

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 155 OF 2016
(ARISING FROM MISC. APP/APPEAL NO. 343 OF 2015
(ARISING FROM CIVIL SUIT NO. 382 OF 2014)

1. M.SHAH& CO. LTD
2. PARIKH HETAL
APPLICANTS
3. OWERE FRANCO
4. OBIRO ISAAC EKIRAPA
5. JOHN MUHAISE BIKALEMESA:.....APPLICANTS

VERSUS

MK FINANCIERS LIMITED:.....RESPONDENT.

BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO
(JUDGE)

RULING

This is an application brought under **Section 96 of Civil Procedure Act Cap 71** and **Order 51 Rule 6 of the Civil Procedure Rules S I 71 - 1)**, seeking for orders that ;

1. The time within which to file affidavits in reply to Miscellaneous Application No. 343 of 2015 be enlarged.
2. Costs should be provided for.

This Application is supported by the Affidavit of Hetal Parikh deponed on the 19th of April, 2016 which states the grounds briefly as follows;

1. That the Applicants all relied on the Affidavit of Hetal Parikh in opposition to the Respondent's Appeal.
2. That the said Affidavit deponed by Hetal Parikh in opposition to the Respondent's Appeal was found by this Honourable court to be defective and was stuck out.
3. That failure to file a proper Affidavit in reply by the Applicants was a mistake by the Applicants' lawyers.
4. That the Applicants are interested in opposing the Appeal and seek to be heard on the merits of the Appeal.
5. That it is just and equitable that this application is allowed.

The Applicants in this Application were represented by M/s Ekirapa & Co. Advocates and Respondent represented himself.

The Applicants filed written submissions and the Respondent made oral submissions.

In his submission Counsel for the Applicants contended that Mr. Hetal Parikh the 2nd Applicant and the Country Director of the 1st Applicant swore an Affidavit in support of this Application in a dual capacity.

Counsel in addition while citing the provisions of **Order 1 Rule 12 of the Civil Procedure Rules** which permits one of the Plaintiffs or Defendants in a case where there are more than one to appear, plead or act for the others with authority of such other party and that such authority must be in writing stated that the 2nd Applicant also depones the Affidavit on behalf of the other Applicants with their consent and authority as reflected by annexure "A" an attachment to the Affidavit.

The 2nd Applicant who deponed on behalf of all the other Applicants contends that the failure to file a proper Affidavit in reply was a mistake by the Advocate who is also the 4th Applicant herein.

While relying on the case of **Wanedeya William Giboni Vs Gibon Kibale Wambi; CACA No.8 of 2002**, where it was held that, "*An Applicant must show sufficient cause which must be related to inability or failure to take a particular step within a prescribed time and that unless guilty of dilatory conduct, a vigilant litigant should not be debarred from the pursuit of his rights on account of the negligence or omission of his Counsel and that the Administration of Justice requires that the substance of the dispute should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights*", to support his contention stated that the affidavit which was filed and struck out was as a result of mistake of his Counsel and that it is well settled that an error of Counsel should not be visited on his clients.

Counsel for the Applicants further contended that the purpose of Court is to determine disputes on merit and where there is a mistake or omission of Counsel that defeats this purpose, the Court can allow correction of such defect. That this Court has precisely done it by allowing the filing of this Application.

Counsel thus submitted that that this is a just and proper case where this Court can exercise its discretion to extend the time within which the Applicants should file Affidavits in reply to *Miscellaneous Application/Appeal No.343 of 2015; MK Financiers Ltd Vs N. Shah & Co. Ltd & 4 others*.

The Respondent in his reply opposed this Application on two major grounds; that is that there is no Application before Court in Law and that even if there is any Application, it does not disclose any sufficient cause to warrant the grant of the prayers.

The Respondent submitted that the Application is fatally defective for contravening clear provisions of the Commissioner for Oaths Act Cap 5, the Oaths Act Cap 19 and the Stamps Act Cap 342.

In terms of contravening the Commissioner for Oaths Act, the Respondent submitted that where as **Rules 8 & 9 of the Commissioner for Oath Rules** require all exhibits to be sealed as per the 3rd schedule, the said Authority attached as Annexure 'A' is not in line with the Law which is coached in mandatory terms as it is not dated. He thus relied on the case of **Chebei & Anor Vs Masai Labu COA Misc Application No. 41/2010**, where it was held that annexures which contravene Rules 8 & 9 cannot be relied upon in Law.

In regard to contravening the Stamps Act, the Respondent while citing the case of **Proline Soccer Academy Vs Lawrence Mulindwa**, where Justice Bamwine struck out the Application based on an unstamped document and held that failure to pay stamp duty is a matter of substance and not a mere technicality, contended that Annexure 'A' in this case the Authority is not stamped and that should be struck off.

The Respondent further submitted that Order **1 Rule 12 (1) of the CPR** does not extend to swearing Affidavits that if it did so, it would have provided for that clearly.

That an Affidavit must be sworn by a party himself

He contended that, the deponent had no authority to depone an Affidavit on behalf of the rest of the Applicants.

The Respondent submitted that the cases cited by Counsel for the Applicant in submission of **Wanedeya William Giboni Vs Gibon Kibale Wambi ; CACA No.8 of 2002** is distinguishable from this Application as it related to reinstatement of a suit which had been dismissed for nonappearance unlike the present Application which is for extension of time and that that case related to Counsel not renewing his practicing certificate which is not the case here.

That the application is defective.

In rejoinder Counsel for the Applicants contended that annexure 'A' to the Affidavit of Hetal Parikh was commissioned by Chris C.K Ndozireho, a Commissioner for Oaths, that the Affidavit bears a stamp name and signature of Chris C.K Ndozirebo, the same Commissioner of Oaths who

commissioned the Affidavit thus complying with the provisions of **Rule 8 of Commissioner of Oaths Rules**.

That the Affidavit of Hetal Parikh was commissioned on 19th April, 2016 at Kampala thus complying with section 6 of the Oaths Act that requires the place and date when the Affidavit is taken to be stated.

On the argument by the Respondent that that no stamp duty was paid on annexure 'A' and therefore the same was not admissible in evidence, Counsel for the Applicants contended that annexure 'A' is a pleading required by **Order 1 Rule 12 of the Civil Procedure Rules** which permits and or authorizes one of the Plaintiffs or Defendants to act, plead or do any act for the others where there is more than one plaintiff or Defendant and that such authority must be filed with the Court.

He thus submitted that Annexure 'A' is a pleading required by **Order 1 Rule 12 of the CPR** and therefore not subject to the Stamps Act, that even if it were subject to the Stamps duty under the Stamps Act, that the position of the Law is now clear that the duty of the Court is to determine whether the stamp duty is payable on a document and then give an opportunity to the party to pay such stamp duty. He thus cited the case of **PESA Finance Ltd Vs Loius Ntale ; Civil Suit No. 470 of 2009**, to support his Contention.

Counsel thus on the aspect of stamp duty in rejoinder submitted that Annexure 'A' is not liable to any duty but should this Court find that it is, that they be given opportunity for such stamp duty to be paid.

On the argument by the Respondent that **Order 1 Rule 12** does not extend to swearing Affidavits, Counsel for the Applicants cited the case of **Pearline Investments Limited Vs Kampala Capital City Authority & Anor; Miscellaneous Application No.23 of 2011**, where it was held that an Affidavit in support of a notice of motion is a pleading to support his contention stated that **Order 1 Rule 12** specifically mentions pleadings as one of the acts an authority under the Rules permits.

That the Respondent's submissions in that regard are misconceived.

Counsel also contended that **section 96 of the Civil Procedure Act and Order 51 Rule 6 of the CPR** permits this Court to extend time for doing any act under the Rules, that the Respondent's argument on Limitation and cases cited on it are misconceived since the issue of Limitation does not arise.

In this case the Applicants filed this Application and have demonstrated to this Court vigilance to have this matter disposed off on its merits.

As regards the deponing of the Affidavit on behalf of the other Applicants, The Respondent in this case contended that **Order 1 Rule 12 (1) of the CPR** does not extend to swearing Affidavits that if it did so, it would have provided for that clearly.

Order 1 Rule 12 reads as follows;

In the case of **Mukuye Steven & 106 others Vs Madhvani Group Limited Misc Application No.0821 of 2013**, Justice Bashaijah held that Order Rule 12(20) requires that the authority shall be in writing signed by the party giving it and shall be filed in the case where two or more plaintiffs or defendants and any of them may be authorized by any other of them to appear, plead or act for the other in any proceedings. In his decision, he stated that wording of the provision above, there is nothing that prohibits the deponent from swearing an Affidavit on behalf of others who have given him the authority in writing duly signed to represent them.

The Learned Trial Judge in that case held that the annexure to the Affidavit of the deponent meets the requirements under sub rule 2, that the form of Authority shall be in writing signed by the party giving it.

It is my considered opinion, relying on the authorities above that annexure 'A' in the instant case is not an instrument but a requirement under **Order 1 Rule 12 of the Civil Procedure Rules** which gives the deponent powers to act on behalf of his fellow Applicants.

As regards to the Affidavit and Annexure 'A' being defective since it is not dated, signed and commissioned as required by section 6 of Cap 5, its Court's considered view that the requirements under the Law of being

deponed and signed by the deponent has been met as it is dated, signed and commissioned as required by section 6 of Cap 5.

With regard to the Annexures to the Affidavit, in this regard I am compelled to find and Court finds that the requirements of the Law were complied with.

I am fortified in my finding by the case of **Egypt Air Corporation T/a Egypt Air Uganda Vs Suffish International Food processors Ltd & Anor SC Misc. Application No. 14 of 2000** where it was found that;

Sealing and marking of annexures to affidavits is a legal requirement which facilitates the easy identification of annexures.

In addition with regard to the contention that annexure "A" is supposed to be charged with stamp duty under the **Stamps Act section 2 (1)a**.

It is trite Law that the duty of the Court is to determine if stamp duty is payable on a document and then give an opportunity to the party to pay such stamp duty. (*see the case of PESA Financing Vs Lois Ntale C.S No. 470 of 2009.*)

As regards to whether the Application has not disclosed any sufficient cause to warrant the grant'

In this case Counsel for the Respondent contended that the Application is defective

Counsel for the Applicants on the other side stated that the delay was as a result of mistake on the part of his Counsel and that he has not been guilty of dilatory conduct.

According to **section 96 of the Civil Procedure Act**, it is provided that where a period is fixed or granted by Court by doing any Act, prescribed or allowed by this Act, the Court may in its own discretion from time to time enlarge the period even if the period originally fixed or granted may have expired.

The Courts in Uganda have held that in order for Court to exercise its jurisdiction to exercise the time, the Applicant has to show sufficient

grounds for failure to act on time (see the case of **Barko Arabe Espanol Vs Bank of Uganda Supreme Court Civil Appeal No.8 of 1998.**)

According to the case of **Barko Arabe Espanol Vs Bank of Uganda Supreme Court civil Appeal No. 8 of 1998** Oder JSC (as he then was) considered whether mistakes of an advocate amounts to sufficient cause.

The learned Justice held that the common feature in all the Applications where 'sufficient cause' has to be proved like in an 'Application for extension of time' is whether a party shall or shall not be permanently deprived of the right of putting forward a bonafide claim or defence by reason of the default of his professional advisor or advisor's clerk.

He cited the cases of **Keyor Kian and Bornon and Gitt vs Shoosmith** that have been relied on in cases in East Africa and Uganda like; **Shabin Bin Rampakrash Annd (1955) 22 EACA 48 48**, where it was held that, the mistake or misunderstanding of a Plaintiff's legal advisor even though negligent may be accepted as proper ground for granting relief under the equivalent of order 19 rule 20 of CPR.

That the discretion of Court being perfectly free and words "sufficient cause" not being comparable nor synonymous with "special grounds."

Whether the grounds would be acceptable depends on the facts of the particular case.

In this case, the Applicant filed an Application in Court, contrary to what Counsel for the Respondent stated and gave reasons for failure to file a proper response in time as failure on the part of his Counsel to advise them that the deponent could not depone the Affidavit on behalf of the other Applicants which led the Court to strike it out yet they are still being interested to be heard on the merits of the case.

The reason given here is the mistake on the part of Counsel to give them proper advise that the deponent had to have authority which they have now given (see copy on Court record.)

Counsel also relied on the authorities which state that a mistake on the part of Counsel should not be visited on his client.

Having carefully perused through the pleadings, the evidence on record and having heard from both the Counsel for the Applicants and the Respondent, I am of the considered opinion that, the Applicant has shown sufficient reason as to why court should exercise its discretion and extend the time within which he can file Affidavits in reply to Misc. Application No. 343 of 2015.

I am fortified in my finding by the case of **Shabin Bin Ram Pakrash Aund** (supra)

Besides that the Applicant has not been guilty of dilatory conduct

The Application is therefore allowed with costs in the cause.

Besides that, and Court finds that the Applicant has not been guilty of dilatory conduct in filing this Application,

The Applicant is granted permission to file the Affidavit within two weeks from the date of this Order and serve the Respondent.



Margaret C. Oguli Oumo

(Judge)

25/01/2017