

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
CIVIL DIVISION  
CIVIL REVISION NO. 11 OF 2021  
(ARISING FROM MISC. Cause No. 40 of 2019)

ADE KAGUMAHO ..... APPLICANT

VERSUS

STELLA RAMA.....RESPONDENT

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING.

**Introduction.**

This is an application by way of Notice of Motion brought under **Sections 83 & 98 of the CPA, Section 33 of the Judicature Act and O. 52 r 1, 2 & 3 of the CPR** seeking orders that;

1. The proceedings and ruling in **Miscellaneous Cause No. 40 of 2019** be revised and set aside.
2. Costs of this application be provided for.

The grounds in support of this application are stated in the affidavit in support deponed by **Ade Kagumaho** but briefly are that;

1. The applicant on the **5<sup>th</sup> April 2019** instituted an application; **M.C No. 40 of 2019** for a certificate to levy distress for rent at the Chief Magistrates Court at Kira and the said application was fixed for hearing on **20<sup>th</sup> June 2019**.

2. On the **19<sup>th</sup> June 2019**, the applicant wrote to court withdrawing the said application and the same was filed on court record on **20<sup>th</sup> June 2019**. (See **annexure B**).
3. When the matter came up for hearing on **20<sup>th</sup> June 2019**, the applicant discovered that the respondent had also filed an affidavit in reply on **19<sup>th</sup> June 2019** through her lawyers.
4. At the hearing, the applicant informed the trial magistrate that she had withdrawn the matter and requested the file to be closed.
5. The trial magistrate refused to entertain the applicant's submissions and insisted that the respondent proceeds with the hearing since he had preliminary points of law to raise.
6. The applicant then applied for an adjournment to enable her file an affidavit in rejoinder and also hire a lawyer.
7. The trial magistrate rejected both applications and insisted that the respondent proceeds.
8. The trial magistrate delivered her ruling on **3<sup>rd</sup> September 2019** dismissing the applicant's application with costs.
9. The trial magistrate had no jurisdiction to proceed with an already withdrawn matter.
10. By the trial magistrate denying the applicant an opportunity to file a rejoinder in the matter and to hire a lawyer, the trial magistrate acted with material irregularity.
11. It is in the interest of substantive justice that this application is granted to address the procedural irregularities exhibited by the trial magistrate.

The grounds opposing the application are stated in the affidavit in reply deponed by **Stella Rama**, the respondent who stated that;

1. The letter withdrawing the matter was never produced before the trial magistrate and has just been brought to the respondent's and court's

attention at this stage thus the applicant should be put to strict proof thereof.

2. When the applicant got to know of the respondent's reply on **19<sup>th</sup> June 2019**, she directed service to her lawyers of Mushabe, Munungu & Co. Advocates who were indeed served on **19<sup>th</sup> June 2019** and acknowledged receipt. (**See annexure A to the affidavit in reply**).
3. The applicant never informed the trial magistrate of her intentions to withdraw the application thus she will be put to strict proof thereof.
4. The applicant opted to proceed in the absence of her lawyers despite being served by the respondent's lawyers on **19<sup>th</sup> June 2019** but did not enter appearance.
5. The application was dismissed on a preliminary point of law.

### **Representation.**

The applicant was represented by Mr. Kenneth Gideon Munungu while the respondent was represented by Mr. Sunday Emmanuel Taban.

### **Note:**

It should be noted that counsel for the applicant initially filed this matter as **Misc. Cause No. 266 of 2020** but according to our category in this division, such a matter falls in the category of civil revisions thus the same was given a **Civil Revision No. 11 of 2021**. However, counsel for the applicant persisted and/or deliberately continued to refer to the matter as **Misc. Cause No. 266 of 2020** which should not mislead court.

At the hearing of the application, both counsel agreed to file written submissions which was granted. However, Counsel for the applicant intimated to court that he would raise preliminary objections and it was agreed that he should raise the P.Os in his written submissions. Both counsel filed written submissions respectively;

**Counsel for the applicant raised the following Preliminary objections in his written submissions;**

- 1. That the supplementary affidavit in reply deponed by Kiiza Cleophas Ceaser Ndozireho should be struck off the record since he is not a party to the suit and thus has no locus to swear an affidavit.**
- 2. That the supplementary affidavit was filed without leave of court.**

It is therefore important for this court to resolve the preliminary objections at this stage.

**Submissions by counsel for the applicant on preliminary objection No. 1.**

Counsel for the applicant submitted that a one Kiiza Cleophas Ceaser Ndozireho is not a party to the suit and therefore lacks locus to swear an affidavit replying to a matter to which he's not a party.

Counsel stated that while the law may allow an individual who is not a party to swear a supplementary affidavit, the same should be limited to correcting errors and should not go to the merits of the matter. Counsel referred to the case of **Ndlebe V Budget Insurance Ltd 7457 of 2017**.

Counsel for the applicant added that in this particular case, though the supplementary affidavit is baptized as such, it is in actual sense an affidavit in reply.

**Submissions in reply by counsel for the respondent.**

Counsel for the respondent submitted that the affidavit in issue contains information necessary for the respondent to set out all factual aspects of the case to enable court fully determine the real issues in controversy between the parties.

Counsel submitted that the supplementary affidavit was deponed by the son to the respondent who is of advanced age and has always attended court together

with his mother, the respondent. That the affidavit was to confirm the apparent material falsehood by the applicant that she had filed for a withdrawal whereas not.

**Analysis of court on preliminary objection No. 1.**

From the court record, it is not in dispute that a supplementary affidavit was deponed by a one Kiiza Cleophas Ceaser Ndozireho who was not a party to the suit. However, there is no law which prohibits an individual who is not a party to a suit to swear a supplementary affidavit.

The said supplementary Affidavit by Kiiza was filed on **24<sup>th</sup> March 2021** and the applicant had an opportunity to make a rejoinder on the same on **15<sup>th</sup> April 2021** hence the supplementary affidavit did not prejudice the applicant in any way.

Counsel for the respondent submitted that Kiiza Cleophas was a son to the respondent who attended court together with his mother and this fact was not rebutted by the applicant in rejoinder.

In applications of this nature, the evidence is by affidavits hence such an affidavit can help court reach a just decision.

On that note, Preliminary Objection No. 1 is overruled.

**Submissions by counsel for the applicant on preliminary objection No. 2**

Counsel for the applicant cited the case of **Ndlebe V Budget Insurance Ltd 7457 of 2017** where court held that;

***“Before filing a supplementary affidavit, the respondents were supposed to provide an explanation to the satisfaction of the court that it was not malicious in its endeavor to file the further affidavit and that other party will not be prejudiced.”***

Counsel submitted that there was no leave or explanation sought by the respondent for the need of the supplementary affidavit.

Counsel further stated that it was an attempt by the respondent to patch up the defects in her defence since the supplementary affidavit was filed after the matter had commenced on 12<sup>th</sup> March 2021.

**Reply to Preliminary objection No.2 by counsel for the respondent.**

Counsel for the respondent cited the case of **Anita Among V Ndagi Innocent Ndaaga**, H.C. Misc. App No. 972 of 2013 where court noted that;

*“If the error of counsel in filing a supplementary affidavit without leave does not go to the root of the application and does not affect the competence of the suit then such affidavit should be allowed...”*

**Analysis of court on preliminary objection No. 2.**

From court record, by the time the supplementary affidavit was filed on 24<sup>th</sup> March 2021, the applicant had not filed a rejoinder which was filed on 15<sup>th</sup> April 2021 and there was no time frame given for the filing.

In addition, even if the supplementary affidavit was filed without leave of court, it does not go to the root of the application and does not affect its competence neither does it prejudice the applicant.

**In view of the above, preliminary objection No. 2 is overruled.**

Having resolved the preliminary objections in the negative, I shall now proceed to determine the application on its own merits.

Counsel for the applicant and respondent framed four issues for determination by this court;

**Issues.**

1. Whether Misc. Cause No. 40 of 2019 was withdrawn on the 20<sup>th</sup> of June 2019?

2. Whether the applicant was denied to file a rejoinder?
3. Whether the applicant was entitled to legal representation at the hearing?
4. What remedies are available to the parties?

**Issue No. 1: Whether Misc. Cause No. 40 of 2019 was withdrawn on the 20<sup>th</sup> of June 2019?**

**Submissions by counsel for the applicant on issue No. 1.**

Counsel submitted that **O. 25 r 1 (i) of the CPR** provides that the plaintiff may at any time before the delivery of the defendant's defence or after receipt of that defence before taking any other proceeding in the suit by notice in writing wholly discontinue his/her suit.

Counsel argued that the applicant furnished **annexure B** which is a letter dated **19<sup>th</sup> June 2019** and received by court on **20<sup>th</sup> June 2019**, withdrawing **M.C No. 40 of 2019**.

Counsel added that the applicant in her affidavit in support and rejoinder in this application stated that at the commencement of the proceedings on **20<sup>th</sup> June 2019**, she informed the trial magistrate about the letter withdrawing the matter but the magistrate chose to ignore her concerns and instead proceeded with the application.

Counsel further stated that since there is no evidence to discredit the authenticity of the letter withdrawing the matter, the trial magistrate acted with materiel irregularity when she purported to conduct a hearing of a withdrawn matter.

**Reply by counsel for the respondent on issue No. 1.**

Counsel submitted that the applicant failed to adhere to the legal procedure for withdrawal of suits.

Counsel stated that the record of court and ruling clearly show that the applicant did not notify court about the withdrawal of the matter during the hearing of **20<sup>th</sup> June 2019** the said letter of withdrawal wasn't served on the respondent and isn't on court record.

Counsel argued that the applicant under **paragraph 5** of her affidavit in support stated that when the matter came up on 20<sup>th</sup> June 2019 she discovered that the respondent had also filed an affidavit in reply on **19<sup>th</sup> June 2019** through her lawyers.

Counsel added that in the purported letter of withdrawal, the applicant under **paragraph 1** stated that she wished to withdraw the matter since there was a pending **C.S No. 380 of 2017** in the High court as mentioned in the respondent's reply.

Counsel further submitted that those are falsehoods in the applicant's affidavit thus ought to be disregarded by this honorable court.

Counsel referred to the case of **Sirasi Bitaitana & 4 Ors V Emmanuel Kananura H.C.C.A No. 47 of 1976** where court held that;

*“The inconsistencies in affidavits cannot be ignored however minor, since a sworn affidavit is not a document to be treated lightly. If it contains an obvious falsehood, then it all naturally becomes suspect. An application supported by a false affidavit is bound to fail because if applicant in such a case does not go to court with clean hands and tell the truth.”*

#### **Analysis of court on issue No. 1**

Section 83 of the Civil Procedure Act contains the law on revision and it provides as follows; *“The High court may call for the record of any case which has been determined under this Act by any Magistrate's court and if that court appears to have;*

- a) Exercised a jurisdiction not vested in it in law*
- b) Failed to exercise a Jurisdiction so vested*



*c) Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, The High court may revise the case and may make such order in it as it thinks fit..."*

In the instant case, I have perused the proceedings of the lower court record dated **20<sup>th</sup> June 2019** and noted that there is nothing showing that the applicant notified court by letter or orally that she intended to withdraw/had withdrawn the matter.

In addition to the above, the alleged letter of withdrawal was not on court record and was also not served on the respondent until it was produced at the hearing of this application, and court informed both counsel to that effect.

I also noted from the proceedings of the lower court record that during the hearing of the matter on **20<sup>th</sup> June 2019**, the applicant proceeded to submit on her case before court and nothing is indicated that she asked the trial magistrate for withdrawal.

The applicant told court lies in her affidavit that the trial magistrate refused to entertain her submissions on withdrawal of the matter and opted to proceed with the hearing. However, there is no evidence on record that the applicant made such a request.

Basing on the proceedings of the lower court record, this court finds that there was no proof of withdrawal of the matter. It is my considered view that Revision was used as an alternative or backdoor to an appeal.

I therefore find that there was no illegality or material irregularity caused to the applicant to warrant revision.

Issue No. 1 is answered in the negative.

## **Issue No. 2: Whether the applicant was denied to file a rejoinder?**

### **Submissions by counsel for the applicant on issue No. 2.**

Counsel for the applicant submitted that **O. 8 r 19 of the CPR** provides that once a defendant has filed his/her defence the other party has a right to file a pleading subsequent to the defence hence the applicant had a right to file a rejoinder in MC No. 40 of 2019.

Counsel argued that the trial magistrate ought to have given the applicant an opportunity to file a rejoinder before proceeding with the matter on **20<sup>th</sup> June 2019** thus the trial magistrate acted illegally and with material irregularity and injustice when she failed to give the applicant an opportunity to file a rejoinder.

Counsel cited the case of **Standard Chartered Bank (u) Ltd V Mwesigwa H.C.M.A No. 477 of 2012** where it was held that;

**“The applicant has a right to file a rejoinder to rejoin and controvert or dispute the contents of the affidavits in reply.”**

### **Reply by counsel for the respondent on issue No. 2.**

Counsel submitted that on the day of trial at the lower court, the applicant proceeded to submit and did not inform court that she wanted more time to make a rejoinder. Counsel stated that the applicant is now alleging that she was refused from filing a rejoinder and yet she deponed that she had withdrawn the matter which is contradictory.

Counsel also added that this application is brought on grounds of procedural defects that did not exist thus is brought in bad faith and it should be disregarded by this court.

### **Analysis of court on issue No. 2.**

I have very carefully perused the proceedings of the lower court record particularly of **20<sup>th</sup> June 2019** and I did not come across any request by the applicant to file a rejoinder.

I have also noted that the applicant is alleging that she was denied to file a rejoinder and yet she deponed that she had withdrawn the matter which is contradictory and inconsistent. For one to come to justice, they should come through the main door and not the window.

Counsel submitted that the applicant had withdrawn the matter then he claimed that she was not given a chance to file a rejoinder, in a withdrawn matter. Whoever comes to equity must come with clean hands.

In view of the above analysis, there was no illegality or material irregularity or injustice to warrant revision in this case.

On that note, issue No. 2 is answered in the negative.

**Issue No. 3: Whether the applicant was entitled to legal representation at the hearing?**

**Submissions by counsel for the applicant on issue No. 3.**

Counsel submitted that the applicant in her affidavit in support stated that she requested the trial magistrate to allow her get a lawyer which request was ignored. Counsel argued that it was the applicant's constitutional right to be accorded the opportunity to be represented by a lawyer of her choice.

Counsel added that the trial magistrate's conduct in that regard amounted to injustice.

**Reply by counsel for the respondent on issue No. 3.**

Counsel submitted that the applicant opted to represent herself at trial by not requesting court for an adjournment. That the applicant was alive to that fact when she requested that the affidavit in reply be served on her lawyers, Munungu, Mushabe & Co. Advocates but the said lawyers opted to skip court without an explanation.

### **Analysis of court on issue No. 3.**

It is trite that a right to legal representation is a constitutional right. However, in the instant case, the applicant personally filed her matter **on 5<sup>th</sup> April 2019**. It was not indicated that the matter was filed by an advocate. Even when the applicant appeared on **20<sup>th</sup> June 2019**, she appeared on her own and did not inform court that she wanted to be represented.

I have doubt in my mind that the applicant had intentions to engage the lawyer at that stage.

In my opinion, the allegations by the applicant that she was denied an opportunity for legal representation cannot stand because the trial magistrate didn't deny her the same. The allegations are only brought in bad faith which this court cannot condone.

Issue No. 3 is answered in the negative.

**Issue No. 4: what remedies are available to the parties?**

### **Submissions by counsel for the applicant on issue No. 4.**

Counsel submitted that **Section 83 (c) of the CPA** empowers the high court to revise and make such orders as it thinks fit where the trial magistrate has exercised its jurisdiction illegally or with material irregularity or injustice.

Counsel stated that the proceedings and ruling in **MC No. 40 of 2019** should be revised and set aside. Counsel also prayed for costs of the application to be awarded to the applicant.

### **Reply by counsel for the respondent on issue No. 4.**

Counsel submitted that the applicant has failed to show by way of evidence that the trial magistrate exercised her jurisdiction with material irregularity and injustice. Counsel added that the application should be dismissed with costs to the respondent.

**Analysis of court on issue No. 4.**

In the instant case, I find that the trial magistrate rightly exercised the jurisdiction vested in her by law and did not in any way act illegally or with any material irregularity or injustice, thus I don't find it fit for this application to warrant revision.

**Conclusion.**

In the final result, this application is dismissed with the following orders;

1. The proceedings and ruling in **Miscellaneous Cause No. 40 of 2019** are upheld.
2. Costs of this application are awarded to the respondent.

**I so order**

**Dated, signed and delivered by email at Kampala this 28<sup>th</sup> day of May 2021.**

**Emmanuel Baguma**

**Judge.**