

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-MA-217-2012
(ARISING OUT OF MISC. APPLICATION NO. 16 OF 2012)
(ARISING FROM MISC. APPLICATION NO. 15 OF 2012
AND
(ARISING OUT OF CIVIL SUIT NO. 18 OF 2012)**

- 1. CAPTAIN GERALD WILLIE OKWEYO
2. ALICE B. OKWEYO.....APPLICANT**
- VERSUS**
- 1. ODEKE ISMAEL
2. RUKIA SALIM.....RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

The applicants brought this application under section 98 of the Civil Procedure Act, Order 9 rule 27 and Order 52 rule 1 and 2 of the Civil Procedure Rules for orders that this court sets aside the dismissal of Misc. Application No.16; and orders for its re-instatement.

Secondly that execution of Misc. Application 16/2012 be stayed, and costs be provided for. The application was filed by Notice of Motion and is accompanied by the affidavit of **AGOE PRISCILLA**, Counsel for applicants.

In her affidavit, **Agoe** deponed to the fact that as lawyers for applicants, they tried several times to have Misc. Application 15/2012, and 16/2012 fixed for hearing but to no avail.

They were not aware that the case had been fixed for hearing and they had never been served with a hearing notice.

When the matter came for hearing on 15/1/2014, by consent of both counsel, court granted the parties a schedule within which to file written submissions, so that by the 13/2/2014, the matter comes back to court for mention. The agreed dates have since expired without the applicants filing their submissions.

Respondents however forwarded to court, a submission in Reply to the application in which they stated that:

1. The affidavit in reply sworn in support of the application filed by **Agoe Priscilla**, a lawyer who by law cannot swear an affidavit in support of an application (being counsel). That affidavit in law becomes hearsay.

He referred to the cases of *Jinja Cr. Case No. MJ 478/74 (1974) HCB 2014* and *Bingira v. Uganda [1966] E.A. 445* where the applications before court were dismissed for being defective and being based on hearsay respectively.

I have gone through the stated affidavit, and I agree with counsel that it offends the provisions of O.19 r.3(1). It does not confine itself to factors that the deponent is able of her own knowledge to prove, neither does it show which statements are of her belief and knowledge and the grounds upon which that belief is premised. The

affidavit is omnibus and alludes to hearsay in its use of the form “we”. In the result, I agree with respondents that this affidavit is defective.

Secondly the Respondents have pointed out that the applicant brought the application under the wrong Rule that O.9 r.27 which concerns itself with setting aside a decree ex parte against the defendant. This is outrageous, yet the suits were dismissed under the provisions of O.17 r.4. The arguments by counsel on this premise are correct, and this court upholds them. A dismissal done by court under O.17 r.4, is a “decision” of the court under the wording of O.17 r.4. It is therefore not available for setting aside under O.9 r.27, (which deals with ex parte decrees).

The applicants have not bothered even in this case to file their submissions which is indicative of their failure to attend court the first time matter was before dismissal. I find no merit in this application and agree with counsel for respondents on all points raised in reply. I adopt the reasoning in *Sebugulu v. Daniel Katuda [1979] HCB*, and *Salem Zaidi vs. Faud Humadan [1960] EA 92*, in upholding the dismissal of the said suits.

The application is rejected and is dismissed with costs to the Respondents. I so order.

Henry I. Kawesa

JUDGE

09.04.2014