it would be prejudicial to formulate witness statements as rebuttals to an existing testimony which is on record. Particularly where a witness has been cross examined and re-examined. In such cases the evidence of the witness is akin to that of the witness who sat in court during the testimony of other witnesses and is to be given trifling weight according to the case of **Semande vs. Uganda [1999] 1 EA 321** and **Andiazi vs. Republic [1967] EA 813**. Specifically the court ruled that a court order should be adhered to and time can only be extended upon application. The suit was fixed for hearing in October 2016 on various dates. It was directed that all witness statements which have not been filed and served should be filed or served on 10th June, 2016 without fail and the suit was adjourned for hearing on 5th October, 2016. On 5th October, 2016 the Plaintiff's Counsel applied for striking out the witness statement of Kagoya Jacqueline dated first of July 2016 on the ground that it was filed without the leave of court out of time. Accordingly the statement was struck out and the court held that the Court cannot belatedly extend time without the requisite application and the witness statement of Jacqueline Kagoya was not properly before the court and was struck out. Subsequently the Applicant filed this application.

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With regard to the contention as to whether the application is on behalf of any particular Defendant, this is an application to admit the witness statement and as to whether it is on behalf of all the Defendants cannot be material because the evidence that is adduced on the court record could be used by any of the parties. The objection on that ground therefore fails.

As to whether the Applicants can be heard in this application on the ground that they were in contempt of court order, the court orders are very clear that the statement was filed without leave of court and was not properly before the court. The Applicant was free to file a formal application to be considered on its merits.

Applications for extension of time are clearly governed by Order 51 rules 6 of the Civil Procedure Rules which provides as follows:

“6. Power to enlarge time.

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order.”

The rule deals with the power of the court to extend limited time fixed by the court. The costs of any application for enlargement of time are to be borne by the Applicant. In considering whether to enlarge time or not, the court should consider the interest of justice. In this case the court had already ruled that witness statements filed after the testimony of witnesses is to be given trifling weight. It did not rule that it would be excluded. Of course witness statements can be excluded for failure to comply with the timelines fixed by the court under rule 7 of the Constitution (Commercial Court) (Practice) Directions. Rule 7 of the said the directions, gives the court power to give realistic time limits for hearing which once established should be adhered to and extension would be given in special circumstances. The question is whether there are any special circumstances for enlargement of time.

Rule 7 of the Constitution (Commercial Court) (Practice) Directions gives the court powers to apply some sanctions on any party for failure by a party to comply in a timely manner with any order made by the commercial court. For instance the court may refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim.

The discretion whether to extend time or not, remains with the court. The question of whether the testimony should be given trifling weight is a matter to be considered in the main submissions if

the court allows the application extending time for the Defendant to file witness statements. The Plaintiff has already closed his case and the suit is coming for hearing the defence.

In the circumstances, the Applicant's application to extend time within which to file the witness statement of Jacqueline Kagoya on the ground that her job as a magistrate made it hard for the Defendant to access her in time will be allowed. As to whether the testimony should be given trifling weight, the matter is easily answered by considering the fact that the witness statement had been filed before. The wrong description of the witness statement or failure to give the proper dates when the witness statement signed or filed is in the circumstances of this case not a basis for barring the application. In the premises, the previous witness statement of Jacqueline Kagoya which had been struck off the record shall be readmitted by an order of extension of time within which to have it filed and that statement shall be validated as having been filed in time. No additional statement shall be made to the said witness statement and the prejudice for having it filed after the testimony of the Plaintiff would be avoided. In the premises, the witness statement of Jacqueline Kagoya is re admitted and validated. It shall be made available to all the parties including the court as originally filed.

The Applicant's application succeeds and the costs of the application shall be borne by the Applicants.

Ruling delivered in open court on 1st June, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Bakole Simon Counsel for the 3rd Defendant and holding brief for Counsel David Sempala

Plaintiff is in court but his Counsel is absent

Fox Odoi Counsel for the Applicant holding brief for Dr. James Akampumuza

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

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1st June, 2017