

UGANDA / JUDGMENT

Kassim v Ochieng & 2 Others (Miscellaneous Application 52 of 2025) [2025] UGHC 366 (30 May 2025) [2025] UGHC 366

COURT

High Court of Uganda

BEFORE

Lubega, J

CASE / FILE NUMBER

Miscellaneous Application 52 of 2025

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBALE
MISCELLANEOUS APPLICATION NO. 52 OF 2025 (ARISING FROM CIVIL SUIT NO.
053 OF 2021) KASSIM MUHAMMAD HASSAN ::::::::::::::::::::::::::::::

VERSUS

1. DAVID OCHIENG OKOLONG
2. SSEKIDDU SEMEI KAKUNGULU
3. KYANGWA KAKUNGULU ::::::::::::::::::::::::::::::

BEFORE: HON. JUSTICE LUBEGA FAROUQ

RULING

1. Introduction

- 2. The Applicant brought this application by way of notice of motion against the Respondents under Article 28 (1) of the 1995 Constitution of the Republic of Uganda as amended, Section 33 [now Section 37] of the Judicature Act, Cap.16, S.98 of the Civil Procedure Act, Cap. 282, and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules SI 71-1, seeking for orders that
 - a) The exparte proceedings of the 18th day of March, 2025 be set aside;
 - b) The Applicant be granted leave to cross examine the 1st Respondent/Plaintiff;

- c) The Applicant/ 1st Defendant be allowed to give/ lead his evidence in court;
- d) Costs of the application be provided for.
- 3. The application was premised on the grounds set out in the affidavits in support and in rejoinder deponed by the Applicant, KASSIM MUHAMMAD HASSAN, briefly the grounds are that-
 - a) The main suit HCCS No. 53 of 2021: David Ochieng Okolong Vs. Kassim Muhammad Hassan and 2 others came up for hearing on the 18th day of March, 2025;
 - b) The Applicant's lead counsel, Mr. Okuku George was unable to attend court because he was feeling unwell;
 - c) Counsel Muhangi George who appeared for the Applicant on that day did not cross examine the 1st Respondent/ Plaintiff despite being accorded an opportunity to do so;
 - d) The failure of counsel Muhangi George to cross examine the Applicant during the court hearing of 18/3/2025 greatly prejudices the Applicant's case;
 - e) Negligence of counsel should not be visited on the Applicant who is an innocent litigant;
 - f) This application has been filed without inordinate delay;
 - g) The Applicant shall suffer gross injustice, if this application is disallowed as the Applicant shall not be accorded an opportunity to be heard hence occasioning a gross miscarriage of justice;
 - h) The Respondent shall not be prejudiced by the grant of the instant application;
 - i) It is only fair for this honourable court to accord the Applicant an opportunity to cross examine the 1st Respondent/Plaintiff as well as according the Applicant an opportunity to lead his evidence in order to preserve the Applicant's right to a fair hearing;
 - j) The grant of this application shall help to preserve the Applicant's Constitutional right to a fair hearing;
 - k) The application is bonafide and it is brought in the interest of natural justice and equity for it to be granted by this honourable court.
- 4. The 1st Respondent opposed this application through an affidavit in reply deponed on 11/4/2025 on grounds briefly that
 - a) It is true the main suit came up for hearing on 18/3/2025 ;
 - b) On that day, all the three Respondents were in court, but the Applicant was absent;
 - c) The Applicant was represented by Counsel Muhangi George who comes from the same law firm with Mr. Okuku James, the lead counsel of the Applicant;

- d) Counsel Muhangi George is one of the lawyers instructed by the Applicant to represent him in the main suit;
- e) The said counsel had previously appeared in court with other lawyers to represent the Applicant;
- f) When the main suit came up for hearing on \$18/3/2025\$, Counsel Muhangi George deliberately declined to cross examine the 1st Respondent;
- g) It was a deliberate move for Counsel Muhangi George not cross examine the 1st Respondent, and the same cannot be negligence;
- h) The proceedings of \$18/3/2025\$ were not ex parte since the Applicant was represented by an advocate, Counsel Muhangi George.
- 5. The 2nd and 3rd Respondents opposed this application through an affidavit in reply deposed by the 3rd Respondent, on grounds briefly that
 - a) When Civil Suit No. 53 of 2021 came up for hearing on \$18/3/2025\$, the Applicant's legal counsel Mr. James Okuku, was neither present in court nor did he avail any credible explanation for his absence at the material time;
 - b) The Applicant's purported excuse that his advocate was indisposed is a mere assertion which is not supported by any medical evidence;
 - c) On the said date when the main suit came up for hearing, Mr. George Muhangi appeared in court on behalf of the Applicant, but opted not to cross examine the Respondents, a decision squarely attributable to the Applicants' legal team and not the fault of court or the Respondents;
 - d) The Applicant has not demonstrated any exceptional or sufficient cause to warrant the exercise of this court's discretion to allow this application;
 - e) That it is a cardinal principle that litigation has to come to an end;
 - f) The instant application is frivolous, vexatious, and abuse of court process, and it is in the interest of justice that it be dismissed with costs

6. Background

- 7. The background of this application is that on the 18th day of March, 2025, Civil Suit No. 53 of 2021 came up for hearing before this court. The 1st Respondent who is the Plaintiff in the main suit, and the 2nd and 3rd Respondents who are co-defendants with the Applicant in the main suit were present with their Advocates. On the other hand, the Applicant/ 1st Defendant was absent, but was represented by Mr. George Muhangi who informed court that he was holding brief for Mr. James Okuku.

- 8. Prior to 18th day of March, 2025, the main suit had come up for hearing on 24/11/2024, the Applicant's counsel Mr. Okuku James informed court that he was not able to proceed due to the absence of his client. He prayed for an adjournment to enable the attendance of his client the Applicant herein. This court granted his prayer and the matter was adjourned for that reason.
- 9. On the 18/3/2025 when Civil Suit No 53 of 2021 was called for hearing, Mr. George Muhangi appeared for the Applicant/^{1st} defendant. Mr. Goerge Muhangi told court that he was not ready to proceed and that he had instructions from Counsel Okuku to request for an adjournment because the lead counsel was indisposed. The court declined his request and ordered the matter to proceed as it had been scheduled.
- It should be noted that both counsel Gorge Muhangi and Counsel 10. Okuku James had joint instructions to represent the Applicant in the main suit.

Representation 11.

During the hearing of this application, Mr. Okuku James and Pius 12. Ddamulira jointly represented the Applicant while the ^{1st} Respondent was jointly represented by Mr. Wandera Ogalo and Mr. Brian Othieno, the ^{2nd} and ^{3rd} Respondents were represented by Mr. Maasa Joseph. Counsel for both sides made oral submissions which I have considered in determination of this application.

Preliminary objections 13.

- In the course of hearing the submissions of counsel for both sides, \$14. the ^{1st} Respondent's counsel raised issues regarding the validity of the Applicant's affidavit in support and in rejoinder.
- I observed that the issues raised by the ^{1st} Respondent's counsel are 15. material in nature, and could have effect on the propriety of the present application. It is my view that I deal with these issues before I delve into the merits of the application.
- The ^{1st} Respondent's counsel submitted that the affidavit in support 16. of the application dated \$20/3/2025\$, and the affidavit in rejoinder dated \$22/4/2025\$ have different signatures yet they are purported to be deponed by the same person, the Applicant. Counsel Brain Othieno submitted that the glaring difference of the Applicant's signatures on the said two documents does not need a hand writing expert to declare them different.
- He expressed that because of the fishy conduct of the Applicant 17. exhibited by the differing signatures on his affidavits, he does not appear in court with clean hands. Counsel invited the attention of court to scrutinize the two differing signatures on the Applicant's affidavit in support and in rejoinder.

- In reply, Counsel Okuku James submitted that the conclusion by 18. the 1st Respondent's counsel that the Applicant's signatures on the affidavits in support and in rejoinder differ, is a speculation since the Applicant was not called to be cross examined on the same.
- I have had an opportunity to look at the impugned signatures on the 19. Applicant's affidavit in support dated 20/3/2025 and the affidavit in rejoinder dated 22/4/2025. On the affidavit in support dated 20/3/2025, the Applicant signed using what is called a simple signature by inserting the initials of his name (Kassim.m.) while on the affidavit in rejoinder dated 22/4/2025, the Applicant used a cursive signature written in a connected style.
- Having carefully looked at the two signatures claimed to be of the 20. Applicant on his affidavit in support and in rejoinder, my observation is that the two visibly differ in all material formations. Their difference is too glaring to require an opinion of a handwriting expert. This court forms this view after scrutinizing the said two signatures, and also bearing in mind that court is an expert of all experts. Ref. (See Simbamanyo Estates Limited Vs. Equity Bank Uganda Limited and 2 others, Miscellaneous Application No. 660 of 2022)
- Since the Applicant was not cross examined on this aspect to 21. establish which of the two signatures is his true signature? I will, for purposes of this application consider the signature of the Applicant on his affidavit in support to be his genuine signature because it was the first document to be filed in court. All the later documents filed in court for purposes of this application in the name of the Applicant with a different signature from the one appended on the affidavit in support are hereby rejected. That is the fate of the affidavit in rejoinder dated 22/4/2025 which is hereby struck out for the reasons given in the foregoing.
- Secondly, Counsel Wandera Ogalo submitted that the Applicant's 22. affidavit in support offends the law. That the deponent signed, and the translation was made after his signing. He cited Section 3 of the Illiterates Protection Act, and submitted that the deponent ought to have signed on his affidavit after a translation has been made to him.
- Again, counsel contended that the deponent affirmed the affidavit in 23. Mbale, and the translator who translated it to him gives his address as

being Plot 37 Majanji Road, in Busia which is a different town. He also contended that the commissioner for oaths who commissioned the Applicant's affidavit did not indicate the date when he commissioned it.

- Accordingly, it was counsel's view that the Applicant's affidavit is 24. defective, and incapable of supporting this application. He referred court to the case of Mugema Peter Vs Mudiobole Nassar CA No. 16 of 2016, for the proposition that improperly administered affidavits ought to be expunged from the record of court.

- In reply, Counsel Okuku James for the Applicant submitted that the 25. Applicant's affidavit was drawn by his law firm, and that is where the translation was made. Thereafter, the Applicant affirmed it from Mbale where it was commissioned. Counsel urged that, that is a reasonable explanation for signing the affidavit in one place and commissioning it in another. He invited court to invoke Article 126 (2) (e) of the Constitution, and administer justice without regard to technicalities.

Section 3 of the Illiterates Protection Act, Cap. 288 provides that-26.

> "Any person who writes any document for or at the request, on behalf or in the name of any illiterate shall also write a 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."

- I have looked at the Applicant's affidavit in support dated 27. 20/3/2025. It bears a certificate of translation made by Okuku James, Esq indicating that he translated the contents of the document to the affirmant in Kiswahili, the language best understood by the deponent.
- I have carefully read and appreciated the provisions of Section 3 of 28. the Illiterates Protection Act (supra), I have not been able to find a

requirement in the law that the jurat on the document made for an illiterate person needs to appear first before the provision for signing by the deponent. In my view, what is required to appear on a document for an illiterate is a certificate of translation. The manner and style in which it appears is immaterial.

- The purpose for the provision of the certificate of translation on the 29. document made for illiterate is to certify that the owner of the document is aware of the impact of the contents of that document, and that the same conform to the reasons for execution of the document.
- In the view of the above, it is my finding that the Applicant's affidavit 30. in support dated 20/3/2025 complies with the requirements under the Illiterates Protection Act (supra).
- The other aspect raised by counsel for the Respondents, is that the 31. commissioner for oaths who commissioned the Applicant's affidavit did not indicate the date on which he commissioned it.
- According to section 6 of Oaths Act, Cap. 21, it is provided that-32. "Every commissioner for oaths or notary public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

- In the present case, I have cautiously perused the impugned 33. Applicant's affidavit dated \$11/3/2025\$. I note that the commissioner for oaths signed on page 6 of the affidavit, and stamped thereon. The name of the commissioner is indicated in the stamp, and the postal address which is shown to be of Mbale.
- The signature of the commissioner appears after the signature of the \$34.\$ translator which also appears after the affirmant's signature which appears to have been appended on 20/3/2025. The requirement of the law is explicit. It is coached in mandatory terms, the commissioner for oaths **shall** state in the jurat the place and the date on which the affidavit or oaths is taken.
- My observation, is that the jurat on the Applicant's affidavit was 35. made by a different person, and then presented before the commissioner for signing. In fact, this is the position as was explained by Counsel Okuku James in his submissions in rejoinder. Similarly, I perceive from the jurat on impugned affidavit that also the date of its making is not shown.
- It therefore follows that the impugned affidavit in support of the 36. Applicant offends section 6 of the Oaths Act.
- However, since the impugned affidavit shows the place and date on 37. which the Applicant affirmed it. Bearing in mind that both the signatures of the affirmant and the commissioner for oaths appear on the same page of the document, there is a possibility that the commissioner for oaths could have endorsed on the said affidavit on the same date on which it was affirmed. Therefore, the non-compliance of the Applicant's affidavit in support with the requirements under section 6 of the Oaths Act (supra) would appear to me as legal technicality.
- A legal technicality is understood to mean the procedural or formal 38. rules of law that govern how legal processes are conducted, rather than what the outcome should be.
- Article 126 (2) (e) of the Constitution enjoins court to administer 39. justice without undue regard to technicalities. It thus provides that-

"In adjudicating cases of both a Civil and criminal nature, the courts shall subject to the law administer substantive justice *without undue regard to technicalities.*"

I am also fortified with the decision of the Supreme Court in the case 40. of Horizon Coaches Vs. Edward Rurangaranga and Another NO.18 of 2009 (**unreported**), where Katureebe JSC, as he then was, held that-

> "Article 126 (2) (e) of the Constitution of the Republic of Uganda *enjoins courts to administer substantive justice without undue regard to technicalities. But where the effect of adherence to* technicalities may have the effect of denying a party

substantive justice, the court should endeavor to invoke that *provision of the constitution.*"

I would in the interest of substantive justice invoke the provisions 41. of Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995 to cure the lapses or technicality omitted by the Applicant's affidavit in support to allow this application be determined on its merits.

Analysis of court 42.

- Counsel for the Applicant submitted that the proceedings of court 43. on \$18/3/2025\$ in the main suit were conducted *ex parte* due to the failure of the Applicant's lawyer Mr. Muhangi George to cross examine the 1st Respondent.
- He further argued that this was negligence and mistake of counsel 44. that cannot be visited on the innocent litigant. As a result, counsel prayed that the court takes pleasure to set aside the *ex parte* proceedings of \$18/3/2025\$, and allow the Applicant to cross examine the 1st Respondent. To fortify his argument, he relied on the case of *Zam Nalumansi & Another Vs. Sulaiman Lule*, SCCA NO.02 Of 1992 where it was *inter alia* held that-
- "Negligence of Counsel ought not to be visited on an innocent litigant." On the other hand, the Respondent's counsel argued that the 45. proceedings of court on 18/3/2025 were not *ex parte*. He stated that the Applicant was duly represented by an advocate, Mr. Muhangi George who was given an opportunity to cross examine the 1st Respondent, but he consciously elected not to cross examine the 1st Respondent.
- On the issue of negligence of counsel, it was submitted for the 46. Respondent that the Applicant's counsel was not negligent, but he soberly chose not cross examine the 1st Applicant. The 1st Respondent's counsel also cited the case of *Nelson Lukozi Vs. Simba Telecom Limited & Anor COA*, Miscellaneous Application No. 235 of 2019, where the Court of Appeal noted the principle in the Supreme Court case of *Horizon Coaches*

Vs. Edward Rurangaranga and Another (Supra) and held that-

"Before court exercises its discretion, one way or the other, it must be satisfied that the mistake or inadvertence of counsel is excusable. This is because a mistake as to the provisions of the law, in general, affords one no excuse. Everyone is presumed to know the law. Accordingly, the court being prayed to exercise its discretion, so as to hold that the mistake or inadvertence of counsel, should not be visited upon the client, must furnish plausible grounds to court, as to why Counsel's conduct in the circumstances, is excusable."

47.

The Black's law Dictionary, 11th Ed. at page 1241 defines *ex parte* proceedings to refer to-

> "Legal actions or proceedings that are initiated or conducted" without notice to, or the presence of, the other party in a legal matter."

In the present case, the record of court clearly shows that when Civil 48. Suit No. 53 of 2021 came up for hearing on 18/3/2025, the Applicant/ 1st Defendant was absent, but he was represented by Mr. George Muhangi who informed court that he was holding brief for Mr. James Okuku, yet he had joint instructions with the same lawyer to represent the Applicant.

Order 3 (1) of the Civil Procedure Rules SI 71-1 provides that-49. "Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person."

The Applicant admits in paragraphs 4 & 5 of his affidavit in support 50. that when the main suit came up for hearing on 18/3/2025, his lead counsel Okuku James did not attend court because he was not feeling well, but he was represented by Counsel Muhangi George who did not cross examine the 1st Respondent.

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- It is inconceivable for the Applicant's counsel to refer to the 51. proceedings of 18/3/2025 as being *ex parte*. Therefore, the Applicant's first prayer to set aside the alleged *ex parte* proceedings is misconceived and unsustainable in that regard.
- Be as it may, even if Mr. Muhangi George was appearing on brief, 52. the law presumes that he had instructions to proceed. (See: Paragraph 9 of the Constitution (Adjournments for Courts of Judicature) (Practice) Directions, 2019, where it is provided that-

"An advocate holding brief for another advocate shall ordinarily be expected to have instructions to proceed in the matter."

Counsel Muhangi George who appeared for the Applicant on 53. 18/3/2025 was given an opportunity to cross examine the 1st Respondent, as it is affirmed by the Applicant in paragraph 5 of his affidavit in support, but counsel chose not to proceed at will. The law gives latitude to a party to cross examine a witness produced to testify against him, if so desired. This means that cross examination of a witness is not a must, one can choose to waive that right.

Section 137 (1) of the Evidence Act Cap.8 provides that-54.

> "A witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him or her so desires) re-examined."

- The Applicant's counsel, Mr. Muhangi George who appeared on 55. 18/3/2025, being conversant with the law as I want to believe, made a clearheaded choice not cross examine the 1st Respondent. This counsel's move cannot be termed as negligence. In my view, it is a litigation strategy which counsel opted to take. To me, it now becomes an afterthought for the Applicant to turn around and instruct new lawyers to move court to recall the witness whose lawyer refused to cross examine.
- The nature of this application, if permitted by court has an effect of 56. retarding the litigation process, and timely disposal of suit. It is a

constitutional principle that courts are enjoined to deliver timely justice. I note that Civil Suit No.53 of 2021, is a matter which has been in court for about four years now without substantial progress, not until the 18/3/2025 when it took off amidst unjustified prayers for adjournment from the Applicant's counsel.

- For the reasons I have stated above, I reject the Applicant's prayer 57. to recall the 1st Respondent for cross examination. The Applicant did not make any prayer in his application to recall, and cross examine the 2nd and 3rd Respondents. I would also disregard with the prayers stated in the 2nd and 3rd Respondents' affidavit in reply.
- The Applicant sought to be allowed by this court to give/lead his 58. evidence in court. I am aware that the 1st Respondent who is the plaintiff in the main suit closed his case on 18/3/2025, and on the same day the 2nd and 3rd Respondents gave the defence, and the matter was fixed for locus visit.

Section 134 of the Evidence, Act Cap. 8 provides that-59. "The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and criminal procedure respectively, and, in the absence of any such *law, by the discretion of the court.*

- The established practice in conducting the hearing of civil cases, is 60. that when the plaintiff's case is closed, the defence is given an opportunity to present its case. I note that before this application was filed, the defence case had been closed, and the matter was fixed for locus visit. However, since the locus visit was deferred by court, I will invoke the discretion of this court to allow the Applicant's prayer to present his defence in Civil Suit No. 53 of 2021.
- In the upshot, I make the following orders-61.
- a) The Applicant's prayers to set aside the exparte proceedings of 18/3/2025, and to recall the 1st Respondent for cross examination are denied;
- b) The Applicant is allowed to appear in court in person to give evidence his defence in Civil Suit No. 53 of 2021 on the 10th July 2025 at 2pm.

c) Costs of this application shall be in the cause.

I so order

LUBEGA PAROUQ
Ag. JUDGE

Ruling delivered electronically via the emails of the Advocates of parties on this \$30^{\text{th}}\$ day of May, 2025

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