ROAD MASTER CYCLES(U)LTD

v

TARLOCK SINGH SAGH

HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

HIGH COURT MISC. APPLICATION No. 1609 OF 1999
(Arising out of High Court Civil Suit No. 1264 of 1999)

(**Before: Honourable Mr. Justice R.O. Okumu Wengi)**

March 2, 2000

Civil Procedure – Hearing of suits – First suit dismissed for want of prosecution – Application to reinstate denied – Fresh suit filed – Court jurisdiction – When suit may not be entertained by Court

Civil Procedure – Application for court not to grant remedies sought – Application supported by defective affidavit – Effect on application

In 1997, the Respondent/Plaintiff filed a suit against the Applicant/Defendant in the High Court. The suit was dismissed for want of prosecution and a subsequent application to have the suit reinstated was dismissed. The Respondent changed advocates and filed a new case in 1999. The Defendant, Applicant in this matter made the present application under Order 9 rule 1B(2) seeking orders that the Court had no jurisdiction to grant the remedies sought by the Respondent.

The Respondent contended that the application was incompetent as it was supported by a defective affidavit. The issues for Court to decide were whether the new suit filed by the Respondent could be entertained, and the fate of the defective affidavit filed by the Applicant.

Held:

(i) Court found that the respondent's initial suit was dismissed under order 15 rule 4 of the *Civil Procedure Rules*, on account of the failure to produce evidence, thereby rendering the subject matter of the claim *res judicata*; this was the basis upon which the application to have the suit reinstated was denied; as such the Court could not entertain the new suit filed by the Respondent since the matter was *res judicata*;

(ii) Dismissal of the Respondent's case under order 15 rule 4 Civil Procedure Rules resulted in pronouncement of a judgment and decree in the case, under the circumstances, the Respondent's should have sought leave of court to appeal to the Court of Appeal to set aside the decree;

(iii) Court granted the application by the applicants, and dismissed the Respondent's suit, but

did not award costs to the Applicant as it was noted that the affidavit in support of the application was fatally defective for failing to indicate the date on which it was commissioned contrary to the provisions of section 8 of the Oaths Act.

Cases referred to:

Camille v Merali (1968) EA 314
Frederick Sekyaya Sebgulu vs Daniel Katunda [1979] HCB 46
Girado v Alarm & Sons Ltd [1971] EA 449
Lugobe v Barclays Bank (1973) I ULR 86
Rawal v The Mombasa Hardware (1968) EA 392.
Rawal v The Mombasa Hardware (1968) EA 392.

Salem A.H Zaidi v Faud H. Humeidan (1960) EA 92
Teddy Namazzi v Anne Sibo [1986] HCB 58

Legislation referred to:

Civil Procedure Act Section 101
Civil Procedure Rules Order 9 rule 1 B (2) , rule 20, Order 15 rule 4
Oaths Act Section 8

Counsel for Applicant : Mr. Bernard Tibesigwa
Counsel for Respondent: Mr. Mugenyi.

RULING

R.O. OKUMU WENGI, J: This is an application brought under Order 9 rule 1 B (2) of the *Civil Procedure Rules* seeking an order that this court has no jurisdiction relief the remedy sought by the to grant or Respondent. The background is that the Respondent/plaintiff brought an action against the Applicant/Defendant in Civil Suit No.1149 of 1997. That suit was dismissed by the Hon. Principal Judge for want of prosecution. All the counsel were present when this was done.The Plaintiff then applied under Order 15 and Order 9 rule 20 to have the dismissed suit reinstated. That application was dismissed as well. Then the plaintiff who had now changed advocates, having attempted unsuccessfully to reinstate his dismissed suit, filed a new case Civil Suit No. 1264 of 1999. While this case is pending, defendant/applicant has made the present application which was supported by the undated affidavit of Patrick Barugahare. The decree in the original suit as well as the plaint and the ill fated application to reinstate the dismissed suit were annexed as verified exhibits or annextures to the undated affidavit. The respondent/plaintiffs advocate did not file any affidavit in reply but promptly pointed out that the applicants affidavit was defective as the date of its commissioning was not indicated. He also cited the inherent jurisdiction of the court to entertain the new suit which he said was in order. It was also stated by both counsel that costs in the first suit was paid but no information regarding costs in the ill fated application to reinstate the suit was availed to Court. In the circumstances this Court has to decide the fate of the new Civil Suit he has filed. No case law was cited and the earlier records of this court were not availed until two days after the hearing of this application. From the ruling where the Hon. Principal Judge declined to reinstate the dismissed suit it is clear that he dismissed the suit under the provisions of Order 15 rule

4. The learned principal Judge stated:

> "I must say that the decision which is being sought to be reversed by setting aside the dismissal of the suit was arrived at pursuant to Order 15 rule 4 which provides."
> "(4) where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to further progress of the suit for which time has been allowed the Court may notwithstanding such default proceed to decide the suit forthwith"

I have to state that in dismissing the application for adjournment and the entire suit I derived solace from the provisions of Rule 4 of Order 15 of the *Civil Procedure Rules* as well as the uncertainty between the plaintiff and his Counsel which caused so much vacillation and inordinate delay. Needless to say it was in order for the applicant to have brought this application under Order 15 rule 4 and Order 48 *Civil Procedure Rules* as it was also nothing unusual to cite Section 101 of the *Civil Procedure Act* in his aid. Whereas however I agree that Section 101 of the *Civil Procedure Act* vests the Judge with very wide inherent discretionary powers which are beyond any powers provided by the Rules of procedure I confess I am unable to follow the decision of GOUDIE , J. in *Girado v Alarm & Sons Ltd* [1971] EA 449.

> "Surely some cause must be shown for the Court to base its inherent powers to restore a suit otherwise it would be merely a question of some application being made and without a question the Court merely restoring the suit."

The learned Principal Judge then found no sufficient cause shown and dismissed the application to reinstate the suit. Therefore firstly the suit was dismissed under Order 15 rule 4 of the *Civil Procedure Rules.* The parties were both represented and therefore present in Court. The suit was clearly not dismissed under Order 9 rule 19 or for that matter Order 15 rule 3 of the *Civil Procedure Rules*. This being case then it was not possible to apply for and get the suit reinstated under the provisions of Order 9 rule 20 of the *Civil Procedure Rules*. See: *Frederick Sekyaya Sebgulu vs Daniel Katunda* [1979] HCB 46 where an order of dismissal under Order15 rule 4 was stated to be regular and that it can only be set aside by the Court of Appeal. The only way was therefore for the respondent to appeal to the Court of Appeal and not to apply as he did under Order 9 rule 20 of the *Civil Procedure Rules* to reinstate the suit. This complicated matters for him. Indeed dismissal of a suit on failure to produce evidence as happened in this case is a judgment on the merits for purposes of *res judicata*. This is the authority of the decision in *Salem A.H Zaidi v Faud H. Humeidan* (1960) EA 92 where FORBES V.P. (as he then was) considered the consequences of a dismissal of a suit under rule 178 of the Rules of Court. He said:

> "The rule of the Indian Civil Procedure rules which corresponds to rule 178 of the Rules of Court is rule 4 of Order XV which, though not identical, is substantially the same. I have been unable to discover any direct authority on the question whether dismissal under Order XV rule 4 of the Indian rules operates as *res judicata* under Section 11 of the Indian Code. There is authority however on the effect of dismissal under Order XVII rule 3 of the Indian rules and that rule corresponds to rule 203 of the Rules of Court. I am unable to see any difference in principle between a dismissal under rule 178 (Order XV rule 4) and a dismissal under 2203 (OXVII rule 3). In each case the dismissal may be on failure to

> produce evidence. I think therefore that the cases relating to Order XVIII rule 3 of the Indian rules can afford guidance in considering the effect of dismissal under r. 178. It is established that a decision under Order XVIII rule 3 is a decision on the merits, that is to say on consideration of such materials as may be available and that if in the case of a plaintiff such materials fail to substantiate the claim the suit is dismissed on that ground and not for the default committed by him (CHITALEY & RAO, CIVIL PROCEDURE CODE 6th Ed. p. 2645; p. 446 and cases there cited."

The learned vice President of the Court of Appeal sitting at Aden then concluded.

> "Similarly in terms of Order XV rule 4 of the Indian Rules if a plaintiff fails to produce evidence the court can pronounce judgment. It does not dismiss the suit for non prosecution
> …… .Equally I think when the court acting under rule 178 of the rules of Court "pronounces judgment" it must be a judgment on the merits of the material before it. The decree issued in the instant case substantiates that this was in fact so.....
> .. .It is well settled in India that a dismissal of a claim under Order XVII rule 3 on account of the plaintiffs default in producing evidence to substantiate his case has the same effect as a dismissal founded upon evidence and that the subject matter of such a claim will be *res judicata*.
> …….since the decision is deemed to be a decision on the merits this is a logical conclusion. And it seems to me that a judgment pronounced against a party under Order XV rule. 4 must on the same principle operate as *res judicata*. Though the case cited is not available, it is stated in CHITALEY… that it has been held in a Bombay case that a judgment pronounced against a party under Order X rule 4 (2), upon the failure of the party to appear in person, when so ordered, operates as *res judicata*... .such judgment [which is pronounced under rule 178] must be deemed to be a decision on the merits and must have the same effect as a dismissal upon evidence; that accordingly the matters in issue on the suit must be deemed to have been heard and determined; and that the decision operates as *res judicata"* (p.97-98) .

In the present case the circumstances are almost on all fours. I have not been given much case law on this matter by either counsel and I feel that the above dictum is dead on the point and I must follow it and do so.

Now in the present case, counsel faced with an ordeal he brought on himself, filed an application and, later, a new civil suit. Once his application failed, as it had to, he could only appeal again against the order refusing to reinstate the suit. This court, when it refused to set aside the order of dismissal of the suit acted regularly as it could not pass any other order. It had no authority to do so. It was not for instance intimated that the suit was dismissed under Order15 rule 3, 5 or 6 of the *Civil Procedure Rules* as such to draw in the inherent power of Court when applying for the suit to be reinstated. The dismissal of that application anyway stands in my way and at the same time this appears to be a case which in effect has consequences similar to a dismissal of a suit under Order 9 rule 19 where no fresh suit may be instituted. *Lugobe v Barclays Bank* (1973) I ULR 86. It is a case where the plaintiff had to go to the Court of Appeal to set aside the decree dismissing his case under Order 15 rule 4 of the *Civil Procedure Rules*. It is unfortunate that each

time the plaintiff acted though the unfortunate medium of the counsel he chose in these cases. The more recent advocates have in my view made more serious blunders four or more times. The first is when they made their ill fated application to set a side the dismissal order without leave or improperly. The second when they failed to pursue the correct line of setting a side the decree and or accessing the Court of Appeal. The third when the dismissal of their application was left unchallenged and the fourth when they filed a new suit. The fifth perhaps is their failure to effectively controvert this application by filing an affidavit in reply and providing more information on the earlier applications and on the proceedings in the earlier suit.

It is my understand that if the suit had been dismissed under the provisions of Order 15 rule 6 then a new suit could be filed as this is a special provision but which does not apply in respect of dismissals under rules 3 and 4 of that Order or Order 9 rules 19 and 20. See *Rawal v The Mombasa Hardware* (1968) EA 392.

If the suit had been dismissed under Order 15 rule 3 then this could result in an order and not a decree which would have been applicable as of right in like manner as an application made under Order 9 rule 20 to set aside a suit dismissed under Order 9 rule 19. See: *Camille v Merali* (1968) EA 314. If the suit had been dismissed under Order15 rule 3 this would result in an order only and not a judgment and decree. But being a decision in the suit, the reason being that the plaintiff who was present could not prosecute the suit, a judgment with reasons and a decree resulted necessitating leave of Court to appeal to the Court of Appeal. Rather than doing this, the respondent/plaintiffs new advocates rushed into the wrong procedure and got trapped into more procedural webs. When they got strangulated they simply filed a new case. I do not think this is proper and for this reason I will allow this application and strike out the new Civil suit 1264 of 1999. No costs are ordered as the applicant filed a defective affidavit and I ought to dismiss his therefore defective application on the authority of *Teddy Namazzi v Anne Sibo* [1986] HCB 58 where the affidavit like in this case was fatally defective for failing to indicate or bear the date on which the oath was taken contrary to the provisions of Section 8 of the *Oaths Act*. No order is also made in respect of costs in the civil Suit I have struck out but the hapless plaintiff in those failed suits may extract his remedy from his counsel personally in my view.