

UGANDA / JUDGMENT

**Commodity Export International Ltd v
Kabarole Hillside Secondary School & 2 Ors
(MISCELLANEOUS APPLICATION NO. 0011
OF 2015) [2017] UGHCCD 20 (30 March 2017)
[2017] UGHCCD 20**

COURT

HC: Civil Division (Uganda)

BEFORE

Ojok, J

CASE / FILE NUMBER

MISCELLANEOUS APPLICATION NO. 0011 OF 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION NO. 0011 OF 2015

(Arising from HCCS No. 19 of 2012)

COMMODITY EXPORT INTERNATIONAL LTD..... APPLICANT

VERSUS

1. KABAROLE HILLSIDE SECONDARY SCHOOL
2. MUJUNGU MESTEL RESPONDENT
3. MUSANA SAMUEL

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

RULING

This is an application by Notice of Motion under **Section 33** of the Judicature Act, **Section 98** of the Civil Procedure Act, **Order 48 Rules 1** and **3** of the Civil Procedure Rules for orders that;

1. The order dismissing Civil Suit No. 19 of 2012 for want of prosecution be set aside and the suit reinstated and heard on its merits.
2. Costs of the application be in the cause.

The application is supported by the affidavit of Kabazzi Richard and the grounds are;

1. That the Applicant instituted Civil Suit No. 19 of 2012 against the Respondents claiming damages for eviction, permanent injunction, mesne profits. General damages and costs and the Defendants/Respondents filed their defence.
2. That on 4th April 2014, the Defendants/Respondents duly consented to the Plaintiff's/Applicant's late filing of the reply to the Written Statement of Defence.
3. That the Applicant's advocates then forwarded a copy of the joint Scheduling Memorandum to the Respondent's Advocates for concurrence or comment so as to come up with an agreeable joint Scheduling Memorandum for filing.
4. That the Respondents' Advocates have never responded to the proposed joint Scheduling Memorandum.
5. That on the 16th day of September 2014, the suit came up for hearing.
6. That neither the Plaintiff/Applicant nor her Advocate has ever been served with the hearing notice for the date of 16th September 2014.
7. That it is in the interest of justice and fairness that this Court grants an order for reinstatement of Civil Suit No. 19 of 2012.

The application was opposed by an affidavit in reply sworn by Okello Bonny George.

M/s Nyanzi, Kiboneka & Mbabazi Advocates appeared for the Applicant and M/s Nyamutale & Company Advocates for the Respondents. By consent both parties agreed to file written submissions.

Resolution of all the grounds:

Counsel for the Applicant submitted that the Respondents consented to the late filing of the Applicant's WSD and subsequently, on 12th September 2014 the Applicant's Counsel forwarded a proposed Joint Scheduling Memorandum to the Respondents' Advocate but received no correspondence.

On 16th September the Applicant discovered that the suit had been dismissed for want of prosecution and yet no hearing notice had ever been served. That the Scheduling was meant to be done in Court but did not take place because of the absence of the Applicant's advocate who was never served hearing notices by the Respondents' Counsel.

That the nonappearance of the Applicant's advocate is a mistake that should not be visited on the Applicant as per the case of **S. Kyobe Senyange versus Naks [1980] HCB 30**, where it was held that a mistake or oversight on the part of an advocate though negligent is sufficient cause for setting aside an *ex parte* decree.

And in the case of **Julius Rwabinumi versus Hope Bahimbisome**, SCCA No. 14 of 2000, where it was held that it would be a great injustice to deny an applicant pursuit of his rights merely on the blander of his lawyers when it is well settled that an error of Counsel should not be necessarily visited on his client.

The Applicant prayed that in the interest of justice and fairness the suit be reinstated and be heard on merit.

The Respondents through their Counsel on the other hand submitted that the Applicant had no interest in prosecuting the dismissed suit. That the Applicant took two months to reply to the Respondents' Counter-claim and on various hearing dates the Applicant nor his advocates appeared in Court and the suit was finally dismissed on 16th September 2014.

That the Applicant and his advocate did not give any reasons as to why they did not appear in Court at all material times and it is not the duty of the Respondents to serve hearing notices to the Applicant.

In the case of **Mukisa Biscuits Co. versus West End Distributors**, [1969] E. A 696 at P. 701, it was held that;

“...it is the duty of the Plaintiff to bring his suit to early trial and he cannot absolve himself of his primary duty...”

That in the instant case it was the duty of the Applicant to pursue his case and he was legally represented from the institution of the case.

Counsel for the Respondents submitted that scheduling was to take place in Court but this never happened because of the nonappearance of the Applicant and his Counsel.

I do concur with the submissions of Counsel for the Respondents that it was the duty of the Applicant and his Counsel to keep themselves informed. The argument that Counsel for the Respondents should have served them hearing notices is not tenable since it was the Applicants case and she should have pursued it diligently and prudently. The failure of the Applicant to appear in Court was never explained and thus it cannot be imputed on the Respondents who at all times did appear in Court on the given dates.

In regard to the mistake of Counsel and it is the reason for the nonappearance of the Applicant Counsel for the Respondent cited the case of **Abdala Habib versus Harban Sing Raipu** [1960] E. A 325, where court refused to adjourn the matter by the Plaintiff's advocate in the unexplained absence of the Plaintiff.

That in the instant case the Plaintiff never appeared in Court from the time the matter commenced and no reason was ever forwarded to justify his absence. That in the circumstances the Applicant was indolent and inept and therefore cannot benefit from the tenet that negligence of Counsel should not be visited on a client and it is trite law that the Plaintiff should always appear in person.

Counsel for the Respondents further submitted that the plaint discloses no cause of action and that the Respondents are not the registered owners of the suit land. Thus, the plaint is frivolous and vexatious and hence cannot sustain the instant applicant for its reinstatement. That in the circumstances the application should be dismissed with costs.

In my view, the Applicant was at fault for not following her case even though they had indulged a lawyer who was in personal conduct of the same. Therefore, I find that the Applicant was equally negligent and cannot hide under the tenet of negligence of Counsel. The Applicant much as Counsel had the duty of appearing in Court during the hearing of her matter. Applicants are using “mistake of Counsel” to waste Court’s time, drag on litigation which creates unnecessary case back log and is an abuse the Court process.

In nutshell I find the application lacks merit and is dismissed with costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE.

30/03/2017

Judgment read and delivered in open Court in the presence of;

1. Representative of the 1st Respondent
2. James – Court Clerk

In the absence of both Counsel and the Applicant.

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OYUKO. ANTHONY OJOK

JUDGE.

30/03/2017

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