

UGANDA / JUDGMENT

Muwonge v Musoke & Another
(Miscellaneous Application 42 of 2022)
[2023] UGHC 386 (7 September 2023)
[2023] UGHC 386

COURT

High Court of Uganda

BEFORE

Katamba Nkwanga, J

CASE / FILE NUMBER

Miscellaneous Application 42 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MASAKA****MISCELLANEOUS APPLICATION NO.42 OF 2022****(ARISING FROM CIVIL SUIT NO.58 OF 2018)****FRANCIS MUWONGE SALONGO:::APPLICANT****VERSUS**

- **1. JOSEPH MUSOKE MAJALA**
- **2. SSALI RONALD:::RESPONDENTS.**

Before; Hon. Justice Victoria Nakintu Nkwanga Katamba**RULING.**

This Application was brought under Order 9 Rule 23 and Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1 seeking orders that;

- 1. The order dismissing Civil Suit No.58 of 2018 be set aside.
- 2. Civil Suit No.58 of 2018 be reinstated.
- 3. Costs of the Application be provided for.

The Application was supported by an affidavit deponed by Bbaale Sadat, an advocate with the law firm representing the Applicant and he states as follows, that;

- 1. Civil Suit No.58 of 2018 was fixed for mention for the 15th day of March 2022 at 10.00a.m and on that day he was on his way to this Court but he got involved in an accident at Lukaya.
- 2. Due to the circumstances, he was delayed and unable to arrive at the Court in time.
- 3. He arrived at Court at around 11.00a.m but the matter had already been dismissed.
- 4. He contacted the Applicant to appear but the Applicant was unwell.
- 5. This amounted to sufficient reason for his none appearance.
- 6. His lapses should not be visited on the client.

An affidavit in reply was deponed by Ssali Ronald, the 2nd Respondent where he states as follows, that;

- 1. The Applicant has not been diligent in following up with the case and on many occasions without any viable explanation, he has not been attending Court.
- 2. The dismissal was a natural consequence of the Applicant's lack of diligence.

In rejoinder, Bbaale Sadat stated as follows, that;

- 1. The Applicant has been diligent in following up the case.
- 2. Due to the pandemic, the Applicant lost track of the case.
- 3. A perusal of the record indicates that they did not appear on two occasions only but that was because they did not know the matter had been fixed.
- 4. The Applicant is of advanced age and always sickly.
- 5. The Applicant would always wait for Counsel's communication over the matter because he is unable to constantly come to Court.

Representation.

The Applicant was represented by Bbaale Sadat while the Respondent was represented by Mayanja Thomas.

Both parties filed written submissions.

Submissions for the Applicant.

Counsel submitted that under Order 9 Rule 23(1) of the Civil Procedure Rules, Court is empowered to set aside a dismissal on proof of sufficient cause. It was then submitted that sufficient cause relates to inability or failure to take a particular step. Counsel submitted that due to his accident and the Applicant's sickness, they were both prevented from appearing at the time the matter was called.

Counsel while also relying on the case of *Nicholas Roussos v Golam Hussein and Another*, Civil Appeal No.9 of 1993, submitted that his lapses should not visited on the innocent litigant. It was Counsel's submission that he truly intended to appear

however, he was prevented from doing so by the accident on that day. Counsel also submitted that the Application was brought without inordinate delay.

Counsel relied on the authorities of; *National Insurance Corporation v Mugenyi and Co. Advocates* 1987 HCB 28, *Captain Phillip Ongom v Catherine Nyero*, SCCA. No.14 of 2001, *Rosette Kizitio versus Administrator General and others*, SCCA. No.9 of 1986, *Florence Nabatanzi v Naome Binsobodde* SCCA. 1987, *Sipiriya Kyaturesire v Justine Bagambe*, CA. No.20 of 1995 and *Monaco Cosmetics Ltd and 2 others v Old Stanley Hotel Ltd*, MA. No.593 of 2016 to support his submissions.

Submissions for the Respondent.

Counsel submitted that the record speaks for itself. The Applicant has not been attending Court and this is not behaviour of a person who truly wants his case to be heard on merit and determined. The Applicant has failed to prove sufficient cause. Counsel relied on the case of *Hussein Nsubuga and another v the Administrators of the estate of the late Gladys Ndagire Taaka*, MA. No.726 of 2011.

Having carefully considered the affidavits and submissions of both Parties, I now proceed to determine this Application.

Determination of Application.

Before delving into the merits of this Application, I have observed that the affidavit in support of this Application was deposed by Bbaale Sadat, an advocate who is in personal conduct of this matter.

Regulation 9 of the *Advocates (Professional Conduct) Regulations* provides for such circumstances.

Regulation 9 provides as follows ; "*Personal involvement in a client's case*- *No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether*

verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears."

The purpose of the above provision is to bar an advocate from appearing before a court on behalf of a client when he/she is at the same time, a witness or a potential witness in a contentious matter.

In the case of *Uganda Development Bank vs. Kasirye Byaruhanga & Co. Advocates, SCCA No. 35/1994* it was held that an advocate who finds him/herself in such a situation has to choose whether to act as a witness or as Counsel. As such, where an advocate depones to an affidavit in support of an application in a contentious matter, his/her professional duty is not to, at the same time, appear in personal conduct of the matter.

Where an advocate has appeared in personal conduct in a contentious matter, he cannot lawfully depone to an affidavit in the same matter and such an affidavit is fatally defective. (See: *Linyi Huatai Battery Manufacturing Company Ltd versus Musa AF Enterprises Co. Ltd, HCMA. No.573 of 2020*)

On the strength of the above authorities and applying the principles therein to this Application, it is clear from the record that while Counsel Bbaale Sadat deponed an affidavit in support and in rejoinder, he also appeared for the Applicant when this Application came up for hearing, circumstances that are barred by Regulation 9 of the Advocates (professional conduct) Regulations.

As a result, the affidavit in support of the Application is fatally defective and this also renders the affidavit in rejoinder fatally defective. Both affidavits are therefore struck off the record.

Where there is only one affidavit in support of an Application and the affidavit is said to be invalid, the Application cannot stand because it is not supported by any affidavit.

(See; *Abaho Anania and others versus Rwasbushaija and others, HCMA. No.258 of 2022*)

Having found that the Affidavit in support is fatally defective and having struck the same off the Court record, this Application cannot stand and is hereby dismissed with costs to the Respondents.

I so order.

Dated and delivered at Masaka this 7th day of September, 2023.

Victoria Nakintu Nkwanga Katamba.

Judge.

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