

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISCELLANEOUS APPLICATION NO. 622 OF 2011**  
***ARISING FROM HIGH COURT CIVIL APPEAL NO. 0031 OF 2000***

**JOHN WILLIAM BEYAGALA.....APPLICANT**

**VERSUS**

**YUNUSU KASUMBA.....RESPONDENT**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application by Notice of Motion brought under section 98 of the Civil Procedure Act and Order 43 rule 16 of the Civil Procedure Rules (CPR) to set aside the order of dismissal of the appeal made on 3<sup>rd</sup> December 2009, to re admit the appeal and allow the applicant to file submissions in court. The grounds of the application are that:-

- i) The then applicant's Counsel failed to make submissions and the applicant was not aware of this omission or mistake made by the Counsel.*
- ii) The applicant was not availed an opportunity to reply to the affidavit sworn by Mr. Nsubuga Nsambu on whose affidavit the court based its decision.*
- iii) The applicant is ready to make submissions if he is given a chance to do so.*

The grounds of the application are contained in the affidavit of **John William Beyagala** the applicant. It is opposed by the respondent who filed an affidavit in reply through his Counsel **Yusuf Nsubuga Nsambu**. Counsel filed written submissions on the application.

In his submissions, learned Counsel for the applicant relied on the evidence as deponed to in the affidavit in support by **John William Beyagala** the applicant. The applicant's evidence, as gathered from the said affidavit and its annexures, is that he is the appellant in civil appeal no. 0031 of 2000. In 2009 he engaged Mr. Senkezi an Advocate to represent him in the appeal. On 13<sup>th</sup> October 2009 the trial Judge made an order for the parties to make written submissions by 27<sup>th</sup> October 2009 and his Advocate undertook to do it. He however failed to make the submissions. Consequently, the trial Judge dismissed the appeal for failure to make submissions. The applicant further avers that he has just discovered the dismissal through his current Advocate Mr. Kityo. The applicant avers that the mistake was made by his former Advocate and he did not tell him why he failed to make the submissions. He avers that he wants the appeal to be heard on the merits. His Counsel submitted that there is sufficient cause for the Court to set aside the dismissal order as the applicant was unable to know what his Counsel had done. He submitted that a mistake or lack of attention or want of care on the part of Counsel is a good ground and sufficient cause to set aside an order of court. He also questioned the mandate of the respondent's Counsel to file the affidavit in reply which was not served on the applicant, denying him the opportunity to make a reply.

The respondent's Counsel, opposing the application, averred in his affidavit in reply that the misunderstandings between the applicant and his Advocate for failure to make submissions cannot be blamed on court, and that it would be unfair to set aside the dismissal order after the case has taken almost ten years in court.

I will not dwell on the issue raised by the respondent's Counsel as to which court is entertaining this application. This has been put to rest by the applicant's Counsel in his submissions in rejoinder that his heading of his submissions as being before the Chief Magistrate's court was a typing error. I have accepted the explanation.

The second point to consider is that raised by the applicant's Counsel about the mandate of the respondent's Counsel to file the affidavit in reply which was not served on the applicant. The record indicates that this application was filed in the court registry on 19<sup>th</sup> September 2011. Counsel for the respondent appeared before me on 20<sup>th</sup> February 2012 to hear this application. The applicant's Counsel was absent at the time but the applicant was present. By then the affidavit in reply was already on the court record. Court at that time was given the impression

that this matter had lasted twenty years. In the interests of expediency and given the tight court schedules, I directed the filing of written submissions within time schedules. In that regard, the question of whether there was mandate by this court in filing the affidavit in reply does not arise as it was already on the court record when the matter came up for hearing.

This takes me to the gist of this application.

Order 43 rule 16 of the CPR states as follows:-

***“Where an appeal is dismissed under rule 14 and 15 of this order, the appellant may apply to the High Court for the re admission of the appeal; and, where it is proved that he or she was prevented by any sufficient cause from appearing when the appeal was called for hearing...the court shall re admit the appeal on such terms as to costs or otherwise as it thinks fit.”***

I note that this rule applies to appeals that have been dismissed due to non appearance of the appellant when the appeal is called for hearing, and, though this does not arise in the instant case, where notice is not served in consequence of the appellant’s failure to deposit costs. In this case the appeal was dismissed for the appellant’s Counsel’s failure to file submissions. The situation under which such dismissed appeal can be reinstated is not covered by the said Order 43 rule 16 of the CPR. This could be because the situation where no submissions are made would require considering the appeal on the evidence available rather than dismissing it. Order 17(4) of the CPR is clear that if submissions are not given a Judge can go ahead and write a judgment. In the instant circumstances therefore this court finds it more appropriate to address this matter under section 98 of the Civil Procedure Act which was also cited by the applicant’s Counsel invoking this court’s inherent powers.

The applicant averred in his affidavit that his Counsel’s failure to make the submissions and the subsequent dismissal of the appeal by the trial Judge have just been discovered through his current Advocate Mr. Kityo, and that the mistake was made by his former Advocate who did not tell him why he failed to make the submissions. This infers that the applicant could not file his own submissions as he did not know what his Counsel had done or not done. There is a wealth of authorities to the effect that a mistake or lack of attention or want of care on the part of Counsel, or ignorance of procedure by an undefended litigant is a good ground to set aside an order of

court. See **Shaban Din V Ram Parkash Anamb [1955] EACA 48; Zirabamuzale V Corret [1962] EA 698; Ofono Yeri Appolo V Sanjay Tanna & Anor [2007] HCB 68.**

In my opinion the mistakes or negligence of Counsel in the way he handled (or mishandled) the appeal should not be visited on the client. The Client was not even aware that his Counsel had not made the required submissions. In the interests of justice, and in order to have this appeal heard on the merits, I find that the circumstances in this case are sufficient cause to set aside the order of dismissal of Civil Appeal No. 0031 of 2000. I would disagree with the respondent Counsel's submissions that the applicant is outside the time to appeal. The record indicates that the judgment in the Mengo civil suit no 703/1993 and the appeal was filed on 18<sup>th</sup> April 2000, which was in time. The factors which delayed the hearing of the appeal, including delayed typed proceedings, were outside the control of the applicant/appellant.

In the premises and on the foregoing authorities, I am satisfied that the applicant has proved the grounds of his application against the respondent. I therefore allow this application for the following orders as prayed:-

- i) The Order for dismissal of Civil Appeal No. 0031 of 2000 is set aside and the same is re instated to be heard on merit.
- ii) Costs of the application will be in the cause.

**Dated at Kampala** this 8<sup>th</sup> day of November 2012.

Percy Night Tuhaise

**JUDGE.**