

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 199 OF 2015**  
**ARISING FROM MISCELLANEOUS APPLICATION NOS. 179/2014;**  
**178/2014; & 292/2013**  
**ARISING FROM HCCS NO 68/ 2012 & ADMIN. CAUSE NO. 308/2013**

**1. SSEMBATYA BUMBAKALI**  
**2. NALULE NUSIFAH.....APPLICANTS**

**VERSUS**  
**ECO PETRO UGANDA LIMITED.....RESPONDENT**

**BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE**  
**RULING**

This is an application brought under Order 9 rules 23 & 29 of the Civil Procedure Rules (CPR); Order 52 rules 1 & 3 of the CPR; and section 98 of the Civil Procedure Act for orders that:-

- a) The dismissal order in Miscellaneous Application No. 179/2014 be set aside.
- b) Miscellaneous Application No. 179/2014 be reinstated and be heard on merits *inter partes*.
- c) Costs of the application be in the cause.

The grounds of the application are contained in the affidavit of Ssembatya Bumbakali the 1<sup>st</sup> applicant, which are briefly that:-

1. The applicant was prevented from attending court when the matter was called for hearing by sufficient cause.

2. The applicant early in the morning of 30<sup>th</sup> June 2015 was at the time visiting his doctor having developed complications in the night and hence, it is his unplanned visit to his doctor that caused the delay.
3. The dispute between the parties concerns land which needs to be heard and be determined on merits *inter partes*.
4. It is in the interests of justice that the application be allowed.

The application was opposed by the respondent through the affidavit in reply of their Managing Director Ddamba Douglas. It was to the effect that the applicant had not shown sufficient cause for non appearance on the day the application was fixed for hearing, and that the application is incompetent. Counsel for both sides made oral submissions, which, together with the affidavit evidence, gave rise to the following issues:-

- 1) Whether the 2<sup>nd</sup> applicant's not filing an affidavit in support of the application or not appearing for the same application renders the instant application incompetent.
- 2) Whether the applicants' failure to serve the respondent within the prescribed 21 days without applying to extend time rendered the application a nullity under Order 5 of the CPR.
- 3) Whether the medical report not attached to the affidavit in support of the application is admissible in evidence.
- 4) Whether there is sufficient cause to reinstate MA 179/2014

**Issue 1: Whether the 2<sup>nd</sup> applicant's not filing an affidavit in support of the application or not appearing for the same application renders the instant application incompetent.**

The respondent's counsel's submissions were that there are two applicants but there is no affidavit from the 2<sup>nd</sup> applicant; and that the application cannot be allowed without the affidavit of the 2<sup>nd</sup> applicant who did not explain her absence yet the dismissal of Miscellaneous Application 179/2014 was in respect of both applicants. The 1<sup>st</sup> applicant's counsel submitted in response that the two applicants are administrators of the same estate and failure by the 2<sup>nd</sup> applicant to be vigilant to protect an estate cannot stop the 1<sup>st</sup> applicant from protecting the same where facts are basically the same.

In this case, the record shows that both applicants did not appear in court when MA 179/2014 was called for hearing, consequent upon which the respondents counsel successfully prayed this court to dismiss it. The instant application reads that it was filed by the two applicants. The 1<sup>st</sup> applicant filed a supporting affidavit but the 2<sup>nd</sup> applicant did not. The 1<sup>st</sup> applicant's affidavit only referred to the circumstances which led him and his lawyer not to attend court. It did not refer at all to the 2<sup>nd</sup> applicant's circumstances or explain her non attendance, neither did it state that it was sworn on behalf of the 2<sup>nd</sup> applicant.

In the given circumstances, it is clear that the 2<sup>nd</sup> applicant though mentioned as an applicant, did not file any supporting affidavit to the instant application nor did she attend its hearing. She had also not attended MA 179/2014 when it was dismissed. This situation can only mean that she has neglected or waived her rights to explain her non attendance of MA 179/2014, the dismissed application. I find nothing on the record or in the adduced evidence, or in the cited authorities, to suggest that her not filing any affidavit in support of the application or her non appearance in court renders the instant application incompetent. In my opinion the supporting affidavit of the 1<sup>st</sup> applicant is sufficient for the application to proceed, since it is not a legal requirement that where there is more than one applicant, each and every applicant must file a supporting affidavit or be a witness.

**Issue 2: Whether the applicants' failure to serve the respondent within the prescribed 21 days without applying to extend time rendered the application a nullity under Order 5 of the CPR.**

It was submitted for the respondent that the application sought to be re instituted (MA 179/2014) was served on the respondents more than 10 months after it was issued for service, that is, after it had expired; that failure to serve it within the prescribed 21 days without application to extend time rendered the instant application (MA 199/2015) a nullity under Order 5 of the CPR; and that a court of law would not issue an order in vain since the application to be re instated would not have any force of law as it is a nullity. The 1<sup>st</sup> applicant's counsel submitted in response that the applicants should not be penalized by the litigant's failure to access a file which was lost in court.

Order 5 rule 1(2) & (3) of the CPR requires service to be effected on the opposite party within twenty one days from the date of issue of the summons, except where the applicant, within fifteen days of the expiry of summons, applies to court to extend the time of service. The suit shall be dismissed without notice if service is not effected within the stipulated time where no application for extension has been made. Section 2 of the Civil Procedure Act defines a suit to mean all civil proceedings commenced in any prescribed manner.

In the instant case, the record shows that the notice of motion in MA 179/2014 was signed and sealed by the Registrar on 20/08/2014. The hearing date indicated in the motion is 30/06/2015. Apparently, the Registrar signed the motion in blank without indicating the hearing date, since the hearing date of 30/06/2015 is ten months after the motion was signed. The affidavit of service shows that the application was served by this court's process server on both the applicants' and respondent's counsel on 30/06/2015, the same date it was to be heard. The same record shows that, before that, there were numerous administrative decisions on the file following its retrieval from the Execution Division of the High Court where it had been transferred for execution of a court order in **Eco Petrol (U) Ltd V Ssembatya Bumbakali & 2 Others Miscellaneous Application No 240/2013 Arising From High Court Civil Suit No 509/2011** (Land Division) and **Civil Suit No 68/2012** (Family Division).

The respondent's counsel cited **Orient Bank Ltd V Avi Enterprises Ltd Civil Appeal No 002/2013 Arising from MA 37/2013 & CS 147/2013**, Madrama J, to support his submissions on the point of late service. In the said case, where the application was held to be a nullity, the chamber summons were issued five days out of time, but there is no mention that it was signed and sealed in blank without indicating the hearing dates, as was the case in the instant case where the motion was signed and sealed in blank and the hearing date filled in ten months later, and where both parties were served by court. The circumstances of the instant case are different from the case cited by counsel. I would not apply it to the instant situation where the file appears to have been delayed within the court file movement procedures.

**Issue 4: Whether the medical report not attached to the affidavit in support of the application is admissible in evidence.**

The 1<sup>st</sup> applicant's counsel, in the course of her oral submissions, availed court a medical report from **Rahma Central Clinic** to support the applicant's claim that the said applicant was in hospital at the time the application was dismissed. The respondent's counsel opposed the admissibility of the medical report, stating that it was not attached to the affidavit in support of the application.

The record shows that the 1<sup>st</sup> applicant did not attach the medical report to his supporting affidavit. The report was availed to court by the 1<sup>st</sup> applicant's counsel as she made her oral submissions to court.

Order 6 rule 2 of the CPR states that every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents, and a list of authorities to be relied on; except that a list of authorities may be provided later with leave of court.

In this case the 1<sup>st</sup> applicant's supporting affidavit alluded to his having visited his doctor at the time the application was called for hearing. The medical report was availed to court at the time of submissions. It is not in doubt that the 1<sup>st</sup> applicant should have attached the medical report to his affidavit so that it becomes part of his affidavit evidence. However, given the circumstances of the application, where the averment about the 1<sup>st</sup> applicant's visiting a clinic had already been made, and in the spirit of Article 126(2)(e) of the Constitution which allows this court to, subject to the law, administer substantive justice without undue regard to technicalities, this court exercised discretion and accepted the medical report though it was not attached to the supporting affidavit.

#### **Issue 5: Whether there is sufficient cause to reinstate MA 179/2014.**

The 1<sup>st</sup> applicant's counsel's submissions were that on the day the application was to be heard, the applicant was sick and he fell on his way to court; that the people who had come to his rescue called the last person he had talked to on phone who was his lawyer who ran to his rescue and took him to the clinic where he had previously been admitted on 29/06/15; that when he was a bit well and proceeded to court, the matter had been dismissed; that his lawyer did not appear because he had first to save his life; and that it is the duty of humanity for lawyers to save life.

The respondent's counsel submitted in reply that the lawyer Edward Kakete did not file an affidavit to support the 1<sup>st</sup> applicant's averments; that there is no nexus between the role of the lawyer to appear in court and his alleged accompanying of the 1<sup>st</sup> applicant to the doctor's clinic; that the 1<sup>st</sup> applicant's paragraph 4 of the affidavit contradicts what his lawyer submitted from the Bar; and that the application bears falsehoods which should not be allowed by court. The 1<sup>st</sup> applicant's counsel submitted in rejoinder that there was nothing false in the 1<sup>st</sup> applicant's affidavit;

Order 9 rule 23(1) of the CPR provides as follows:-

*“Where a suit is wholly or partly dismissed under rule 22 of this Order, the plaintiff shall be 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 the dismissal aside, and, if he or she **satisfies the court that there was sufficient cause for nonappearance when the suit was called 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.”*(emphasis added)

The applicant's affidavit in part, reads as follows:-

4. That on the 30/06/2015 I was held up at my doctor's clinic having developed complications in the night and I reached this court when my case had just been dismissed for my non appearance and that of my lawyer.
5. That my lawyer Kakete Edward had accompanied me to my doctor's clinic and we reached court 30 minutes after 09.00 o'clock when the application had just been dismissed for non appearance.
6. That I am informed by my aforesaid lawyers herein and I verily believe that I and my lawyers were prevented from attending court when the matter was called for hearing by sufficient cause.”

The submissions made by the 1<sup>st</sup> applicant's counsel on how the said applicant fell sick, tantamount to adducing evidence from the Bar. Learned Counsel could as well have waived her professional duties of representing the 1<sup>st</sup> applicant and offered to depone an affidavit in support

of the application, and or be a witness for the applicant. I will, in that respect, not take counsel's submissions into account. In any case, without prejudice, the submissions are at variance with the applicant's affidavit evidence. The gist of the 1<sup>st</sup> applicant's affidavit evidence, which is also reflected in ground 2 of the application, is that he visited the clinic on 30/06/2015 having developed complications in the night; that lawyer Kakete Edward accompanied him to his doctors clinic on the said date; and that they reached court 30 minutes after 09.00 o'clock when the application had just been dismissed for non appearance.

The said evidence is at variance with the submissions of the 1<sup>st</sup> applicant's counsel which are that the applicant's lawyer ran to his rescue after he collapsed on his way to court and took him to the clinic where he had previously been admitted on 29/06/15. The 1<sup>st</sup> applicant did not state anywhere in his affidavit that he had previously been admitted to the clinic. His evidence is that he, having developed complications in the night of 29/06/15, was held up at the clinic on 30/06/2015 and his lawyer Kakete Edward had accompanied him. In fact, ground 2 of the application specifically states that the 1<sup>st</sup> applicant was at the time of the hearing *"visiting his doctor having developed complications in the night and hence it is his **unplanned** visit to his doctor that caused the delay."* (emphasis added).

In my humble interpretation of the said averment, if the 1<sup>st</sup> applicant had been admitted the previous day as his counsel would want court to believe, then the next morning's "visit" to the doctor, as averred in the 1<sup>st</sup> applicant's affidavit, would not be called for since the said applicant would already be an in - patient of the clinic, and his visit would not accordingly be "unplanned." The impression from the application and its supporting affidavit is that the 1<sup>st</sup> applicant's first visit to his doctor was on 30/06/2015 and he was accompanied by his lawyer. This is a stark contradiction of the submissions of his counsel that he was admitted the previous night to the same clinic.

The lawyer, Kakete Edward, who would have corroborated the 1<sup>st</sup> applicant's affidavit evidence, did not file any affidavit to support the application or strengthen the 1<sup>st</sup> applicant's evidence. The said lawyer's evidence was vital to explain his client's non attendance as well as his non attendance as the applicant's counsel, more so, since the 1<sup>st</sup> applicant averred in paragraph 5 of his affidavit that the said lawyer had accompanied him to the clinic.

The 1<sup>st</sup> applicant's affidavit evidence is also inconsistent with the medical report his counsel presented to court. While the 1<sup>st</sup> applicant's affidavit states that he visited the clinic on 30/06/15 (the day of the hearing of the application), the medical form shows that the applicant visited the said clinic on 29/06/2015.

I find the applicant's affidavit to be full of contradictions and apparent falsehoods and, therefore, not safe to rely on. I agree with the respondent's counsel that the application bears falsehoods. It would defeat justice to rely on such affidavit to allow the application.

This application is accordingly dismissed with costs.

**Dated at Kampala this 23<sup>rd</sup> day of November 2015.**

Percy Night Tuhaise

**Judge.**