

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**MISC. APPLICATION NO 411 OF 2021**  
**(ARISING OUT OF CIVIL SUIT NO. 269 OF 2017)**

**OPII BOB JAMES.....APPLICANT**

**VERSUS**

- 1. DECO TILES(U)LTD (FORMERLY CTM (U) LTD)**
- 2. ATTORNEY GENERAL OF UGANDA.....RESPONDENTS**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

This is an application brought under Article 126(2) (e) of the 1995 Constitution, Section 98 of the Civil Procedure Act and Order 52 r 1 & 3 of the Civil Procedure Act for orders that:

1. Leave of court be granted to the applicant to re-open the plaintiff's case and call evidence of Mr. Opoi Francis Enjeu, and to subsequently cross-examine the defendant's witnesses in the matter.
2. The costs of the application be provided for.

The grounds of the application are set out in the affidavit of Luke Kasakya which briefly states that;

- a) That the plaintiff's case and defendants' case were closed on the 1<sup>st</sup> day of March 2021 in absence of the applicant and his counsel.

- b) That the above fixed date was a result of the court's adjournment to the same on the 16<sup>th</sup> day of December 2020.
- c) That on the 16<sup>th</sup> of December 2021 when the matter was adjourned to the 1<sup>st</sup> of March 2021, the plaintiff's counsel mistakenly noted 1<sup>st</sup> July 2021 as the date adjourned instead of 1<sup>st</sup> March 2021, which date was transmitted to the client who noted the same.
- d) That both the applicant and his counsel honestly believed that the matter had been adjourned to the 1<sup>st</sup> day of July at 11:00 am.

The respondent never filed any affidavit in reply but made submissions in opposition on points of law.

The applicant was represented by *Counsel Timothy Nsimbi* while the 1<sup>st</sup> respondent was represented by *Counsel Ojambo Robert*.

### ***Whether the court should set aside the order made under Order 17 rule 4?***

That on the applicants civil suit no 269 of 2017 against the defendants was fixed in September 2020 and after the scheduling the plaintiff commenced leading his evidence and PW1 testified on the 7<sup>th</sup> day of September, 2020 and the matter was then adjourned to 16<sup>th</sup> day of December 2020 and again adjourned to the 1<sup>st</sup> of March, 2021 where both the applicant and his counsel conveniently failed to attend court. The court proceeded under Order 17 rule 4 and closed the plaintiff's case and opened the defence case and the matter was set for judgment after giving directions to the parties to file submissions.

### **Analysis**

The basis of the instant application is that the applicant and his counsel failed to appear before the honorable court with no reasons given to the honorable court as to why both were absent yet the matter was previously adjourned when all parties including counsel were in court.

The order to proceed *ex parte* in absence of the applicant was made under Order 17 rule 4 of the Civil Procedure Rules S.I 71-1. It provides that *where any party to a suit to whom time has been granted fails to produce his or her evidence or to cause the attendance of his or her witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.*

Once a matter proceeds under the above order, such order cannot be set aside but the only remedy open to the applicant is an Appeal after the whole case is determined. ***See Pentecostal Assemblies of God (Lira) Ltd v Pentecostal Assemblies of God (Uganda) Ltd HCMA No. 14 of 2018***

The court's understanding and interpretation of Order 17 Rule 4 of the Civil Procedure Rules S.I 71-1 the rule provides that Court may proceed notwithstanding either party failing to produce evidence thus it vests a judicial officer who has conduct of a matter before him or herself with the discretion and power to decide what next step the court may take where a party fails to perform any act necessary for the progress of a suit which position has also been judicially pronounced upon by the court in a decision of my learned brother Justice Oyuko Anthony Ojok in the case of ***Kiiza Augustine vs Katusabe Vincent HCT-01-CV-LD-CA-060 (2013) reported in [2018] UGGCLD 25.***

The genesis of the instant application is that this honorable court in High Court Civil Suit No. 269/ 2017 made an order to proceed and determine the matter under Order 17 rule 4. The applicant wants court to set aside its order that resulted in proceeding to hear the case immediately so that the applicant is granted leave of court to re-open the plaintiff's case and call the evidence of Mr. Opoi Francis Enjeru and to subsequently cross examine the defendants witnesses in the matter so as to have the main suit heard and decided on merit *inter partes*.

The court record clearly shows that on the all the parties were present in court with their counsel. The court noted as follows: This matter shall come up for further hearing on 1<sup>st</sup> –March 2021 at 11:00-1:00pm. All witnesses must attend court on that day. The difference between March and July is wide and any alleged confusion in recording the said dates is extremely minimal. The applicant has not

sworn an affidavit to confirm the alleged confusion in dates in order to corroborate the position put forward by counsel. This leaves this court in doubt whether there was a genuine mix-up in the said dates.

I agree with the submission of counsel for the respondent. The applicant has not shown any sufficient cause for the failure to attend court on the day the matter had been fixed for hearing in presence of both counsel and the applicant. It is indeed true that this was not only a mistake of counsel for the failure to attend court but rather a confusion of the applicant who also attended court on that day and noted a wrong date. Counsel for the applicant could not notify an applicant about a wrong date when he was equally present court and he has not deposed any affidavit to confirm the said fact.

No reason is advanced why the applicant who was present in court on 16<sup>th</sup> December 2020 never attended court or presented the said witness. In the case of ***Hadondi Daniel vs Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003*** court held while citing ***Capt Phillip Ongom vs Catherine Nyero Owota SCCA No. 14 of 2001***, Justice Mpagi-Bahigeine agreeing with Justice Mulenga stated that:

*“ it would be absurd or ridiculous that every time an advocate takes a wrong step, thereby losing a case, his client would seek to be exonerated. This is not what litigation is all about. Counsel applied a wrong strategy....no sufficient cause has been shown to entitle the applicant relief sought.”*

This application for setting aside the orders of this court is devoid of merit and no sufficient cause has been shown by the applicant and it is only intended to delay conclusion of the dispute in the main suit.

The above finding notwithstanding, this court notes that an order made under Order 17 rule 4 of the Civil Procedure Rules finally disposes of a suit as was held in **the case of Ntalo Mohamed vs Stanbic Bank of Uganda Limited Misc. App. No. 211 of 2017**. Therefore, the law under Order 17 rule 4 grants court unbridled license to enter judgment for the parties on the basis of pleadings even without formal trial if circumstances warrant.

In this case the applicant has already testified in the matter and this court should not be bogged down with multiplicity of witnesses which will delay the

determination of the trial. The court could act on testimony of a single witness to determine a matter before it. Judicial decisions depend on intelligence and credit and not multiplicity of witnesses produced at trial. ***See Kru v Saoud Bros & Sons [1975] 1 GLR 46.***

A party to a case may refuse to participate in proceedings altogether or fail to lead evidence. A party, who fails to avail himself or themselves of that opportunity, cannot claim denial of right to a fair hearing. The court is duty bound to proceed with the trial to conclusion and make deductions, draw conclusions or make findings on the basis of the available evidence on court record.

This application is dismissed with costs.

I so Order.

**SSEKAANA MUSA**  
**JUDGE**  
**14<sup>th</sup> October 2022**