

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT NAKAWA**  
**MISCELLANEOUS APPLICATION NO. 585 OF 2013**  
**(Arising from HCCS NO. 173 OF 2013)**

**MUSA SBEITY &**

**ANOR:.....**

**APPLICANTS/DEFENDANTS**

**VERSUS**

**AKELLO**

**JOAN:.....**

**RESPONDENT/PLAINTIFF**

**Before: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA**

**RULING**

Musa SBeity herein referred to as the 'Applicant' brought this Application by Notice of motion under Section 98 of the Civil Procedure Act Cap 71; O.36 Rules 11 and Order 52 Rules of the Civil Procedure Rules (CPR) S. I, 71-1 The Application is for orders that:-

1. The Default Judgment and Decree entered by this Honorable Court on the on 22/11/13 be set aside;
2. That the Defendants/Applicants be granted unconditional Leave to defend the main suit vide HCCS NO. 173 OF 2013.
3. That the Costs of this Application be provided for.

The Application is supported by the Affidavit of Tumwesigye Wycliffe, an Advocate.

The Applicant was represented by Counsel Kitakule Shamim of M/s Okecha Baranyanga & Co. Advocates whilst the Respondent was represented by Counsel Rebecca Athieno of M/ s Omara Atubo & Co Advocates.

The back ground of this Application is that the Plaintiff/Respondent On the 24<sup>th</sup> day of January 2011, took her motor vehicle, registration N0. UAP 888G, a Nissan Path finder for repair at the premises of the 2<sup>nd</sup> Defendant/Applicant where it was handed to the 1<sup>st</sup> Defendant/Applicant. The Plaintiff/Respondent filed a suit against the Defendants/Applicants vide HCCS N0. 173 OF 2013 for a recovery of US \$ 72,050 (Seventy Two Thousand Fifty United States Dollars) as the purchase price of M/V Reg. N0. UAP 888G of US \$ 40,000, taxes paid on the said vehicle of US \$ 11,550, alternative transport for two and a half years of US \$ 14,000, interest money paid for the purchase of a gear box; US \$ 6,500 and costs of the suit jointly and severally.

Both Counsel appeared before this Honorable Court on the 21/1/13 for their submissions. Ms. Kitakule Shamim, Counsel for the Applicant argued that she was served on the 11/9/13 whereby she filed a Leave to appear and defend on 18/9/13. Ms. Kitakule argued that she tried to secure a hearing date for hearing but in vain. It was Counsel Kitakule's submission that she could not have the matter fixed because she was reliably informed that the Trial Judge was in a Session.

The Learned Counsel Kitakule informed this Honorable Court that she learnt that the Default Judgment had been entered prematurely on 22/11/13 as there was an application filed for Leave to appear and

defend the suit. She asked this Honorable Court to allow this Application.

In reply to Counsel Kitakule's Application, the Learned Counsel Ms. Rebecca Athieno for the Respondent intimated to Court that the summons were served on 11/9/13. She further submitted that an Application for a Default Judgment was made on 7/10/13. The Learned Counsel Ms. Athieno submitted that when she appeared before this Honorable Court on 8/10/13, there was no Application for Leave to defend as claimed by Counsel for the Applicant, Ms. Kitakule. Counsel Athieno objected to this Application on ground that the Applicant has no valid defence and that their intention is to delay justice. Ms. Athieno contended that since there was no Application for Leave to appear and defend, the said Application as claimed by the Applicant is wrongly brought before this Honorable Court. She believes that the application was filed without paying the necessary Court fees. Therefore, it should not be entertained before this Court. Counsel Athieno asked Court to dismiss this Application and award costs to the Respondent.

In re-joinder, Counsel Kitakule maintained the fact that Application No. 463 in respect of which a Default Judgment was issued on 18/9/13 was valid. I recall Counsel Athieno's submission that, the Affidavit was picked from this Honorable Court on the 22/9/13 by Counsel to Applicant's Clerk. Ms. Athieno also informed this Court that the documents filed by the Applicant were not commissioned necessitating her to point out this fact to the Applicant's Counsel. It was Counsel Athieno's submission that the documents did not bear the signature of the Clerk on the Court stamp.

In order for me to make an informed Ruling, I requested Counsel for the Applicant, Ms. Kitakule to avail this Honorable Court with a copy of the receipt to show that she paid the Court fees. I have looked at the payment receipt produced by Counsel. I have noted that the date of payment was 18/9/13 at 1:25 PM.

Counsel for the Respondent informed this Honorable Court that the Application for a Default Judgment was made on 7/10/13 and that when she appeared before this Court on 8/10/213, there was no Application for Leave to defend on the file. I have carefully perused the additional Affidavit in reply to the Notice of Motion sworn by Akello Joan, the Respondent, on 20/1/14. In paragraphs 2 & 3, of the said Affidavit, she acknowledges the fact that summons were served on the Defendants/Applicants on 11/9/13 and that on 7/10/13 upon perusal of the file, there was no Application for Leave to appear and defend. Similarly, in paragraph 4, the Deponent states that her Counsel filed an Affidavit of Service on 8/10/13 but still, there was no application pending.

In Paragraph 5, Ms. Akello Joan states that an Application for a Default Judgment was filed on 14/11/2013 when she appeared before the Deputy Registrar on 22/11/13, when the Default Judgment was entered. I have also taken keen interest in the averments in Paragraphs 6, 7 and 8 of Ms. Akello's Affidavit to the effect that prior to entering the Default Judgment, the Deputy Registrar took it upon herself to go through the file and ascertain whether there was no pending Application. Indeed, she found out that there was no pending Application that had been filed.

The Application to set aside the Default Judgment was brought under the provisions of Order 36 rule 11 CPR and S.98 of the Civil Procedure Act. Order 36 rule 11 provides that

*“After the decree the Court may, if satisfied that **the service of the summons was not effective, or for any other good cause,** which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the Defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.”*

Counsel for the Applicant told Court that she filed an Application for Leave to appear and defend. I will not go into details as I have already discussed it above. It is interesting to note that Counsel for the Applicant filed the Application for leave to appear and defend but the record did not reflect the same. I am convinced that Deputy Registrar together with the Clerk were diligent in perusing through the file before entering the Default Judgment. Counsel claimed that she filed the Application for Leave to appear and defend but failed to get a hearing date because the Trial Judge was in a Session. I do not believe her because nothing was put down on the Court file to show that the Application had been filed. I am left with no choice but to conclude that Counsel Kitakule sneaked the Application in the File to appear as if the same had all along been filed at the appropriate time.

I am aware of the doctrine that a man or woman who empowers an agent to act for him/her is not allowed to plead ignorance of his/her agent's dealings. (See the case of ***Twiga Chemicals v. Viola Bamusedde Bwambale, C/A Civil Appeal No 9 of 2002***). However, in ***Captain Philip Ongom v. Catherine Nyero Owota, S/C Civil Appeal No.14 of 2001***, it was held that it is an elementary principle

of our legal system, that the acts and omissions of the advocate in the course of representation bind a litigant who is represented by an advocate. However, in applying that principle, the Court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. It was further held that a proper guide is needed in applying the principle. At the base of this is the fact that the Advocate's conduct should be geared towards pursuit of and within the scope of what the advocate was engaged to do. In light of that, a litigant ought not to bear the consequences of the Advocate's default, unless the litigant is privy to the default, or that the default results from failure on the part of the litigant to give to the Advocate due instructions.

It is now a settled principle of law in our jurisdiction that mistakes of Counsel, however, negligent should not be visited on a litigant. In ***Banco Arabe Espanol vs. Bank of Uganda SCCA No. 8/1998 [1997-2001] UCL 1, Oder, JSC (RIP)***, while giving the background to the development of this principle stated that:-

*"The question of whether an "oversight", "mistake", "negligence", or "error", as the case may be, on the part of counsel should be visited on a party the Counsel represents and whether it constitutes "sufficient reason" or "sufficient cause" justifying sufficient remedies from courts has been discussed by courts in numerous authorities. Those authorities deal with different circumstances; and may relate to extension of time for doing a particular act, frequently in cases where time has run out; some of them concern setting aside a Default Judgment as in the present case. But they have a common feature whether a party shall, or shall not, be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default of his professional advisor or advisor's clerk."*

As seen from that background, the rationale behind that principle is that a litigant should not be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default of her professional advisor or advisor's clerk. This principle was therefore established in the interest of substantive justice. There are many other authorities in Uganda where this principle was stated with approval. They include; **Hajji Nurdin Matovu vs. Ben Kiwanuka SCCA No. 12 of 1991** (Unreported), **Alexander Jo Okello vs. Kayondo & Co. Advocates SCCA No. 1 of 1997** (Unreported) and **Andrew Bamanya v Shamsherali Zaye CAC Application No. 70 of 2001**, where Mukasa-Kikonyogo, DCJ (as she then was) observed that mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant.

As regards "*good cause*," the phrase is not defined in the CPR but it is defined in **Black's Law Dictionary, Seventh Edition**, as; "*A legally sufficient reason*". The authors explained that "*good cause*" is often a burden placed on a litigant (usually by a court rule or order) to show why a request should be granted or an action excused.

The phrase "*sufficient cause*" that is usually used interchangeably with the phrase "*good cause*" has been explained in a number of authorities. In the cases of **Rosette Kizito v Administrator General and Others Supreme Court Civil Application No. 9/86** reported in **Kampala Law Report Volume 5 of 1993 at page 4**, it was held that "*sufficient reason*" must relate to the inability or failure to take the particular step in time.

In **Nicholas Roussos v Gulamhussein Habib Virani & Another, Civil Appeal No.9 of 1993 (SC)** (unreported), the Supreme Court laid down some of the grounds or circumstances which may amount to "*sufficient cause*." They include mistake by an advocate through

negligent, ignorance of procedure by an unrepresented defendant and illness by a party.

Taking into account the above explanation of the phrase “*good cause*,” the Applicants had the burden to show why their failure to file an application for Leave to appear and defend the suit in time should be excused. This required them to state a justifiable reason why they did not take the necessary action. I have carefully perused the Affidavit in support of this Application and the submission of Counsel for the Applicants but I do not find any cogent or sufficient reasons advanced by the Applicants for their inaction.

The other point I wish to note is the objection raised by Ms. Athieno that that the Affidavit filed by the Applicant in this case does not bear the signature in the stamp neither was it commissioned. The Applicant’s Counsel does not dispute this fact and she did not also submit on the same. In the case of ***Sagu V Roadmaster Cycles (U) Ltd [2002] 1 EA 258 (CAU)***, it was held that a defect in the jurat or any irregularity in the form of the Affidavit cannot vitiate an affidavit in view of Article 126 (2) (e) of the Constitution of the Republic of Uganda. Further it was held that a Judge has power to order that an undated Affidavit be commissioned and signed but Court may penalize the offending party in costs. The same position was stated in ***Kebirungi Justine V M/S Road Trainers & 2 Ors MA No. 285 of 2003 arising from Civil Suit No. 687 of 2002***, where Honourable Ruby Aweri Opio J. made some observations. I take note of the fact that Counsel for the Applicant did not take any step to show that the defect in the Affidavit was an oversight or otherwise. In



that regard, I find that the Affidavit filed by Counsel was incompetent and I accordingly strike it out.

In my considered opinion, I find that the Applicant and her Counsel have not furnished this honourable Court with “*sufficient cause*” for not entering an appearance when the Application for a Default Judgment was entered.

In the circumstances, this Court has no option but to dismiss this Application. Costs of this Application are awarded to the Respondent and it shall be paid by Counsel for the Applicant personally because of her failure to act in time and for not providing a justifiable reason or sufficient cause for her failure thereby giving rise to this Application.

I so order

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**HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA**  
**JUDGE**

24/01/014