THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-O4-CV-MA-314-2014

OBAI JOSEPH :: APPLICANT

VERSUS

ARIONG BARNABAS :: RESPONDENT

BEFORE: HON. MR.JUSTICE HENRY I. KAWESA

RULING

This is an application by Notice of Motion. It's brought under Article 126 (2)(e) of 1995, Section 98 CPA and 046 r1 (1) (a), 8, and O.52 r 3 CPR.

It seeks orders that:

1. Orders made on the 11/9/2014 in High Court Misc. Application No.0231 / 2013 be reviewed and be set aside.
2. Costs be in the cause.

It's supported by the affidavit of the applicant Obai Joseph. The affidavit in paragraph 4 alleges that applicant was coned by a one "Kiirya masquerading as a lawyer, who he gave documents to file for him and even paid him legal fees deposit. In paragraph 7, he later discovered that he had coned him.

In reply Nyakecho Rachael for Omara Atubo & Co. deponed that the applicant failed to prosecute the matter, and instead filed a false affidavit. In paragraph 5 she points out i.e applicant was represented by Musiiho & Co.advocates and in paragraph 6 that on 9/7/2014 in court the applicant had services of senior counsel Okuku.

In paragraph 7 he prayed that the applicant came to court with dirty hands, trying to adduce new evidence. In paragraph 9 she points out the applicant is coming up with new facts on review which should be rejected.

In arguing the application, Counsel Mwambu for the applicant relied on the affidavit in support paragraph 3, 4, 5, 6 and 7 to argue that as per affidavit applicant had shown reasonable cause for failing to prosecute. He relied on 0.46 r (1) (1) (a) and Re *Nakivubo chemist v Attorney General 1979 HCB 12* that once court is shown by applicant that there is sufficient reason the application should be granted. He argued that sufficient i.e by virtue of Article 126(2) Justice should be administered with no regard to technicalities.

In reply Counsel for the respondent argued that Under O.46 CPR, the grounds to prove in such an application are:-

1. Discovery of new important matter in evidence.

She argued that the application raises no important matter or evidence.
She argued that Rules were made for Courts to follow, and Artickle 126 is not applicable. She said i.e the applicant did not come with clean hands since he swore to falsehoods.

In cross reply Mwambu claimed that O.46 raises 3 grounds;

i) Discovery of new matter
ii) Falsehood or mistake
iii) Any other sufficient reason. He claims their moving under *"any other sufficient reason"*

I have gone through the application. The grounds necessary for proof under

> *"O.46 are discovery of new and important matter of evidence which after exercise of due diligence was not within his or her knowledge, mistake or error apparent on face of the record or any other sufficient reason."*

From the affidavit in support of the application he alleges in paragraph 4,5,6,7, that a one "Kiirya" was the cause of his failure to file and prosecute his appeal on time. Apart from these allegations, there is no other factor alleged by the applicant.

However in the Respondent's affidavit in reply the above assertions are controverted under Nyakecho's affidavit paragraphs 5 , 6, 7 and 8.

As rightly argued by Counsel for respondent, the applicant has not shown any discovery of a new fact/matter, or a mistake/error on the record. Is there therefore any other sufficient reason on record?

When Miscellaneous Application No.231/13 was called in Court for hearing, applicant was duly represented and even had submissions filed for him by a law firm of Mbale Law Chambers. He therefore had ample time to raise the issue of the conman called "Kiirya" and would have explained it as the cause of his failure. However in that application, he swore an affidavit and Counsel based on it to argue that "He received the typed copy of proceedings late and was way laid by assailants and injured and underwent treatment for one year, by reason of which he could not serve the respondent with a Notice of Appeal. (See Respondent's submissions on record in Miscellaneous Application No.231/2013. For the applicant to file another application and now claim a different set of facts to explain the same scenario is unacceptable. It amounts to coming to Court with "unclean" hands as pointed out by Counsel for Respondent.

I do not agree with Counsel Mwambu's application of Article 126(2)(e) of the Constitution to this deliberate abuse of the process of Law. Well as its true that Rules of procedure are handmaidens of justice, it is also important to note the jurisprudence laid down in the case of *UTEX INDUSTRIES LTD V AG SC CV APP 52/1995* that;

> *"Regarding Article 126(2)(e) and the Mabosi case we are not persuaded that the CA delegates intended to wipe out the rules of procedure of our Courts by enacting Article 126(2)(e). Paragraph (e) contains a caution against undue regard to technicalities. We think that the article appears to be a reflection of the saying that the rules of procedure are handmaids of justice – meaning that they should be applied with due regard to the circumstances of each case ...."*

In this case clearly the applicant has sat on his rights In spite of various opportunities availed to him to prosecute the appeal. The provisions of O.46 CPR are not in form but in content, so that failure to satisfy Court that the matter falls squarely under O.46 CPR is fatal to the application and cannot be cured by a resort to Article 126 (2)(e).

I therefore for reasons stated above agree with Counsel for respondents that this application is hanging. It does not show any sufficient ground to warrant review. It is disallowed and is dismissed with costs to the respondent. I so Order.

Henry I Kawesa
JUDGE
28.07.2015