THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – MA – 0142 OF 2015

(Arising from HCT – 01 – CV – CA – 027 of 2015)

(Arising from KAS – 00 – CV – CS – 236 of 2012)

UGANDA TELECOM LTD .....APPLICANT

VERSUS

KILEMBE INVESTMENTS LTD.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Ruling

This is an application by notice of motion under **Order 43 Rule 16**, **Order 52 Rules 1-3** of the Civil Procedure Rules S.I 71-1 and **Section 98** of the Civil Procedure Act. The Application seeks for orders that;

1. Civil Appeal No. HCT – 01 – CV – CA – 027 of 2015 be re-admitted or re-instated.
2. Costs

The application is supported by affidavit sworn by Ms. Ruth Aliguma Ongom and a supplementary affidavit sworn by Mr. Rashid Kibuuka.

The Respondent's affidavit in reply was sworn by Mr. Luke Kanyonyi opposing the application.

Background

The Applicant filed an appeal under **Section 62** of the Advocates Act and the Advocates (Taxation of Costs) (Appeals and References) Regulations by Chamber Summons.

The appeal was fixed on 16th December 2015 at 9:00am and the case was called for hearing in Court, the Appellant and her Advocate were not in Court and as a result the trial Judge

dismissed the appeal for want of prosecution. The Applicant being dissatisfied with this decision made an application to have the appeal re-instated.

The grounds of this application are;

1. That Civil Appeal No. HCT – 01 – CV – CA – 027 of 2015 was fixed for hearing on 16th December 2015 and when it was called for hearing the Court dismissed it for want of prosecution with costs.
2. That Counsel for the Applicant was engaged in a High Court plea bargain Session and she was interviewing the accused persons at Court.
3. That Counsel who was to appear for the Applicant was prevented by sufficient cause when the appeal was called for hearing.
4. That the appeal has merit and high chances of success.
5. That it is fair and equitable that the appeal be re-admitted or re-instated.

Counsel Musinguzi Bernard appeared for the Applicant and Counsel Chan Geoffrey Masereka for the Respondent.

Counsel for the Applicant prayed for leave of Court to file the supplementary affidavit and cited the case of **Samuel Mayanja versus Uganda Revenue Authority, HCT – 00 – CC – MC – 0017 of 2005** (Unreported) where it was stated inter alia that;

"Where the Applicant wants to file a further affidavit, he ought in my view, to seek the leave of the Court; otherwise the proceedings may turn simply into unregulated game of 'ping pong'. As the affidavit was filed without leave of the Court, and it was objected to by the Respondent, I shall not have regard to the same."

Counsel for the Respondent however raised a preliminary objection to the filing of the supplementary affidavit out of time and submitted that there was no application to file out of time made praying for leave of Court to do so and could not therefore be made during submissions.

I do not find it prejudicial in anyway if the supplementary affidavit is filed. In the interest of justice this Court allows the Applicant file its supplementary affidavit out of time. The preliminary objection is therefore rejected.

Counsel for the Respondent raised another preliminary objection to the effect that the affidavit sworn by Ms. Ruth Aliguma Ongom should be struck off for lack of the name of the

Commissioner for Oaths. That it is mandatory for the Commissioner for Oaths or Magistrate to put his/her name as per **Rule 9** of the Commissioner for Oath (Act) Rules which states among others that the Commissioner for Oaths must put his or her name on the affidavit being commissioned.

He went on to cite the case of **Dr. Kiiza Besigye versus Y.K. Museveni and Another, Election Petition No. 1 of 2015,** where it was stated that;

"It is mandatory to include a name of the Commissioner for Oaths on the affidavit being commissioned as required by the Oaths Act and the Rules made there under."

And the case of **Mutooro Samuel versus Best Kemigisa and Basaliza Francis, HCT – CV – M.A No. 096 of 2011**, where the Chief Magistrate had commissioned an affidavit, placed a Court seal but did not put his name on the affidavit commissioned, it was held that the name of the Commissioner for Oaths must appear on the affidavit being Commissioned failure of which renders the affidavit defective and as a result cannot support the application.

Counsel for the Respondent stated that in the circumstances the affidavit be struck out for failure to conform to the provisions of the law.

This defect is curable and there are authorities to that effect as discussed below;

In the case of **Col. (Rtd) Dr. Besigye Kizza versus Museveni Yoweri Kaguta and Electoral Commission. S.C. Election Petition No. 1 of 2001,** the 1st Respondent's affidavit did not indicate the name or title of the person before whom it was made. It merely contained a signature and the seal of the High Court. It was submitted for the 1st Respondent that the signature was that of the Registrar of the High Court, Mr. Gidudu who had power to administer an affidavit by virtue of his office. Mr. Gidudu subsequently made an affidavit confirming that he is the person before whom the affidavit was sworn. Hon. Justice Odoki CJ held:

"…the Registrar's jurat fulfilled the essential requirements of the jurat namely the place and date the affidavit was made. But it should have included his name and title to strictly comply with the Form of jurat contained in the Schedule. The lack of proper form was however cured by the affidavit sworn by Mr. Gidudu. Accordingly the objection raised against the affidavit sworn by the 1st Respondent had no merit"

In that case all the justices found that the omission to name the officer who had administered the oath had been cured by the subsequent affidavit sworn by Mr. Gidudu wherein he averred that the contested affidavit had been administered by him.

Also in **Suggan versus Roadmaster Cycles (U) Ltd [2002].E.A 25** cited in the case of **Nabukeera Hussein Hanifa versus Kibule Ronal and Electoral Commission**, **Election Petition No. 0017 of 2011**, where an affidavit was not dated. Justice Mpagi – Bahigeine JA (as she then was) held that it is trite that defects in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of **Article 126(2)(e)** of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. That a judge has powers to order an undated affidavit to be dated in court or that the affidavit be re-sworn before putting it on record and may penalize the offending party in costs.

Counsel for the Applicant also, in rejoinder submitted that the Magistrate's omission to state his/her name is not fatal and can be cured by an affidavit clarifying the particulars of the said magistrate and cited the authority of **In the matter of Section 43 of the Judicature Statute and In the matter of the Retirement of David Behimbisa Bashakara by the District Service Commission, Mbarara District Local Government Council, HCT – 05 – CV No. 0048 – 2001 page 6**, it was held that;

"I also agree that in carrying out his work the Commissioner did deviate from the format provided in the Third Schedule to the Commissioner for Oaths Rules. I, however, defer from Counsel's submission that the position is curable by the provisions of ***Section 43*** *of the interpretation Decree 1996 (now interpretation Act, Cap. 3) which provides;*

> *"Where any from is prescribed by any Act or Decree, an instrument or document which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document or which is not articulated to mislead."*

I concur with the submissions of Counsel for the Appellant and with the authorities as cited above, in my view omission by the Magistrate to write his name is curable and not fatal and, does not invalidate the substance of the affidavit. There was also a supplementary affidavit confirming the Magistrate that administered the Oath in the affidavit of Ms. Ruth Aliguma Ongom. Thus, this preliminary objection is rejected.

Ground 1: That Counsel who was to appear for the Applicant was prevented by sufficient cause when the appeal was called for hearing.

Counsel for the Applicant submitted that Ms Ruth Aliguma Ongom the then Counsel for the Applicant was at Court interviewing accused persons for the High Court Criminal Session and this was known to Counsel for the Respondent. She went ahead and attached the cause list to her affidavit as proof. That in the circumstances since Counsel for the Respondent had already seen Counsel for the Respondent at the Court he should have been courteous and informed/notified her when the case was called up for hearing but instead caused its dismissal.

Further that the failure to attend by the Applicant at the time of the hearing of the appeal was because she had engaged Counsel whom she had confidence in to ably execute the matter. Counsel for the Applicant relied on the authority of **Hajati Safina Nababa versus Yafesi Lule, Civil Appeal No. 9 of 1978** as cited in the case of **Yowasi Kabiguruka versus Samuel Byarufu, Court of Appeal, Civil appeal No. 18 2008**, where it was held inter alia that;

"It is Axiomatic that a party instructs Counsel, he assumes control over the case to conduct it throughout, the party cannot share the conduct of the case with his Counsel. He must elect both to conduct it entirely in person or to entrust it to his Counsel."

In the circumstances therefore the Applicant cannot be blamed for not attending Court and the omissions and negligence of Counsel cannot be visited on the Applicant.

Counsel for the Respondent on the other hand submitted that **Order 43 Rule 14** of the Civil Procedure Rules provides that when the Appellant does not appear when the appeal is called for hearing, the Court may make an order that the appeal be dismissed. And that **Order 43 Rule 16** of the Civil Procedure Rules states that the appeal can be re-instated on grounds of sufficient cause. That as per the affidavit of Ms. Ruth Aliguma Ongom she was interviewing accused persons for the plea-bargain session. Counsel for the Respondent noted that she should have been prudent and first adjourned the appeal and went on to interview those inmates.

Counsel for the Respondent further submitted that the Applicant was informed of the hearing date but still did not appear in Court and if a representative had attended the appeal would not have been dismissed. That there is also no proof of former Counsel's negligence and was

never specifically proved and therefore there was no sufficient reason given to Court failure to appear in Court the day the appeal was dismissed.

In the case of **Nicholas Roussos versus Ghulam Hussein Habib Virani, Supreme Court Civil Appeal No. 9 of 1993 at Page 6**, it was held that;

"As regards the principles upon which the discretion under Rule 24 may be exercised, the Courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an advocate though negligent may be accepted as a sufficient cause."

And in the case of **Geoffrey Magezi and another versus Sudhir Rupaleria, Supreme Court Civil Application 10 of 2002**, where it was held that;

"It is now settled that omission or mistake or inadvertence of Counsel ought not to be visited on the litigant."

In **Shabir Din versus Ram Parkash Anand 22 (1955)EACA 48(CA-K*).*** It was held that:

"*For an application to succeed a mistake by plaintiff's advocate (though negligent) may be accepted*."

And in **Nakiridde versus Hotel International (1987) HCB 85**, it was further held:

"*The main test for reinstatement of a suit is whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests are merely the nature of the case and whether there is a prima facie defence to the case.*"

In my view the former Counsel's failure to appear in Court at the time of hearing of the Appeal cannot be visited on the Applicant in the instant case. The Applicant explained through his Counsel that the matter had been handed over to Counsel to handle and they believed that she would handle the same ably and that is why they did not appear in Court on that day. I find that the Applicant has proved sufficient reason for failure to appear at the hearing of the appeal and it is not on record that this was a last adjourned that justified the dismissal of the appeal with all due respect. This ground therefore, succeeds.

Ground 2: That the Appeal has merit and high chances of success.

Counsel for the Appellant noted that the appeal raises pertinent issues in regard to the infringement of the Appellant's right to a fair hearing. The taxing officer committed irregularities/illegalities that the Respondent does not want to come to light by opposing the application. That the taxing of the bill 3 days prior to the date fixed for taxation contravened **Article 28(1)** of the Constitution of the Republic of Uganda, 1995.

In the case of **Fairland University Limited versus National Council for Higher Education, High Court Miscellaneous Application No. 39 of 2005**, it was held that;

"A decision arrived at without affording a hearing to the party affected contravenes the essence of natural justice and is therefore no decision at all."

Secondly, that allowing instruction fees of UGX 20,000,000/= which was over 50% of the decretal sum and failure to comply with the advocates (Remuneration and Taxation of costs) Rules, the taxing officer committed illegalities which the appeal brings to the attention of this Honourable Court. Therefore the appeal has high chances of success.

Counsel for the Respondent however, noted that the appeal was premised on the ground that the taxing officer awarded excessive costs to the Respondent and cited the case of **Patrick Makumbi and another versus Sole Electrics, SCCA No. 11 of 1994** where it was held that;

"...the Appellate Court will not interfere with an assessment to costs by a taxing master unless he misdirected himself on a matter of principle."

He went on to state that in the appeal that was dismissed the taxing officer exercised their discretion in taxing the Respondent's Bill and taxed in accordance with the laid down laws and rules. In the circumstances there was no excessive costs and no irregularity caused by the taxing officer.

Counsel for the Applicant in rejoinder disagreed and submitted that the Applicant's appeal is not premised on the excessive costs but also brings to the attention of Court the illegalities committed by the taxing officer in the taxation of the Respondent's Bill of Costs. He noted that the principles which this Court can follow in interfering in the assessment of costs are laid down in the case of **Mbogo and another versus Shah (1968) E.A 93**, where it was stated that;

"... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some

matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice"

In my view the appeal may indeed have high chances of success. The Appellate Court also can only interfere with the assessment of costs by a taxing officer if he/she misdirected themselves on a matter of principle and extravagant assessment can be inferred as misdirection. This ground therefore succeeds.

Ground 3: That it is fair, just and equitable that the Appeal be re-admitted or re-instated.

Counsel for the Applicant brought it to the attention of Court that there was sufficient reason as to why the Applicant was prevented from appearing Court for the hearing on 16th December 2015. That there is probability of the appeal being successful and that the negligence of the previous Counsel should not be visited on the Applicant.

Counsel cited the case of **Canster Rags (U) Ltd versus Stanbic Bank (U) Ltd, Bahabur Karmali and Riyaz Mithani, High Court Miscellaneous Application No. 401 of 2014**, it was held that;

"The High Court may invoke its inherent jurisdiction to set aside a dismissal in the interest of justice provided the incorrect procedure does not go to jurisdiction and had not occasioned prejudice to the Respondent. The Respondent has had an opportunity to reply to the application on the merits and has indeed addressed the Court on the merits. I will therefore consider the application or the merits."

In my opinion, I find that the Applicant has proved sufficient cause as to why the application should be granted and the appeal also may have great chances of success once determined on its merits. In the interest of justice therefore, this application is allowed and let the appeal be re-instated. Costs abide the outcome of the appeal.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

2/12/16.