

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
MISCELLANEOUS APPLICATION NO. 046 OF 2021
(Arising from Mpigi H.C.C.S No. 021 of 2020)

5 ABDUL DDAMULIRA.....APPLICANT

VERSUS

MSS XSABO POWER LIMITED.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

10 Ruling

The applicant brought this application by way of Notice of Motion under **Section 33** of the Judicature Act, **Section 98** of the Civil Procedure Act, **Order 9 Rule 23(1)** and **Order 52 Rule 1** of the Civil Procedure Rules against the respondent. The applicant seeks to set aside the order of 18th/3/2021 under which the main suit was dismissed due to his absence when the suit was called upon in open court.

The applicant made an affidavit in support of his application.

The application was opposed by the Respondent through an affidavit in reply. The respondent also raised a number of preliminary objections.

Representation:

20 M/s Lutaakome & Co. Advocates represented the Applicant whereas M/s Makada & Partners represented the respondent.

Preliminary objections:

25 Counsel for the Respondent raised a preliminary objection to the effect that the main suit was dismissed under **Order 17 Rule 4** of the Civil Procedure Rules and one could not file for reinstatement in the same court but file for an appeal in an appellate court as per the case of **A.P Bhimji Ltd v. Michael Opkno Miscellaneous Application No. 423/2011**.

5 Second preliminary objection was to the effect that, the affidavit in support of the application was commissioned by an advocate who at the time did not have a valid practicing certificate and was therefore invalid making the application one unaccompanied by an affidavit. That the affidavit should therefore be struck out and application dismissed with costs.

10 Thirdly, that no stamp duty was paid for the affidavit. Counsel for the respondent cited the case of **Proline Soccer Academy Ltd v. Lawrence Mulindwa and 4 others, High Court M.A No. 045 of 2009**, where the application was dismissed and the plaint struck out for non-disclosure of a cause of action. It was also held that the effect of non-registration of documents is a matter of substantive law and not procedure.

15 Counsel for the applicant in reply submitted that under **Order 17 Rule 4** of the Civil Procedure Rules, Court should have set the suit for hearing. That the plaintiff did not fail to adduce evidence and court never directed the plaintiff to produce evidence and he failed to do so. Thus, the dismissal of the suit under **Order 17 Rule 4** of the Civil Procedure Rules was out of order. So, was **Order 17 Rule 5** of the Civil Procedure Rules and that the right procedure was under **Order 9 Rule 22** of the Civil Procedure Rules where when the plaintiff does not appear in court, the suit can be dismissed. And **Order 9 Rule 23** of the Civil Procedure Rules allows the plaintiff to apply to court to reinstate the suit giving sufficient reason for their failure to attend court.

20 Counsel added that the respondent filed his amended Written Statement of Defence on the 18th February 2021 and the suit was fixed for hearing on the 18th March 2021 and the case went for mediation.

25 In reply to the issue of the affidavit, counsel for the applicant submitted that the Advocates Amendment Act under **Section 14A** allows the instant affidavit.

Counsel for the applicant further submitted that the affidavit is part of the application and court fees are paid at once for the entire application and the affidavit cannot be paid for separately.

30 Counsel for the respondent in rejoinder submitted that **Section 14A** of the Amendment to the Advocates Act specifically provides for lawfully proceeding advocates who are denied audience, in such cases the proceedings are not a nullity. And in the instant case the Commissioner of Oaths did not have a valid Practicing

Certificate at the time the affidavit was commissioned which made the affidavit a nullity.

5 Counsel for the respondent added that the affidavit attracts stamp duty under **Section 32** of the Stamp Duty Act and thus, the affidavit in the instant case is not admissible.

Resolution:

I have carefully considered the submissions of both parties. Three preliminary objections were raised by the respondent.

10 According to **Order 6 rule 28** of the Civil Procedure Rules, a point of law that is pleaded which when so raised is capable of disposing of the suit, may then by consent of the parties, or by order of the court on the application of either party, be set down for hearing and disposed of at any time before the hearing. (See also: **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696**).

15 It is trite law that points of law can be raised at any stage of the proceedings as per the case of **Hon. Mr. Justice Bashaija K. Andrew** in *Mathias Lwanga Kaganda v. UEB CS No. 124 of 2003*.

20 The first preliminary objection was to the effect that suits dismissed under **Order 7 Rules 4 and 5** of the Civil Procedure Rules cannot be reinstated but rather one had to appeal. The case of **A.P Bhimji Ltd v. Michael Opkno Miscellaneous Application No. 423/2011** was relied upon in that regard. In the above authority I see nowhere it was stated that one had to make an appeal upon dismissal of a suit under **Order 17 Rule 4** of the Civil Procedure Rules. My understanding of the ruling of **Hon. Justice Eldad Mwangusya** is that the Applicant in that case did not give sufficient reason as to why he failed to appear in court on the date set for hearing when the suit was dismissed. There was no holding made to the effect that one could make an appeal where a suit was dismissed under **Order 17 Rule 4** of the Civil Procedure Rules. The application to reinstate the suit was denied, dismissed with costs and dismissal order upheld.

30 Counsel for the applicant submitted that the suit in the instant case was dismissed under the wrong law and the correct procedure under **Order 17 Rule 4** of the Civil Procedure Rules is that the suit proceed and be set down for hearing which was not done in the present case. That **Order 17 Rule 5** of the Civil Procedure Rules would have been applicable if the plaintiff had been told to bring evidence and he

failed. That in the circumstances the correct procedure for court to undertake would have been proceeding under **Order 9 rule 22** of the Civil Procedure Rules. The suit would have been dismissed for non appearance of the plaintiff, whose remedy is provided for under **Order 9 rule 23** which provides for reinstatement.

5 It is my humble view and from my reading of the record, on the 18/3/2021, counsel for the defendant/respondent told court that the last time they were before **His Lordship Odoki**, with the applicant present they raised an issue as to the validity of the suit since the plaintiff had not taken out Summons for Direction under **Order XIA** of the amendment to the Civil Procedure Rules which makes it
10 mandatory otherwise the suit abates. That the plaintiff was advised to take out the Summons which he did not do and the 28 days since the last reply had lapsed. It was under these circumstances that the suit was dismissed under **Order 17 Rule 4** of the Civil Procedure Rules.

Whereas counsel for the applicant submitted that the suit was set for hearing on
15 18/3/2021, the Applicant never appeared in court on that day and nor did he file the Summons for Directions beforehand.

Order XIA Rule 2 of the Civil Procedure Rules as amended provides that;

“Where a suit has been instituted by way of a plaint, the plaintiff shall take out Summons for Direction within 28 days from the date of the last reply or rejoinder referred to in Rule 18 (5) of Order VIII of these Rules.”
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Rule 6 of the Civil Procedure Rules as amended provides;

“If the plaintiff does not take out a Summons for Direction in accordance with sub rules (2) or (6), the suit shall abate.”

In the instant case the plaintiff did not file the Summons for Direction within the
25 time frame given under the law, the rejoinder to the Amended Written Statement of Defence was filed on the 15/2/2021 and a hearing Notice was extracted for 18/3/2021. On the 18/3/2021, as the date the matter was set for, the applicant still did not appear in court when his matter was called out. The applicant having failed to file the Summons for Direction within 28 days, the suit abated
30 under **Order XIA Rule 6** of the Civil Procedure Rules as amended and the application of **Order 17 Rules 4** and **5** of the Civil Procedure Rules in dismissing the suit in the circumstances was misapplied.

Order 17 Rule 5 has since been amended under Statutory Instrument No. 33 of 2013 and suits that fall under **Rule 5** abate and the remedy is bringing a fresh suit.

5 **Order 17 Rule 4** of the Civil Procedure Rules vests a Judicial Officer hearing a matter with the discretion and power to decide a suit immediately when a party to whom time has been given fails to produce his evidence. The applicant in the instant case was not told to produce evidence and he failed rather he failed to file Summons for Directions and the two are totally different.

10 **Order 9 Rule 22** of the Civil Procedure Rules on dismissal for non-attendance also does not apply in the instant case therefore **Order 9 Rule 23** of the Civil Procedure Rules cannot save the day.

The remedy once a suit abates under **Order XIA Rule 7** of the Civil Procedure Rules as amended is to file a fresh suit subject to the law of limitation. Thus, the application for reinstatement of the suit is not tenable and this preliminary objection fails.

15 The second preliminary objection was to the effect that Affidavit was invalid because the Commissioner for Oaths had no valid practicing certificate at the time she commissioned the same. Unfortunately **Section 14A** of Advocates Act as amended does not apply to the instant case. **Section 14A** only comes in handy when an advocate while acting lawfully (with a valid Practicing Certificate) is denied audience among others. (See: **Hard Rock Quarry (U) Limited v. Commissioner Land Registration and Another**. H.C.C.A No. 115 OF 2015).

25 In the instant case the Advocate had no valid Practicing Certificate which is the basis for one to practice/act as a Commissioner for Oaths, without which one cannot commission. One is only a Commissioner for Oaths for as long as their valid practicing certificate is in existence. The affidavit was therefore null and void and cannot be cured under **Section 14A** of the Advocates Act as amended since the Commissioner for Oaths lacked a valid practicing certificate upon which her commissioning powers are dependant. **Article 126 (2) (e)** of the Constitution of the Republic of Uganda, 1995 cannot also be invoked as the suit had already abated and the instant application is incompetent since the remedy is filing a fresh suit. This preliminary objection is upheld.

30 The third preliminary objection was in regard to non-payment of stamp duty for the affidavit.

It is my considered view that an affidavit is an accompaniment of the application by Notice of Motion and not a separate document as submitted by the respondent. There was therefore no need to pay for it separate stamp duty. **Order 52 Rule 3** of the Civil Procedure Rules, makes an affidavit part of the Notice of Motion under which evidence is by affidavit. **Section 32** of the Stamp Duty Act is not applicable in the instant case.

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Order 52 Rule 3 provides as follows;

“Every notice of motion shall state in general terms the grounds of the application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.”

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It is therefore my considered view that it is only affidavits that are filed as independent documents that attract stamp duty. In the instant case there was no need to pay separate fees for the affidavit in support of the application. This preliminary equally fails.

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It is my finding and holding that only one preliminary objection in regard to the affidavit being invalid is upheld: the other two preliminary objections fail. The application cannot survive as it seeks to set aside the order of 18th/3/2021 under which the main suit was dismissed due to the absence of the applicant when the suit was called upon in open court. As has been discussed the procedure followed in Court to dismiss the suit was wrong since the suit abated and the law under which reinstatement is sought is also wrong.

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The application is accordingly found to lack merit and incompetent. The applicant is advised to file a fresh suit. The application is hereby dismissed with costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

31/05/2021

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Ruling delivered in open court in the presence of;

1. Counsel for the applicant.
2. The applicant.
3. Counsel for the respondent.
- 5 4. The representative of the respondent.
5. Court Clerk – Nadia.

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OYUKO. ANTHONY OJOK

10 **JUDGE**

31/05/2021