

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**MISCELLANEOUS APPLICATION NO. 022 OF 2017**

**(Arising out of Miscellaneous Application No. 091 of 2016)**

5 **(Arising out of Civil Suit No. 001 of 2015)**

**WESTERN UGANDA IMPORTERS AND DISTRIBUTORS LTD.....APPLICANT**

**VERSUS**

**FRANK MWEBESA.....RESPONDENT**

10

**BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE**

**Ruling**

The Applicant Western Uganda Importers and Distributors Ltd brought this Application by Notice of Motion under **Article 126(2) (e)** of the Constitution of the Republic of Uganda,  
15 **1995, Order 9 Rule 23(1), Order 52 Rule 1 & 2** of the Civil Procedure Rules, **Section 98** of the Civil Procedure Act and **Section 33** of the Judicature Act. The Application for orders that; the order dismissing Miscellaneous Application No. 091 of 2016 be set aside; Miscellaneous Application No. 091 of 2016 be reinstated with all the orders in it and determined on merit; and provisions be made for the costs of the Application.

20 The Application is supported by the affidavit of John Paul Musede and the grounds briefly are;

1. Counsel in personal conduct of the matter was prevented by a sufficient cause from being in Court at the time when the matter was called up for hearing.
2. The Managing Director of the company was also prevented from being present in  
25 Court when the matter came up for hearing but he managed to send a member of the company Mrs Hellena Biira Bwambale who was present in Court by the time Court dismissed the application.

3. The matter before Court is a land matter where in the Applicant's land has been fraudulently taken away from it without being given a right to be heard through collusion.
4. The Respondent would not be prejudiced in any way if this application was granted.
5. It is just and equitable that this application is granted.

The application was opposed by the Respondent and two affidavits to that effect were filed with the following grounds:

- a. That due to the gravity of the case all parties were warned to be in court so that all matters involving the Applicant are fully handled.
- 10 b. That the Applicant and its Counsel were not present.
- c. That the affidavit of John Musede does not comply with the law and ought to be rejected.
- d. That the Powers of Attorney of the Respondent were dully registered.
- e. That there are inconsistencies and contradictions in Musede John's affidavit and what  
15 Hellena Bwambale told Court.
- f. That the Applicant has not advanced any sufficient cause for its non attendance.

**Brief back ground:**

The Applicant filed Miscellaneous Application No. 0091 of 2016 in this Honourable Court  
20 seeking inter alia to set aside a consent judgment that was entered between the Applicant and the Respondent on the 7<sup>th</sup> day of May 2015 in respect of Civil Suit No.001 of 2015.

This Application No. 0091 of 2016 was fixed by Court in the presence of all parties.

That on the 29<sup>th</sup> day of March 2018, all parties attended Court except the Applicant's Counsel who failed to attend without any explanation given to Court for non-appearance. The  
25 Honourable Justice Oyuko. Anthony Ojok therefore heard and dismissed Miscellaneous Application No. 0091 of 2016 with costs granted to the Respondent hence the instant Application.

M/s Tropical Law Advocates represented the Applicant and M/s Akampurira & Partners, Advocates and Legal Consultants represented the Respondent. By consent both parties filed  
30 written submissions.

**Issues:**

1. Whether the Applicant has shown sufficient cause to warrant grant of the orders sought?
2. Whether the Power of Attorney of Bylon Muagrura was valid or not?
- 5 3. Whether the Affidavit of John Musede was proper?

**Resolution of issues:**

**Issue 1: Whether the Applicant has shown sufficient cause to warrant grant of the orders sought?**

Counsel for the Applicant submitted that there was sufficient cause to warrant the absence of  
10 the Applicant’s Counsel and the case of **National Insurance Corporation versus Mugenyi and Company Advocates, 1978, H.C.B P. 28**, lies out the test for sufficient cause as under **Order 9 Rule 23** of the Civil Procedure Rules as;

*“The main test for reinstatement of a suit was whether the Applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the  
15 case and whether there was a prima facie defense to that case....”*

Counsel for the Applicant submitted that Counsel for the Respondent was well aware that Counsel for the Applicant was unable to attend Court on that day since he had informed him about another matter that he was in personal conduct of. That one of the members of the Applicant Mrs. Hellena Biira Bwambale was in Court on that day and asked to be put on  
20 record which was allowed. However, Court went ahead to dismiss the matter for want of prosecution.

Counsel for the Applicant added that the issue at hand touches land and this needs to be investigated and determined on its merits. That it would be unfair for a party to lose 22 acres without being heard as this would occasion a grave miscarriage of justice. Thus, the nature of  
25 the claim ought to be put at the forefront and whether there are any triable issues.

Counsel for the Respondent on the other hand submitted that when the Miscellaneous Application came up for hearing one Hellena Bwambale told Court that their Advocate was indisposed and the affidavit of John Musede says that Counsel in personal conduct of the matter had another hearing in a different Court. That these are contradictions indicating that

either Hellena Bwambale or John Musede is not telling the truth and thus this evidence should be rejected because they are grave in nature.

Secondly, that the Applicant had been warned about the gravity of the matter and that they were to deal with all matters before this Court, only for Counsel in personal conduct of the case not to attend Court. That this was a tactic to delay Court and it is in that light that the application was dismissed.

Thirdly, that the said Hellena Bwambale obtained Letters of Administration on the 28<sup>th</sup> day of June 2017 long after the hearing date and therefore did not have powers to represent the estate of the Late Bwambale Christopher at the material time of the hearing.

Thus, the said Hellena Bwambale did not have locus to represent the Applicant Company in Court at the time of the hearing of Miscellaneous Application No. 0091 of 2016.

Counsel for the Respondent went on to submit that the Applicant and Respondent entered into a consent agreement on the 7<sup>th</sup> day of May 2015 which was signed by the Chairman and Secretary of the Applicant Company, the Respondent's Attorney and both parties' Counsel. That on 29<sup>th</sup> March 2017, Matia Bwambale, Ivan Muhasa Mpondi, Wilson Mujumbi, the three validly elected Company Executive Board Members stood by the terms of the consent judgment and also that they never appointed David Bwambale to represent them in Court.

Further, that Counsel David Bwambale was in personal conduct of Miscellaneous Application No. 0091 of 2016 and he purportedly filed it on behalf of the Applicant Company seeking inter alia to set aside the consent judgment. That the issue to be determined by this Court is whether Counsel David Bwambale had authority to act for the Company in Miscellaneous Application No. 0091 of 2016.

Furthermore, that if Court were to grant the Applicant's prayers in this instant application and set aside the exparte ruling, the Application would be rendered useless as the subject matter of the suit has been overtaken by events. That the matter has been concluded and execution already took place therefore it has already been overtaken by events and would serve no useful purpose once it is reinstated. That in any event that the Applicants were dissatisfied with the consent judgment and Decree delivered in respect of the said Civil Suit No. 001 of 2015, the available remedy is by way of appeal against the same.

Counsel for the Respondent concluded that the Applicant has not shown sufficient cause to warrant grant of the prayers sought in this application and it should be dismissed with costs.

This Court has considered and internalised the submissions on both sides. It is on record that on 29/3/2018, all parties were in Court except the Applicant's Counsel. No explanation was given for his absence. The then presiding Judge, Justice Oyuko. Anthony Ojok, dismissed  
5 Miscellaneous Application No. 91 of 2016 with costs.

This Application is to set aside the dismissal order above. The law applicable is set out under **Order 9 Rule 23(1)** of the Civil Procedure Rules which provides:

*“Where a suit is wholly or partly dismissed under Rule 22 of this Order, the Plaintiff shall be  
10 precluded from bringing a fresh suit in respect of the same cause of action. But he or she may apply for an order to set aside the dismissal aside, and if he or she satisfies the Court that there was sufficient cause for non-appearance when the suit was called on for hearing, 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.”*

15 Counsel for the Applicant rightly quoted the case of **National Insurance Corporation versus Mugenyi & Company Advocates [1978] HCB 28**, where it was held that the main test for re-instatement was whether the Applicant honestly intended to attend the hearing and did his best. The other test was the nature of the case.

This Court's attention has been drawn to the submissions by Counsel for the Respondent that  
20 whereas one Hellena Bwambale informed Court that Counsel was indisposed and not able to attend Court on that day, the affidavit of John Musede in support of the application was that Counsel David Bwambale had another case in the land Division of High Court. The two versions by Hellena Bwamable and John Musede were contradictions which leaves this Court in doubt as to who of the two was telling the truth.

25 The law relating to contradictions and consistencies is well settled in a number of cases including **Makau Nairuba Mabel versus Crane Bank Ltd, HCCS No. 380 of 2009**, it was held that major inconsistencies intended to mislead or tell deliberate untruthfulness should be rejected. So in view of the grave inconsistencies in the evidence of the applicant through John Musede and Hellena Biira which point to deliberate untruthfulness, because either Counsel,  
30 David Bwambale was indisposed or attending another Court. He could not be indisposed and

at the same time attending to another case. This Court finds and holds that given such contradictions and inconsistencies then no sufficient cause has been shown by the Applicant.

Secondly, as pointed out by John Musede under paragraph 2 of his affidavit in support of the Application, the firm of M/s Tropical Law Advocates had instructions. The question is why didn't one of the lawyers in the firm attend Court if for any cause David Bwambale was not able to.

Furthermore, whereas the Applicant's Counsel submitted that one of the members of the Applicant, Ms. Hellena Biira Bwambale was in Court. However, Counsel for the Respondent submitted that Hellena Bwambale **obtained Letters of Administration on 28/6/2017, long after the hearing date of 29/3/2016.**

I agree with Counsel for the Respondent that Ms. Hellena Biira Bwambale did not have powers to represent the Estate of the late Bwambale Christopher as at 29/3/2016.

On the second test for purposes of setting aside the dismissal order or not, Counsel for the Applicant submitted that the merits of the case should not be delved into to the extent of determining whether or not it has a chance of success. He emphasised that what is important is the nature of the claim and whether there are triable issues.

Counsel for the Applicant further submitted that there was connivance and fraud during the sealing of the consent judgment which led to the Applicant losing 22 acres of land to the Respondent. And that it was a triable issue, necessitating the re-instatement of the main application and hearing of the main suit on the merits.

Counsel for the Respondent on the other hand submitted that on the merits, the Respondent and the Applicant company entered into a consent on 7/5/2015. And that the consent was signed by the Chairman and Secretary of the Respondent Company, the Respondent's Attorney and Advocates on both sides.

He quoted the case of **Attorney General & Another versus James Mark Kamoga & Another, SCCA No. 8 of 2004**, their Lordships held:

*"Prima facie, any order made in the presence and with the consent of Counsels is binding on all parties to the proceedings or action and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court... or if the consent was given without sufficient material facts, or in misapprehension or ignorance of*

*material facts, on in general for a reason which would enable a Court or set aside an agreement.”*

In the present case, on 29/3/2017 when Miscellaneous Application No. 0091 of 2016 was heard and determined, the Applicant Company was represented as per record by;

- 5 1. Matia Bwambale, the Applicant’s Director/Secretary.
2. Ivan Muhasa Mpondi, the Applicant’s Chairman/Director.
3. Wilson Mujumbi, the Applicant’s Treasurer/Director.
4. Mpondi John Claude, the Applicant’s undersecretary.

10 Three(3) of these are validly elected Company executive board members who stated that they stood by the terms of the consent judgment and also that they never appointed David Bwambale to represent them in Court.

So besides not attending the Court on that day, mandate of Counsel David Bwambale to represent the Applicant Company was questionable. That is why on record, my brother Justice Oyuko. Anthony Ojok stated:

15 *“Since the members of the Defendant’s Company have disowned the advocate who filed the application, I take it that the advocate has no locus in the first place, nevertheless, he has not turned up to this Court nor given any explanation why he is not in Court. Court should not be used as a centre for delaying justice. I therefore find no reason why I should not dismiss this Application with costs...”*

20 I entirely agree with the above ruling in the circumstances.

I further note that the substantive case was concluded between the Applicant and the Respondent through a consent judgment and execution has already taken, place. In the case of **Housing Finance Bank Ltd & Another versus Edward Musisi, Court of Appeal Civil Appeal No. 158 of 2010**, quoted by Counsel for the Respondent, it was held that Court orders  
25 are not and should not be issued in vain.

In this Application therefore, not only have I held that it has no merit as no sufficient cause has been shown, but the matter has been overtaken by events. I also want to add that litigants and the people of Uganda should appreciate the fact that litigation process has to come to an end. The Courts in this country will not resolve cases by going forward and the backwards,

particularly where a sincere and honest consent judgment devoid of fraud has been concluded. Issue No. 1 is therefore resolved in the negative.

**Issue 2: Whether the Power of Attorney of Bylon Muagrura was valid or not?**

Counsel for the Applicant submitted, that the Respondent made his reply through his lawful attorney Bylon Mugarura. Power of Attorney is dated 23<sup>rd</sup> February 2015 and the affidavit is dated 10<sup>th</sup> May 2017.

He added that according to **Section 2** of the Stamps Act 1<sup>st</sup> part of the schedule; Powers of Attorney is categorized among documents that are chargeable with duty. That the Powers of Attorney in the instant case never paid stamp duty and is therefore not admissible in evidence as per **section 42** of the Stamps Act. he concluded that it must be struck off because the deponent derived authority to depone it from those Powers of Attorney and nor can the supplementary affidavit exist since what it is supplementing does not exist.

Counsel for the Respondent on the other hand submitted that the Powers of Attorney of Bylon Mugarura were under the authority of the Respondent to act on his behalf and stamp duty was paid on the 23<sup>rd</sup> February 2015 and thus it is a proper and competent document. That the Respondent through his lawful Attorney, Bylon Mugarura swore a supplementary affidavit on the 29<sup>th</sup> September 2017 wherein they attached Powers of Attorney which clearly show that stamp **duty for the same** was paid.

The position of the law under **Section 42** of the Stamps Act is as follows;

“No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence or shall be acted upon registered or authenticated by any such person, or by any public officer unless the instrument is duly stamped.”

In the case of **Tobacco and Commodity Traders International Inc. Versus Mastermind Tobacco (U) Ltd, High Court Companies Cause No. 18 of 2002**, quoted by Counsel for the Respondent, the Honourable Justice James Ogola stated:

“All in all, the Court finds the Power of Attorney to be proper and competent in all respects. If however, any particular element is proved wanting, it would not be fundamental or fatal. It could be remedied in due course without any prejudice to the Respondent. Such a remedy



*could be effected either by amendment of the existing Affidavit or by permitting deposition of the supplementary affidavits...”*

Furthermore, in **Yekoyada Kaggwa versus Mary Kiwanuka (1974) HCB**, Odoki J(as he then was) held that;

- 5 “Generally, under Section 38 of the Stamps Act, any instrument on which a duty is chargeable is inadmissible in evidence unless that instrument is duly stamped... however, such unstamped instruments can be rendered admissible in evidence on payment of the duty with which the instrument is chargeable...”

In the present case, the Respondent, through his Lawful Attorney, Bylon Mugarura swore a  
10 supplementary affidavit on the 29<sup>th</sup> day of September 2017 wherein they attached Powers of Attorney (Annexure “A”), which clearly show that stamp duty for the same was paid on the 23<sup>rd</sup> February 2015 and duly stamped.

It is therefore, the finding and holding of this Court that the Powers of Attorney of Bylon Mugarura were proper and competent in all respects. The contention by Counsel for the  
15 Applicant that the supplementary affidavit of Bylon Mugarura cannot stand is hereby rejected.

### **Issue 3: Whether the Affidavit of John Musede was proper?**

The application in this case was supported by an affidavit of John Musede C/o M/s Tropical  
20 Law Advocates, Kampala. The same was allegedly sworn on 30/3/2017 before a commissioner for Oaths. Counsel for the Respondent submitted that the said affidavit does not comply with the law and should be struck out. He added that it has the following defects:

1. It bears no particulars of the Commissioner for Oaths.
2. It bears no stamp of the Commissioner for Oaths.
- 25 3. The affidavit bears no name or address of the Commissioner for Oaths.

Counsel for the Respondent concluded that the above are statutory requirements whose defect is not curable under **Article 126(2)(e)** of the Constitution.

Counsel for the Applicant on the other hand submitted that since the affidavit was commissioned, the absence of the stamp does not invalidate the same and that it is curable under **Article 126(2)(e)** of the Constitution.

5 He added that the affidavit was signed by Commissioner Mbogo who has appended his signature but omitted the stamp.

I have considered the submissions by both sides on this very crucial matter. In Black’s law dictionary, 6<sup>Th</sup> Edition page 58, it is stated that;

*“An affidavit is a statement of declaration in writing on oath or affirmation before a person having authority to administer oath or affirmation.”*

10 It is therefore important that the particulars of the person having authority be clearly stated. That is a mandatory requirement under the Oaths Act, Cap. 19 laws of Uganda and not a mere technicality curable under **Article 126(2)(e)** of the Constitution.

15 In **Utex Industries versus Attorney General, SCCA No. 52 of 1995**, the Supreme Court held that Article 126(2)(e) of the Constitution was never intended to do away with the rules of procedure.

In the present case, the absence of the Commissioner for Oaths’ stamp makes the entire affidavit incurably defective and the same is hereby struck out.

In the premises, the application is naked and lacks a supporting affidavit.

20 In conclusion therefore, it is the finding of this Court that sufficient cause has not been shown by the Applicant to warrant the setting aside of the dismissal order.

Secondly, the application lacks merit as it involves setting aside a consent judgment which has long been executed and so it is overtaken by events.

25 Thirdly, the affidavit in support of the application by John Musede is incurably defective as it bears no stamp or seal of the alleged commissioner for oaths. The application therefore has no supporting affidavit and cannot stand. All in all, the application is hereby dismissed with costs.

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**WILSON MASALU MUSENE**

**JUDGE**

**7/3/2019**