**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL DIVISION**

**MISC. APPLICATION 407 OF 2013**

**DOOR MASTERS LTD:::::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**MULTILINE CONSTRUCTION CO. LTD:::::::::::::::::::RESPONDENT**

**BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO**

**RULING**

1. **Brief facts:**

The applicant filed the instant application in this Honorable Court under Order 9 Rule 23, order 52 Rules 1, 2, and 3 of the Civil Procedure Rules SI 71-1 and section 98 of the Civil Procedure Act Cap 71.

That applicant seeks the orders below;

1. That the order for dismissal of the main suit entered in favour of the respondent against the applicant be unconditionally set aside.
2. That the main suit be re-instated.
3. Costs of this application be provided for.
4. **Grounds for the application:**

The grounds upon which the application is based are particularized in the affidavit attached are briefly that;

1. That the applicant is not guilty of dilatory conduct and has at all times been proactive in the pursuit of this matter. There was no delay and/ or failure to prosecute the matter. The applicant’s counsel only missed one court appearances for which he had sufficient reason.
2. That the failures of Counsel, if any, should not be meted on the applicant and in the instant circumstances, it is Respondent’s counsel who took long to reply counsel for the applicant yet at all times, he was aware that the matter was to be heard the 13th of May 2013.
3. That it is the applicant’s constitutional right to be heard.
4. That it is in the interests of justice that this application be allowed and the orders sought therein be granted by the court

And the respondent will not be greatly prejudiced if this application is allowed.

1. **Preliminary Objections on points of law:**

Before discussing the issues raised in this matter, I will consider the two preliminary points of law raised by the respondent.

The first preliminary point of law was that the affidavit in support of the application contained falsehoods which falsehoods were not explained nor refuted in the affidavit in rejoinder and could be found in paragraphs 11, 15, 16 and 17. It is false to say in paragraph 11 of the supporting affidavit that by 12.5.2013 when counsel travelled to Bushenyi his firm did not know the respondent’s new counsel and yet the notice of change of advocates was received by the deponent himself on the 7.5.2013 (See respondent’s Annexture ‘R2”), delivered the draft scheduling memorandum to new counsel on the 7.5.2013 (see applicant’s Annexture B) and received a return of the same with amendments on 10.5.2013 (see applicant’s Annexture B). Paragraphs 15, 16 and 17 of the supporting affidavit are for the same reason false. The respondent referred me to the case of  **Mugume Ben & Another versus Akanwasa Edward [2008] HCB 159** in which the applicants denied having been served with a notice of motion, it was held that an application supported by a false affidavit is bound to fail because in such a case the applicant has not come to court with clean hands to tell the truth.

I fail to find any scintilla of falsehoods here. Maybe what I make of the same is that there were mistakes in dating and this cannot in itself make the affidavit incurably defective and hence used for denying a party a right to be heard.

The respondent raised another preliminary point of law that the affidavits supporting the application first do not say whether they are made from the deponent’s knowledge or from information and belief and as such the affidavits are incompetent as was held in the case of **Kassamali Gulamhussein Co. Kenya Ltd versus Kyrtatas Bros Ltd** **[1968] EA 542 (CA-K).** In addition, the respondent drew the attention of this court to the fact thatsecond the affidavit did not distinguish between natters stated on information and belief and their source and to which the deponent swears by his own knowledge as was pointed out in the cases of **Kabwimukya versus Kasigwa** **[1978] HCB 251** and as per **Premchand Raichand Ltd versus Quarry Services Ltd [1969] EA 514** and as such they should be rejected.

I have carefully perused the affidavits in questions, and I find that what the respondent is alleging is not borne from my reading of them. They are clear to me as stating the circumstances under which they were sworn and go on to prove the point which the deponents wish this court to take note of. There may be issues as to their drafting but do not go to the root of what the deponents wish to point out to this court and as such I find no reason to merely discard them on the basis of the allegations made by the respondent. It must be recalled that it has long since been held that the courts of law should not dwell too much the technicalities in pleadings but ought to exercise substantive justice.

I find this situation existing in the instant matter and therefore I would overrule the preliminary objections raided.

1. **Whether the applicant is guilty of dilatory conduct:**

The applicant submits that it and its counsel are not guilty of dilatory conduct since they have at all times been diligent and proactive in the pursuit of the applicant’s interests. The respondent states otherwise.

From the facts as stated herein, it clear to me that while the applicant’s counsel missed one court appearance which was for the scheduling of the main suit, there appears to have been sufficient reason as to why he was unable to attend to court contrary to what is alleged by the respondents since the records show that on the 2nd of May 2013, service of the scheduling memorandum was made on the respondent’s counsel at the chambers of **Tumwesigye Louis & Co. Advocates** who declined service saying that instructions had been withdrawn from him. It is clear to me that since this was the position, the Applicant could not have had any other knowledge of which advocate to serve until the 7th day of May, 2013, when it discovered that **Byaruhanga & Co. Advocates** had been given instructions to defend the respondent. Then counsel Byaruhanga then made changes to the proposed scheduling memorandum and served the same on the applicants on 10th day of May 2013 when counsel with personal conduct of the suit was unavailable having lost his grandmother. This to me was satisfactory action.

It should be recalled that Order 9 rule 23 of the Civil Procedure Rules SI 71-1 requires that r an applicant must satisfy the court that there was sufficient cause for non appearance when the suit was called on for hearing. That this point was considered in the case of **Barclays Bank Ltd versus Kikwaya, Misc. App. No. 128 of 2012,** while referring to the case of **Nakiride versus Hotel International Ltd [1987] HCB 85** *where it was held that; “In considering whether there was sufficient cause why counsel for the applicant did not appear in court on the date the application was dismissed, the test to be applied in cases of that nature was whether under the circumstances the party applying honestly intended to be present at the hearing and did his best to attend. It was also important for litigant to show diligence in the matter”*

In the instant case, counsel for the applicant intended to be present at the scheduling. He prepared the draft joint scheduling memorandum well within time and tried to serve the same on the respondent’s counsel. However, the untimely death of his grandmother prevented him from turning up in court on the day in question. Secondly, once he returned from burial, he immediately prepared the final copy of the scheduling memorandum and attempted to serve the same on the 15th of May, 2013 only to discover that the suit had been dismissed but then he immediately filed this instant application for reinstatement on the 23rd of May 2013.

Clearly, neither the applicant nor its counsel is guilty of dilatory conduct. The above actions instead speak of vigilance and diligence. In the alternative but without prejudice to the foregoing, even if the applicant’s lawyers were guilty of dilatory conduct, which is not the case in this instance, in the case of **Joseph Muluta versus Sylvano Katama, Civil application No. 21/199** following the case of **Joy Tumushabe versus Anglo African Ltd & Another, Civil application No. 14/1998,** court stated inter alia that, *“it is trite law that a vigilant litigant should not be penalized for the dilatory conduct of his advocate or the court if he or she has not directly or indirectly contributed to it.”*

I find that this conduct is suggestive of persons who were neither guilty of dilatory conduct.

1. **Whether the mistake of counsel, if any, can ne visited on the litigant:**

From the pleadings in this matter, it is clear to me that the applicant’s counsel was unable to attend court on the appointed date for reasons of the untimely death of his grandmother and had not informed the Applicant to be in court. While I find this conduct dilatory, it is not sufficient reason to take away the applicant’s right to be heard as was held by my learned sister Hon. **Lady Justice Hellen Obura** in the case of **Barclays Bank Uganda Ltd v Kikwaya supra** stated inter alia that it is now settled that mistake of counsel however negligent cannot be visited on the litigant*.*

In the instant matter, while there is no proof that counsel lost his grandmother, the fact that the applicant had given him brief to represent him and he did not appear is sufficient for me to hold that the applicant cannot be made to suffer as a result since he had given brief to counsel to represent him in court and counsel failed for one reason or another to attend court. The applicant therefore cannot be made to suffer as a result of the mistake of counsel.

1. **Whether the applicant’s constitutional right to be heard can be breached:**

The **Article 28 of the Constitution of Uganda 1995** provides for the right to be heard. Everyone is entitled to the right to be heard and a fair hearing and further still, Article 44 provides that the right to be heard is non derogable. In the case of **National Enterprises corporation versus Mukisa Foods Ltd; CA Civil Appeal No. 42 of 1997** while referring to the case of **Evans versus Bartlam [1937] AC 473 at 480,** the court stated that *unless and until the court has pronounced a judgment upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure.*

Clearly, the circumstances require that the case be heard on its merit and since the respondent would not be prejudiced or suffer hardship if they can be compensated in costs, I would consider the circumstances in the instant matter to warrant reconsideration as in this instant case the main suit was never heard on its merits. I would therefore find that it is meritorious to allow the main suit to be reinstated so the suit can be finally determined on its merits and this would be in line with the applicant’s constitutional right to be heard and in any case, the respondent can be adequately compensated by an award of damages.

1. **Whether this application is in the interests of justice:**

On the Applicant’s contended that was in the interests of justice that this application be allowed and the orders sought therein be granted, I take note of the holding by Berko, J.Ain **National Enterprises Corporation v Mukisa Foods Ltd (Civil Appeal No. 42 of 1997)** when he stated inter alia that *“it follows what I have said that the learned judge was wrong in refusing the application to set aside the exparte judgment. I have seen that if the decision is allowed to stand, it will result in injustice being done. This court in such a situation, has the power and the duty to remedy the injustice” court went ahead to set aside the exparte judgment*.

**Section 98 of the Civil Procedure Act** is to the effect that nothing in this act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In this instant case, it is necessary and in the interests of justice, fairness and equity that the main suit be finally determined on its merits. This will only be achieved if its instant application for the reinstatement of the main civil suit is allowed.

1. **Orders:**

In the premises, I find that the applicant has made a case for this honourable court to consider the circumstances under which their matter was dismissed and therefore being convinced that there are reasonable grounds in this application, I would be constrained to allow this application so as to enable the dispute between the parties to be heard to enable the determination of the real issues in dispute.

The costs of this application would be in the cause in any event.

I do so order accordingly.

**Henry Peter Adonyo**

**Judge**

**30th October, 2014**