BANCO ARABE ESPANOL

v

BANK OF UGANDA

SUPREME COURT OF UGANDA AT MENGO

SUPREME COURT CIVIL APPEAL NO.8 OF 1998
(ON APPEAL FROM COURT OF APPEAL CIVIL APPEAL NO. 23 OF 1998)

BEFORE:
ODER, J S.C.
TSEKOOKO, J.S.C.
KAROKORA, J.S.C.
MULENGA, J.S.C.
KANYEIHAMBA, J. S.C.

October 5, 1999

Civil Procedure – Security for costs – Appellant ordered to pay security for costs in High Court – Appellant depositing bank guarantee for payment of cost in court as security – Bank guarantee rejected by High Court Registrar and suit dismissed – Suit reinstated upon application on grounds that Appellant was prevented by sufficient cause from furnishing security within time allowed – Whether circumstances of case amounted to "sufficient cause" envisaged by Order 23 rule 2(2) Civil Procedure Rules – Bank guarantee given because of delays involved in obtaining cash deposit – Whether "Sufficient cause"

Civil Procedure – Applications for setting aside dismissal of suit – Suit reinstated upon application on grounds that Appellant was prevented by sufficient cause from furnishing security within time allowed – Whether circumstances of case amounted to "sufficient cause" envisaged by Order 23 rule 2(2) Civil Procedure Rules – Mistake by advocate – Whether "sufficient cause"

Appeals – Court of Appeal holding there was no sufficient cause for reinstatement of case – Duty of first appellate court – Whether evidence properly evaluated – whether court of appeal wrongfully interfered with exercise of discretion by trial judge

This second appeal is brought against the decision of the Court of Appeal at Kampala which overturned the High Court's decision and orders reinstating the appellants suit against the respondent Bank of Uganda. The suit had been dismissed on grounds that the appellant failed to deposit security for costs within the period ordered by the High Court.

The facts leading to the matter are that, In 1989, by way of a loan agreement the appellant lent the Ugandan government One million United States Dollars. The respondent signed the loan agreement as guarantor for repayment of the loan. The Uganda Government defaulted on repayment of the loan at which point the appellant sued the Uganda Government and the respondent in the High Court of Uganda for recovery of the loan. The Uganda government and the respondent objected to the suit on the ground that it was time-barred. Only the Uganda Government application was successful. The suit against the government was dismissed, but was allowed to proceed against the respondent. Thereafter the respondent

applied to the High Court for an order that the appellant deposit security for costs. The application succeeded and the appellant was ordered to pay a deposit of shs. 20,000,000/= at the High Court as security for costs within 30 days from the date of the ruling. The appellant deposited at the High Court a bank guarantee issued by Tropical Africa Bank Ltd, promising payment of shs. 20,000,000/= as security for costs. The bank guarantee was rejected by the Registrar of the High Court for not being a cash deposit, which the court had ordered, and the suit was dismissed

The appellant applied to the High Court for orders to set aside the dismissal, and to reinstate the suit. The application was heard and granted resulting in an order setting aside dismissal of, and reinstating the suit. The respondent made an informal application for leave to appeal. The respondent appealed to the Court of Appeal against the High Court orders setting aside the dismissal and reinstating the suit and the appeal succeeded. The substance of the decision of the Court of Appeal was in effect that the High Court ought not have reinstated the suit because the appellant had not shown sufficient cause for the failure to furnish the security for costs, as ordered. as a result of which the Court of Appeal reversed the High Court order reinstating the suit, and made an order dismissing the suit with costs. The appellant now appeals against that decison.

Held:

(i) The first appellate court has a duty re-appraise or re-evaluate evidence by affidavit as well as to evidence by oral testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial judge. The present is one of the clear cases in which it was incumbent on this Court to re-evaluate the evidence. The Supreme Court found that the Court of Appeal failed in its duty, as first court of appeal to subject the evidence in the case to that fresh scrutiny which the appellant expected it to do.

(ii) The evidence showed that the appellant deposited the bank guarantee due to a mistake belief that the guarantee would suffice as the security for costs by the High Court. Taking into account bureaucratic delays in obtaining payment of money from the appellant at its office in Spain and the difficulty in transferring of money internationally, the appellant would have required more time to comply with the High Court order for a cash deposit.

(iii) Under Order 23 rule2 (2) of the *Civil Procedure Rule*s, an order for dismissal of a case can be set aside for sufficient cause. The circumstances of the case showed that the appellant was prevented by sufficient cause from depositing the money for security of costs within the time allowed because it was under the mistaken belief that a guarantee would suffice as security for costs as per the advice of their counsel. The Supreme Court found that the present case was one where the error by counsel for the appellant should not be visited on the appellant, and that the circumstances amounted to sufficient cause for the purposes of setting aside dismissal of the suit.

(iv) While the Court's power to dismiss a suit, under order 23 rule2 (1) is automatic upon the plaintiffs failure to comply with an order for security for costs, the Court’s power to reinstate such dismissed suit under rule2 (2) is discretionary. The Supreme Court found that the trial judge properly exercised her discretion by setting aside the dismissal of the appellant’s suit. Brevity of the ruling was not an error causing a miscarriage of justice.

Cases referred to:

45MB. Patel v. *R. Gottifried* (1963) 20 EACA, 81.

Alexander Jo Okello v. *Kavondo* & *Co. Advocates.* Supreme Court Civil Application No. 17 of 1996 (Unreported).
Baker v. *Faber* (1908) WN.9
Bogere Charles v. *Uganda,* Supreme Court Criminal Appeal No.10 of 1998 (unreported).
Bogere Moses and Anor v. *Uganda* Supreme Court Criminal Appeal. No. 1 of 1997 (unreported)
Bray v. *R. J. Bray,* (1957) EA. 302,
Caspair Ltd v Harry Gandy (1962) E.A 414
Charles Bitwire v. *Uganda* Supreme Court Criminal Appeal No. 23of 1985
Clouds 10 Ltd v. *Standard Chartered Bank Ltd.* Civil Application No. 35 of 1992(unreported)
Coles v. *Ravenshear (*1907) 1KB 1
Eltafick Trading Co. v. Libyan Arab (U) Bank and Another H.C.C.S. No.138 of 1985 (Unreported)
Essaji v. *Solanki* (1968) EA 218
G.M Combined (U) Ltd. and others v. A.K. Detergents (U) Ltd. Court of Appeal Misc Application No. 760 of 1997 (Unreported)
G.M *Combined, Court of Appeal Civil Appeal No.* 28 of 1989 (unreported);
Gatti v. *Shoosmith* (1939) 3 All E R 916
H.K. Shah & *Anor* v. *Osman Allu* (1974) 14 EACA*;,*
Haji Nadin Matovu v. *Ben Kiwannka,* Supreme Court Civil Application No. 12 of 1991 (Unreported)
Haji Nurdin Matovu v. *Ben Kiwanuka.* Supreme Court Civil Application No. 12 of 1991(Unreported)
Halderkiimar Mohindra v. *Mathuradevi Mohinda.* Civil Appeal No. 34/1952. EACA*:*
Kairu v. Uganda [1978] HCB 123
Kevorkian v. *Burnev* (1937) All E. R 97
Kifamunte Henry v. *Uganda* Supreme Court Criminal Appeal. No. 10 of 1997 (unreported)
L.A.M Hussein v. *G.I Kakiiza and* 2 *others.* Supreme Court Civil Application 30 of 1994 (unreported)
Mbogo and Another v. *Shah* (1968) E.A. 93;
Mot v Chanchalbhai (1915) 1166 EALR 16
Okeno v. *Republic* (1972) EA. 32
Pandya v. *R* (1957) EA 336;
Patrick Njoroge Nguri v. Livingsone Mithul (1955), 22, EACA, 43.
Peters v. *Sunday Post Ltd.* (1958) *EA* 423
Re Helsby (1894) IQB 742
Shabir Bin Ram Pakrash Aund (1955). 22 EA.CA 48
Shah v. *Allou Osuman* (1947) 14, EACA, 45;
Shiv Construction Co. v. *Endesha Enterprises Ltd,* Supreme Court Civil Application No. 15 of 1992 (unreported).
Uganda Development Bank v. *National Insurance and Another (SCU) Civil No.* 28-95 (unreported)

Legislation referred to:

Civil Procedure Rules Order 23 rule 2(2)
Court of Appeal Rules Directions 1996 rule 86(1)(g), rule 29 .
Evidence Act, section 101 of the

JUDGMENT

ODER, J.S.C.: This is a second appeal. It is brought against the decision of the Court of Appeal at Kampala (MANYINDO, D.C.J.; ENGWAU, J.A. and TWINOMUJUNI, J.A.) which overturned the High Court's decision and orders reinstating the appellants suit against the respondent Bank of Uganda. The suit been dismissed on the ground that the appellant failed to deposit security for costs within the period ordered by the High Court.

The Background to the appeal is as follows: By a loan agreement dated November 11, 1989 the appellant lent and the Ugandan government borrowed United States Dollars One million (US$ 1,000,000.00). Repayment of the loan was guaranteed by the respondent. The appellant is a Spanish bank carrying on banking' business in Spain.

After paying two installments of the loan, the Uganda Government defaulted on the loan agreement. Consequently, the appellant sued the Uganda Government and the respondent in the High Court of Uganda for recovery of the loan. By a formal Application in the High Court both the Uganda government and the respondent objected to the suit on the ground that it was time-barred. Only the Uganda Government application was successful. In a ruling delivered on November 21, 1997, the High Court dismissed the suit against the government. The respondent's application failed, and the Court ordered that the suit against it should proceed to trial.

Thereafter the respondent on December 15, 1997 applied to the High Court for an order that the appellant should deposit security for costs. The application succeeded and the appellant was ordered to pay a deposit of shs. 20,000,000/= at the High Court as security for costs within 30 days from January 16, 1997, the date of the order.

On February 13, 1998 the appellant deposited at the High Court a bank guarantee issued by the Tropical Africa Bank Ltd. promising payment of shs. 20,000,000/= as security for costs. The bank guarantee was rejected by the Registrar of the High Court for not being a cash deposit, which the court had ordered. Consequently, the suit was dismissed on February 25, 1998.

Thereafter the appellant on February 25, 1998 applied to the High Court for orders to set aside the dismissal of, and to reinstate, the suit. The application was based on several grounds to which I shall revert later in this judgment. It was heard and granted on May 27, 1998, resulting in an order setting aside, and reinstating, the suit. On the occasion the High Court made that order, the respondent made an informal application for leave to appeal. The application for leave was granted, following which the respondent appealed to the Court of Appeal against the High Court orders setting aside the dismissal and reinstating the suit. The appeal succeeded, as a result of which the Court of Appeal reversed the High Court order reinstating the suit, and made an order dismissing the suit with costs. Hence the appeal.

Eight grounds of appeal are set out in the Memorandum of Appeal. As amended with leave of the Court, the grounds are to the effect that:

1. The learned Justices of the Court of Appeal erred in law and fact when they held there was not sufficient cause for reinstatement of the suit by the High Court.

2. The learned Justices of the Court of Appeal erred in fact and law when they failed to re-appraise, evaluate and consider the evidence for failure to deposit the money for security for costs in time which evidence was not rebutted in the High Court by an affidavit in reply.

3. The learned Justices of the Court of Appeal erred in fact and law when they took additional

evidence on appeal without leave of court of a letter from the appellant's firm of advocates dated February 13, 1998 which was not legally addressed in the High Court by an affidavit in reply.

4. The learned Justices of the Court of Appeal erred in law when they interfered in the exercise of the discretion of trial judge to set aside the dismissal order of the suit and to order a reinstatement of the suit.

5. The learned Justices of the Court of Appeal erred in law when they took judicial notice of the fact that bureaucratic procedures and delays in money transfers were an afterthought and untenable when there was no evidence in rebuttal from the respondent in the trial court.

6. The learned trail Justices of the Court of Appeal erred in fact and law when they dismissed the suit in the lower court while it was partly heard and the appellant had closed its case.

7. The learned Justices of the Court of Appeal erred in law and fact they heard the appeal from an unreasoned order contrary to rule 86(1)(g) of the *Court of Appeal Rules Directions 1996*.

8. The learned Justices of the Court Appeal erred both in fact and in law when they awarded respondents costs of the appeal in the trial court.

Mr. Justine Semuyaba, counsel for the appellant argued the first, second, third, fourth and fifth grounds of appeal together In my view he rightly did so because the first five grounds raise two main issues, namely, first, whether the Court Appeal failed in its duty as the first appellate court to re-evaluate the evidence in this case, resulting a wrong decision. Second, whether the Court of Appeal wrongfully interfered with exercise of discretion by the trial Court. In his submission, the learned counsel contended that the appellant's application in the High Court, aside the dismissal of the suit together with the affidavits filed in support of the application showed that there was sufficient cause justifying the High Court decision to act as it did. Following the Court order for security for costs the appellant was under a mistaken belief that a guarantee would suffice as security for costs *before* money was deposited in cash. Secondly, as Justo Trashorras Diaz said in his affidavit of May 6, 1998, the delay in paying money for security for costs was caused by problems in money transfer internationally. Third, the appellant applied for extension of time within which to furnish the security for costs ordered by the court, but the application was not heard before the suit was dismissed. These, the learned counsel contended, constituted sufficient cause for purposes of Order 23 rule 2(2) *Civil Procedure Rules*. For authorities on application of Order 23, rule 2 (2) the learned counsel cited A.I.R. COMMENTRIES ON CODE OF CIVIL PROCEDURE, page 550, Chitaley and Rao; *G.M Combined (U) Ltd. and others v. A.K. Detergents (U) Ltd. Misc Application No. 760/97 (CAU) (unreported) and Eltafick Trading Co. v. Libyan Arab (U) Bank and Another H.C.C.S. No. 138/85.*

In this regard, Mr. Semuyaba also submitted that the affidavits in support the appellant's application for setting aside the suit was not rebutted by the only affidavit in reply sworn by Mathia Sekatawa on 27.5.98. Moreover, to that affidavit was annexed a document not commissioned by a Commissioner for Oaths.

Another aspect of this case concerning which the appellant's counsel made submission is the duty of an appellate court in dealing with discretion already exercised by a trial court under 0.23 rule(2). He said that a party wishing to convince an appellate court to interfere with the exercise of discretion by such a court must show that it has suffered injustice. Mere difference of opinion is not enough. The applicant has to show that the trial court arrived at a wrong decision causing injustice and that the applicant has been mistreated by allowing a reinstatement the dismissed suit. The learned counsel relied on *Shah* v. *Allou Osuman* (1947) 14, *EACA*, 45; *Uganda Development Bank* v. *National insurance Corporation and* G.M

Combined, Civil Appeal No. 28/ 959 *(CA,U) (unreported);* G.M *Combined and others* v. *A.K. Detergents (U) Ltd., Misc Application No. 760/97 (HCU). (Unreported).*

In the instant case, it is contended for the appellant that the respondent also had to show to the Court of Appeal that the learned trial judge used wrong reasons. This the respondent did not do.

It is also contended for the appellant that the colossal amount of money involved was another reason justifying setting aside the dismissal of the suit. This point was made in the High Court at the hearing of the application for setting aside the dismissal of the suit. *G.M Combined (U) Ltd.* (Supra) was also referred to.

For the respondent, its learned counsel, Mr. Masembe Kanyerezi, also argued in his reply, the first, second, third, fourth and fifth grounds together He submitted that it was clear from the order security for costs that it was money, not a bank guarantee which was required to be deposited in court. Courts have discretion to order for any form of security for costs, but in the instant case, it was money, which was to be deposited by the appellant. The last date for doing so was February 26, 1998. When the suit next came for hearing on February 25, 1998 the respondent had not yet deposited money in court. So, the suit was dismissed although the appellant's application for extension of time was pending in the High Court. Mr. Kanyerezi submitted that the operation of Order 23 rule 2(2) is mandatory. Once security for costs is not deposited within the time fixed for doing so, it is mandatory for the trial court to dismiss the suit. *Patrick Njoroge Nguri v. Livingsone Mithul* (1955), 22, EACA, 43. However, where a suit is dismissed the plaintiff may apply to set aside the dismissal. But court’s discretion to do so is circumscribed in that setting aside of a dismissal can be done only on sufficient cause. The respondent in the instant case made such an application. The question is whether the application was supported by sufficient cause. It was not, in the respondent's view.

In this connection the respondent’s learned counsel submitted that the reasons given by the appellant in support of its application for setting aside the dismissal were contradictory. On the one hand, it was said in paragraph 9 of Birungi Wyclife’s affidavit of February 27, 1998 that money for security for costs was not deposited in court because of a mistaken belief on the part of the appellant's counsel that a bank guarantee would suffice in place of a court deposit as security for costs. On the other hand, as stated in paragraphs 4,5 and 9 of Justo Trashorras Diaz’s affidavit dated May 6, 1998, the appellant did not deposit money in time because of bureaucratic procedures involved in approving payment of money and delays in making international money transfers. The two reasons, it is contended, were irreconcilable. Contrary to the appellant's contention, the bank guarantee was not deposited pending arrival of money. This is clear from the letter dated February 13, 1998 addressed by the appellant's lawyers, M/S Birungi Semuyaba, Iga & Co. Advocates. The letter said inter alia, that the appellant had opted for the guarantee as security for costs. A copy of the bank guarantee was forwarded with the letter No mention was made of the difficulty in transmission of the money. In accordance with the provisions of section 101 of the *Evidence Act*, the appellant had the duty to prove its case to justify reinstatement of its case. This it did not do, it is contended.

Moreover, it is said, the High Court did not help matters. The learned trial judge did not indicate which of the appellant’s irreconcilable reasons amounted to sufficient cause to support the decision.

The respondent's learned counsel then criticized the appellant's claim in Diaz's affidavit of May 6, 1998 that remission of money was delayed by bureaucratic procedure. The affidavit did not clarify whether the bureaucratic procedure related to Spanish law or to the appellant's own internal procedure. If the delay was caused by the appellant's own bureaucratic procedure, it was not sufficient cause. Bureaucracy had to be something intrinsic. It was not shown by evidence that the process of remitting money was started

early enough to comply with the time limit fixed by the High Court. Where a plaintiff is ordered to deposit security for costs within a stipulated period compliance with the order is mandatory. *Patrick Njoroge Nguri* (supra).

It is further submitted that the appellant could institute a new suit if it fails to have the Court of Appeal's decision reversed. Courts are more stringent when deciding whether to reinstate a suit dismissed under Order 23 rule 2 where a plaintiff can start a new suit that where the plaintiff cannot. *Shabir Din v. Ram Prakash Arand* (1955) 22 EACA.48.

On exercise of a trial court's discretion and role of an appellate court, the learned counsel referred to *Peters* v. *Sunday Post Ltd.* (1958) EA 423 at 429, and 430.

Order 23, rule 2(2) under which the High Court reinstated the appellant's suit, provides as follows:

> "2(2) where a suit is dismissed under this rule, the plaintiff may apply for an order to set aside the dismissal, and, if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the trial."

The suit was reinstated upon a successful application by the appellant. The application was supported by affidavit evidence, which the learned trial judge accepted to have shown sufficient cause. The appellant now complains that the Court of Appeal reversed the reinstatement because, inter alia, it failed to re-appraise, evaluate and consider the evidence for the appellant's failure to deposit the money for security in time. It is contended that that evidence was not rebutted by affidavit in reply. By this the appellant is urging this court to re-appraise the relevant evidence. It is on the basis of the evidence adduced by both sides that the court would decide whether the appellant proved or did not prove sufficient cause for reinstatement of its suit.

The duty of the Court of Appeal to re-appraise evidence on an appeal from the High Court in its original jurisdiction is set out in rule 29 Rules of the Court of Appeal as follows;

> "29(1) on any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the court may;
>
> (a) re-appraise the evidence and draw inference of fact,
> (b) in its discretion, for sufficient reason take additional evidence or direct that additional evidence be taken by the trial Court or by commissioner;
>
> (2) ……
> (3) ……"

This court recently restated the application of this rule in the case of *Kifamunte Henry* v. *Uganda* Supreme Court Criminal Appeal. No. 10 of 1997 (unreported). Although the principles stated therein were in respect of a criminal appeal, there can be no doubt that they equally apply to civil appeals. On a first appeal, an appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. In *Kifamunte Henry* (supra) this court said:

> "We agree that on first appeal.... The appellant is entitled to have the appellant's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to rehear the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather that another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge who saw the witness but there may be other circumstances quite apart from the manner and demeanor which may show whether statement is credible or not which may warrant a court in differing from the judge even on a question of fact turning on credibility of witness which the appellate court has not seen. See *Pandya* v. *R* (1957) *EA* 336; *Okeno* v. *Republic* (1972) *EA.* 32; *and Charles Bitwire* v. *Uganda Criminal Appeal No.* 23/85 *(SCU) (unreported)."*

In my opinion the duty of a first appellate court as restated in the case of *Kifamunte* (supra) applies to re-appraisal or re-evaluation of evidence by affidavit as well as to evidence by oral testimony, except, of course, that impression of demeanour of witnesses does not arise in the case of affidavit evidence.

In the same case the court also said:

> "It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first appellate Court. On second appeal it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principles: See *D.R. Pandya v. R* (1957) E.A.(supra) *Kairu v. Uganda* [1978] HCB 123."

After referring to provisions of the Judicature Act and the Trial on Indictments Decree, which are not relevant to the instant case, the court continued.

> "This court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale we shall assume the duty of the first appellate court and create unnecessary certainty. We can interfere with the conclusions of the court of appeal if it appears that in consideration of the appeal as a fist appellate court, the court of Appeal misapplied or failed to apply the principles set out in such decisions as *Pandya* (supra) *Ruwala* (Supra) *Kairu* (Supra)."

The same principles were echoed by the Court in subsequent cases. See *Bogere Moses and Anor* v. *Uganda Supreme Court Criminal Appeal. No.* 1 of 1997 (Unreported) and *Bogere Charles* v. *Uganda, Supreme Court Criminal Appeal No.10 of 1998* (unreported).

In the instant case, the grounds of the appellant's application for reinstatement of the suit were set out in the Notice of Motion as follows:

"(a) The plaintiff was prevented by sufficient case from depositing the money for security within the time allowed by the court because it was under a mistaken belief that a guarantee would suffice to cater for security for costs within reasonable time because she was under an ardent belief that a guarantee would cater for security for costs before the money was deposited in cash.

(b) The plaintiff through her counsel Birungi, Semuyaba, Iga & Co. Advocates on February

25, 1998 applied to extend the time within which to provide the security for costs but the court did not hear the application.

(c) That on 25th-day of February 1998 when the application to extend the time was to be heard, that was the day when the order for dismissal of the suit was made before the application could be heard and had the application to be heard, the plaintiff would have deposited the money.

(d) That the suit involves a colossal sum of money U.S. $1,413,604.70 and therefore it is in the interest of justice that the plaintiff be allowed time to deposit the security for costs ordered by the court on January 16, 1998.

(e) That the plaintiff did not inadvertently fail to deposit security for costs because she had already made arrangements with Tropical Africa Bank Ltd. to furnish the money to court on demand because of the problems involved in transferring money to Uganda."

One affidavit in support of the appellant's application was deponed to by Birungi Wycliffe, the appellant's counsel, on February 27, 1998. So far it is relevant, the affidavit stated as follows:

3. That on 25th day of February, 1998 counsel for the applicant filed in court a guarantee worth 20,000,000/= whose terms were, inter alia that the sum of shs. 20,000,000/= would be payable on demand.

4. That counsel for the applicant did file the guarantee with the Deputy Registrar His Worship Wangutusi who informed counsel that he would consult the Judge on the matter

5. That on the 20th day of February 1998 counsel for the applicant filed application for extension of time within which to furnish security of costs and the said application was scheduled to be heard on February 25, 1998,

6. That on the 23rd February, 1998 we received a letter dated 20th February, 1998 from His Worship Wangutsi informing us that the Judge had directed that shs. 20,000,000/=. cash be deposited court and not a guarantee.

7. That on the date for hearing the application for extension of time, the learned Judge dismissed-the suit.

8. That the applicant had acted promptly and genuinely by filing a guarantee in a bid to satisfy court requirements.

9. That I am informed that it was a mistaken belief on the part of counsel for the plaintiff that a guarantee would suffice for a cash deposit and the terms of the guarantee included a provision that the money would be payable immediately on demand.

10. That the case was dismissed before the application for extension of time within which to furnish security could be heard and yet the application was properly before the court,

11. That the plaintiff did not inadvertently fail to deposit the said shs. 20,000,00/= in cash but for the procedures of transferring money from the home country Spain to Uganda which are problematic and take a long time.

12. That the conduct of the applicant/plaintiff is not dilatory as they honestly acted by filing a guarantee.

13. That I am informed by General Secretary of the plaintiff bank. Mr. Justo Trashorras is ready and willing to deposit the security as cash so ordered by this Honorable Court. ”

The appellant's application for reinstatement of the suit was supported by another affidavit are relevant.

3. That on 16th day of January 1998 when this Honourable Court ordered the Applicant/plaintiff to pay security for costs of shs. 20,000,000/=. I was present in Uganda,

4. That thereafter I returned to Spain to make arrangements for payment of the money into court.

5. That however, due to the bureaucratic procedures involved in approving payment of the money and the delays in making international money transfers, the applicant/plaintiff bank was unable to send the money within thirty (30) days as was ordered by court.

6. That before the thirty (30) days expired, I instructed our lawyers Ms Birungi Semuyaba, Iga, and Co. Advocates through M/S Tropical Africa Bank Ltd. to obtain a guarantee that the money would be paid.

7. The guarantee was not acceptable to court and the suit was dismissed.

8. That now the applicant/plaintiff bank has managed to send a draft of shs. 20,000,000/= (Twenty million shillings). A Photocopy of the Draft is hereby attached and marked as 'Annexture A '

9. That was intentional to fail to deposit the cash ordered in time but it was due to problems involved in sending the money to Uganda which process involves intricate procedures of approval, communicating to our bankers in London and transferring money through a local Ugandan bank.

10. That we have always been ready and willing to deposit the money ordered by court but we were only let down by the limited time within the transfer the money.

11. That I duly communicated to the applicant plaintiff/bank lawyers about this fact and instructed them to seek an extension of time in court..

12. That the claim the applicant/plaintiff has against the respondent/defendant involves US$1,413,604.70 and is so colossal that in the interests of justice is prayed to court to reinstate the suit in order to have the issues involved judiciously adjudicated upon.”

One affidavit was filed by the respondent in opposition to the appellant's application for reinstatement of the suit. The affidavit was deponed to by Mathias Ssekatawa Counsel for the respondent. So far as it is relevant it stated.

"3. The applicant/plaintiff through its advocates M/S Birungi, Semuyaba, Iga and Co. Advocates opted to deposit a guarantee in court instead of cash in clear disregard of the court order. A copy of the applicant's counsel's letter dated the 13th February, 1998 clearly indicating the basis for

depositing the guarantee instead of cash is annexed and marked 'A' and copy of an earlier affidavit sworn by the applicant's counsel also clearly indicating the reason for depositing the guarantee is annexed and marked 'B'.

4. That the applicant's affidavit support of this application are inconsistent with the earlier averments by the applicant's counsel annexed hereto and should be regarded as being false.

5. That the averment in paragraph 6 of the affidavit of Justo Diaz in support of this application to the effect that the applicant deposited the guarantee due to difficulties in obtaining approval of payment of money and in making international money transfers is patently false, as international money transactions can be concluded within hours and is also contrary to his earlier affidavit dated the 9th day of January, 1998 stating that the applicant is a respectable International bank with large money reserves in New York, USA. A copy of this affidavit is annexed and marked 'C'.

6. That the applicants flaunting of clear and explicit court order cannot amount to sufficient cause for failure to comply therewith and the application for reinstatement of the suit is without foundation. "

7. That the applicant is not without remedy as it can file a suit if it so wishes on the same facts. "

Consideration and conclusion of the Court of Appeal on the evidence I have just referred to and the respondent's submissions thereon appear in the leading judgment of ENGWAU, J.A:

> "In my view, the crux of the matter in grounds one and two of this appeal is whether or not sufficient cause was shown for the reinstatement of the main suit. Learned counsel for the appellant rightly, in my view, submitted that a guarantee in place of a cash security for costs was not enough as it was contrary to the court order The Learned trial judge did not say on what basis the suit was reinstated. In view of what I have stated above, a guarantee would not be sufficient cause for reinstatement of the suit.
>
> Learned counsel for the respondent has submitted that the bureaucratic procedures involved in approving payment of the money and the delays in making international money transfers were sufficient of the suit. I do not agree as the alleged bureaucratic procedures and delays in money transfers were not established. I agree with counsel for appellant that the respondent had no serious intention to pay security in cash. In my view, the alleged bureaucratic procedures and delays in transfers were an afterthought. "

In my opinion the present is one of the clear cases in which is incumbent on this Court to re-evaluate the evidence. This is because, with the greatest respect, the Court of Appeal failed in its duty, as first court of appeal to subject the evidence in the case to that fresh scrutiny which the appellant expected it to do. My reasons for saying so are given hereafter.

I have already set out the appellant's affidavit evidence to support its application for reinstatement of the suit. A summary of it is first that there been a mistaken belief on the part of the appellant's counsel that a bank guarantee would suffice instead of a cash deposit in court as security for costs. Second, that delays in depositing cash was due to problems in sending money from Spain, a process which involved intricate procedures of approval, communication to the appellant's bankers in London and transfer of money through a local bank in Uganda. Third, that the appellant made an application for extension of time within which to deposit in court money for security in costs. Instead of hearing the application, which was pending in court at the time the learned trial judge simply dismissed the appellant's suit for its failure to deposit money with the time ordered by the High court. Fourth, that the appellant bank had sent

(presumably to Diaz himself) a bank draft of shs.20,000,000/=, the money required to be deposited in Court. Fifth, that is was in the interest of justice that the suit should be reinstated in order to have the issues involved judiciously adjudicated upon.

As I have said already in this judgment the appellant's affidavit evidence was controverted by the respondent's evidence in the affidavit of its counsel, Mathias Sekatawa, dated May 27, 1998. The gist of the contents of the affidavit is first, that the appellant opted to deposit a bank guarantee instead of cash in clear disregard of the High Court order This was clear from the letter dated February 13, 1998 addressed by the appellant's counsel to the respondent's counsel. The letter was annexed to Ssekatawa's affidavit. Depositing a guarantee instead of cash as security for costs amounted to a clear flouting of the court's explicit order. Such flouting of the court's order, the affidavit stated, could not amount to sufficient cause to support reinstatement of the appellant's suit. Second, Ssekatawa's affidavit further stated to the effect that the allegations by Justo Thrashourras Diaz in his affidavit of May 6, 1998 of difficulty in transferring money was false as international money transactions could now be concluded in a matter of hours.

As I shall show later in this judgment the respondent's affidavit evidence in my view failed to controvert the appellant's evidence.

There can be no doubt that if the appellant opted to deposit a bank guarantee as a substitute for cash, it did so in clear contravention of the High Court order As extracted the order said, inter alia;

> "It is hereby ordered that the respondents/plaintiffs do furnish to this Honourable Court security to the tune of shs. 20,000,000/= (Twenty Million shillings) on account of the costs of this suit within thirty days from the date hereof."

The order of the High Court have been so clear namely, that it was shs. 20m/= which was to be deposited in court, why then did the appellant not comply with the High Court order within the prescribed time? The underlying answer to this question, in my view, is to be found in reading together paragraphs, 5, 9, and 11 of the affidavit of Birungi Wycliff, paragraphs 9 and 10 of the affidavit of Justo Trashorras Diaz and grounds (a) and (b) of the appellant's notice of motion. In a nutshell, the answer is that the appellant deposited the bank guarantee due to a mistake belief that such a guarantee would suffice as the security for costs by the High Court and that due to bureaucratic delays in obtaining payment of money from the appellant at its office in Spain and difficulty in transferring of money internationally more time was necessary than was available for the appellant to comply with the High Court order. From all this, in my view, an inference may be drawn to the effect that the appellant needed more time which to transfer the required money from Spain to Uganda.

Support for inference that appellant needed more time is found in the appellant's efforts to extend time within which to deposit cash. According to paragraph 5 of Birungi Wycliffs affidavit of February 27, 1998, the appellant's application for extension of time was filed on February 20,1998. This was after the date for depositing security for costs, namely, February 16, 1998, had passed, but it was before the suit was dismissed on February 25, 1998. The respondent concedes that the appellant made such an application. It also agrees with the appellant that the application was not heard on the day it should have been done. Instead the suit was dismissed on that day.

With regard to the alleged mistaken belief on the part of the appellant's counsel, I would say this:

The question of whether an "oversight", "mistake", "negligence" or "error", as the case may be, on the

part of counsel should be visited a party the counsel represents and whether it constitutes "sufficient reason" or " sufficient cause" justfying discretionary remedies from courts has been discussed by courts in numerous authorities. Those authorities deal with different circumstances; and may relate to extension of time for doing a particular act, frequently in cases where time has already run over; some of them concern setting aside expect judgment or reinstating dismissed suit 'such as in the present case. But, they have the common feature whether a party shall, or shall not, be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default and of his professional advisor or advisor's clerk. The interests of the party who has obtained, or is in a position to obtain, a permanent advantage by reason of such default, and of the unfortunate and perfectly innocent party who has been deprived of a right through no fault of his own, are irreconcilable, and the courts have always found difficulty in deciding who is to suffer. Without going through the authorities at length, it may be said that the English authorities prior to *Re Helsby* (1894) IQB 742_generally led to the conclusion that the fault of the professional advisor should not be visited on his client, and that the matter should be re-opened terms, so as to enable to point of substance to be dealt with. After the decison in *Re Helsby* the tide flowed the other direction and it was generally held that the client must suffer for his advisor's mistake. This position is most clearly set out by the English court of Appeal in *Coles* v. *Ravenshear (*1907) 1KB 1. It was not, however, until a much later date that the reasons for this change were clearly understood. In spite of the decision in *Baker* v. *Faber* (1908) WN. *Coles* v. *Ravenshear* (supra) was still generally believed to contain the whole law on the subject. It was until *Kevorkian* v. *Burnev* (1937) All E.R 97 and *Gatti* v. *Shoosmith* (1939) 3 All E R 916: that the law was clearly understood. They explained that re *Helsbv* and the cases following were decided on the words "special leave" or "special reasons", and that if there were no requirement of "special" grounds the matter must be open and the court's decision unfettered.

The decisions in *Kevorkian* v. *Burnev* and *Gatti* v. *Shoosmith* have been followed by courts in East Africa and Uganda in cases where an applicant has to show "sufficient cause" for extension of time. In the case of *Shabir Bin Ram Pakrash Aund* (1955). 22 EA.CA 48. It was held that the mistake or misunderstanding of the plaintiffs legal advisor, even though negligent, maybe accepted as a proper ground for granting relief under the equivalent of Order 19 rule 20, of the Civil Procedure Rules, the discretion of the court being perfectly free and the words *"sufficient cause"* not being comparable or synonymous with *"special ground.* " Whether the ground for granting relief will be acceptable depends on the facts of the particular case.

Other authorities in which the same principles have been applied are *Bray* v. *R. J. Bray,* (1957) EA. 302, *Haii Nurdin Matovu* v. *Ben Kiwanuka.* Supreme Court Civil Application No. 12 of 1991(Unreported) and *Alexander Jo Okello* v. *Kavondo* & *Co. Advocates.* Supreme Court Civil Application No. 17 of 1996 (Unreported).

On the basis of the authorities referred to above, I consider that the present case is where the error part of counsel in the form of a mistaken belief that a bank guarantee would suffice, should not be visited on the appellant, especially in view of the fact that the appellant showed an intention to bring cash. In the circumstances the failure to deposit money within the prescribed time due to such error on the part of the appellant's counsel would amount to sufficient cause for purposes of setting aside the dismissal of the suit under Order 23 rule2 (2) of the *Civil Procedure Rules*.

The instant case, in my view, is distinguishable from that of *Patrick Njoroge Nguri v. Livingstone Wanji Muthuri* (1995) Vol 22. E.A.C.A. 43. In that case a suit was dismissed in the High Court of Kenya due to the plaintiff’s absence. An application to set aside the dismissal was allowed on terms, one of which was that the plaintiff should furnish security for costs by a certain date with this term, due to lack of funds, the plaintiff was unable to comply, and suit was dismissed. The plaintiff successfully applied to have the dismissal set aside. The defendant appealed to the East African Court of Appeal which held inter alia, that mere luck of funds is "not sufficient" under an equivalent of our Order 23 rule 2 (2). On the face of that

case would appear to support the respondent absolutely in the instant case. The facts were somewhat similar to those in the instant case in certain respects. When the plaintiff's suit was called for hearing on March 19,1952 in the High Court of Kenya at Nakuru, the plaintiff was absent but he was represented by counsel. Counsel found himself unable to proceed because he could not call witnesses. RUDD J. dismissed the suit, but a stay was given for such time as would enable an application to be made to reinstate the suit. On April 10, 1953 that application having been dully made, was allowed on terms. One term was that shs. 1000 /= security should be furnished by the plaintiff by April 25, 1953 and costs thrown away should be paid. Counsel for the plaintiff tendered to the Registrar just before time ran out a bond for shs. 1000 /= in purported compliance with the order for security for costs. The Registrar refused to accept it. The reason for refusing appears to be that the order made by RUDD, J was clearly not an order for security in the sum of 1000/= to the satisfaction of the Registrar as was sometimes made, but was an order for lodgment of shs. 1000/= cash. The reason for offering the bond instead of lodging cash as security was set out with complete candour in an affidavit of the plaintiff and was simply that he could not then raise the necessary money. There was no reason to suppose that either he or his counsel ever thought that the bond would be accepted by the Registrar, or would be a sufficient compliance with the learned Judge's order for security. On March 28, 1952, the plaintiff, having succeeded in raising some money, lodged shs. 1000/= in court but this lodgment was, of course, out of time, and was therefore not a sufficient compliance with the learned Judge's order On December 17, 1952 the defendant moved for dismissal of the action on the ground that the terms of RUDD, J's order had not been complied with and HANLEY, J dismissed the action under an equivalent of our order 23 rule 2(2). The plaintiff was duly represented. Thereafter the plaintiff applied for setting aside of the dismissal. The application was allowed by MAYERS, J. From that order the defendant appealed successfully.

The one distinction between that case and the instant is that in that case neither the plaintiff nor his counsel put forward as a ground for setting aside the dismissal of the suit that they had had a mistaken belief that a bond of shs.l000/= would suffice as security for costs. The reason given for non compliance with the court order in that case was lack of funds. In contrast to the position in that case, affidavit evidence in the instant case was that counsel had had a mistaken belief that a bank guarantee would suffice. A more important distinction however is on grounds of substantive justice due to the grounds stated in the appellant's notice of motion. The instant case should therefore, be treated differently from the *Patrick Njoroge Njuri case.* (Supra)

One of the grounds in support of the application for reinstating the suit in the instant case was stated in paragraph (e) of the notice of motion and paragraph 9 of Diaz's affidavit, to which I have already referred in this judgment.

Diaz deponed to that affidavit in his capacity as the Secretary General of the appellant Bank. Paragraph 14 of the affidavit stated:

> "That whatever is stated herein above is true to the best of my knowledge and belief by virtue of my position in the applicant/plaintiff bank save that in paragraph 7 which is information obtained from our lawyers M/S Birungi, Semuyaba, Iga Co. Advocates ".

What Diaz said in paragraph 9 of his affidavit was purportedly controverted by paragraph 5 of Ssekatawa's affidavit, which. I have set out in this judgment. Then the last two paragraphs of the same affidavit stated as follows:

> "8. That what is stated herein is true to the best of my knowledge.
>
> 9. That I swear this affidavit in opposition to the Applicant's application for reinstatement of this

suit".

In relation to Diaz's affidavit Ssekatawa's affidavit calls for the following comments. First the deponent did not disclose the means of his knowledge. In the case of *Caspair Ltd. Harry Gandy* (1962) E.A 414 the Court of Appeal for East Africa held that an affidavit sworn by counsel for a party in the case was defective, because the affidavit did not disclose the deponent's means of knowledge or the grounds of his belief in the matters set out in the affidavit, nor did it distinguish between matters stated on information and belief and matters to which the deponent swore from his own knowledge. In my view the decision in *Caspair Ltd.* (Supra) is still good law.

In the circumstances, in my opinion, Ssekatawa's affidavit was fatally defective and cannot be accepted in opposition to the Diaz's affidavit. It should not have been admitted in evidence.

Second, even if Ssekatawa's affidavit was not defective, it was sworn to disprove allegations which were contentious. It purported to disprove allegations of facts by Diaz's affidavit that there were delays in releasing money from the appellant bank and that there were problems in transmitting money internationally through Spain to a bank in Uganda. It also at the same time purported to prove that transmission of money internationally can now be concluded in a matter of hours; and that the allegations in Diaz's affidavit about difficulty in transmitting money from Spain to Uganda was false. Allegations in Diaz's affidavit in this regard are technical matters, knowledge of which counsel. is not expected to have unless, of course, he is well armed with the relevant source. It is in my opinion undesirable for counsel to be a witness for his client in a case such as this one.

Third if the contents of paragraph 9 of Diaz's affidavit were false, as it was alleged in paragraph 5 of Ssekatawa's affidavit, the best procedure, in my view, was for the respondent to cross-examine Diaz on his affidavit. This was not done.

In the circumstances my view, with respect, is that had the Court of Appeal re-evaluated the evidence in the appellant's application for reinstating the suit, as it was its duty to do, it would have come to the conclusion that the appellant had showed sufficient cause.

I turn now to the issue of how the Court of Appear dealt with the High Court's exercise of its unfettered discretion in this case. It is now well settled law that an appellate court should not interfere with the exercise of unfettered discretion of a trial court unless it is satisfied the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court was clearly wrong in exercise of its discretion and that as a result there was a failure of justice, *Mbogo and Another* v. *Shah* (1968) E.A. 93; *Halderkiimar Mohindra* v. *Mathuradevi Mohinda. Civil Appeal No.* 34/1952. EACA*: H.K. Shah* & *Anor* v. *Osman Allu* (1974) 14 EACA*;, 45MB. Patel* v. *R. Gottifried* (1963) 20 EACA, 81. *Haji Nadin Matovu* v. *Ben Kiwanuka,* Supreme Court Civil Application No. 12 of 1991 (Unreported)

In *Uganda Development Bank* v. *National Insurance and Another* (SCU) Civil No. 28-95 (unreported) this court said this on page 7 of its judgment.

> "... the principles which this court applies when deciding whether to interfere with the exercise of discretion by a trial Judge are well known and are set out in such decisions such as *Mbogo v. Shah* (1968) E.A 93.where NEWBOLD, at page 96 stated that the principle to be 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 that as a result there has been a misjustice.
>
> There, principles are referred to in various terms. In *Famous Cycle Agencies* (Supra), Civil Appeal No. 16 of 1994 and *Yahaya Kiriisa v. Attorney General* Civil Appeal No.7 of 1994 (SCW 9 (unreported)- Judicial discretion must he exercised on fixed principles: Jetha v. Sinsh (1931) LRK- where there has been no improper exercise of discretion, the Judge's decision cannot normally be upset: *Devji v. Jinabhai* (1934) 1 EACA 89.
>
> A mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the court below. There must be shown to be an unjudicial exercise of discretion at which no judge could reasonably arrive whereby injustice has been done to the party complaining: *Shah v. Allu* (supra)
>
> Though there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if discretion has been rightly exercised, an appellate court may look at the facts to ascertain if discretion has been rightly exercised: *Mot v Chanchalbhai* (1915) 1166 EALR 16.

What the court said in *Uganda Development Bank* (supra) is still good law.

In a case such as the present, as I have mentioned before in this judgment, there is, on the one hand, the necessity for the rules to be followed, and on the other, the need for courts to control their proceedings and not to be inhibited by the rules of procedure. As George, C.J, said in *Essaji* v. *Solanki* (1968) EA 218 at 222 the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights. Unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes, should be fostered rather that hindered. This, of course, does not mean that rules of procedure should be ignored. Each case must be decided on the basis of its own circumstances. In the instant case the grounds and affidavit evidence on which the learned trial Judge exercised her discretion in favour of the appellant have already been set out in this judgment.

The ruling and order of the learned trial Judge were in the following terms:

> “Upon hearing both counsel in this application, I think the applicant made out a case in which the court can exercise its discretion and set aside the dismissal. The suit is reinstated to be heard on merit.”

The learned counsel for the respondent criticized the ruling and order on the ground that the learned trial Judge did not indicate which grounds or criteria she accepted as amounting to sufficient cause to justify reinstatement of the appellant’s suit especially, it is contended, as some of the reasons were contradictory to others. To my mind this criticism is not justified because the learned trial Judge took into consideration all the evidence and submissions of both the parties. She accepted the appellant’s evidence and submissions which supported its application for reinstatement of the suit and rejected the respondent's. The brevity of the ruling and order of the court, in the circumstances of this case, in my view, was not an error causing a miscarriage of justice.

In the circumstances, and for the reasons I have given in this judgment I have no doubt that the learned

trial judge properly exercised discretion by setting aside the dismissal of the appellant's suit. With the greatest respect, therefore, the learned Justices of Appeal should not have interfered with the exercise of that discretion. Grounds 1,2,3,4 and 5 of appeal should, therefore, succeed.

What I have said in respect of grounds 1 to 5, in my view, disposes of this appeal. It is, therefore, unnecessary for me to consider grounds 6 and 7 of the appeal.

Ground 8 was abandoned.

In the result, I would allow this appeal with costs here and in the Court of Appeal. The cost of application in the High Court should go to the respondent, as it was a thrown away cost. I would also set aside the orders of the Court of Appeal and substitute it with restoring the orders of the High Court which set aside the dismissal of the appellant's suit and ordered the trial of the suit to continue. As TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., and KANYEIHAMBA, J.S.C., agree, there will be orders on those terms.

TSEKOOKO, J.S.C: I have had the benefit of reading in draft the judgment prepared by my learned brother the Hon. Mr. Justice Oder, Justice of the Supreme Court, which he has just delivered and I agree that this appeal should be allowed with costs in the terms proposed by him.

The facts of the case have been set out in the said judgment of my learned brother and I need not repeat them here serve to say that in the appeal the appellant asks us to reverse the judgment of the Court of Appeal which held that the trial judge erred when she set aside her order dismissing the suit and instead reinstated the suit for hearing and determination on merit.

The appeal is based on 8 grounds which have been set out in the judgment of Oder Justice of the Supreme Court. Grounds 1 and 2 read:

> "1. That learned Judges of the Court of Appeal erred in law and fact when they held that there was not sufficient cause for reinstatement of the suit by the High Court.
>
> 2. The learned Judges of the Court of Appeal erred in fact and law when they failed to re-appraise, evaluate and consider the evidence for failure to deposit the money for security for costs in time which evidence was not rebutted in the High Court by an affidavit in reply. "

At the hearing of the appeal, Mr. Semuyaba, counsel for the appellant supported the decision of the trial judge and contended that the Court of Appeal erred when it reversed the decision of the trial judge who exercised her discretion properly when she reinstated the suit. Mr. Masembe - Kanyerezi, Counsel for the respondent, contended that there was no sufficient cause upon which the learned trial judge exercised her discretion to set aside the dismissal order and that the reinstatement of the suit for hearing and determination on the merits was unjustified.

Mr. Masembe Kanyerezi based his contentions on two points. First, that failure by the trial judge to give reasons in support of her decision vitiated her ruling. The second contention is that paragraph 5 of the affidavit of Birungi Wycliff sworn on 27/2/1998 conflicted with Paragraphs 3,4, 5 and 9 of the affidavit of Justo Trashorras sworn on 6/5/1998. Learned counsel submitted that the contradictions show that the judge was not justified in ordering the reinstatement of the suit. Birungi's affidavit and that of Trashorras have been set out in the judgment of ODER, Justice of the Supreme Court.

The two affidavits among other affidavits were sworn to support the application by the appellant to have

its suit re-instated. The suit which had been dismissed by the trial judge for failure by the appellant to provide security for costs, was reinstated in accordance with an order made by the trial judge immediately after addresses by counsel. The brief ruling is in the following words: -

> "Order: Upon hearing both counsel in this application, I think the applicant has made out a case in which the Court can exercise its discretion and set aside the order of dismissal. The suit is reinstated to be heard on merit".

Obviously it is desirable that in such applications as this, a reasoned ruling should be given. But Order 23 rule 2(2) of the *Civil Procedure Rules* sets no standard format of the ruling. Deficiencies in this ruling must be appreciated on the basis that the learned judge must have read the notice of motion, all the affidavits, both in support and in opposition to the motion before she heard the parties. The ruling was made immediately after counsel's addresses. The trial judge was the same judge who heard the application for security for costs, granted it and also dismissed the suit. She knew the facts. The order made on January 15, 1998 by the trial judge must have been misunderstood by counsel for the appellant. In the order the judge ordered the appellant to provide security for costs.

Should a misunderstanding by an advocate be visited upon the appellant? There are a number of decisions where courts, including this court, have held that in circumstances like this one the blunders of an advocate should not be visited upon a litigant: *L.A.M Hussein* v. *G.I Kakiiza and* 2 *others. Supreme Court Civil Application 30 of* 1994 (unreported) an application under rule 4 but whose reasoning fits in the present application; See also *Delia Almeida* v. *Drule Almeida. Sup. Court Civil Application* 15 *of 1990* (unreported) and *Shiv Construction Co.* v. *Endesha Enterprises Ltd, Supreme Court Civil Application No.* 15of 1992 (unreported). Of course a contrary view exemplified by *Clouds 10 Ltd* v. *Standard Chartered Bank Ltd. Civil Application No.* 35 of 1992(unreported) exists; but the decision there was based on the peculiar facts of that case and are clearly distinguishable. Moreover, I think that now Article 126(2) (e) of the Constitution is relevant to this case.

The Article reads;

> "126(2) *In adjudicating cases of both a civil and criminal nature, the courts shall subject to the law apply the following principles*
>
> ..... *(e) Substantive justice shall be administered without undue regard to technicalities."*

I have no doubt that this is a case where the provisions of para (e) of clause (2) of Article 126 of the Constitution can be properly invoked. The appellant wanted to comply with the trial judge's order I take it that the appellant's advocates misunderstood the method of compliance. In my view in a case like this one, technicalities ought not to be a basis for denying justice to the litigant.

The learned judgment in the Court of Appeal considered essentials of the appeal as follows:

> "In my view, the crux of the matter in grounds one and two of this appeal is whether or not sufficient cause was shown for the reinstatement of the main suit. Learned counsel for appellant rightly, in my view, submitted that a guarantee in place of a cash security for costs was not enough as it was contrary to court order ule
>
> Learned trial Judge did not say on what basis the suit was reinstated. In view of what I have stated above, a guarantee would not be sufficient cause for reinstatement of the suit.
>
> Learned counsel for respondent has submitted that the bureaucratic procedures involved in

approving payment of the money and the delays in making International money transfers were sufficient cause for reinstatement of the suit, I do not agree as the alleged bureaucratic procedures and delays in money transfers were not established. I agree with counsel for appellant that the respondent had no serious intention to pay the security in cash. In my view, the alleged bureaucratic procedures and delays in the transfers were an afterthought.

Accordingly, I find merits in grounds one and two.

On the third ground, learned counsel for appellant submitted that the learned judge was wrong in not awarding the appellant costs of the application. Learned Counsel for respondent on the other hand submitted that since the application for reinstatement of the suit was in their favour, the learned trial Judge should have awarded costs to the respondent as the successful party.

It is trite that normally costs follow the event. The matter of costs is the discretion of court. In the instant case the successful party should have been awarded the costs unless the judge thought otherwise. As it is, the Judge was silent as to costs. Therefore ground 3 ought to succeed because the appellant should have been the successful party in the lower court".

In my view the learned Justices of Appeal erred in their conclusions on grounds one and two. I think that on the facts the appellant's default is a technicality which should be punished by awarding costs to the respondent for the events which occurred in High Court.

However since the respondent had been dragged into court by the default of the present appellant, I think the Court of Appeal was correct in awarding costs to the respondent.

In the result I would allow this appeal in part. I would agree with the orders proposed by Oder, Justice of the Supreme Court

KAROKORA, JSC: I have had the benefit of reading in draft the judgment of Oder, J.S.C. I agree with him that the appeal should be allowed. I would also agree with the orders he proposed.

MULENGA, JSC: This is an appeal against a decision of the Court of Appeal, which overturned an order of the High Court. The High Court order was made under 0.23 rule 2(2) of the Civil Procedure Rules, reinstating the appellant's suit, which had been dismissed under rule2 (1) of the same Order, for failure to comply with terms of an order of security for costs.

The substance of the decision of the Court of Appeal was in effect that the High Court ought not have reinstated the suit because the appellant had not shown sufficient cause for the failure to furnish the security for costs, as ordered.

The facts of the case are so ably set out in the judgment of my learned brother, Oder JSC which he has just read, that there is no need for me to repeat them. I had opportunity to read that judgment in draft and I agree with the conclusion that the appeal ought to succeed, and I also agree with the proposed orders.

However, owing to the significance of the issues that this appeal raises, I shall add my views thereon from a slightly different perspective.

In my view the starting point, if not the cornerstone of this appeal, is the answer to the appellant's complaint against the Court of Appeal presented as the fourth ground of appeal. It reads:

"4. The learned Justices of the Court of Appeal erred in law when they interfered in the exercise of the discretion of the trial Judge to set aside the dismissal order of the suit and to order a reinstatement of the suit. "

It is common ground that while the Court's power to dismiss a suit, under) Order 23 rule2 (1) is automatic upon the plaintiffs failure to comply with an order for security for costs, the power to reinstate such dismissed suit under rule2 (2) is discretionary. The pertinent provisions of Order 23 are brief and it is expedient to reproduce them here: -

"ORDER XX III SECURITY FOR COSTS.
1. The Court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant.

2. (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw there from.

(2) Where a suit is dismissed under this rule the plaintiff may apply for an order to set the dismissal aside, and if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed; the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

3....."

It is evident from the provisions that the court has no alternative but to dismiss the suit under rule 2 (1), in the event of the non-compliance with terms of the order of security for costs made under rule l. However, where an application for reinstatement of the dismissed suit is made under rule2 (2), the court has discretion to either set aside the dismissal, or not to do so. Mr. Masembe-Kanyerezi, Counsel for the Respondent, forcefully argued that although under rule2 (2) the trial court has discretion, the discretion is circumscribed and cannot be exercised to reinstate the suit unless the reason for non-compliance is first proved to be sufficient cause to the satisfaction of the court. He pointed out that in the instant case the learned trial judge had not indicated in her ruling which of the reasons given had satisfied her as sufficient cause, and that when the Court of Appeal, in exercise of its duty as a first appellate court, reappraised the evidence it came to its own conclusion that the alleged reasons for non-compliance were not established. Counsel argued that in the circumstances the Court of Appeal was correct to hold that no sufficient cause was proved supporting an order for reinstating the suit.

With due respect to Counsel, it is clear to my mind that his persuasive argument is flawed in one fundamental aspect. It is trite that on an appeal against a decision made in exercise of discretion the appellate court will not interfere with the trial court's decision unless it was arrived at unjudicially. In such a case therefore the primary duty of the appellate court is to consider whether or not the trial court exercised its discretion judicially. Although the appellate court would for that purpose have to consider the evidence, its concern is not to re-appraise or re-evaluate it with a view to coming to its own conclusion but whether there is evidence in support of the trial court's conclusion. This position of the law has been expressed diversely in different precedents. Thus in the decision of the Court of Appeal for East Africa in *Mbogo* v. *Shah* (1968) EA 98, SIR CLEMENT DE LESTANG, V.P. said at P.94 H-l:

"I think it is well settled that this Court will not interfere with the exercise of its

> discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

SIR CHARLES NEWBOLD , P., on the other hand put it thus at page 96 G-H:

> "… 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 had 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 discretion and that as a result there has been some injustice."

The Supreme Court also addressed the same issue in *Uganda Development Bank* v. *National Insurance Corporation. Civil Appeal No.28 of* 1995 (unreported). in the leading judgment with which ODER, JSC and ODOKI, J.S.C. concurred with TSEKOOKO, JSC, after citing with approval the above mentioned passage in the judgment of SIR CHARLES NEWBOLD, P. and referring to several other precedents concluded:

> "A mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the Court below. There must be shown to be an unjudicial exercise of the discretion or an exercise of discretion at which no Judge could reasonably arrive whereby injustice has been done to the party complaining: *Shah v. Allu*. (1947) 14 EACA 45".

In the instant case the decision of the trial Court which the Court of Appeal had to consider with a view to determining whether the former had properly or wrongly exercised its discretion is in very brief terms. After hearing addresses by Counsel for and against the application for setting aside the dismissal of the suit, the learned trial Judge made the following ruling and order:

> "Order: Upon hearing both counsel in this application, 1 think the applicant has made out a case in which the Court can exercise its discretion and set aside the order of dismissal. The suit is reinstated to be heard on merit. "

The Court of Appeal did not find that the learned Judge had exercised her discretion un judicially in the sense of taking into consideration matters she ought not to have done, nor in the sense that the decision was so manifestly wrong that no court exercising its discretion could reasonably have arrived at. In the leading judgment with which the other two learned Justices of Appeal concurred, ENGWAU, J.A., after reviewing submissions by Counsel, said: -

> "In my view, the crux of the matter in grounds one and two of this appeal is whether or not sufficient cause was shown for the reinstatement of the main suit. Learned counsel for appellant rightly, in my view, submitted that a guarantee in place of a cash security for costs was not enough as it was contrary to court order Learned trial Judge did not say on what basis the suit was reinstate**d**. In view of what I have stated above, a guarantee would not be sufficient cause for reinstatement of the suit.
>
> Learned Counsel for respondent has submitted that the bureaucratic procedure involved

> in approving payment of the money and the delays in making international money transfers were sufficient cause for reinstatement of the suit. I do not agree as the alleged bureaucratic procedures and delays in money transfers were not established. I agree with counsel for appellant that the respondent had no serious intention to pay the security in cash. In my view, the alleged bureaucratic procedures and delays in the transfers were an afterthought" (emphasis added).

It is quite evident from this passage that the Court of Appeal was substituting its own conclusions on the affidavit evidence as more accurate than the conclusion in the ruling of the learned trial judge. Mr. Masembe -Kanyerezi highlighted this before us, when he reiterated that because the trial Judge gave no reasons for the ruling it was open for the Court of Appeal to interfere with her finding that sufficient cause had been 5.hown. With due respect, I do not agree. Although I would not encourage trial courts to routinely omit giving reasons for their decisions on such issues, I do appreciate that with the pressure of work on them, it may be understandable when they do. What is important, particularly in the instant case, is to consider whether or not there was material before the trial Court on which it could reasonably have exercised its direction in the manner that it did. To that extent, in my view there is a distinction to be drawn between an appeal against a decision based on a discretion and an appeal against a decision on ordinary findings of fact. In the latter the appellate court is under duty to rehear the case and draw its own conclusions save that where the decision depends on the manner and demeanour of witnesses, it must keep in mind that it did not see or hear the witnesses which the trial court did. In the former cases however the appellate court may interfere with the conclusions of the trial Court only where it is shown that the trial court exercised its discretion un judicially. It is from that point of view that the Court of Appeal ought to have examined the evidence in the instant case.

My learned brother ODER, JSC, has exhaustively dealt with the re-evaluation and the inferences to be drawn from the affidavit evidence before the trial court in the instant case. I agree with his conclusions. I would only add two observations.

In his submissions that sufficient cause was not shown, Counsel for the Respondent stressed that in its application for reinstatement the appellant had given two contradictory reasons why it did not comply with the terms of the order In my view, upon taking the evidence as a whole, it appears that what is made out as contradiction is not such contradiction after all. In the affidavit sworn by the Appellant's General Secretary, Justo Trashorras Diaz on 6th May 1998, he avers that when the order of security for costs was made on 16th January, 1998 he was present in Uganda and thereafter returned to Spain to arrange for remittance of the money ordered, but the remittance was not effected within the prescribed time owing to bureaucratic procedures involved in approving such payments and to delays in making International money transfers. He further avers, (and this confirms what is averred in the affidavit sworn earlier by Wycliffee Birungi Advocate on 27th February 1998) that before expiry of the period the Court had prescribed for the payment, the appellant's Advocates were instructed to obtain a guarantee in lieu of the cash payment. It appears from the said affidavit of Wycliffee Birungi, that the guarantee was obtained and was submitted to the Deputy Registrar of the High Court on the 13th February 1998, just two days before expiry of the prescribed period, and that when they did so the Advocates mistakenly believed that the guarantee would be a suitable substitute for the cash security ordered. It seems to me that the two reasons, namely the bureaucratic procedure and delays, and the mistaken belief that the guarantee was suitable substitute for cash deposit, were complimentary rather than contradictory of each other It is quite plausible that while initially it was thought, on the part of the appellant, that the cash would be remitted

within the prescribed period, when it became apparent that it could not be, the attempt to substitute the guarantee for cash was made. That to my mind is the rational explanation why the Appellant's Advocates had to write to the respondent's Advocates, on the same day, not only to communicate that the guarantee had been deposited in court, but to advance argument with authority that the substitute was correct.

To my mind this view is further supported by the next step taken by the Appellant. The said Wycliffe Birungi further avers in his affidavit that on 20th February 1998, five days after the period expired, but before the suit was dismissed, the Appellant filed an application for extension of time. Apparently that application was fixed for hearing on 25th February 1998. Although copy of that application was not made part of the record of appeal in this Court, (despite inclusion of numerous other documents that were neither in issue nor material to the appeal) the fact is not disputed. Indeed the record of proceedings shows that when the parties appeared on 25.2.98, the learned trial judge first dismissed the suit, as required under oder23 rule 2, whereupon Mr. Semuyaba, counsel for the applicant said:

> "Since the suit has been dismissed, I pray to withdraw this application. ”

The application was thereupon dismissed with costs

Given that background, I find it difficult, with all due respect, to agree with the Court of Appeal either that the "the alleged bureaucratic procedures and delays in the transfers were an afterthought" or that no sufficient cause was shown for setting aside the dismissal. More importantly however I would hold that, given the affidavit evidence before the learned trial judge, it cannot be said that she exercised her discretion unjudicially.

My second observation is on the decision of the Court of Appeal for Eastern Africa in *Patrick Njoroge Ngumi v. Livingstone Wanii Muthui* (1955) 22 EACA 13 which Counsel for the Respondent relied on his submission to us. The facts of that case are rather similar to those in the instant case with the exception that the reason for failure to comply with the order of security for costs had been expressly stated to be the plaintiffs lack of funds, but a judge of the trial court had on that account set aside the dismissal. On appeal it was held that mere lack of funds is not "sufficient cause" for the purposes of the rule. In my view, that was to be expected, considering that the basic purpose of security for costs is to protect a defendant from being dragged into court and made to incur litigation expenses, if there is no hope of his being reimbursed in the event of successfully defending the suit. On that ground I would distinguish that precedent from the instant case where there was some evidence that the non-compliance was due to procedural obstacles rather than lack of funds. It is also pertinent to observe that the court in that case stressed that it interfered because it was evident that the judge who had set aside the dismissal had acted under a misconception of the nature of the order of security for costs. BRIGGS J.A: said at p.46

> "We think that this misconception of the learned Judge's mind prevented him from exercising his discretion in a judicial manner, and that in consequence it is open to this court to deal with the matter in this respect as *res integra.*”

The Court of Appeal in the instant case did not find, and this court has not found any such similar misconception on the part of the trial court to warrant interference with its discretion.

The concluding remarks in the judgment of BRIGGS J .A., in the *Njoroge Ngumi case* (supra) are, albeit obiter, noteworthy. He said;

> “I wish to add that in my opinion the plaintiffs correct course in the circumstances was to

> apply as soon as possible, after obtaining funds, for extension of time to furnish the security……If this had been done before the action was dismissed, I see no reason why the court should not have allowed the application although time had run out. I also wish to add that I should feel great reluctance to allow this appeal, were it not that the plaintiff can, if he so desires, file another suit on the same cause of action. Where this is not so, the point must always be kept in mind as one of the factors which would affect the exercise of discretion."

In the instant case, as I have said earlier, the Appellant made application for extension before the dismissal. On February 25, 1998 the parties appeared in court. The record does not indicate whether they had been summoned to hear the dismissal order or for the hearing of the application. There is no explanation why the application was not heard before the order for dismissal was made. As it, happens, it is the same judge who dismissed the suit without first hearing the application for extension of time, who later heard and granted the application for setting aside that dismissal. In absence of a reasoned ruling, I refrain from saying that she took that into consideration, but it is a factor that could have been legitimately considered in the exercise of her discretion. Secondly, unlike in the *Njoroge Ngumi case* (supra), it is not certain in the instant case that if the dismissal of the suit was maintained the Appellant would be able, if it desired, to file a fresh suit on the same cause of action. In the interests of substantive justice this point cannot be ignored at this stage even if at the time the learned trial judge exercised her discretion it might have been inapplicable. Upholding the dismissal would cause undue injustice to the Appellant than reinstating the suit would, if at all, prejudice the Respondent.

KANYEIHAMBA, J.S.C: I have had the benefit of reading a draft the Judgment of my brother Oder, J.S.C., and I agree with him that this appeal must be allowed. I also agree with the orders he has proposed. I have nothing further to add.