

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT
MISCELLANEOUS APPLICATION NO. 1019 OF 2020
(Arising out of Miscellaneous Application No. 775 Of 2020)
(Arising from Civil Suit No. 60 of 2020)**

HASS PETROLEUM UGANDA LIMITED ::::::::::::::: APPLICANT

VERSUS

SOURCE OILS UGANDA LIMITED ::::::::::::::: RESPONDENT

BEFORE HON. LADY JUSTICE JEANNE RWAKAKOOKO

RULING

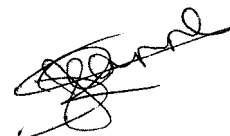
Introduction:

This application is brought under Section 98 of the CPA, Order 36 rule 3(2), Order 51 and Order 52 rule 1 & 3 of the CPR for orders that;

- a) That the Respondent's Miscellaneous Application No. 775 of 2020 be dismissed.
- b) The Applicant be granted default judgment.
- c) Costs of the application be provided.

The application was supported by the affidavit of Muhiga Hamza, the Applicant's Advocates Process Server attached thereto, which briefly stated;

- a) That on 21st August 2020, the deponent received summons to file defence to be served on the Defendant.
- b) That on the 3rd of September 2020, the same was served upon the Defendant in Ndeeba and the Respondent acknowledged receipt by signing and stamping.
- c) That the deponent on the 21st September 2020 filed an affidavit of service in court.
- d) That on the same date, the deponent inquired whether there was an application for leave to appear and defend, for which there was not and

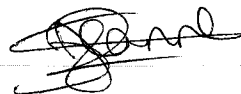


hence filed an application for default judgment the next day on 22nd September, 2020.

- e) That on the 19th Day of October 2020, the deponent went to court to check if their application for a default judgment had been granted and found an application dated 24th September 2020 which they served onto themselves.
- f) That the statutory time for filing an application for leave to appear and defend is 10 days had expired on the 17th day of September, 2020 and thus Misc. App No. 775/2020 was filed out of time as the Respondents were served on 3rd September, 2020.
- g) That the Respondent's application holds no prayer for extension of time for leave to defend the main suit.
- h) That the Respondent's application holds no triable issue.
- i) That it is in the interest of justice that the Applicant be granted default judgment.

The Respondent's filed an affidavit in reply deposed by Ali Mohammed Hassan, a Director of the Respondent, which briefly stated;

- a) That the Respondent was indeed served with summons in a summary suit plaint on the 3rd September 2020 and immediately instructed its former lawyers to handle the matter.
- b) That on the 10th day of September 2020, he was called by the then counsel in personal conduct to swear an affidavit in support to the application which he found already prepared and signed and he also signed the affidavit and dated 10th September 2020. (copies of same attached as A and B respectively)
- c) That he was informed by his former lawyers that the application was filed on that same day and fixed on 2nd February 2021.
- d) That when making a follow up on 28th January 2021 to confirm date, it was found that the said lawyers had not filed the Respondent's application in time and that the Applicant had applied for its dismissal.
- e) That he opted to change instructions to the current lawyers who advised that that he file an application to enlarge time to validate its pending application filed out of time and the Respondent without unreasonable delay filed MA No. 109/2021. (copy of said application attached as C)
- f) That the Respondent's application contains grounds upon which this court can premise on to enlarge time or validate the already filed application and granting the same would be in the interests of justice as the Respondent will suffer unjust loss if not granted.



Both parties filed submissions as directed by court.

Legal Representation:

1. Onder Oscar Steven Isaac for the Applicant
2. Nakuera Musa & Kamulegeya Abdul Rashid for the Respondent

Issues for determination:

1. Whether MA No. 775/2020 should be dismissed and the default judgment be granted?
2. Remedies available?

Resolution:

Preliminary Objection.

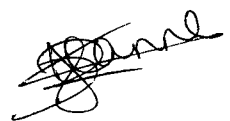
The Respondent raised a point of law to the effect that the application is defective because the affidavit in support of it is sworn/deposed by a court process server without the authority of the Applicant being attached to it. The Respondent cited Order 3 rule 1 of the CPR as well as the case of **MK Financiers Limited v N. Shah & Co. Ltd & 4 Ors HCMA Appeal No. 343 of 2015** to conclude that if it is incurably defective, it ought to be dismissed with costs.

MHK Engineering Services (U) Ltd V Macdowell Limited Miscellaneous Application No.825 Of 2018 Justice Wamala Boniface while determining the question of who has capacity to swear an affidavit on behalf of a Company, and citing the provisions of Order 3 Rule 1 of the CPR which are that;

“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf”;

Stated that;

“According to the above provision, the swearing of an affidavit can be categorized as an “act in any court required or authorized by the law to be made or done by a party in such court” and such act may “be made or done



by the party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf". As such, for a deponent to an affidavit on behalf of a Company to have capacity to do so, he/she must be either a representative in person to the Company, or a recognized agent, or an advocate duly appointed to act in that behalf."

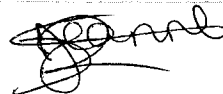
In that regard, and based on the nature of the application beforehand, I find that the information provided by the deponent, Muhiga Hamuza, as an authorized court process server, who gives information regarding the filing of the applications as well as the Respondent's late filing, its proper to say that, firstly, he as a court process server is a duly recognized agent within the ambit of the above provision. Secondly, the information he depones to in the said affidavit is well within his knowledge and is crucial to the subject matter of this application and it would be inefficient to have another person depone the said affidavit.

Therefore, this preliminary objection fails on those grounds.

Issue 1- Whether MA No. 775/2020 should be dismissed and the default judgment be granted?

The Applicant submitted that for an application for leave to appear and defend to be heard, it must have been filed within the prescribed period of 10 days. That the Respondent's filed seven days after the said time and that this application should be granted because the Applicant has ably shown that the Respondent's filed their application to appear and defend out of time, therefore making it invalid from the start and thus have no locus regarding the said application. Further, that MA No. 775/2020 should therefore be struck off court's record. They relied on **Ariho & Anor v Centenary Rural Development Bank Ltd & 2 Ors CS No. 14/2016** and Order 36 rule 3 sub-rule 2 to state that the Respondent's filing out of time directly entitles the Applicant a decree in the amount claimed in Civil Suit No. 601 of 2020.

The Respondent's in response averred that their delay in filing the application for leave to appear and defend was a mistake of former counsel and that it is a principle of law that a party should not be penalized or suffer because of a mistake and cited the cases of **Burhani Decorators & Contractors v Morning Foods Ltd & Anor HCT Kenya CA No. 604 of 2012, Banco Arabe Espanol v Bank of Uganda [1999] 2 EA 22** to state that the substance of all disputes should be investigated and decided on their merits and errors or lapses should not bar a litigant from pursuing his rights. They further relied on Section 98 of



the CPA and Order 51 rule 6 of the CPR as well as Article 126 (2) (e) of the Constitution of Uganda to pray that the Respondent's application for leave to appear and defend is heard and determined on its merits.

After careful perusal of the pleadings of both parties, I make the following considered findings;

The gist of the Applicant's contention is that the statutory time for filing an application for leave to appear and defend is 10 days which had expired on the 17th day of September 2020 before the Respondent filed their application for leave to appear and defend thus Misc. App No. 775/2020 was filed out of time as the Respondents were served on 3rd September 2020. That further, the Respondent's application holds no prayer for extension of time for leave to defend the main suit and should be dismissed.

Whereas the Respondent concedes to these facts, their defence is that it was the mistake of their counsel as the Respondent ensured that the documents were prepared and signed in time and it was the counsel who filed the same out of time.

Mistake of counsel has generally been accepted as sufficient cause in cases of filing out of time as was held in the case of **Roussos v Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993** in which it was decided that a mistake by an advocate, though negligent, may be accepted as a sufficient caus., Also, in the case of **Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001**, one of the considerations given in determination of sufficient cause was that;

"Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ..."

From the facts of the Respondent through their affidavit in reply, it is clear that the litigant took all reasonable steps to see to it that their application was filed on time and indeed it would be unfair for this court to deny their vigilance and not given them a chance at getting justice based on the mistakes of their negligent counsel who was well aware of the consequences of the late filing.



In ***Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22***, the Supreme Court of Uganda held that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

In that regard, and in accordance to Article 126 (2) (e) wherein courts are called to administer justice without undue regard to technicalities, I find that the Respondent has proved sufficient cause as to why Miscellaneous Application No. 775 of 2020 was filed out of time.

Conclusion and Order:

1. This application is hereby dismissed.
2. The Respondent's MA No. 775/2020 is hereby not dismissed.
3. The Applicant is hereby not granted a default judgment in CS No. 60 of 2020.
4. There will be no order for costs in this application.

I so order.



Jeanne Rwakakooko

JUDGE

09/11/2021

This Ruling was delivered on the 30th day of November 2021