**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT MBALE**

**HCT-04-CV-MA -0050- OF 2012**

**DINAH BUSIKU::::::::::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

1. **UGANDA LAND COMISSION ::::::::::::::::::::::::RESPONDENTS**
2. **MASUBA FRANCIS**

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

# RULING

Applicant brought this application by Notice of Motion under O. 9 r 23(1) and O. 52 R. 1 of the Civil Procedure Rules.

The application is supported by the affidavit of **Dinah Busiku** setting forth the grounds of the application.

The applicant under ground (a) of Notice of Motion states that she had justified cause for not appearing when CS 19/ 14 was called for hearing.

(b) That it's in the interest of justice that the suit be reinstated and be heard on merits.

(c) She has interest to prosecute the suit.

(d) No injustice will accrue to the Respondents if the suit is reinstated.

The Respondent opposed the application. According to the affidavit in reply sworn by **Masuba Francis** the application is a waste of time, and prayed in

paragraph 22 that if its granted he be awarded the taxed costs before the suit is set down for hearing and for final determination.

At the hearing counsel for the applicant informed this court that when the matter came up on 7th February 2017 , the applicant who has a long history of sickness was sick and unable to attend. However her lawyer did not attend the trial because he sent a colleague who also did not appear before the Judge having gone to a wrong court. He prayed that applicant be excused since she personally is interested in having the matter prosecuted. Counsel argued that this being a land matter it ought to be heard interparties; and no irreparable injury will occur.

Counsel for Respondent in opposing the application, pointed out that the applicant has no sufficient cause raised in the application. He points at counsel who was in attendance when the court gave instructions to parties on 6th October 2016 and adjourned the matter to 7.2.2017 ( in counsel's presence). He therefore argued that it is false to argue that the failure to attend court was excusable on account of the alleged sickness of the applicant. The fact that the colleague went to a wrong court was also frowned at by counsel for the Respondents as a ploy to evade the truth; that applicant's failed to attend the court, and also failed to follow the court orders to file witness statements and a joint scheduling memorandum.
He prayed that if court grants the reinstatement it should be with conditions that the taxed costs of this application be paid before the main suit is reinstated.

In Rejoinder applicant's counsel insisted that applicant was under a disability of sickness and could not attend court, nor instruct counsel regarding her witnesses yet she was the primary witness. He prayed that costs be in the cause.

From the above arguments two issues arise for determination:

1. Whether applicant has shown that she has sufficient cause.
2. Whether taxed costs should be conditional upon the grant.

I resolve them as follows:

**1. Sufficient cause**

Under O. 9 r. 23 of the Civil Procedure Rules:

> "*Where the suit is wholly or partly dismissed under Rule 22 of this order the plaintiff…. may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was <u>sufficient cause</u> for non appearance when the suit was called on for the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit*"

In this application applicant claims she was under a disability a fact proved by her affidavit and annextures thereto.(See paragraph 4, 5, 6) of affidavit in support of Motion , and ( paragraph 6, 7 and 8 of affidavit in rejoinder by applicant). I note that Respondent challenges this fact under paragraph 17 of the affidavit in reply.

The objection not withstanding there is documentary evidence of the sickness as attached on the pleadings.

This disability was therefore a reality.

The only question is, did this affect counsel's failure to attend as well?

The answer is No. The submissions by counsel for applicant and the pleadings all show that there was laxity of counsel. As a result of counsel's laxity there was no representative for the applicant in court, hence the dismissal. Is this excusable conduct?

It has been held in several cases that " Mistake of counsel should not be visited on the litigant. Such mistake of counsel has in most cases been interpreted as sufficient cause, but with each case turning on its peculiar circumstances. See ***Mary Kyomulabi V Ahmed Zirondemu Civil Appeal N0. 41/1979*** and ***Zamu Nalumansi V Sulaiman Lule CA. N0 2 of 1992***. The gist of all these cases is that it would be unfair and unjust to penalize the applicant because of the negligence of his Advocate.

In view of the above case law and the notion that; " the administrator of justice normally required that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of the his right..!! ( Per ***Mary Kyomulabi V Ahamed Zirondemu*****( Supra**); am inclined to conclude and hold that the failure to attend was mistake of Counsel.

The applicant was sick. These factors combined amount to sufficient cause for which I will allow the application and set aside the dismissal.

**2. Costs**

The Respondent prayed for taxed costs.

Section 27 of the Civil Procedure Act, provides that costs are within the discretion of the court.

The courts have in the process laid down procedures by case law to guide in the exercise of this discretion.

For purposes of this application, I notice that if it was not for laxity of the applicant's counsel this application would have been avoided , and hence respondent's would have avoided its costs. I do agree that the Respondent is entitled to the " *throw away costs*" or costs thrown away. These are " *costs arising from an order of court which requires a party whose conduct has resulted in the proceedings or any part of them being ineffective to pay the wasted costs, including the costs of the other party*."
(See: ***The Uganda Civil Justice Bench Book 1st Edition-.. 2016- LDC publishers page 224***) . Also ***Rwantale V Rwabutoga (1988-90) HCB 100.***

The prayer for taxed costs is rejected and replaced with an order that the applicant pays costs of the Respondents( thrown away) in this application.
These costs will be assessed and paid at the end of the main trial regardless of the outcome of the same.

The application is granted with costs to the Respondents in terms above. I so order.

**Henry I. Kawesa**

**JUDGE**

**05.07.2017**