



**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL COURT DIVISION)**

**MISCELLANEOUS APPLICATION NUMBER 574 OF 2021  
(Arising from CS No. 988 of 2018)**

**BOLLORE TRANSPORT & LOGISTICS LTD.....APPLICANT  
VS.**

**TULSA INVESTMENTS LIMITED.....RESPONDENT**

**BEFORE HON. MR. JUSTICE RICHARD WEJULI WABWIRE  
RULING**

**A. INTRODUCTION**

1. The Applicant brought this Application by Notice of Motion under Section 98 of the CPA Cap. 71 and Order 9 rule 23 and Order 52 rule 1 and 3 of the CPR, SI 71-1 for orders that the Order dismissing Civil Suit No. 988 of 2018 be set aside, that Civil Suit No. 988 of 2018 be reinstated and fixed for hearing on its merits and for costs of the Application to be in the cause.
2. The Application was supported by the Affidavit of Megere Hillary, Counsel to the Applicant. The Respondent filed an Affidavit in reply deposed by Joseph Sendagire, a director in the Respondent Company.

## **B. REPRESENTATION**

25 3. The Applicant was represented by M/s OSH Advocates while the  
Respondent was represented by M/s J Byamukama & Co. Advocates.  
Both parties filed written submissions.

## **C. PRELIMINARY OBJECTION**

30 4. In their Affidavit in rejoinder, the Applicant raised a preliminary  
objection towards the Respondent's Affidavit in reply and prayed that  
the same should be struck off the Court record with costs because it  
was filed 11 (eleven) months after receipt of service of the Application  
without leave of Court and in contravention of the law.

## **D. DETERMINATION BY COURT**

35 5. Before I consider the merits of this Application, I will first deal with the  
Applicant's preliminary objection as raised in their Affidavit in rejoinder,  
to the effect that the Respondent's Affidavit in reply be struck off the  
Court record with costs, because it was filed 11 (eleven) months after  
receipt of service of the Application without leave of Court.

40 6. **Order 12 rule 3 (2) of the Civil Procedure Rules SI 71-1**, provides  
that a reply to the Application by the opposite party shall be filed within  
fifteen days from the date of service of the Application and be served  
on the Applicant within fifteen days from the date of filing the reply. This  
provision was expounded in the case of **Stop and See (U) Ltd v**  
45 **Tropical Africa Bank Ltd, MA No. 333/2010**, when Justice  
Christopher Madrama (as he then was) held as follows;

*“A reply or defence to an Application has to be filed within fifteen  
days. Failure to file within 15 days would put a defence or  
Affidavit in reply out of the time prescribed by the rules. Once the*

50                    *party is out of time, he or she needs to seek the leave of Court*  
                         *to file the defence or Affidavit in reply outside the prescribed*  
                         *time.”*

7. The Court record shows that this Application was filed on 20<sup>th</sup> April  
2021 and the Affidavit in reply filed on 12<sup>th</sup> May 2022. It should be noted  
55                    that the Affidavit in reply was filed more than a year later and the  
                         Respondent did not seek leave to file it out of time. This is a  
                         contravention of Order 12 rule 3 (2) of the Civil Procedure Rules SI 71-  
                         1 which clearly states that a reply to the Application by the opposite  
60                    party shall be filed within fifteen days from the date of service of the  
                         Application. I am in agreement with my learned brother in *Stop and*  
                         *See (U) Ltd v Tropical Africa Bank Ltd (supra)* that the practice of legal  
                         practitioners filing Affidavits in reply at pleasure should be discouraged.  
                         Allowing an Affidavit in reply that was filed more than one year after  
                         the Application had been filed would be condoning this practice. As  
65                    such, the Respondent’s Affidavit is accordingly struck off the Court  
                         record for being filed out of time without leave of Court. This has the  
                         implication of leaving the Application unopposed.

#### **E. CONSIDERATION OF THE MERITS**

8. The Applicant’s Counsel submitted that the Applicant was prevented  
70                    from attending Court on 26<sup>th</sup> March 2021 when the suit was dismissed  
                         because of Mistake of Counsel and that the mistake should not be  
                         visited on an innocent litigant.

9. In his Affidavit in support, the Applicant's Counsel deponed that Civil  
Suit No. 988 of 2018 was fixed for mention on the 16<sup>th</sup> day of December  
75                    2020 at 9:45 am but he failed to appear because he had another matter

in a different Court which had been scheduled for hearing the entire morning and the same had been scheduled before this case. That Court adjourned the matter to another date but unfortunately the said date was never communicated to him by Counsel for the defendant who attended Court that day. That this is the sufficient cause that precluded him from appearing when the suit was called for mention on 26<sup>th</sup> March 2021. That the Applicant's Counsel have diligently prosecuted Civil Suit No. 988 of 2018 from its inception and only missed attending Court on the 16<sup>th</sup> day of December 2021 when Counsel was attending earlier scheduled matters before another Court.

10. Where a suit is dismissed for want of prosecution under Order 9 rule 22 of the Civil Procedure Rules SI 71-1, the Plaintiff may apply for the dismissal order to be set aside under Order 9 rule 23 of the Civil Procedure Rules SI 71-1, upon satisfying Court that there was sufficient cause for nonappearance when the suit was called for hearing.

11. In the case of **Nicholas Roussos v Ghulam Hussein Habib Virani, CA No. 9/1993**, the Supreme Court laid down some circumstances that may amount to sufficient cause when it stated that; *“A mistake by an advocate though negligent may be accepted as a sufficient cause...ignorance of procedure by an unrepresented defendant may amount to sufficient cause...illness by a party may also constitute sufficient cause...”*

12. The Applicant attached a page of their diary, exhibited as annexure ‘A’ to their Affidavit in support of the Application. It shows

that on 16<sup>th</sup> December 2020, the Applicant had one scheduled matter which was Tumusiime vs. Ecobank. In paragraph 4 of his Affidavit in support, the Applicant's Counsel stated that the matter of Florence  
105 Tumusiime vs. Ecobank had been scheduled on the same day to be heard for the entire morning and had been scheduled before this case.

13. It is a practice of Court that before a case is allocated a date, the lawyers are required to cross check with their diaries and agree on an available date. The Applicant does not dispute that they were present  
110 in Court on the day when CS No. 988/2018 was allocated a hearing date of 16<sup>th</sup> December 2020.

14. Although I am inclined to find that the Applicant has satisfied this Court that there was sufficient cause for nonappearance when the suit was called on for hearing on 26<sup>th</sup> March 2021, I am convinced that the  
115 Applicant did not act diligently.

15. Annexure 'B' to their Affidavit in support of the Application, shows that the Applicant was served with hearing notices indicating 16<sup>th</sup> December 2020 as the hearing date. Much as the same were received in protest, the diligent thing to do would have been for the  
120 Applicant to send a representative to Court on the said date to seek an adjournment on the ground of Counsel for the Applicant having another matter in a different Court. This was not done but rather the Applicant chose to ignore the said hearing and never followed up on its outcome until its dismissal on 29<sup>th</sup> March 2021, which is over three months later.

16. Be that as it may, for purposes of ensuring a right to a fair hearing  
125 as guaranteed under Article 28 of the Constitution of the Republic of Uganda 1995, the Applicant will be given an opportunity to be heard

on the merits. However, the costs of this Application shall be met by the Applicant.

130 17. The Order dismissing Civil Suit No. 988 of 2018 is set aside and  
Civil Suit No. 988 of 2018 is accordingly reinstated.

Delivered at Kampala this 24<sup>th</sup> day of June 2022.

135 Richard Wejuli Wabwire

**JUDGE**