

**THE REPUBLIC OF UGANDA**

**INI THE HIGH COURT OF UGANDA AT KAMPALA**

**(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO.1310 OF 2022**

**(Arising out of Civil Suit 436 of 2018)**

**VOLCANO LIMITED:.....APPLICANTS**

**VERSUS**

**BOARD OF GOVERNORS OF OLD KAMPALA SENIOR SECONDARY SCHOOL:.....RESPONDENTS**

**Before: Lady Justice Alexandra Nkonge Rugadya.**

**Ruling.**

This application brought by way of Notice of motion under **Section 33 of the Judicature Act cap.13, Section 98 of the Judicature Act cap.98, Order 9 rules 22 & 23, and Order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1** seeking orders that the order of dismissal of **Civil Suit No.436 of 2018** be set aside, and the suit be reinstated and heard on its merits. It further seeks that costs of the application be in the main cause.

**Grounds of the application.**

The grounds in support of the application are contained in the affidavit in support of **Counsel Leonard Opurong**, an advocate of the High Court, practising with **M/s KSMO Advocates**, the applicant's representatives.

He states *inter alia* that while the applicant's advocates were entrusted with conduct of this matter, a one Mr. Jacob Kalaabi of **M/s KSMO Advocates** was prevented by sufficient cause from appearing in court on the day the main suit came up for hearing and that when the matter last came up for hearing on 17<sup>th</sup> February 2022 in the presence of counsel **Jacob Kalaabi**, court directed the parties therein to file their respective witness statements by May 2022, after which the matter would be set down for hearing but because counsel for the applicant was mistaken in regards to the date on which the matter was coming up for hearing, he did not appear on the exact date when the same came up for hearing.

That because it was the mistake of counsel not to note down the exact date when the matter would be coming up for hearing, the same should not be visited on the innocent litigant who is willing to prosecute the matter and that although counsel for the applicant prepared witness statements in regards to the main suit, he obtained a challenge in filing the same in time owing to the fact that at the time, the key witnesses were living in Rwanda, out of jurisdiction and there was a boarder closure between Rwanda and Uganda which in turn caused the delay in filing the said witness statements as the movement of people was hindered. Thus it was difficult to have the statements proofread, signed and filed in time.

That while it is the above mentioned challenges that made it difficult for the applicant to comply with the directives of this court, court should have sympathy on the applicant to have the matter reinstated



for hearing considering the fact that the applicant has already taken steps to prosecute the case by filing a scheduling memorandum as well as the plaintiff's trial bundle.

In addition, that the counter-claim was fixed for hearing on 10<sup>th</sup> November 2022, the respondent was not to be prejudiced in any way while the applicant will suffer irreparable damage which cannot be atoned for by compensation.

Further, that the application has been made expeditiously therefore the applicant is not guilty of inordinate delay and that it is in the interest of both natural, and substantial justice that this application is granted.

The application is further supported by an affidavit deposed by **Mr. Agusse Kalimba**, one of the directors of the applicant company. He stated that he was informed by his lawyers that when the matter came up for hearing on 17<sup>th</sup> February 2022, court directed the parties thereto to file witness statements of the witnesses set out in the joint scheduling memorandum May 2022 and that the matter was set down for hearing.

That according to the joint scheduling memorandum, the applicant had only one witness whose statement was prepared by counsel but there was a challenge in finalizing the signing and filing of the same because **Mr. John Mary Vianney Nshimiyamimana** was in Rwanda at the time, and that owing to the closure of the boarder between Rwanda and Uganda which made movement of people, goods and services difficult, there was a delay in filing the witness statement since the said closure of the boarders not only hindered the movement of people but also the signing of the witness statement.

That while the main suit was dismissed by this court on grounds of non-compliance with the directives of this court, it is the above mentioned challenges that made it difficult to comply with the said directives thus this court should out of sympathy for the applicant set aside the dismissal order, and have the matter reinstated for hearing and determination on its merits as there is sufficient cause warranting the same.

Additionally, that the applicant having filed a scheduling memorandum and trial bundles has taken necessary steps in prosecuting his case and that because his counsel was prevented from coming to court to explain the delay in filing the witness statement because he forgot to note down the scheduling date, the applicant's non-appearance was due to a mistake of counsel who did not note down the date and that the same should not be visited on the innocent litigant who is willing to prosecute his case.

That the respondent will not be prejudiced its counter claim is fixed for hearing for 10<sup>th</sup> November 2022 and that if the matter is reinstated, it can be heard together with the counterclaim while the applicant on the other hand will suffer irreparable injury which cannot be atoned for in costs if the application is not granted.

That the applicant is not guilty of any inordinate delay as the application has been made expeditiously, and that it is in the interest of justice that this application is granted.

The respondent opposed the application through the affidavit in reply deposed by **Mr. Luwano Meddy**, its procurement officer who stated that the affidavit in support deposed by Leonard Opurong should be struck off the record on grounds that the same offends **Rule 9 of the Advocates Professional Conduct Regulations SI 267-2** as well as **Order 19 rule 3 of the Civil Procedure Rules SI 71-1** and that the





same was made in support of **High Court Civil Suit No.892 of 2016**, which is not a matter before this court.

That the affidavit in support of **Mr. Agusse Kalimba** not only offends **order 9 rule 13 (supra)**, but is also tainted with falsehoods since he is not a director of the applicant company and that while **Civil Suit No.436 of 2018** was fixed for mention on 17<sup>th</sup> February 2022, both the applicant and respondent were represented by their respective legal representatives at the hearing wherein a joint scheduling memorandum was adopted, and parties were directed to file their witness statements by 1<sup>st</sup> May 2022 and counsel for the applicant was further directed to obtain a hearing date, extract hearing notices and serve the same on the respondents/defendants, but no steps were taken by counsel for the applicant to comply with the said directives.

That while no sufficient cause has been presented by counsel for the applicant for not appearing in court on the date scheduled for hearing, counsel's total disregard of the directives of this court does not amount to a mistake of counsel and that when the matter came up for hearing on 17<sup>th</sup> February 2022, counsel for the plaintiff willingly conceded to filing witness statements by 1<sup>st</sup> May 2022 and to appear in court in June 2022 yet he knew that he could not physically contact his clients due to the alleged boarder closure which was never brought to the attention of this court.

That while the defendants/respondents herein in compliance of the directives of this court filed their witness statements by 25<sup>th</sup> April 2022 and served the same on the applicant's advocates on 6<sup>th</sup> June 2022, this matter came up for hearing on 6<sup>th</sup> June 2022 in the presence of a one Mr. Muloni James who is a representative of the defendant and counsel for the defendant, and in the absence of the plaintiffs.

That if counsel for the plaintiff could not reach due to the boarder closure, he ought to have brought the same to the attention of this court rather than agree to filing the witness statements by 1<sup>st</sup> May 2022 and that it is also common knowledge that the Uganda-Rwanda boarder was re-opened on 7<sup>th</sup> March 2022 before the deadline for filing that witness statements.

In addition, that no sufficient cause has since been presented by the applicant failure of there counsel to enter appearance when the matter was called for hearing or for failure to comply with the directives of this court and that even to date, no effort to file the witness statements have been made by the applicant who has shown no interest in prosecuting this matter thus the orders dismissing **Civil Suit No.436 of 2018** should be maintained.

Further, that the applicant in its plaint sought an order for special damages of **Ug. Shs. 252,693,500/=** as well as general damages, interest at a rate of 25%, as well as costs which prayers this court was aware of at the time of making the decision to dismiss the suit and that if the plaintiffs were indeed interested in prosecuting their case, they could have explored other electronic options of having the documents proof read and signed and as such, the order dismissing **Civil Suit No.436 of 2018** should be maintained

The applicant also filed an affidavit in rejoinder to the averments set out in the respondent's affidavit in reply. The same was deponed by Counsel Leonard Opurong who stated that this application should be heard and determined on its merits without undue regard to technicalities and as such, the respondent's allegations that the affidavit in support of the application deponed by Leonard Opurong



should be struck out for misquoting the suit number should be disregarded, and the substantive matter be heard on its merits.

That it is not in dispute that that the witnesses were out of jurisdiction and that because the boarder was closed, movement of people and services across the border was hindered and that while the closure of the boarders between the two countries out rightly affected counsel's efforts to comply with the directives of this court to file witness statements in time, all efforts to have the same were made.

Additionally, that because this court did not give a clear date as to when the matter was supposed to come up for mention in June 2022, counsel was not aware of the date and as such he did not attend the mention date to explain why he had not complied with the rules, as well as the challenges he had encountered in complying with the directives.

That the witnesses have already filed their witness statements in the matter which are on record and that the matter could be heard on the date fixed for hearing of the counter claim. He also stated that while the respondent shall not be prejudiced in anyway if this application is granted and the main suit is reinstated, the same will enable this court to determine the matters between the parties for justice to be met.

**Representation.**

The applicant was represented by **M/s KSMO Advocates** while the respondent was represented by **M/s Nagawa Associated Advocates**. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

**Consideration.**

I have carefully read the evidence and submissions of both counsel the details of which are on court record and the details of which I have taken into account in determining whether or not this application merits the prayers sought herein.

The main issue for consideration as set out in the applicant's written submissions in support of the application is whether or not this application warrants the reinstatement of **Civil Suit No.436 of 2018**.

**Order 9 rule 27 of the Civil Procedure Rules SI 71-1** lays down the procedure for setting aside an ex parte judgment. It provides thus:

***"...In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set aside; and if he or she satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient means from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs***

In the case of **National Insurance Corporation versus Mugenyi and Company Advocates, 1978, H.C.B P. 28**, it was held that the main test for re-instatement was whether the applicant honestly intended to attend the hearing and did his best.





It is now settled law that sufficient reason must relate to the inability or failure to take a particular step in time. **See: innacle Projects Limited Vs Business in Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010.**

5 Counsel for the applicant in the instant case argues that he was prevented by sufficient cause from appearing in court on the day that the matter came up for hearing because when the matter last came up for hearing on 17<sup>th</sup> February 2021, court directed the parties to file witness statements by May 2022 and that it is at that point that the matter would be set down for hearing but counsel was mistaken as to which particular day the matter was coming up which caused him to misdirect himself on the exact date when the matter was coming thus it was the mistake of counsel who did not note down the date  
10 of the hearing which should not be visited on the innocent litigant who is willing to prosecute his case.

In the case of **Nicholas Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993** it was decided that a mistake by an advocate, though negligent, may be accepted as a sufficient cause.

15 In **AG vs. AKPM Lutaaya SCCA No. 12 of 2007, Katureebe, JSC**, held that the litigant's interests should not be defeated by the mistakes and lapses of his counsel. And in **Godfrey Mageze & Brian Mbazira vs. Sudhir Ruparelia SCC Application No. 10 of 2002 Karokora, JSC**, held that the omission, mistake or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of his appeal there by denying him justice

20 In the present case, it is not in dispute that counsel for the applicant forgot to note down the date for hearing of the matter or that he failed in his duty to diligently follow up on the matter so as to know the date that had been set for hearing of the main case.

The applicant further averred through affidavit evidence that although counsel prepared the witness statements in the matter, he got challenges in filing the same on time because the key witnesses were out of jurisdiction and was living in Rwanda and that because the border between Uganda and Rwanda  
25 was closed, the movement of people across was hindered which made it difficult to have the statements proof read, signed and subsequently filed in time however all this was not brought to the attention of court in time by counsel for the applicant who ought to have informed court of any challenges faced.

30 It is clear from the above that the inadvertence of counsel who did not properly take conduct of this matter led to the dismissal of the main suit. It is now settled law that where an applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law. (**See: Florence Nabatanzi vs. Naome Binsobodde SC Civil Application No. 6 of 1987; Sipiriya Kyaturesire vs. Justine Bakachulike Bagambe CA No. 20/1995**)

35 On that premise as shown in the different authorities herein discussed, it is just and fair that this application be allowed. In any case, the respondent's counter claim is set to be heard by this court and it is in the interest of justice that all matters touching the subject matter of the suit land be determined finally and completely, to avoid litigating over the same matters again.

Accordingly, the order of dismissal of **Civil Suit No.436 of 2018** is hereby set aside.



Since the failure to enter appearance on the date of hearing was occasioned by counsel, the costs of this application shall be borne by counsel for the applicant.

I so order.


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**Alexandra Nkonge Rugadya**

**Judge.**

**29<sup>th</sup> March 2023.**

Delivered by email  
  
29/3/2023