

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0545-2005

(Arising from HTC-00-CC-CS-0586-2003)

INFOTECH SYSTEMS LTD

APPLICANT/DEFENDANT

VERSUS

RAPS (U) LTD

RESPONDENT/PLAINTIFF

BEFORE: THE HON. MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant is seeking to set aside the decree entered in the head suit on 8th June 2005 after dismissing its application for leave to appear and defend for lack of prosecution. This application is made under Order 33 rule 11, order 48 rule 1 and Section 98 of the Civil Procedure Act. The application seeks no further orders except for provision of costs to be made. Surprisingly it does not seek leave to appear and defend.
2. The grounds of the application are that the advocate for the plaintiff mistakenly entered the wrong date in his diary and he communicated that same wrong date to the client. On the day that application came for hearing they were not in court, as a result of this mistake. Mr. Baguma Rogers, the managing director, has sworn an affidavit to that effect. It is not contested.
3. Mr. Fred Ruhindi, learned counsel for the applicant, submitted that the failure of the advocate to turn up was due to a mistake of the advocate and the consequences of this mistake should not be visited on the party.
4. Mr. Obonyo, learned counsel for the respondent opposed this application. He submitted that in an application of this nature, the applicant must also show that it has a good defence to the merits of the case. He referred this court to the decision of Caltex Oil (U)

Ltd v Kyobe HCCS No.89 of 1990 [unreported]. He further submitted that the applicant had failed in his application to show that he has a good defence.

5. Order 33 Rule 11 of the Civil Procedure Rules provides the court with the discretion to set aside decrees already entered under Order 33 where service of summons was not effective or for other good cause. The court is authorised to grant leave to the applicant to appear and defend.
6. In applications for setting aside a decree under Order 33 Rule 11, it is usual to include a prayer to be granted leave to appear and defend, as this may, in effect, be the reason why ultimately, it is sought to set aside the decree. This would enable an applicant to proceed and put its case before the court in accordance with the rules. It may be tactless for an applicant who wishes to set aside a decree not to seek leave, at the same time, to appear and defend as consideration of the application for setting aside a decree lawfully entered, would necessitate inquiring into whether the applicant has a defence on the merits.
7. In *J. Hodge v P.E. Page* HCCS No.75 of 1958 [unreported] considering application to set aside a decree under rule 11, McKisack, C.J., held that before an application to set aside a judgment regularly obtained, could be granted, the court had to be satisfied not only that the defendant had had a reasonable excuse, (e.g. illness) for failing to enter an appearance, but also as to his “merits” i.e., (his prospects of success in the action).
8. In *Caltex Oil (U) Ltd v Kyobe* (supra), Byamugisha, J., (as she then was), considering an application under Order 33 Rule 11, held that as to whether the applicant should be granted leave to appear and defend the test to be applied was whether he had disclosed such facts as might be deemed sufficient to entitle him to defend.
9. Clearly in the case before me the applicant had not only failed to disclose any facts that may entitle it to defend, but the applicant had not in fact simultaneously applied for leave to appear and defend under Order 33 Rule 11 of the Civil Procedure Rules which it ought to have done.
10. The applicant has provided an excuse as to why it did not turn up in court when its application came up for hearing. I agree that the excuse may be sufficient to explain the absence of counsel and his client from court on that day, but taken alone it is not sufficient to vacate a decree lawfully entered, as it has failed to show if it is entitled to defend the suit on the merits.

11. This application is dismissed with costs.

Dated at Kampala this 7th day of September 2005

FMS Egonda-Ntende
Judge