

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. APPLICATION NO. 264 OF 2014
(ARISING OUT OF MISC. CAUSE NO. 87 OF 2014)
(ARISING OUT OF HCCS. NO.334 OF 2013)
(AND IN THE MATTER OF COURT OF APPEAL CA.NO.233 OF 2013)**

a) **GREEN SKYWAYS AGENCIES LTD**
b) **PHOENIX OILS LTD** **APPLICANTS**
VERSUS

BANK OF AFRICA **RESPONDENT**

RULING

BEFORE LADY JUSTICE EVA K. LUSWATA

This is an application presented by Swabur Marzuq for the applicant by Notice of Motion under 0.9 R.23 (1) & (2) CPR , 0.52 R.1, 2 & 3 and Section 98 CPA seeking an order to set aside the dismissal of MA/087/14 and the attendant costs, and for its reinstatement. The application is supported by the affidavit of Peter Allan Musoke an advocate practicing with M/s Lwere Lwanyaga & Co. Advocates. The main ground presented is that the applicant was for sufficient reason prevented from making an appearance when the dismissed application was called to hearing on 4/3/14.

On 11/6/14 when this application came up for hearing, both the respondent and their counsel were absent. Mr. Marzuq confirmed that they had been served on 26/3/14 and an affidavit of service filed in proof thereof. I was satisfied with the service and allowed Mr. Marzuq to proceed *ex parte*, and the following therefore is my ruling.

O.9 R.23 CPR permits a plaintiff to apply to set aside a dismissal order that has been made under 0.9 R.22 CPR where they satisfy court that there was sufficient cause for their non appearance when the suit was called to hearing. That law has been reechoed in many rulings some of which were presented by counsel for the applicant. Most authorities have interpreted sufficient cause to include negligence of counsel to take a necessary step or action to prosecute the case, for example, failure to make an appearance when the case is called for hearing. See for example **William Gubaza Vs Uganda Electricity Brand HCCS. 571/95**. This is even where counsel

has been grossly negligent because the principle is that the mistake of an advocate should not be visited on the innocent party. See for example, **Banco Arabe Espanol Vs Bank of Uganda Supreme Court CA.08/98.**

According to Peter Allan Musoke, the firm of Lwera Lwanyaga & Co. Advocates had the instructions of the applicant to file an application to stay the proceedings of HCCS.334/13. That they acted upon those instructions by filing MA.087/14 and fixed it for hearing on 4/3/14. Service upon counsel for the respondent was done by a one Miiro, a clerk in their firm. However, that Miiro after fixing the application for hearing inadvertently failed to inform Mr. Musoke that the file for the application was transferred from Justice Elizabeth Kabanda and placed before Justice Eva Luswata K. He further stated that, without the information of the transfer, Mr. Musoke appeared before Justice Elizabeth Kabanda under the mistakenly belief that the matter was still proceeding before her. That Justice Elizabeth Kabanda did hear him at the bar with information that the matter was not cause listed and advised him to seek another date through her court clerk. Mr. Musoke inadvertently did not peruse the cause list to confirm whether the matter had been actually placed before another Judge in the division and for that reason, both him and the applicant were absent when the matter was called for hearing before Justice Eva Luswata K. and dismissed. He concluded that the applicants are still interested in pursuing MA.087/14 and it would be just, fair, and equitable and also in the interests of both parties that the dismissal is set aside and the application reinstated.

The purpose of 0.9 Rule 2 CPR was to allow parties who are genuinely interested in pursuing their claims to do so by seeking reinstatement after dismissal for non appearance. What is vital is for the applicant to show that they honestly intervened to proceed with their case and should be allowed to do so even in cases (such as this one) where their lawyers have been negligent. Indeed, I find it negligent for Mr. Peter Musoke to omit studying the cause list to confirm before which Judge the application had been placed. In fact, I see no evidence on record to indicate that MA.087/14 was ever placed before Justice Kabanda as he claims. That notwithstanding, this is the applicants' case and in my view, they have demonstrated a genuine interest in pursuing the dismissed application. They filed the application for reinstatement a mere two days after its

dismissal and instructed counsel to prosecute it. In my view, they have satisfied the provisions of the law and I accordingly allow the application.

The dismissal of Miscellaneous Application No. 87 of 2014 is accordingly set aside, the order for costs in the same cause is also set aside. In addition I order that the applicants meet the costs of this application.

I so order.

EVA K. LUSWATA
JUDGE
16/6/14