

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0005-2008

(Arising from HCT-00-CC-CS-0035-2005)

Builtrust Construction Ltd
Applicant/Plaintiff

Versus

Kalangala District Local Council
Respondent/defendant

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant, Builtrust Construction Ltd, is seeking various orders from this court. Firstly it seeks that the order of this court dismissing the head suit be set aside and that the suit be set down for hearing. Secondly it seeks that execution of all orders arising from and consequential upon the *ex parte* order be stayed. Lastly that costs of this application be provided for.
2. This application is supported by an affidavit sworn by Mr. Apollo Awayi, the Managing Director of the applicant. The grounds upon which the application is made are stated to be three. Firstly that counsel for the applicant, Mr. Alaka Caleb failed to present the applicant's case and did not bring this to the applicant's attention in time. Secondly that the applicant has a good case on the merits. Lastly that it is fair, just and equitable that this be application be granted.
3. The application is brought under Section 98 of the Civil Procedure Act, and Order 52 Rules 1 and 2 of the Civil Procedure Rules.
4. This application is opposed by the Attorney General who acts for the respondent. An affidavit, sworn by Mr. George Kalemera, a State Attorney, was filed in

opposition.

5. Mr. Kwemara Kafuuzi, learned counsel for the applicant who appeared for the applicant at the hearing basically submitted that the applicant was let down by his counsel, one Mr. Caleb Alaka, who had been instructed to conduct the case. He submitted that in effect, the applicant had no legal representation at the hearing of the case which had resulted in the dismissal of the suit. The applicant had not been notified of the hearing of the case by his counsel, and had been unaware of what was going on in spite of being in touch with his advocate.
6. Mr. Kwemara Kafuuzi submitted that this court had wide discretion to remedy an injustice that the applicant would suffer, if the order for the dismissal of the suit was left to stand. He referred to the case of *National Union of Clerical, Commercial and Technical Employees v National Insurance Corporation SCCA No. 17 of 1993 (unreported)* in which the Supreme Court considered inherent powers of the High Court of Uganda. He also referred to *Peter Katuramu v Agri Industrial Management Agency Ltd Civil Application No. 45 of 2000, (unreported)* a Court of Appeal for Uganda decision, in which the failings of counsel, were not visited upon the party that such counsel represented.
7. Ms Susan Odong, learned State Attorney, appeared for the defendant in this case. She submitted, relying on the affidavit in reply sworn by Mr. Kalemera, that the applicant had failed to show that he was entitled to the remedy prayed. Given that this suit was dismissed under Order 17, the only remedy available to the plaintiff/applicant was to file a fresh suit. Lastly she submitted that the applicant was guilty of great laxity given that the suit was dismissed 6 months previous to the filing of the current application. She submitted that this application ought to be dismissed.
8. The brief background to the matter before me is that the applicant filed this suit on 17th January 2005. It obtained default judgment on 10th February 2005 but this was set aside by consent of the parties on 14th April 2005. On 30th August 2005 a scheduling conference was held, and the suit was fixed for hearing on 13th

October 2005. On that date Mr. Caleb Alaka came with the plaintiff, and claimed to have been freshly instructed. He applied for an adjournment as he was not ready to proceed. The hearing of the suit was adjourned sine die.

9. On 14th June 2007 this court issued a notice to show cause why this suit should not be dismissed under Order 17 rule 2 of the Civil Procedure Rules. The hearing was to be on 27th June 2007. On that day, the applicant plaintiff was represented by a Mr. Wetaka. I heard both counsel and found that the plaintiff had failed to show cause why this suit should not be dismissed. I dismissed the suit. And now the present application is brought to set aside that dismissal.
10. The applicant contends that this court is clothed with inherent jurisdiction to make such an order. The respondent's contention is that the only remedy available to the applicant is to file a new suit. Under Order 17 Rule 6 (2) of the Civil Procedure Rules it is expressly provided that in case of dismissal of a suit under that rule, the plaintiff is free to file a fresh suit, if it is not time barred. However the dismissal of the current suit was not under that rule. It was under Order 17 Rule 2 of the Civil Procedure Rules, which makes no similar provision as Order 17 Rule 6.
11. What is clear is that a dismissal under Order 17 Rule 6 of the Civil Procedure Rules does not render the suit res judicata as the suit would not have been determined on its merits. Likewise, a dismissal under Order 17 Rule 2, does not render the suit res judicata, and that leaves a window of opportunity, in appropriate cases for such a suit to be either re-filed, rules permitting, and or reinstated. I accept that this court has a wide discretion under Section 98 of the Civil Procedure Act, to prevent or correct any injustice, and may in appropriate circumstances intervene, in a case as the present one.
12. The question before me is whether the applicant has made out a case for this court to exercise its discretion to set aside that dismissal, and order the suit to be heard on its merits. Given the date the cause of action arose the possibility of filing a new suit is out of question. The plaintiff would be out of time.
13. It is claimed that the plaintiff's counsel, Mr. Alaka, failed to notify the

plaintiff/applicant of the hearing date of the notice to show cause and the dismissal that followed. This may explain sufficiently the applicant's inability to attend the hearing and or take further action after the dismissal in a timely manner to seek to protect his interests. The applicant may, however, not be without relief. He may consider proceeding against his former counsel in negligence, and recover the damages it has suffered as a result of counsel's dereliction of duty.

14. I note that respondent would not suffer any prejudice which cannot be cured by an order for costs. In order to bring the plaintiff/applicant's woes to swift end, and allow it its day in court, I will exercise my discretion, and set aside the dismissal of the suit, and have it reinstated. The applicant/plaintiff shall bear the respondent's costs of these proceedings in any event.

15. I notice that the claim is for a sum that falls within the jurisdiction of Chief Magistrates' Court. The contract which gives rise to the cause of action was made and was performed in Kalangala, which is within Masaka Magisterial Area. The defendant carries on business and is resident in Kalangala within Masaka Magisterial Area. I direct that this suit be transferred to the Chief Magistrates' Court of Masaka Magisterial Area for disposal.

Dated, signed, and delivered the 13th day of February 2008

FMS Egonda-Ntende
Judge