

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**(FAMILY DIVISION)**  
**MISCELLANEOUS APPLICATION NO. 98 OF 2021**  
**(ARISING OUT OF CIVIL SUIT NO. 040 OF 2010)**

**1. WASWA AMON BWOGI**  
**2. KATO WILLIAM KAJUBI=====APPLICANTS**

**VERSUS**

**MAYANJA JOSHUA KAJUBI=====RESPONDENT**

**BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA**

**RULING**

**Introduction**

This ruling is in respect of an application by Notice of Motion to set aside the ruling and Orders of this court made on 4/9/2019 dismissing Civil Suit No. 40 of 2010, reinstatement of Civil Suit No. 040 of 2010 and costs. It is supported by the affidavit of the first applicant Waswa Amon Bwogi.

**Appearance and Representation.**

When the application first came up for hearing on 3/11/2021, the applicants were in court and represented by **Mr. Levis Karugaba** of Ms Masanga & Co. Advocates. Neither the respondent nor his advocate (s) was present in court. However, present in court was a one **Samnani Murad** who informed court that he was representing the respondent. When he was asked whether he had a Power Attorney appointing him to represent the respondent in this application, he produced a Power of Attorney

dated 1<sup>st</sup> July 2019. Counsel for the applicants contended that the said Power of Attorney did not extend to representing the respondent in court in this matter. In the interest of justice, I allowed the said “Donee” of the Powers of Attorney to address court for purposes of knowing the status of the respondent and his representation in court. He informed court that the respondent had changed advocates from Ms. Zawedde Lubwama & Co. Advocates to Ms. Kajeke & Co. Advocates. He further informed court that Kajeke & Co. Advocates had already prepared a reply and the same was ready for filing. I allowed the respondent to file the reply, serve the applicants and the applicants to file a rejoinder if any. Parties were further directed to file written submissions which the parties did.

### **Facts.**

The facts as deduced from the applicant’s pleadings and from the entire court record are as follows:

The applicants sued the respondent vide Civil Suit No. 040 of 2010 wherein they were referred to as “plaintiffs” and “defendant” respectively. The suit was for mismanagement of the estate where the applicants were said to be beneficiaries. The applicants filed witness statements and Trial bundle as directed by court in effort to prosecute their suit. On the other hand, the respondent failed to file the witness statement and the trial bundle within the time directed by court even after the time was extended.

The applicants then applied for a default judgment under O. 17 Rules 3 and 4 of the CPR which court allowed and set the matter for formal proof hearing. Being dissatisfied with the decision of court, the respondent filed Miscellaneous Application No. 44 of 2016 for setting aside the default judgment which was dismissed by the Learned Trial Judge who upheld/ maintained the default judgment.

The respondent being dissatisfied with that decision, filed an Appeal in the Court of Appeal Vide Civil Appeal No. 91 of 2017 which is still pending in court. It was during the pendency of the Appeal that Civil Suit No. 040 of 2010 was dismissed for want of prosecution under O.17 Rule 5 of the CPR as Amended hence this application.

### **The application.**

The application is supported by the affidavit of Waswa Amon Bwogi, the 1<sup>st</sup> Applicant. In reply for the respondent, the affidavit is sworn by one Samnani Murad of Kajeke, Maguru & Co. Advocates on account of the Power of Attorney earlier talked about in this ruling. Mr. Samnani attached a copy of the said Power of Attorney on his affidavit in reply.

Counsel for the applicant submitted that the affidavit sworn by Samnani Murad was fatally defective because he does not have *locus standi* to swear an affidavit in the instant application arising from Civil Suit No. 040 of 2010. According counsel for the applicant, the Power of Attorney from which the deponent claims to derive locus does not relate to the instant application. He further submitted that the contents of the power of Attorney did not grant him any authority to represent the respondent in court matters instituted in this honorable court.

According to the applicants' counsel, the application is not opposed by the respondent and he prayed to court that the application should be determined and granted based on the applicant's evidence. He cited the case of Fredrick Zaabwe Versus Orient Bank & Others SCCA No. 4 of 2006 and submitted that the law on the Powers of Attorney is that they should be construed strictly and specifically to its contents.

Upon reading the contents of the impugned Power of Attorney, I find that it relates to management of the following properties which the respondent owns and or holds by virtue of Letters of Administration Vide Administration Cause No. 247 of 1991;

- (a) Plot 581 Block 10 Kibuga, Bukesa Parish, Mengo, Kampala
- (b) Plot 582 Block 10 Kibuga, Bukesa Parish, Mengo, Kampala
- (c) Plot 583 Block 10 Kibuga, Bukesa parish, Mengo, Kampala and
- (d) Plot 83 Block 23 Kibuga, Busega, Lungujja, Kampala.

In order to meaningfully address this issue, I will reproduce the relevant sections of the Power of Attorney in issue. The acts that the “Donee” is assigned to execute are as follows:

- (1) To take possession of all the documents of title relating to the aforesaid properties.*
- (2) To secure, manage the property described and to assign or execute any documents concerning and relating to the above described properties.*
- (3) To employ professional, including attorneys/ lawyers, accountants, land surveyors*

AND to do all such things as may seem expedient and necessary to achieving the above objects.

It further states that *“This power of Attorney shall be construed broadly as a General Power of Attorney. The listing of specific powers is not intended to limit or restrict the general powers granted in this power of attorney in any manner”*

After carefully studying the wording of the Power of Attorney, I find that whereas it purports to be general in nature, it does not in my view extend to representation in court matters. It is my considered opinion that if the respondent ever intended to give

powers of court representation, he would have specifically stated it for certainty and avoidance of doubt because it is a very critical aspect considering the history of this matter. If he was able to specifically state what in my view are not as important as representation in court, then he would not have missed providing for court, representation in court if he intended to because it goes to the root of the matter given the fact that matters related to the property listed in the Power of Attorney are the point of contention in Civil Suit No. 040 of 2010 and the same have been in court since 2010 and have not yet been resolved to date. Moreover, at the time when this Power of Attorney was executed (1<sup>st</sup> July 2019), Civil Suit No. 040 of 2010 was still unresolved. The same was dismissed on 4<sup>th</sup> September 2019.

I therefore agree with counsel for the applicant with regard to the affidavit sworn by Samnani Murad Hasanali and I find it incompetent for lack of locus by the deponent and the same is accordingly struck out.

This therefore means that this application is unopposed. I will therefore proceed to address the issues as formulated by Counsel for the applicants.

Issues

- 1. Whether there are grounds for court to set aside the ruling made on 04.09.2019?***
- 2. What are the remedies?***

Resolution of the Issues.

- 1. Whether there are grounds for court to set aside the ruling made on 04.09.2019?***

Civil Suit No. 040/2010 was dismissed under Order 17 rule 5 Civil Procedure Rules (CPR) as Amended for want of prosecution. The provision states as follows;

“5. Dismissal of suit for want of prosecution”

(1) In any case not otherwise provided for, in which no application is made or step taken for a period of six months by either party with a view to proceeding with the suit after the mandatory scheduling conference, the suit shall automatically abate”.

Counsel for the applicant submitted that the import of the above rule is that if no application is made or steps taken for a period of six months by either party with a view of proceeding with the suit... the suit shall automatically abate. He further contends that the rule faults neither the plaintiff nor the defendant but either of them which means that before the rule is invoked, regard has to be made as to whether either party has or has not taken steps to prosecute the case.

Counsel for the applicants submitted that upon the dismissal of Miscellaneous Application No. 44 of 2016, the respondent, being dissatisfied with the ruling of the court, filed a Notice of Appeal expressing his intention to appeal against that decision and the same was filed in court of Appeal. It was later registered as Civil Appeal No. 91 of 2017. He therefore argued that filing of an appeal by the respondent was a step taken by the respondent with a view to proceeding with the suit which is provided for in Order 17 Rule 5 (1) of the CPR as Amended.

Counsel for the applicants also submitted quoting Order 17 rule 5 (2) of the CPR as Amended that the remedy provided would be in bringing a fresh suit subject to the law of limitation. He further contended that this instant case is not affected by the law of limitation because it relates to breach of trust and the same is protected by Section 19 (1) (a) & (b) of the Limitation Act Cap 80 but the remedy of filing the suit afresh would not give remedy to the applicants because in the absence of Civil Suit No. 040 of 2010, Civil Appeal No. 91 of 2017 would have no basis and stand

in abeyance because its origin is Civil Suit No. 040 of 2010. While arguing that re-instatement of the suit would not defeat the defence of limitation, counsel for the applicant relied on the cases of *Comtel Intergrators Africa Ltd Versus National Social Security Fund H.C.M.A No.0772 of 2016* and *Meera Investments Limited versus Uganda investment Authority H.C.M.A No. 114 of 2015*.

I have considered the grounds of this application as contained in the Notice of Motion and the affidavit. I also considered the submissions filed by counsel for the applicants and the entire court record which contains the history of Civil Suit No. 040 of 2010 which this application seeks to re-instate and I agree with counsel for the applicants that much as there was no formal stay of Civil Suit No. 040 of 2010, there is evidence that Notice of Appeal Arising from Miscellaneous Application No.44 arising from Civil Suit No. 040 of 2010 was filed in this court on 11<sup>th</sup> May 2016. This is per the “Received Stamp” which is on the Notice of Appeal. This served as notice to this court that Civil Suit No. 040 could not proceed before resolving the appeal that the respondent had filed.

Besides, I also wish to observe that Order 17 Rule 5(1) CPR as Amended under which Civil Suit No. 040 was dismissed envisages inaction by either party after the mandatory scheduling conference. In the instant case, there was no scheduling conference because the respondent even failed to file his trial bundle and witness statements as directed by court. When he failed to do that, the appellants who were then plaintiffs moved court to proceed under Order 17 Rules 3 and 4 of the CPR and prayed for a default judgement which court granted. In my view, the application by the applicants/ plaintiffs to court to enter a default judgment was a step taken with a view of proceeding with the suit.

Before I take leave of this matter, I need to observe that I have carefully read the court record and my observations are the applicants who were plaintiffs in Civil Suit No. 040 of 2010 were vigilant at prosecuting this suit as evidenced by their adherence to schedules provided by court.

On the contrary, the respondent/ defendant defied court directives on several occasions regarding court schedules even when they were given extension of time. This led to the learned trial Judge to grant the prayer by the appellants/ applicants and entered a Default judgement under O.17 Rules 3 and 4.

It is also worth noting that the learned trial judge while disposing of Miscellaneous Application No. 44 of 2016 observed that the applicant who is now the respondent filed an affidavit that was tainted with falsehoods and she could not rely on it.

In light of the above, I find that failure to allow this application would gravely disadvantage the applicants who filed Civil Suit No.040 of 2010 with a hope of getting a remedy from court and they had been vigilant to pursue their matter at all times. The same was dismissed for no fault by the appellants. I have also been able to observe the vigilance of the applicants because on the two occasions when this application came up in court, both of them were present with eagerness to know the outcome of the application.

On the other hand, disallowing this application would benefit the respondent because he would have nothing to lose. This is because, from the record, he has never made any effort to have Civil Suit No. 040 disposed of substantively. This could even explain why on the two occasions this application came up in court, the respondent never attended court neither did his advocates. Only Murad Hasanali Samnani, the purported agent of the respondent has been attending court. This to me is indicative of a person who is not interested in seeing this matter logically concluded.



I therefore allow this application and make the following orders;

- (a) The Order of this court made on the 4<sup>th</sup> day of September 2019 which dismissed Civil Suit No. 040 of 2010 under Order 17 Rule 5(1) Civil Procedure Rules as Amended is hereby set aside.
- (b) Civil Suit No. 040 of 2010 is hereby reinstated pending the disposal of Civil Appeal No. 91 of 2017.
- (c) Each party shall bear its costs because there is no evidence that Civil Suit No. 40 of 2010 was dismissed at the instance of the respondent.

I so order.

**Dated at Kampala this 19<sup>th</sup> day of November 2021.**

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**Alice Komuhangi Khaukha**

**Judge.**

**19<sup>th</sup> November 2021.**