



THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-MA-0063-2023
(ARISING FROM HCT-05-CV-CA-0039-2021)

MPIRIRWE COSTANCE ----- APPLICANT

VERSUS

1. KAMARAYO NATHAN

2. TASHOBYA ASSEZI

3. KAGARA PHILIPO ----- RESPONDENTS

Before: Hon. Justice Nshimye Allan Paul M.

RULING

REPRESENTATION

The Applicant was represented by Advocate Obed Ageswa from M/s Ngaruye Ruhindi, Spencer & Co. Advocates, while the Respondents were represented by Advocate Tumwebaze Emmanuel who was holding brief for Advocate Ben Muhumuza from M/s Tumwebaze Emmanuel Advocates & Solicitors.

BACKGROUND

The Applicant instituted this application on 23rd February, 2023 by notice of motion under Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13, Order 43 Rule 14 & 16, and Order 52 Rule 1 of the Civil Procedure Rules SI 71-1, seeking orders that;

1. The order dismissing Civil Appeal No.0039/2021 be set aside and that the appeal be re-admitted and restored on the cause list and a date be appointed for hearing it.
2. Costs of this Application be in the main cause.

The Application is supported by the affidavit of the Applicant, and opposed by the affidavit of the 1st Respondent – Kamarayo Nathan.

GROUND S

The grounds of the Application as stated in the Notice of Motion are as follows;

1. There was sufficient cause for the non-appearance of the Applicant/Appellant and his Advocate when the Appeal was called for hearing and dismissed on 8th February, 2023.

2. The Applicant has been vigilant in prosecuting the appeal which has overwhelming chances of success.

3. The Applicant/Appellant will suffer irreparably if this Application is not granted.

4. That the Applicant is dissatisfied with the ruling and order of this Court dismissing Civil Appeal No.0039 of 2021.

5. That Civil Appeal No.0039 of 2021 was fixed for hearing and dismissed without the notice of the Applicant.

6. That Civil Appeal No.0039 of 2021 was fixed by Court for hearing before Justice Jane Kiggundu unfortunately she went into retirement and the file lost position.

7. That the last time the Appellant appeared in Court she was informed by Court that she would come back to Court on 28th February, 2023 for hearing.

8. That she went to check on the status of Civil Appeal No.0039 of 2021 at Mbarara High Court on 21st February, 2023.

9. That the Court entered the dismissal order in Civil Appeal No.0039 of 2021 in the absence of both counsel for the Applicant and counsel for the Respondent and without service of the same on her.

10. That the Applicant did not attend Court on 8th February, 2023 because she was not aware of that hearing date for her appeal as she knew that the hearing date was 28th February, 2023 not 8th February, 2023 and that she was never served with Court process for 8th February, 2023 in Civil Appeal No.0039 of 2021.

11. That she is desirous of being heard in Civil Appeal No.0039 of 2021 since it touches the land, she has stayed on for over 30 years.

12. That the Appellant was prevented from appearing in Court on 8th February, 2023 by sufficient cause when Civil Appeal No.0039 of 2021 was called for hearing and dismissed for nonappearance.

13. That the appellant will suffer irreparably if this application is not granted.

14. That it is just and equitable that the applicant be granted the orders herein sought.

15. That it is just and equitable that this Application is allowed in all terms prayed for.

SUBMISSIONS

5 Both parties filed written submissions. The Applicant filed his submissions on 17th May, 2023, while the 1st Respondent filed his submissions on 26th May, 2023. The Applicant rejoined on 20th June, 2023.

Applicant's submissions

10 The Applicant's counsel raised a preliminary objection and prayed for the 1st Respondent's affidavit in reply to be struck out for having been filed beyond the 15-day timeline set by Order 12 Rule 3(2) of the Civil Procedure Rules SI 71-1.

Regarding the merits of the Application, counsel framed two issues;

- 15
1. Whether there is sufficient cause for setting aside the dismissal order
 2. What remedies are available to the Applicant

Counsel submitted that the Applicant's sufficient cause upon which her quest for setting aside the order dismissing Civil Appeal No.0039 of 2021 is premised
20 is that she did not attend Court on the day fixed for hearing of the appeal on 8th February, 2023, because she thought the hearing date was 28th February, 2023, and secondly that she was not served with a hearing notice for 8th February, 2023. Counsel further relied on Article 28 of the Constitution to argue that the Applicant has a non-derogable right to a fair hearing; and concluded by praying
25 that the Application is allowed and Civil Appeal No.0039 of 2021 be cause listed for hearing.

1st Respondent's submissions

In response to the preliminary objection, counsel contended that Order 12 Rule
30 3(2) of the Civil Procedure Rules SI 71-1 concerns filing of responses to interlocutory applications and that it is inapplicable in this situation which is a post-judgment application. Counsel prayed for the objection to be overruled.

Counsel argued that the Applicant did not prove sufficient cause given that she
35 attended a pre-trial session before this Court's learned Deputy Registrar on 17th October, 2022 wherein instructions were issued for filing submissions by the

respective parties and the hearing date. Counsel blamed the Applicant for being negligent if she did not inform her lawyers about the same and contended that she cannot hide under the principle that mistake of counsel ought not be visited on a client.

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Applicant's rejoinder

The Applicant's counsel reiterated his earlier submissions and further contended that it would be a mischief for there to be no timeline for filing of affidavits in such applications as counsel for the 1st Respondent argued. Counsel
10 prayed for the preliminary objection to be upheld.

DETERMINATION

Preliminary objection

I will first deal with the preliminary objection raised by the applicant that the
15 respondent's affidavit in reply was filed out of time and as such ought to be struck out from the record. She contended that the preliminary objection raised is based on **Order 12 Rule 3(2) of the Civil Procedure Rules SI 71-1** (see page 2 & 3 of the applicant's submissions).

20 In my opinion whereas an affidavit in reply to a notice of motion ought to be filed within fifteen days after service of the notice of motion. The law relied upon by the applicant in her preliminary objection is not the appropriate one. Order 12 Rule 3(2) of the Civil Procedure Rules (CPR) SI 71-1 applies to interlocutory applications, in this case we are not dealing with an interlocutory application,
25 but an application seeking to set aside an order dismissing an appeal. The appropriate law would have been Order 8 rule 2 of the CPR read together with Order 49 rule 2 of the CPR.

The application at hand was brought by way of a notice of motion. The law in
30 Order 49 rule 2 of the CPR addresses service of motions stating that:

"All orders, notices and documents required by the Act to be given to or served on any person shall be served in the manner provided for the service of summons"

Then Order 8 rule (2) of the CPR dealing with defences states;

5 *"Where a defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons."*

In my opinion it therefore follows that the respondent's affidavit in reply, is basically her defence to the application and as such it ought to have been filed within fifteen days from service of the notice of motion on them.

10 I have studied court record and find that this application (HCMA 63 of 2023) was served on the respondent's lawyers on 9th March 2023 and an affidavit in service sworn by Maganja Naome was filed in court on 10th March 2023 (see appendix 1 to the applicants written submissions). The respondent using the same lawyers that had been served with the application, filed an affidavit in reply on 27th
15 March 2023.

I find that the respondent's affidavit in reply was filed more than 15 days after the respondents were served with the notice of motion, to that extent the affidavit in reply was filed late and no extension of time was sought from court
20 to file a late affidavit in reply. The extension of time would have been done under Order 51 rule 6 of the CPR that deals with enlargement of time.

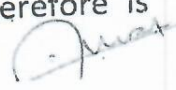
I therefore uphold the applicant's preliminary objection and strike the respondent's affidavit in reply off the record because it was filed out of time.

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Issue 1.

Whether there is sufficient cause for setting aside the dismissal order.

I note that the applicant neither attached to her pleadings the order of dismissal
30 that she is seeking to set aside nor did she state in her pleadings the law under which the appeal was dismissed. It is important to attach to the applicant's application the order that she seeks to set aside, or in the alternative she ought to have stated the law under which the dismissal order was made, because different dismissal orders require different aspects to be proved if
35 reinstatement is to be considered. The applicant's application therefore is



missing a fundamental aspect required for court to give proper evidence-based consideration.

5 I have perused the appeal file in HCCA 39 of 2021 from which this application arises and find that the appeal was dismissed on 8th February 2023 under Order 43 Rule 14 (1) of the CPR. The typed and signed court order is on the appeal court file, it did not even need the applicant to extract it. I will consider it since it is in a court file. When an appeal is dismissed under Order 43 Rule 14 (1) of the CPR, the recourse in law to reinstate the appeal as is provided in Order 43
10 Rule 16 of the CPR.

ORDER 43 RULE 16 OF THE CIVIL PROCEDURE RULES SI 71-1 provides;

"16. Readmission of appeal dismissed for default.

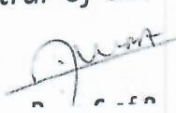
15 *Where an appeal is dismissed under rule 14 or 15 of this Order, the appellant may apply to the High Court for the readmission of the appeal; and, where it is proved that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit." (emphasis mine).*

20 In an application of this nature that is basing on order 43 rule 16 of the CPR, the Applicant has to prove that they were prevented by sufficient cause from appearing when the appeal was called on for hearing. They then pray that Court set aside the order dismissing the appeal that it made when the appellant did
25 not appear in court.

The evidence on court record shows that the sufficient cause put forward by the applicant for not attending Court on the hearing date on 8th February 2023 is that she thought the hearing date was 28th February, 2023, not 8th February,
30 2023 and secondly that she was not served with a hearing notice for 8th February, 2023 (see paragraphs 5-10 of the affidavit in support).

In her evidence contained in Paragraph 5 of the affidavit in support she avers that;

35 *"That the last time I appeared before court the Deputy Registrar of the High Court gave me 28/2/2023 as the next hearing date".*



17/11/2022 as ordered by court, actually had they filed their submissions a dismissal would not have been possible because the court would then give its judgement on 8th February 2023 with or without their presence.

5 Orders issued by court as to deadlines of filing submissions ought to be respected and if a party is unable to comply with the court ordered timelines, the recourse is to seek an extension of time because the time lines are not useless and cannot be issued in vain.

10 The failure to adhere to court orders in respect the two dates, one for filing submissions and another for appearing in court on scheduled date, are all omissions for which the Applicant and her Advocates are to blame. In my view failure to comply with Court orders is fundamental and portrays the applicant as a party that is not really interested in pursuing her appeal.

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Issue 2

Remedies

In conclusion, I find that the applicant has not discharged her obligation to prove sufficient cause to warrant the setting aside the order dismissing High Court Civil

20 Appeal no 39 of 2021. I therefore order that;

1. This application is dismissed.
2. No order as to costs is made since the respondent's affidavit in reply was struck off the record.

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NSHIMYE ALLAN PAUL M.

JUDGE

01-12-2023

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