

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 1066 OF 2012

ARISING FROM CIVIL SUIT NO. 311 OF 2011

ADMINISTRATOR GENERAL  
OF UGANDA [SUING THROUGH]

1. KALOLI MWEBE
2. WANNYANA NORAH HARRIET

.....:APPLICANTS

VERSUS

1. KITATTA ABUDALLA
2. JJUKO BAMWEYANA
3. MUKASA RONALD
4. MOSES MUTAAWE
5. GODFREY NKOBEKU
6. RONNIE MUTYABA
7. SIRAJE BUTCHMAN
8. KIWANUKA KIWANDA
9. LUKWAGO KASSAJJA
10. DIANA NAMUKASA
11. NAMUYIGA AGNES
12. KOBUSINGYE ROSE

.....:RESPONDENTS

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by notice of motion under section 33 of the Judicature Act, section 98 of the Civil Procedure Act and Order 52 rule 1 of the Civil Procedure Rules (CPR), for orders that the decree or order of court dismissing civil suit no 311/ 2011 be set aside; and that costs abide the outcome of the suit.

The grounds of the application are that the applicants filed unsworn written witness statements in civil suit no. 311/2011 owing to inadvertence/mistake of counsel; that the inadvertence of counsel for the applicants ought not to be visited on the applicants so as to extinguish their claim in the suit land; the application discloses sufficient reason for the court to exercise its discretion to review and set aside the order of dismissal so that substantive justice is served; the applicants are not guilty of dilatory conduct in bringing this application and there has been no inordinate delay; and that it is just and equitable that the decree/order be set aside and the application will occasion no prejudice to the respondents.

The application is supported by the affidavit of **Kaloli Mwebe** the 1<sup>st</sup> applicant.

The background to the application is that this court, in hearing civil suit no. 311/2011 *ex parte*, after the plaintiffs had procured a default judgement against the defendants, directed the plaintiff's Counsel to file sworn witness statements as well as written submissions on the matter. The plaintiff's Counsel ignored the court's directives and filed unsworn witness statements together with their written submissions. This court dismissed the suit on grounds that the evidence in form of unsworn witness statements was not credible. This court also observed that it was an abuse of court process for the plaintiffs' Counsel to file unsworn statements against court's directives. The applicants seek this court to review its decision and set aside the judgement and decree.

Counsel for the applicants invoked section 33 of the Judicature Act and section 98 of the Civil Procedure Act to have the judgement set aside. These provisions apply generally to all matters and are normally resorted to when there are no direct provisions on the remedy sought. There are direct provisions for review of court judgements and decrees under Order 46 of the Civil Procedure Rules, but the applicant's Counsel never mentioned them. Instead, they invoked general discretionary provisions. Nevertheless I will proceed to consider the application on the merits.

This application and its supporting affidavit give the impression that the suit was dismissed because of the applicant's Counsel's not exercising due diligence when he filed unsworn witness statements contrary to what this court had directed. With respect, though court noted that the conduct of the plaintiffs' Counsel in filing unsworn witness statements contrary to court's directives was not prudent and an abuse of court process and accordingly condemned him in costs, that was not the basis of dismissing the suit. The basis of dismissing the suit, as is stated in the judgement was because the evidence as it was, in form of unsworn witness statements, was not credible to lead to a judgement in favour of the plaintiffs. This was after court noted that even where a suit proceeds *ex parte* the burden to prove a case to the requisite standards still remains on the part of the plaintiff. See **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**.

When the plaintiffs filed their statements, they did so as court witnesses. **Black's Law Dictionary, 6<sup>th</sup> edition at page 1063** defines a witness as a person whose declaration under oath or affirmation is received as evidence for any purpose, whether it is made on oral examination or by deposition or affidavit.

This is in line with section 101 of the Evidence Act which requires whoever desires to court to give judgement as to any legal right or liability on the existence of facts he/she asserts must prove that those facts exist. This should be read together with section 10 of the Oaths Act which provides that no judgement shall be given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation. In a nutshell the plaintiffs did not discharge their burden of proof since their unsworn statements were not admissible. These were the grounds upon which this court dismissed the plaintiff's claim.

Lastly, I note that section 33 of the Judicature Act empowers court to grant absolutely or on such terms and conditions as it thinks fit all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy are completely and finally determined and multiplicity of proceedings are avoided. Section 98 of the Civil Procedure Act saves the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. The exercise of inherent powers by court is a matter within the discretion of the court. In the exercise of this discretion, the court must act judiciously and according to settled principles, bearing in mind that the decision to make must be based upon common sense and justice. The court has to look at all circumstances of the case. See **Standard Chartered Bank of Uganda V Ben Kavuya & Barclays Bank Ltd [2006] HCB Vol. 1 134**.

In this case, the court based its decisions based on the interpretation of the specific laws of evidence outlined above. In that respect, I decline to review or set this judgement aside.

**Dated at Kampala** this 6<sup>th</sup> day of June 2013.

Percy Night Tuhaise  
**JUDGE.**