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THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISCELLANEOUS APPLICATION NO. 2896 OF 2023  
(ARISING OUT OF CIVIL SUIT NO. 514 OF 2021)

10 GOLDMINE FINANCE LIMITED ::::::::::::::::::::::::::: APPLICANT

VERSUS

KATO ALEX ::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE PATIENCE T.E RUBAGUMYA

15  
RULING

Introduction

This application was brought by way of Notice of Motion under **Article 28 of the Constitution of the Republic of Uganda, 1995, Section 98 of the Civil Procedure Act, Cap. 71, Order 9 Rule 27 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules S1 71-1**, seeking orders that:

1. The ex parte judgment/decree entered against the Applicant in Civil Suit No.514 of 2021 be set aside.
- 25 2. Civil Suit No.514 of 2021 be set down for hearing inter parties.
3. Costs of the application be in the cause.

Background of the application

The Respondent instituted Civil Suit No. 514 of 2021 against the Applicant and 2 Others for a declaration that their actions of selling the Respondent's vehicle were illegal, breach of contract, negligence, an order for

*phw*

5 compensation for the loss of a motor vehicle, an order for payment of  
general, special and punitive damages, interest on the awards and costs  
of the suit.

The grounds of the application are detailed in the affidavit in support by  
Ms. Rola Birungi Mugabe, an Advocate working with the law firm  
10 representing the Applicant and summarized below:

1. That the Respondent filed Civil Suit No.514 of 2021, among others  
against the Applicant with the latter as the 2<sup>nd</sup> Defendant, and it  
thereafter filed its written statement of defence.
2. That the parties complied with the summons for directions by filing  
15 a joint scheduling memorandum, a joint trial bundle and the  
Applicant filed a supplementary trial bundle.
3. That the Applicant and its Counsel attended the Court sessions in  
Civil Suit No.514 of 2021 with the Court session held on 31<sup>st</sup>  
October, 2022, being their last Court appearance.
- 20 4. That on 31<sup>st</sup> October, 2022, the then Trial Judge informed the parties  
that the ruling of the Court regarding the 3<sup>rd</sup> Defendant's preliminary  
objection would be on notice but it was delivered without notifying  
the Applicant.
- 25 5. That the Court record of 10<sup>th</sup> October, 2023, shows that Counsel for  
the Respondent falsely informed the Court that the Applicant had  
been served via ECCMIS as regards the mention date of 10<sup>th</sup> October,  
2023 whereas not.
6. That the Applicant got to know that the suit had been linked to  
ECCMIS when its lawyer accessed the record of the Court to  
30 establish the circumstances under which the aforementioned suit  
was heard exparte by the Court before judgment was passed.

*phw*

- 5 7. That on 10<sup>th</sup> October, 2023, when the suit proceeded, neither the Applicant's contact details nor those of their lawyers had been linked to ECCMIS.
8. That on 10<sup>th</sup> October, 2023, the suit had been fixed for mention but not for hearing hence it was erroneous for the hearing of the same to  
10 proceed on that date.
9. That the Applicant was never served with the judgment notice of the said suit but came to know about the judgment after the Respondent notified the Applicant's other external lawyers of Walusimbi & Co. Advocates about the same.
- 15

In reply, the Respondent through Mr. Busingye Michael, Counsel in personal conduct of the matter, deposed an affidavit opposing the application that:

1. Much as the case was filed pre-ECCMIS, the Applicant is aware that  
20 on 1<sup>st</sup> March, 2022, the Chief Justice launched the ECCMIS system and among the Courts selected to pilot the system was the Commercial Court Division.
2. The Commercial Court Division adopted the ECCMIS system and all Court users including the Applicant were notified.
- 25 3. Paragraphs 5, 6 and 7 of the affidavit in support are false and based on hearsay as the deponent was not in Court and did not disclose her source of information.
4. On 31<sup>st</sup> October, 2021 when the matter was coming up for hearing, the then Trial Judge had told the parties to come with all their  
30 witnesses.

*phw*

5 5. Before the hearing, Counsel for the 3<sup>rd</sup> Defendant raised a preliminary objection and the Court was adjourned after the oral submissions and that the ruling in regard to the same was delivered through ECCMIS.

6. The Respondent expected the Applicant to be linked to the case as  
10 all cases had been migrated. That had the Applicant been interested in participating in the hearing, it would have taken steps to comply with the new system introduced which every other Court user had done.

7. The Applicant has not shown any reasonable cause why the  
15 judgment should be set aside.

#### Representation

The Applicant was represented by M/s Paul Sebunya & Co. Advocates while the Respondent was represented by M/s Prism Advocates.

The parties were directed to file their submissions to which they complied  
20 and the same have been considered by Court. Although the Respondent's submissions bear the heading of 'Applicants submissions' and do not indicate the firm that drafted them, I shall nevertheless consider them in the interest of justice in accordance with **Section 98 of the Civil Procedure Act** since the same were filed on ECCMIS by Counsel for the  
25 Respondent.

#### Issues for determination

Learned Counsel for the Applicant in the submissions raised a preliminary objection regarding the authority of Counsel Busingye Michael deponing  
30 an affidavit in reply to this application.

*phwé*

5 Furthermore, Learned Counsel for the Respondent also raised a preliminary objection to the effect that, the affidavit in support by Counsel Rola Birungi Mugabe does not disclose the capacity in which she deposes it on behalf of an artificial person.

Therefore, the following issues are for determination:

- 10 1. Whether Counsel Busingye Michael's affidavit in reply to this application is fatally defective?
2. Whether Counsel Rola Birungi Mugabe's affidavit in support of this application is fatally defective?
3. Whether there is sufficient cause to set aside the ex parte  
15 judgment/decreed of the Court entered in Civil Suit No. 514 of 2021?
4. What are the remedies available to the parties?

#### Applicant's submissions

##### Issue 1

Whether Counsel Busingye Michael's affidavit in reply to this application  
20 is fatally defective?

Learned Counsel for the Applicant based their objection on **Regulation 9 of the Advocates (Professional Conduct) Regulations SI No. 267-2**, which prohibits an Advocate in personal conduct of a matter to appear in the same matter as a witness.

25 Learned Counsel for the Applicant submitted that this Regulation was the subject of interpretation in the case of ***Uganda Development Bank Vs Kasirye, Byaruhanga and Co. Advocates SCCA No.35 of 1994*** wherein the Supreme Court held that Regulation 9 of the Advocates (Professional Conduct) Regulations aims at distinguishing between an Advocate

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5 practicing before Court and a witness and that in such cases, the Advocate has to choose either to be a witness or Counsel in contentious matters but not both.

### Respondent's submissions

10 In reply to the above preliminary objection, Learned Counsel for the Respondent submitted that the law and authorities prohibit an Advocate in personal conduct of a matter to appear as a witness in contentious matters. Counsel stated that the facts herein are distinguishable as the gist of this application is non - service of the hearing notices to the Applicant. Counsel contended that this is information that only an  
15 Advocate in personal conduct is well versed with and the litigant might not necessarily know.

### Analysis and Determination

**Regulation 9 of the Advocates (Professional Conduct) Regulations,**  
20 stipulates that;

*“No advocate may appear before any Court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes  
25 apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this Regulation shall not prevent an Advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non contentious matter or  
30 fact in any matter in which he or she acts or appears.”*

*phw*

5 The purpose of the above provision is reflected in several cases including  
***Uganda Development Bank Vs Kasirye, Byaruhanga & Co. Advocates***  
***(supra)*** wherein **Wambuzi CJ** held that:

10 *“It is generally accepted that the main intention of this Regulation  
is that an Advocate should not act as Counsel and witness in the  
same case.”*

Considering the above authorities, it is therefore trite that an Advocate  
should not act as Counsel and witness in the same case.

15 However, the Regulation provides an exception to the effect that an  
Advocate shall not be prevented from giving evidence whether verbally or  
by declaration or affidavit on a formal or non-contentious matter or fact in  
any matter in which he or she acts or appears. This position was upheld  
by the Supreme Court in the case of ***Mbarara Municipal Council Vs***  
***Jetha Brothers Ltd Misc. App No.10 of 2021***, in which the Court held  
20 that:

*“In my view, affidavits can be sworn by anyone to prove a set of  
facts and an advocate is not an exception. An advocate is therefore  
not prohibited to swear an affidavit where necessary especially on  
matters that are well within his or her knowledge.”*

25 In the case of ***Electro-Maxx Uganda Ltd Vs Oryx Oil Uganda Ltd, HCMA***  
***No.251 of 2020***, **Hon. Justice Boniface Wamala** held that:

*“It is clear to me that the above Regulation is not meant to bar an  
advocate from giving evidence on behalf of a client. It is meant to  
bar an advocate from appearing before a Court on behalf of a client  
30 when the advocate is a witness or a potential witness in a  
contentious matter.”*

*phw*

5 In the instant case, I have to establish whether the affidavit in issue contains contentious averments. The affidavit deposed by Counsel Busingye Michael gives a background on the roll out of ECCMIS by the Judiciary, its pilot project, use and transition. It also gives a background on the facts regarding the Court proceedings in the suit from the time of  
10 its institution to when judgment was delivered. I consider these facts to be formal as they lay out the Court record and can be accessed by any interested party. Considering the foregoing, it is my finding that the affidavit does not contain any contentious matters to render it fatally defective. Accordingly, I find no merit in this preliminary objection.

15 Issue 2

Whether Counsel Rola Birungi Mugabe's affidavit in support of this application is fatally defective?

Respondent's submissions

In submission, Learned Counsel for the Respondent relied on the case of  
20 ***Black Market Records Vs Malinga Sulaiman and 3 Others HCMA No.2788 of 2023***, and submitted that this Court faced a similar matter where it had to determine whether a person with no proof attached to his affidavit can swear an affidavit on behalf of a company. Counsel submitted that the Court interpreted **Order 3 Rule 1 and Order 29 Rule 1 of the**  
25 **Civil Procedure Rules** while referring to the case of ***MHK Engineering Services (U) Ltd Vs MacDowell Ltd HCMA No. 825 of 2018*** and found the affidavit incurably defective for failure to attach evidence to prove capacity. Counsel stated that it is also trite law that where there is one affidavit in support of an application and the affidavit is found invalid,  
30 then the application becomes unsupported and cannot stand hence it is dismissed. In that regard, Counsel for the Respondent prayed that the

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5 affidavit in support of the application is found to be defective and struck off the record with costs.

Applicant's submissions

10 Counsel for the Applicant emphasized that the affidavit in support of the application was deposed by an Advocate working with the Applicant's duly appointed Advocate. Counsel referred to **Order 3 Rule 1 of the Civil Procedure Rules** and submitted that it authorises two categories of persons to act on behalf of a party to the suit; that is an Advocate duly appointed to act on behalf of a client and a recognised agent.

15 Counsel argued that the facts in the case of ***Black Market Records Vs Malinga Sulaiman and 3 Others (supra)*** are distinct from the facts in the instant application in a way that, the deponent of the affidavit in support of the application in the ***Black Market Records Vs Malinga Sulaiman and 3 Others (supra)***, Mr. Cedric Singleton, deposed the same  
20 as "an officer" of Black Market Records hence he was not an Advocate nor did he qualify as a recognized agent.

Counsel for the Applicant submitted that in the instant case, paragraph 1 of the affidavit in support of the application shows that Counsel Rola Birungi Mugabe deposed the affidavit as an Advocate working with M/s  
25 Paul Sebunya & Co. Advocates, who are Advocates duly appointed to act on behalf of the Applicant in this matter but not as recognised agents as implied by the Respondent's Counsel. In conclusion, Counsel for the Applicant prayed for the objection to be overruled and the application to proceed on its merits.

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5 Analysis and Determination

I have duly noted and read the submissions of both Learned Counsel in respect of this preliminary objection. In the case of **Black Market Records Vs Malinga Sulaiman and 3 Others (supra)** as relied upon by Counsel for the Respondent, I cited the case of **MHK Engineering Services (U) Ltd Vs MacDowell Ltd (supra)**, in which **Hon. Justice Boniface Wamala** while relating the swearing of affidavits to Order 3 Rule 1 of the Civil Procedure Rules stated that;

15 *“... the swearing of an affidavit can be categorised 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 an 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.”*

In the matter at hand, paragraph 1 of the affidavit in support states that;

20 *“I am a female adult Ugandan of sound mind, an advocate licenced to practice law in all Courts of Judicature in Uganda, working with M/s. Paul Sebunya & Co. Advocates who are Counsel for the Applicant and as such I have legal authority to depose this affidavit, am well-versed with the facts pertaining to this application and the main suit and I depose this affidavit in the*  
25 *aforementioned capacity.”*

The above paragraph shows the capacity under which Counsel Rola Birungi Mugabe deposed the affidavit in support of this application. I entirely agree with the submission of Counsel for the Applicant that the facts in the case of **Black Market Records Vs Malinga Sulaiman and 3 Others (supra)** are distinguishable from the facts herein, in a way that the

*phwé*

5 deponent, in that case, did not disclose the capacity under which he deposed the affidavit nor did he attach any evidence to that same effect.

In the instant case, Counsel derives her capacity from **Order 3 Rule 1 of the Civil Procedure Rules** as an Advocate duly instructed by the  
10 Applicant. In the circumstances, I find no merit in this preliminary objection and it is hereby dismissed. Accordingly, I shall proceed to consider the merits of the application.

### Issue 3

15 Whether there is sufficient cause to set aside the ex parte judgment/decreed of the Court entered in Civil Suit No. 514 of 2021?

### Applicant's submissions

It was Learned Counsel's submission that "sufficient cause" as provided under **Order 9 Rule 27 of the Civil Procedure Rules** has been the subject  
20 of many decisions.

Counsel for the Applicant referred to the case of **Florence Nabatanzi Vs Naome Binsobedde SCCA No.6 of 1987** cited with approval in the case of **Hikima Kyamanywa Vs Sajjabi Chris CACA No.1 of 2006**, in which the Supreme Court held that "sufficient reason" or cause depends on the  
25 circumstances of each case and must relate to inability or failure to take a particular step in time.

Counsel submitted that as evidenced by the Court record, the parties at all material times filed the pleadings at the Court Registry and not on ECCMIS as the latter was introduced by Court much later.

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- 5 Counsel stated that the Applicant and their Counsel at all material times attended all the Court sessions with the session of 31<sup>st</sup> October, 2022, being their latest Court appearance and, on that date, the Learned Trial Judge informed the parties that the ruling of the Court regarding the 3<sup>rd</sup> Defendant's preliminary objection would be on notice.
- 10 Counsel submitted that when the matter came up for mention on 10<sup>th</sup> October, 2023, Counsel for the Respondent falsely informed the Court that the Applicant had been served via ECCMIS for that date whereas not. He referred the Court to annexure 'AP1' to the affidavit in support of the application.
- 15 Counsel further contended that the foregoing offers a candid and frank explanation that it was not for the default of the Applicant or its lawyers as regards their non-attendance of the Court session on 10<sup>th</sup> October, 2023 and that it provides sufficient cause that warrants the setting aside of the judgment/decreed that was entered in the aforementioned suit. In
- 20 conclusion, Counsel submitted that the application has merit and prayed for it to be granted.

#### Respondent's submissions

- In opposition to the application, Learned Counsel for the Respondent submitted that when the ECCMIS system was rolled out, all Advocates and
- 25 Court users were notified about the migration and it was incumbent on the concerned Advocates to link all their cases to their ECCMIS accounts as the Commercial Court Division no longer accepted physical filing of documents.

- Learned Counsel stated that as soon as the accounts are linked, the Court
- 30 communicates hearing dates by notification. Counsel for the Respondent

*phur*

5 referred to the case of ***Mwesigye Nicholas Vs P & A Credit Investments Limited HCMA 1677 of 2022***, where a litigant sought to set aside a decree because it had not been able to access its ECCMIS account as a reason for non-appearance. The Court found it to be negligence of Counsel as an approach would have been made to Court or the IT personnel for help.

10 In conclusion, Counsel submitted that the Respondent was not under any obligation to link the Applicant to their case as their Counsel was aware that the Commercial Court Division had migrated to ECCMIS. Counsel for the Respondent prayed that Court dismisses the application.

15 Applicant's submissions in rejoinder

Learned Counsel for the Applicant disputed the Respondent's submission that upon the introduction of the ECCMIS system, issuance of hearing and mention notices by the Court became seldom. Counsel argued that the case of ***Mwesigye Nicholas Vs P & A Credit Investments Limited***  
20 ***(supra)***, is distinguishable from the facts at hand, as in that case the parties were linked to ECCMIS and as stated by the Respondent in his submissions, the Court found that when the notification was sent to the parties, they were deemed to have been served. Counsel for the Applicant contended that in the instant case, no notification was ever sent to the  
25 Applicant nor their Counsel.

Counsel also submitted that the issue before the Court is not about the mistake of Counsel, as claimed by the Respondent in his submissions but that the Applicant was never served with the mention date of 10<sup>th</sup> October, 2023.

30 In conclusion, Counsel for the Applicant contended that it is trite law that the Applicant be given a fair hearing since interest had been shown in

*phw*

5 defending the suit and that neither the Applicant nor its Counsel is guilty of negligence and prayed for the grant of this application.

Analysis and Determination

**Order 9 Rule 27 of the Civil Procedure Rules** under which this application is based provides that;

10           *“In any case in which a decree is passed ex parte against a defendant, he or she may apply to the Court by which the decree was passed for an order to set it aside; and if he or she satisfies the Court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the*  
15           *suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such*  
20           *defendant only, it may be set aside as against all or any of the other defendants also.”*

In the circumstances, the Applicant has to satisfy the Court that there was sufficient reason or cause that prevented him/her from appearing when the matter was called for hearing.

25 Though the law does not define what amounts to sufficient cause, case law has endeavoured to define the same and as relied upon by Counsel for the Applicant, in the case of **Florence Nabatanzi Vs Naome Binsobedde (supra)** as cited with approval in the case of **Hikima Kyamanywa Vs Sajjabi Chris (supra)**, the Supreme Court held that;

*phwé*

5                   *“Sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time.”*

In the instant case, Counsel for the Applicant contended that the Applicant and its Counsel at all material times attended all Court sessions, the last one being on 31<sup>st</sup> October, 2022, wherein the Court informed them that the ruling regarding the 3<sup>rd</sup> Defendant’s preliminary objection would be on notice. However, they were never notified of the same and that the suit was fixed for mention on 10<sup>th</sup> October, 2023, at 9:00 am without their notice.

I have carefully examined the record and observed that at the inception of ECCMIS, this suit was already filed physically. However, the Court adopted the use of ECCMIS and it was undisputed that the parties were aware of the same.

According to the averments of Counsel for the Applicant, it is shown that Counsel last appeared in the matter on 31<sup>st</sup> October, 2022. It is prudent for an Advocate to take due diligence to check on the status of his/her client’s case before the Court. Much as Counsel had diligently attended the previous Court sessions, Counsel should have taken keen interest in the matter and checked with the Court/IT personnel to ensure that all their cases were linked to ECCMIS since Counsel was aware that the Commercial Court Division was using the ECCMIS system.

However, it is trite that negligence of Counsel ought not to be visited on an innocent litigant and that a litigant ought not to bear the consequences of default by an Advocate unless the litigant is privy to the default or the default results from the failure on the part of the litigant to give the Advocate due instructions. (See: ***Zam Nalumansi Vs Sulaiman Lule***

***SCCA No.2 of 1992, Ggoloba Godfrey Vs Harriet Kizito S.C Civil***

*phwé*

5 **Appeal No.7 of 2006** and **Andre Bamanya Vs Sham Sherali Zaver, CACA No.70 of 2001).**

Further, since this was a case filed before the rollout of ECCMIS, I find that the explanation of Counsel for the Applicant relating to not being linked to ECCMIS by 10<sup>th</sup> October, 2023 is sufficient cause, in the  
10 circumstances, that prevented Counsel for the Applicant from appearing in Court on that day.

Considering the above and the fact that it is the legal obligation of this Court to all parties in legal proceedings to ensure the expeditious and fair administration of justice, I find the Applicant to have disclosed sufficient  
15 cause for the grant of the application.

Accordingly, this application is granted with orders that;

1. The ex parte judgment/decreed entered against the Applicant in Civil Suit No.514 of 2021 is hereby set aside.
2. Civil Suit No. 514 of 2021 is hereby fixed for hearing inter parties on  
20 **19<sup>th</sup> March, 2024** at **9:00am.**
3. Costs of the application shall be in the cause.

Dated, signed and delivered electronically this **26<sup>th</sup>** day of **February, 2024.**

25 

Patience T. E. Rubagumya

**JUDGE**

26/02/2024

7:45am

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