THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0181 OF 2005
(Arising out of HCT-00-CC-CS-0710 of 2003)

CROWN BEVERAGES LIMITED :::::::::::::::::::::: APPLICANT

VERSUS

STANBIC BANK UGANDA LIMITED
(NOW MERGED WITH UCBL) :::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

This is an application by Notice of Motion under 0.9 r 20 and 0.48 r 1 of the Civil Procedure Rules. It is for orders that:

1. The order of dismissal made in HCCS No. 710/2003 on 17/11/2004 be set aside.
2. Costs of the application be provided for.

The application is supported by the affidavit of Michael Akampurira in which he states:

1. That the Applicant's counsel was indisposed on the day when the case was set for hearing.
2. That the Applicant's counsel was prevented from attending Court for sufficient cause.
3. That it is in the interests of justice that the order of dismissal be set aside so that the matter be heard and determined on merits.

Briefly, the Applicant herein was the Plaintiff in HCCS No. 710/2003. In that suit, the Plaintiff sought recovery of Shs.51,273,750- being the amount not credited on the Plaintiff's account, general damages, breach of duty and costs of the suit. It is claimed in that suit that the Plaintiff was a customer to the Defendant in its Masaka Branch. That a company called MAYFARE (U) LTD issued to the Plaintiff a series of cheques amounting to Shs.51,273,750- and the Plaintiff deposited them on its account with the Defendant. The Defendant is said not to have credited those cheques on the Plaintiff's account and not to have returned them to the Plaintiff. This, so claims the Plaintiff, caused loss to them. The Defendant filed a defence denying liability.

The case came up for a scheduling conference before my sister Arach Amoko, J. on 10/3/2004. It was adjourned to 4/5/2004 and later to 7/10/2004 and 17/11/2004. Come the last date, neither the Plaintiff nor its counsel

turned up. The suit was dismissed under 0.9 r 19 of the Civil Procedure Rules. Hence this application to reinstate it.

At the hearing, Mr. Masembe Kanyerezi opposed the application. He agrees with learned counsel for the Applicant that one of the tests for reinstatement of a dismissed suit is proof that the Applicant honestly intended to attend and did his best to do so. However, he adds a rider that the Applicant ought to show also that he has a good defence to the claim.

I have very carefully listened to the arguments of both counsel in this application. Order 9 r 20 (1) under which the application was brought provides:

> *"(1) where a suit is wholly or partly dismissed, under rule 19 of this order, the Plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and, if he satisfies the Court that there were sufficient cause for non – appearance when the case was called on for hearing, the Court may make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."*

From the above law, in an application for restoration of a dismissed suit under rule 20, all he needs to do is to satisfy Court that there was sufficient cause for non – appearance; i.e that he had an honest intention to attend the hearing, and did his best to do so, and that he was diligent in applying. The law does not offer a definition of what amounts to 'sufficient cause' but in Shabir Din –Vs- Ram Parkash Anand (1955) 22 EACA 48, it was held that a mistake by the Plaintiff's counsel though negligent, may be accepted. In Nuru Nakiridde –Vs- Hotel International [1987] HCB 85, sickness of counsel was accepted to constitute a just cause.

In the instant case, Mr. Akampurira has sworn an affidavit indicating that he was indisposed on 17/11/2004 when the case came up for hearing. He has not attached any evidence of hospitalization but I think it is too much to expect any form of ill-health to be a subject of hospitalization. Since he is an officer of the Court, I would give his word the due respect it deservers especially so since the record shows that prior to this incident, he was not in the habit of absenting himself. I have therefore given him the benefit of the doubt.

As for diligence in applying, the rules do not provide for a time limit. However, an application to set aside a dismissal order must be brought within a reasonable time. In Re Dhabulo [1977] HCB 75, Court observed that a year and two months was an inordinate delay.

In the instant case, the suit was dismissed on 17/11/2004. On 2/3/2005 the Applicant moved Court for its reinstatement. I would hesitate to consider a period of less than four months an inordinate delay.

I have also been invited to consider the nature of the case and whether the Applicant has a good case. I don't accept this to be a consideration in an application for restoration of a dismissed suit under R.20. It was indeed held in Mitha –Vs- Ladak [1960] EA 1054 (T) that it is not open to the Court on an application under this rule to consider the merits of the suit. I agree.

It is trite that Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. The administration of justice should normally require that the substance of all disputes should me investigated and decided on their merits, and errors, lapses should not necessarily debar a litigant from the pursuit of his rights. Unless the other party will be greatly prejudiced, and cannot be taken care of by an order of costs, hearing and determination of disputes should be fostered rather than hindered: Banco Arabel Espano –Vs- Bank of Uganda SCCA No. 8/98. By saying so, I should not be understood to mean that rules of procedure should be ignored. Each case must be decided on the basis of its own circumstances.

In the instant case, I'm satisfied that the Applicant's counsel was prevented from attending Court by a sufficient cause. I would agree with them that the interests of justice demand that the order of dismissal be set aside so that the matter is heard and determined on merits.

Since the illness of counsel should not have prevented their client to send in a representative to save the day, it is only fair that this application be allowed but with costs to the Respondent in any event. I order so.

Yorokamu Bamwine

J U D G E

25/04/2005