

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. APPLICATION NO. 233 OF 2013
(Arising from HCCS NO. 137 of 2006)**

**ABUBAKER MASHARI:..... APPLICANT
VERSUS**

- 1) BAKUNDA (U) LTD**
- 2) NILE BANK LTD**
- 3) BAT VALLEY AGENCIES LTDRESPONDENTS**
- 4) VICENT KAWUNDE T/A
OSCAR ASSOCIATES**

**RULING
BEFORE LADY JUSTICE EVA K. LUSWATA**

This application was brought under Section 98 of the Civil Procedure Act, Order 9 rule 23 (1) and Order 52 rule 1 and 2 of the Civil Procedure Rules seeking to set aside the dismissal of HCCS No.137/2009 (hereinafter referred to as the main suit) and for its reinstatement.

The application was supported by the affidavit of the applicant where he briefly stated that on 7/8/09, the main suit was called to hearing but dismissed owing to the absence of him and his counsel. He contended that he was absent because he was never informed of the hearing by his counsel. He further explained that he attempted to have the dismissal set aside when he filed Misc Application No, 847/2009 on 14/12/09, but that particular application was never heard for as the Registrar of the Land Division explained to him, it had been withdrawn by his lawyers on 5/3/13. He denied instructing his lawyer to withdraw that application.

Although adequately served, the 1st and 3rd respondents did not respond to the application, which proceeded *ex parte* against them. The affidavits of Andrew Munanura and the 4th respondent were filed in response to the application. Briefly, it was stated in those affidavits that the reliefs sought are in vain and the application devoid of merit because the subject matter in the main suit has already been sold and transferred into names of a person who is not party to the suit. It was stated that the applicant is to be blamed for not being diligent in prosecuting the

main suit and filing the present application four years after the suit was dismissed, which was termed undue delay. The 4th respondent also highlighted several applications that the applicant has filed and withdrawn or failed to prosecute. Mr. Kamuteera further stated that reinstatement of the suit could be allowed only if the applicant paid the taxed costs of the dismissed suit.

At the hearing of 25/6/14, Mr. Walukagga counsel for the 4th respondent cross examined the applicant on his affidavit. The applicant admitted that he had signed the affidavit in support of the application but conceded that he did not know English and that its contents were only read out to him by his lawyer before he signed.

As directed by court, counsel filed written submissions.

Counsel for the applicant submitted that the main suit was dismissed solely due to the negligence of the applicant's former counsel who was served with the hearing notice but neglected to inform the applicant who hence, did not attend court, resulting into the dismissal of the suit. He argued that the negligence of that counsel should not be used against the applicant to deny him an opportunity to be heard and in this, he cited the case of **Motor Mart (U) Ltd Vs. Yona Kanyomozi SCCA No. 6 of 1999** and **National Insurance Corporation vs. Mugenyi & Co. Advocates [1987] HCB 28**. Counsel further stated that after the main suit was dismissed on 17/8/09, the applicant instituted an application for its reinstatement vide MA 847/2009 on 14/12/09. That on several dates court did not sit to hear that application and the court file was reported missing which cannot be attributed to the applicant. That MA 847/2009 was also withdrawn without the applicant's knowledge which led him to file the current application. Thus, there has not been any delay in prosecuting this application.

In reply, counsel for the 2nd respondent submitted that although **Order 9 rule 23** empowers court to make an order setting aside the dismissal of a suit, such remedy is available only when the applicant has satisfied the court that there was sufficient cause for non appearance when the suit was called on for hearing. That Courts have held that sufficient reason must relate to the inability or failure to take a particular step in time. **See; Mugo Vs. Wanjiri [1970] EA 481, Njagi vs. Munyiri [1975] EA 179**. Counsel also stated that failure of an advocate to appear on a scheduled

hearing date is not an error of judgment but a negligent omission to observe a plain requirement of the law. In his view, the applicant had not met the legal requirements for sufficient cause so as to justify the grant of the application.

Counsel further submitted that the application is not supported by an affidavit that passes the requirements of the law. That when the applicant was cross examined on his averments contained in the affidavit it was discovered that he is an illiterate. As such, in the absence of a certificate of translation, the applicant could not have deponed the affidavit in support of contents he did not understand. Counsel cited **Tikens Francis and Anor Vs. The Electoral Commission and 2 Others HC Election Petition No. 1 of 2012** and **Kasaala Growers Cooperative Society Vs. Kakos Jonathan and Another SCCA No. 19 of 2010**. He argued that the provision in **Section 3 of the Illiterates Protection Act** is couched in mandatory terms and failure to comply with it renders the document inadmissible.

Counsel for the 4th respondent submitted in reply that the affidavit in support of the application should be struck out for not having been commissioned in the presence of the applicant. In this he relied on **Section 6 of the Oaths Act Cap 19, Rule 7 of the Commissioner for Oaths Rules** and **Mohammed Majyambere Vs. Bhakresa Khalil MA No. 727/2011**.

Counsel also submitted that no evidence had been adduced to show that the application was withdrawn without the knowledge of the applicant or at his counsel's behest. That it is an abuse of court process for the applicant to then file another similar application and without explaining how the application. That therefore, without explaining how the application for reinstatement of the suit was withdrawn, it should be taken that when the head suit was dismissed in August 2009, the applicant filed an application for reinstatement in 2013, four years since the dismissal of the suit. He argued that this is an inordinate delay in bringing this application which should not be condoned by this court and quoted **Stone Concrete Ltd Vs. Jubilee Insurance Co. Ltd MA No. 358 of 2012**.

In response, counsel for the applicant argued that the objections raised were mere technicalities that cannot be allowed to block the course of justice. He argued that the subject matter of the application is land on which the applicant has his residence and therefore he should be accorded

an opportunity to be heard. He further argued that nothing was shown that the absence of a certificate of translation occasioned an injustice on the respondents. That the true import of the Oaths Act and Rules is intended to protect an illiterate from fraudulent acts of literate persons and therefore, in the circumstances of this case, it should be the applicant and not the respondents to complain. Counsel further argued that the applicant is not illiterate since he testified to be one who can read and write and that he signed the affidavit after it was read to him by his lawyer. He concluded that it would be injustice to reject an affidavit, where the deponent does not complain of signing after being oppressed or manipulated.

Having considered the submissions by both counsels, I find that two objections of law were raised that would require my decision before considering the merits of the application. It was argued for the 2nd and 4th respondents that:-

- i. The affidavit in support of the application was not commissioned in the presence of the applicant.
- ii. The affidavit in support of the application did not indicate that it was read and explained to the applicant who is an illiterate.

The applicant in cross examination testified that he did know English, and he signed the affidavit in support of the application only after it had been read to him by his lawyer. He also conceded that he did not know Augustine Semakula the person who commissioned the affidavit since at the time of signing the affidavit it was only his lawyer present. By way of clarification in re-examination, he testified that he signed the affidavit before some lawyers who he could not remember due to passage of time. I would be persuaded to believe the applicant that he does not know Augustine Semakula (the commissioner for Oaths) and I would give him the benefit of doubt that the passage of time could have erased the minute details of what exactly took place at the time he signed the affidavit. However, I noted that he was clear in cross examination that when he signed the affidavit, it was only in the presence of his lawyer. His clarification that there were other people present appeared to be an afterthought and thus not credible I choose not to believe it. I take it therefore that he did not take the oath before any Commissioner of Oaths as required by which would render the affidavit inadmissible.

Secondly, In relation to illiterates, **Section 3 of the Illiterates Protection Act** provides that;

“Any person who shall write any document for or at the request or on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.”

While considering the above section, the court in **Tikens Francis and Anor Vs. The Electoral Commission and 2 others (supra)** provided by counsel for the 2nd respondent explained that:

“There is a clear intention in the above enactments that a person who writes the document of the illiterate must append at the end of such a document a kind of ‘certificate’ consisting of that person’s full names and full address and certifying that person was the writer of the document; that he wrote the document on the instructions of the illiterate and in fact, that he read the document over to the illiterate or that he explained to the illiterate the contents of the document and that, in fact, the illiterate as a result of the explanation understood the contents of the document...The import of S.3 of the Act is to ensure that documents which are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their content...These stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons...The requirements of the Illiterates Protection Act are legal requirements and not procedural requirements. The law can therefore not be bent under Article 126 (2) (e) of the Constitution...”

This was also considered in the Supreme Court cases of **Kasaala Growers Co-Operative Society vs. Kakooza and Another (supra)** and **Ngoma Ngime Vs. Electoral Commission and Hon Winnie Byanyima (supra)** that were cited by counsel for the 2nd and 4th respondents. In the latter case the principle was that the section is couched in mandatory terms and failure to comply with it must render the document inadmissible.

In the instant case, the applicant admitted to being an illiterate who cannot read or understand English. His affidavit in support of the application does not bear the certificate of translation showing his lawyer’s full names and full address and certifying that the lawyer was the author of the document, or that the lawyer fulfilled any of the requirements under by the law in respect of an illiterate deponent. Although the applicant admitted that his lawyer read out the document to him before he signed, he did not state that he understood the contents before he signed.

I do appreciate the arguments of counsel for the applicant that the rule is meant to protect illiterates and that in this case, the illiterate identified the affidavit as his and was not complaining of any interference in signing it. However, I believe that section was also meant to keep the record pure and true in that the advocate concerned, who in this case, is the actual author of the document, stated in uncertain terms (at the time he made the affidavit) that he had full instructions of the client to make it and that he ensured that the deponent signed, before a commission for oaths that he understood it before signing. This is important because, the concerned advocate cannot at subsequent proceedings be allowed to clarify on such facts which would be giving evidence from the bar. With due respect to the arguments of counsel for the applicant, the facts here cannot be equated to the situation in **Hon.Ssekikubo & 3 Ors Vs Ali & 4 Ors (Misc. Appl. No.233/13)** in which the Supreme Court was prepared to consider it a mere irregularity where the commissioner for oaths omitted to include in the jurat, the place at which the oath had been taken. It was therefore still incumbent upon the concerned counsel to include a certificate of translation at the foot of the affidavit which, as authorities have shown, is a mandatory legal requirement and not a mere technicality. This again would render the affidavit incurably defective.

Sadly therefore, the application, which is by motion, is left without an affidavit in support. Under 0.51 Rule 3 CPR; every motion shall be supported by an affidavit. Therefore, the two points of law raised by the respondents succeed and there would be no need for the court to divulge into the merits of the application.

Before I take leave of this suit, I cannot fail to observe that this is an applicant who has progressively fallen under the hands of advocates who did not represent him adequately. He is a professed illiterate who has been waiting for justice since 2006 and still cannot have benefit of a hearing due to technical matters, one particularly coming up in this matter. In my estimation, he qualifies for protection of this court and as such, he should not shoulder the brunt of costs as a result of acts beyond his control. Since under section 27 (1) CPA, the award of costs is in my discretion. I order that this application stands dismissed with no order as to costs. For the avoidance of doubt, counsel for the applicant is also denied costs and may not file an advocate - client bill as a consequence of this application.

I so order.

EVA K. LUSWATA
JUDGE
16th October 2014