

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO 44 OF 2016
ARISING FROM CIVIL SUIT NO 40/2010

MAYANJA JOSHUA KAJUBI.....APPLICANT

VERSUS

- 1. WASSWA AMON BWOGI**
- 2. KATTO WILLIAM KAJUBI.....RESPONDENTS**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE
RULING

This is an application by Notice of Motion brought under section 33 of the Judicature Act, section 98 of the Civil Procedure Act, Order 52 rules 1, 2 & 3 of the of the Civil Procedure Rules (CPR), for orders that:-

- a) The orders of this honourable court made on the 28th day of January under Order 17 rules 3 & 4 of the Civil Procedure Rules be set aside.
- b) The judgement set to be delivered *ex parte* on 28th day of April 2016 at 12 pm be stayed pending hearing and determination of this application.
- c) Costs of this application be in the cause.

The grounds of the application are contained in the affidavit of Mayanja Joshua Kajubi the applicant. They are briefly that on the 30th day of September 2015, Civil Suit No 40/2010 came before the trial judge for cross examination of the plaintiff's witnesses by Counsel for the defendant/applicant since it had been fixed by this court for hearing on the 30th day of September and 1st October 2015; that the applicant filed his witness statements in this honourable court on the 14th day of May 2015 and served the same to the opposite counsel on the 14th day of May

2015; that since the applicant/defendant's counsel was going for her maternity leave at the time, the matter was adjourned to the 28th day of February 2015 (meant 2016?) as this is the date appearing in Counsel's diary; that to Counsel's surprise, Counsel Janet Amoding who had gone to follow up the matter called her and informed her that the case came up for hearing on January 28th 2016 though she had been told by the Court Clerk earlier that it had been adjourned to the 25th day of February 2016; that the applicant/defendant was confused by the dates but he has no intention to frustrate this honourable court process; that the applicant/defendant is desirous of being heard and having the main suit determined on the merits; and that it is only just and equitable that the orders sought be granted.

The application was opposed by the respondents through the affidavit in reply of Wasswa Amon Bwogi the 1st respondent. It was stated in his affidavit that ever since the respondents/plaintiffs' filing of the suit against the applicant/defendant, the said applicant and his several Advocates had frustrated the suit from proceeding; that ever since the suit started, the applicant had switched Law Firms who have always been seeking adjournments of the suit; that by 14/04/16 (meant 2015) the applicant had not filed witness statements as directed by court, as shown in annexure X; that the applicant prayed to file statements by 30th April 2016 (meant 2015?) but no such statements had been filed by 6th May 2016 (meant 2015?), as shown in annexure X1; that the suit was adjourned to 28th January 2016 and 25th February 2016 as per the court record; that on 28th January 2016 neither the applicant nor his Counsel appeared to proceed in the case and no witness statements were on record by then; that the trial Judge allowed the respondents/plaintiffs to proceed under Order 17 rules 3 & 4 of the CPR; that such a hearing is on the merits; that the applicant's allegations of the court record having been altered/doctored is a serious allegation against a Judge of the High Court; and that the respondents' Advocates have always been appearing in court to proceed with the case.

Counsel for both sides made oral submissions on the matter.

The applicant states in his supporting affidavit that he filed his witness statements on the 14th day of May 2015 and served the same to the opposite counsel on the 15th day of May 2015 (the application states it was served on 14th day of May 2015). This is disputed by the respondents who, through the 1st respondent's affidavit in reply state that the applicant had not filed his

witness statements as directed by court, and that by 6th May 2015 the applicant had still not filed his witness statements.

The sworn witness statements annexed as **A** to the applicant's supporting affidavit are stamped with a stamp of the High Court Family Division indicating that they were "received" in the Registry on 14th May 2015. Annexure **X** to the respondent's affidavit in reply, a letter dated 14/04/2015 written by the applicant's counsel (Zawedde Lubwama) to the respondents' counsel reveals that the respondent requested for extension of time of two weeks within which to file his sworn witness statements. Annexure **X1** to the 1st respondent's affidavit in reply, a letter written by the respondents' counsel to the Deputy Registrar of this Court dated 6th May 2016, reveals the respondents' counsel as having communicated that they had cross checked on the court record and established that there were no applicant's witness statements on the court record. The record of proceedings of 28/01/2016 shows that this court observed and recorded that the defendant's side was yet to file their sworn witness statements. The court record of *Civil Suit No 40/2010: Wasswa Amon Bwogi & Another V Mayanja Joshua Kajubi Civil Suit No. 40/2010* does not contain any copy of the said sworn witness statements, nor is the purported filing of the same endorsed on the page showing documents filed on the court record for the period 29/04/2010 to 29/02/2016.

In that respect, as is apparent from the record of *Civil Suit No 40/2010: Wasswa Amon Bwogi & Another V Mayanja Joshua Kajubi Civil Suit No. 40/2010*, I find the applicant's averments in his sworn affidavit of having filed sworn witness statement from the defendant's side to be false. It is curious how the defendant's sworn witness statement (annexture **A** to the applicant's supporting affidavit) came to be stamped as "received" with this court's stamp for the stated dates, yet the same was not filed, since the same was not physically on the court record, or at least endorsed as having been filed on the court record of *Civil Suit No 40/2010: Wasswa Amon Bwogi & Another V Mayanja Joshua Kajubi Civil Suit No. 40/2010*.

The applicant also states in his supporting affidavit that the matter was adjourned to 25/02/2016; that that is the date appearing in his counsel's diary; and that his counsel was surprised that the case was called for hearing on 28/01/2016. The record of proceedings of *Civil Suit No 40/2010: Wasswa Amon Bwogi & Another V Mayanja Joshua Kajubi* shows that on 30/09/2015, this court, after addressing Counsel Zawedde's correspondence seeking adjournment on grounds of her

being on maternity leave, did fix two dates of 28/01/2016 and 25/ 02/2016 for hearing of the case. The handwritten and electronic recording clearly stipulates 28th January 2016 and 25th day of February 2016 as the hearing dates for the case. The applicant also claims that the record shows that the figure “2” for the month of February had been crossed and replaced with the figure “1” for the month of January, in a way suggesting that the record was tampered with or doctored. It is true the said figures were crossed out in the course of the proceedings due to errors caused by writing very fast on my part as the judge. Nonetheless both the handwritten and the electronic recording clearly captured the two dates of 28th January 2016 and 25th day of February 2016. In addition, both the handwritten and the electronic versions of the record of proceedings clearly reflect that towards the end of the proceedings, the plaintiffs’ counsel sought clarity from court to repeat the two dates and this court clearly reported the two dates to be 28th January 2016 and 25th day of February 2016. The electronic and the handwritten record of proceedings reflect the two dates clearly without any contradictions.

The applicant’s averments of Counsel Janet Amoding’s having been told by the Court Clerk earlier that the matter had been adjourned to the 25th day of February 2016 can only be treated as hearsay. The applicant could have called the Court Clerk as a witness to support his claims, but he chose not to. The Court Clerk, who would have substantiated the applicant’s claims, did not file any affidavit to support the application, yet such evidence was vital to explain the applicant’s contention that this court did not fix the hearing date of 28/01/2016 for hearing of the case.

It is false therefore for the applicant to state in a sworn affidavit that the matter was adjourned only to the 25th day of February 2016 but not the 28th day of January 2016. The fact is that both dates were fixed for hearing of the case.

The applicant’s counsel submitted among other things that her faults should not be visited on the applicant, but the submission was a form of giving evidence from the Bar, which this court declines to accept, since it was not raised anywhere in the application and its supporting affidavit.

The application before this court seeks to set aside the orders made by this court under Order 17 rule 4 of the CPR. The applicant also prays for the main suit to be determined on the merits. The record shows that on 28/01/2016 the defendants and their counsel did not attend court upon

which court granted the plaintiffs' counsel's prayer to proceed *ex parte* under Order 17 rules 3 & 4 of the CPR. Order 17 rule 3 of the said rules states that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed for that purpose under Order 9, or make such orders as it thinks fit. Rule 4 provides that where a party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary for the further progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately.

There are court decisions to the effect that a decision made under Order 17 rule 4 is a decision on the merits which gives rise to a decree. See **A P Bhimji V Michael Opkwo Misc Application No 423/2011, Eridadi Mwanguhya J** as he then was. This would in my opinion mean that the eventual decisions made on this case which is to be disposed of under Order 17 rules 3 & 4 of the CPR will be decisions on the merits, which renders the applicant's prayer to hear the case on the merits uncalled for.

The application also sought the judgement in Civil Suit No 40/2010 to be stayed pending determination of this application. In my opinion this prayer has been rendered redundant since the fact is that the said pending judgement was not, and could not have been delivered by this court without first disposing of this application.

All in all, in the given circumstances, I find it not safe to rely on the applicant's affidavit, which is full of falsehoods. I decline to grant the orders sought by the applicant. The application is accordingly dismissed with costs.

Dated at Kampala this 5th day of May 2016.

Percy Night Tuhaise

Judge.