

UGANDA / JUDGMENT

Kayondo Joseph Asimwe v Azaan Trading Co. Limited (Miscellaneous Application 569 of 2022) [2025] UGCommC 111 (16 May 2025)

[2025] UGCommC 111

COURT

Commercial Court of Uganda

BEFORE

Susan Odongo, J

CASE / FILE NUMBER

Miscellaneous Application 569 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION) MISCELLEANOUS APPLICATION NO 0569 OF 2022 10
(ARISING FROM HCCS NO. 124 OF 2019)

KAYONDO JOSEPH ASIMWE..... APPLICANT/ PLAINTIFF

VERSUS

AZAAN TRADING CO. LIMITED RESPONDENT/DEFENDANT

BEFORE : HON. LADY JUSTICE SUSAN ODONGO

RULING

Introduction

This application was brought by Notice of Motion under O.9 r.18 and O.52 r.1 and r.3 of the Civil Procedure Rules for orders to set aside the order of court made on 19 25 th April 2022, pursuant to Order 9 Rule 17 of the Civil Procedure Rules, dismissing Civil Suit No. 124 of 2019.

By way of background, the Applicant is the plaintiff in the said civil suit. The plaintiff's claim in the suit against the defendant is for special and general damages for breach of contract stemming from the sale of a motor vehicle which 30 turned out not to be roadworthy. The Defendant denied the claim in their

Written Statement of Defence.

5 On various dates, 23/03/2022, 5/04/2022, 19/04/2022, when the suit was called on for hearing none of the parties appeared in court. The court subsequently dismissed the suit.

Application and Supporting Affidavits:

10 The Applicant brought this application under Order 9 Rule 18 of the Civil Procedure Rules and Order 52 Rule 1 and 3 seeking to set aside the orders by the Court dismissing Civil Suit No. 124 of 2019 and costs of the application.

The application was supported by the affidavit of Jonathan Nabende, a law clerk attached to M/s Obed Mwebesa & Associated Advocates, which firm represents

- the Applicant. It is stated in this affidavit, that on 3 15 rd March 2022, the deponent sought hearing dates from the clerk to the Judge handling the suit. That he was advised by the said clerk that the court would serve the law firm with hearing dates when the suit is fixed for hearing. That, coincidentally, on 20th April 2022, when he went to follow up on the matter, he discovered that the Court had fixed
- the suit on 19 20 th April 2022 and dismissed the same in the absence of both parties. That, the law firm did not receive any notice of the hearing date. That the said circumstances amount to sufficient cause for reinstatement of the suit. Further that the applicant has prima facie a good case which he has been vigilant about from the time of filing. That the reinstatement of the suit is fair, equitable and in
- 25 the interest of justice.

In a supplementary affidavit deposed by Mata John Bosco Nsimbi, the advocate having personal conduct of the matter, he stated that the matter had been fixed for hearing on 17th February 2022 but instead on that day he received a telephone call from the clerk to the Judge informing him that the Judge was indisposed

30 and unable to entertain the suit. That when asked for new dates, the clerk informed him that the Judge did not leave dates but the court would inform the advocate of the new date. To the affidavit is attached correspondence dated 3rd March 2022 from the law firm to the court following up on a new hearing date.

Affidavit in reply

35 In response, the Respondent filed an affidavit in reply deposed by Ateel Atif, the General Manager of the Respondent, who stated that as advised by the Respondent's counsel, the application and the supporting affidavits do not

5 disclose sufficient cause for non appearance and should be dismissed with costs. Further, that the Applicant has not shown any interest in prosecuting his case as seen from his non deponement of an affidavit in support of his application.

Representation and Hearing:

When the parties appeared for the hearing of this application, Applicant was 10 represented by Mr. Sam Musimenta and the Respondent was represented by Mr. Matsiko Gerald. The court directed the parties to file written submissions.

Issues for determination:

The singular issue for determination is whether the order for the dismissal of 15 Civil Suit no. 124 of 2019 should be set aside and the suit reinstated.

Applicant's submissions:

The Applicant submitted that under Order 9 Rule 18 of the CPR where a suit is dismissed for non appearance of either party to the suit, the Plaintiff may subject to the law of limitation, bring a fresh suit or apply to court to set aside the 20 dismissal. The applicant further submitted that in an application to set aside dismissal of a suit, the applicant ought to satisfy court that there was sufficient cause for non attendance.

He cited the case of *Nicholas Roussos vs Gulamhussein Habibi Viani & Anor, Civil Appeal No:9 of 1993(SC)(unreported),* in which Court pronounced itself on grounds 25 that constitute sufficient cause such as mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant, illness by a party. The Applicant invoked further support to his argument from the case of *Attorney General Vs. AKPM Lutaaya SCCA No. 12 of 2007* to advance that the litigant's interest should not be defeated by the mistake and lapses of his counsel.

30 Respondent's submissions:

On whether the application discloses sufficient cause, the Respondent submitted that it was incumbent upon both the litigant and his counsel to actively follow up on the case. Therefore, the evidence of the applicant that they were waiting for court to serve them with hearing dates exhibits passiveness, and 35 demonstrates a lack of diligence. The Respondent further submitted that whereas courts have found that negligence of counsel constitutes sufficient

- 5 cause, the same is not absolute for the reasons that the litigant has the option of changing counsel who exhibits continuous negligence or to sue for professional negligence. Failure to do so shows acquiescence to the counsel's negligence. *(Ongom V Nyeru (Civil Appeal no. 14 of 2001) [2003] UGSC) 16; Nakanja V Wamala & 2 Others (Miscellaneous Application No. 001 of 2019).*
- 10 In addition, the Respondent submitted that the affidavit deposed by Jonathan Nabende, the clerk, be struck out for being defective for the reason that he is not rightly placed to depone the affidavit. That it should be deposed by someone with direct knowledge and vested interest in the case. According to the respondent, the fact that the Applicant who has direct knowledge and vested

- 15 interest in the case, has not deposed an affidavit, raises questions about the Applicant's interest in prosecuting the matter. He relied on the Court's holding in **Lukwajju V Mucunguzi* (Miscellaneous Application No. 862 of 2011 [2012] UGHC 208)* where the court emphasized that affidavits should be sworn by individuals with direct knowledge and vested interest in the case. That affidavits deposed by a
- 20 person without proper authorization or personal knowledge are incompetent and defective. The respondent also cited the case of **Kaingana V Dabo Boubou* [1986] HCB 59* to emphasize the position that an affidavit is incompetent and defective where there is lack of authority by the defendant to the deponent to qualify him to act on his behalf either as advocate or a holder of power of attorney.

Submissions in Rejoinder:

The Applicant reiterated that he had exercised all diligence in ensuring his appearance before the court and this is evidenced by follow up letters to the court requesting for hearing dates. The applicant implored the court to hear the suit 30 on its merits. He cited the court in **Banco Arabe Espanol Vs Bank of Uganda* (Supreme Court Civil Appeal no. 8 of 1998)* stating that the errors and 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 35 of disputes, should be fostered rather than hindered.

In rejoinder to the submission on incompetent and defective affidavit, the applicant stated he instructed M/s Obed Mwebesa & Associates to represent him as advocates in the matter and as per Order 3 Rule 1 of the Civil Procedure Rules such authorization is sufficient to enable the swearing of the affidavit.

5 Therefore, the court should find no merit in the respondent's submission as to the competence of the affidavit of the applicant.

The applicant also pointed out that the respondent has not come with clean hands considering that on the date the suit was dismissed none of the parties appeared in court.

10 Court's Determination

I have read the pleadings and submissions of the parties. The respondent's submission gives rise to another issue on the validity of the applicant's affidavit. I will address this issue first.

Issue 1.

15 Whether the affidavit in support is incompetent and defective for having been deposed by a person without direct knowledge and vested interest in the case?

It is worth noting that the respondent's affidavit evidence did not contain contestation about the competence of the deponent swearing the affidavit on behalf of the applicant. The respondent's affidavit deposed to the absence of

- 20 sufficient cause to warrant setting aside of the order for dismissal, and the applicant's failure to personally depose an affidavit in support which exhibited lack of interest in prosecuting the case. It is trite that issues not canvassed in evidence cannot be introduced in submissions. The respondent cannot use post evidence/submissions to cure his affidavit. To my mind, raising of new matters
- 25 at the submission stage is improper and prejudicial to the other party. However, in this case, the concern of prejudice is addressed by the rejoinder of the Applicant. The interest of justice has been served.

I now turn to the issue at hand. The Respondent provided authorities to support his argument that the Applicant's affidavits should be struck out for being

30 incompetent and defective for having been sworn by individuals without direct knowledge and vested interest in the case, and without proper authorization. *(Lukwajju V Mucunguzi (Miscellaneous Application No. 862 of 2011 [2012] UGHC 208); Kaingana V Dabo Boubou [1986] HCB 59.).*

The Court in *Namutebi Matilda vs Ssemanda Simon and 2 Others, MA No. 430/2021* 35 guided that the validity of an affidavit is subject to the same rule as that which governs oral evidence found in section 117 of the Evidence Act, to wit; all persons are competent to swear an affidavit unless the court considers that they

5 are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

It was the finding of the Court that; *"what is required in affidavits is the knowledge or belief of the deponent, rather than authorisation by a party to the litigation. Their* 10 *content is dictated by substantive rules of evidence and their form by the rules of procedure."*

I align myself with this position. The authorities cited by the Respondent are distinguishable. Factually the grounds upon which the applicant brings this application for reinstatement of his suit are premised on miscommunication

15 between the Court and his counsel and counsel's clerk, which led to non appearance and subsequent dismissal of the suit. To my mind, the Advocate and the clerk possess detailed knowledge of the circumstances and are well-placed to depose the affidavit. The Applicant does not have such knowledge and cannot depone the affidavit. In addition, there is no need for further authority to be

20 given to the Advocate beyond that which a party has granted the Advocate when he instructs counsel to assume control over the case.

I, therefore, answer the issue in the negative, finding that the affidavit in support is not incompetent and defective.

25 Issue 2

Whether the order for the dismissal of Civil Suit no. 124 of 2019 should be set aside and the suit reinstated

According to the record on the file, on the dates, 23/03/2022, 5/04/2022, 19/04/2022, when the suit was called on for hearing none of the parties 30 appeared in court. The court subsequently dismissed the suit in accordance with Order 9 rule 17 of the Civil Procedure Rules S. I 71-1. The said law empowers the court to dismiss a suit where none of the parties shows up at the date of the hearing. As a form of relief, Order 9 rule 18 provides for the remedy where such suit is dismissed for none appearance of both parties and it is the law under 35 which this application is brought. I will cite the provision verbatim here below;

O. 9 r 18

5 *Where a suit is dismissed under rule 16 or 17 of this Order, the plaintiff may, subject to the law of limitation, bring a fresh suit or he or she may apply for an order to set the dismissal aside; and if he or she satisfies the court that there was sufficient cause for his or her not paying the court fee and charges, if any, required within the time fixed before the issue of the summons or for his or her nonappearance, as the case may be, the court shall* 10 *make an order setting aside the dismissal and shall appoint a day for proceeding with the*

suit. (Emphasis added)

I observe from the provision that the remedial options available to the plaintiff are; to bring a fresh suit, or apply for an order to set the dismissal aside. The availability of the remedies is dependent upon two conditions; the law of 15 limitation, and the plaintiff satisfying the court that there was sufficient cause for, in this case, his non appearance. The latter condition is in respect to only the remedy for applying for an order to set the dismissal aside. The resultant intention in both remedies is to advance the ends of justice.

It is apparent that the plaintiff's claim is not barred by the statute of limitation. 20 Therefore, that leaves this court with the duty to determine whether the plaintiff has demonstrated to the satisfaction of this Court that he had "sufficient cause" for non appearance when the suit was called on for hearing. I am alive to the position of the law that the grant of an order setting aside the dismissal of a suit is discretionary, and the court must exercise such power without undue

25 prejudice to the other party.

The position of the law is that *"sufficient cause"* must relate to the inability or failure to take the particular step in time **(see; Mugo and others vs. Wanjiri (1970) EA 981 at 483)**. According to Black's Law Dictionary 8th Edition at page 663 "sufficient cause" means to show why a request should be granted or an action 30 excused. By judicial practice "sufficient cause" is liberally constructed in order

to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed **(see Bishop Jacinto Kibuuka v. The Uganda Catholic Lawyers' Society and two others, H. C. Miscellaneous Civil Application No. 696 of 2018)**. They include mistake by an advocate though negligent, ignorance of procedure by an 35 unrepresented litigant and illness by a party. **(see Nicholas Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S. C. Civil Appeal No. 9 of 1993)**. Courts maintain that mistake by the plaintiff's counsel though negligent, may be accepted as sufficient cause. **(see; Shabir Din V Ram Parkash Anand (1955) 22 EACA 48; Stewards of Gospel Talents Ltd v Nelson Onyango & 7 Ors [2009] UGHC 182)**

- 5 In **United Office Equipment and Stationery Supply E. A Vs Uganda Bookshop Ltd [1987] HCB 90,** a case where neither counsel for the plaintiff nor the plaintiff appeared on the date of hearing. Counsel for the defendant appeared and the suit was dismissed under O.9 r 22 Civil Procedure Rules. Counsel for the plaintiff in an application for reinstatement stated that he had gone to Fort Portal and was
- 10 unable to return due to political instability. It was contended that the affidavit did not disclose reasons for counsel's nonappearance and this was due to counsel's negligence and not political instability. The Court held that failure by counsel for the plaintiff to appear was due to the negligence of counsel, although sufficient cause may be as absurd as when counsel is negligent.
- 15 On the one hand, as rightly submitted by both parties, mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant Further, where there are serious issues to be tried, the court ought to grant the application **(see Sango Bay Estates Ltd v. Dresdner Bank [1971] EA 17 and G M Combined (U) Limited v. A. K. Detergents (U) Limited S. C Civil Appeal No. 34 of 1995)**.
- 20 With regard to the responsibility of a litigant to exercise due diligence in the conduct of his case is confined to the extent of his knowledge of the proceedings and access to the courts. A litigant cannot be expected to act beyond what is within his knowledge regarding the status of the case especially having obtained the aid of an advocate. In **Yowasi Kabiguruka V Samuel Byarufu Civil Appeal No.**
- 25 **18 of 2008,** the Court cited **Hajati Safina Nabai Vs Yafesi Lule, Civil Appeal No. 9 of 1978** where it was held, inter alia, that once a party instructs counsel, he assumes control over the case to conduct it throughout, the party cannot share the conduct of the case with his counsel. **(See; Busingye & Anor v Gianluigi & Anor [2014] UGCommC 66)**.

- 30 Besides that, an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. The court will refuse to entertain delayed applications for reinstatement where the reasons the applicant is advancing to justify his or her delay are not convincing, considering the long period of his or her inaction *(see Rossette Kizito v.*
- 35 *Administrator General and others, S. C. Civil Application No. 9 of 1986 [1993]5 KALR 4).*

Having read the pleadings, the record of court and considered the submissions of counsels, I am satisfied that the Applicant was prevented by sufficient cause attributable to the miscommunication between his counsel and the court. There

- 5 is no evidence to show that the applicant was notified that the suit was due for hearing on 23/03/2022, 5/04/2022, when it was called or on 19/04/2022 when it was dismissed. This is a proper case in which mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant. In addition, I note that the application has been brought promptly without inordinate delay,
- 10 and that there are serious issues to be tried. For the reasons stated, the application is allowed.

I, consequently, make the following orders:

- 1. The order dismissing Civil Suit No. 124 of 2019 is hereby set side and the suit is accordingly re-reinstated.
- 2. The suit is adjourned to 10th 15 June 2025 at 9:00am by which date the parties should have filed their respective trial bundles, and Joint Scheduling Memorandum. Counsel for the respondent/Defendant is to be served and a return of service filed before then.
- 3. The costs of the application are to abide the outcome of the suit.

Dated, signed and delivered electronically this 16 th day of May, 2025.

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Susan Odongo

25 JUDGE

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