THE REPUBLIC OF UGANDA

IN THE HIGHCOURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HIGH COURT MISCELLANEOUS APPLICATION NO. 125 OF 2014

SESAM ENERGETICS LTD.....APPLICANT

VERSUS

ELECTRICITY REGULATORY AUTHORITY.....RESPONDENT

BEFORE HON. MR. JUSTICE HENRY PETER ADONYO

RULING

1. **Background:**

This is an application brought under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 52 rules 1 and 3 of the Civil Procedure Rules seeking for:

i. An order to set aside the order issued by this honorable court on the 10th day of December, 2014 dismissing High Court Civil Suit No. 509 of 2014 with costs.

ii. The costs for this application to be provided for.

This application is supported by an affidavit of Mr. James Kyazze which is attached to it.

2. **Grounds:**

The grounds to this application are that:

a) The order was erroneously granted as the applicant was not given an opportunity to be heard.

b) There was no hearing notice extracted and served on the parties requiring them to appear before the trial judge on the 10th day of December, 2014.

c) There was no application filed by the defendant to have the suit dismissed as required by law.

d) The order dismissing High Court Civil Suit No. 509 of 2014 was pronounced erroneously as the plaintiff was still waiting for the court to issue notice of commencement of mediation sessions in accordance with the law.

3. History of the Application:

The applicants filed High Court Civil Suit No. 509 of 2014 on the 24th day of July, 2014 and after a period of time it was dismissed on the 10th day of December, 2014 for want of prosecution under Order 17 rule 5 of the Civil Procedure Rules by this time the applicants are stated to have to have been waiting for the court to issue to them a notice of commencement of mediation under Rule 7 of the Judicature (Mediation) Rules and hence this application.

4. Submissions:

At the hearing of this application, Mr Kabega counsel for the applicant relied on the affidavit of one Mr. James Kyazze in his submission that the applicants were never served with any hearing notice for the matter to be heard on the 10th day of December, 2014. That the applicant could not take any further steps to have the matter heard before this Honourable court for the applicant had by then had the matter set for mediation with a mediator already appointed meaning that since the mediation process had merely began and had not yet been completed , they could not per chance have appeared before this Honourable Court to report on the progress of the mediation process as the process was not yet complete. Learned counsel for the applicant further submitted that in addition to the applicant not being aware that the matter was for consideration of the court, even the Annexture R1 which was attached to the affidavit in reply showed that it was for another civil suit, that is High court civil Suit No. 027 of 2014 Sesam Energetics 1 Ltd v Electricity Regulatory Authority of which the applicant was never aware of and had never participated and that secondly it was as a result of the lack of service on the applicant that

prevented the applicant from appearing in court on the day in question. In that respect learned counsel therefore prayed that the order for dismissal be set aside as the applicant was not given a fair hearing which was its constitutional right.

Dr. Byamugisha who made a reply on behalf of the respondent stated when the dismissal order was granted by the court on the day in question , the court had satisfied itself that both parties had been properly notified of the hearing date and that the Annexture R1 attached to the affidavit in support and which was a hearing notice was properly served on the applicant. Learned counsel went on to further submit that as a matter of fact, the applicants should be seen to have filed the matter ij issue for mediation after the date of the 10th day of December, 2014 which was even after the suit had been dismissed for want of prosecution with costs and for that matter he urged this Honourable court to dismiss this application with costs.

5. <u>Resolution:</u>

For ease of resolution, I will consider all the proposed grounds together for they seem to point to the fact of whether it this court was empowered sufficiently on that particular date to grant the prayers of the respondent when it proceeded to dismiss High Court Civil suit No. 509 of 2014.

The first point to consider as argued by Mr. Kabega counsel for the applicant is that on the day in question the applicant was not aware of the hearing of the matter for it had no idea that the hearing of the matter had been fixed for that purpose on that date of the 10th day of December, 2014 since it was never served with the hearing notice and thus was prevented from appearing in court on the date in question.

In respect to this point, Dr. Byamugisha counsel for the respondent pointed out that before the order was granted the court; the court was satisfied that both parties had been notified of the hearing date and so when it applied for the dismissal of the suit it was exercising its powers granted under Order 17 rule 5 of the Civil Procedure Rules which provides that if a plaintiff does not set down a suit for hearing within eight weeks after the delivery of a defence then a defendant may either set it down for hearing or apply to court for dismissal of the suit.

That is the true position of the law. The Applicant herein , however, argues that it never received any hearing notice from the respondent to warrant the dismissal of the suit on the basis that it did

not set down the suit for hearing within eight weeks after the receipt of the defence for indeed it never was aware that the defendant / respondent had applied for a hearing date for indeed no hearing notice was served on the applicants as the purported notice was addressed to another party and not to the applicant meaning that there was no effective service on it to warrant the pronouncement of the order granted by the court even if the respondent insisted that there was effective service in the matter.

The contested hearing notice is attached to the affidavit in reply to this application as Annexture R1. I have had the occasion to peruse it and on the face of it I find that while indeed it is a hearing notice which was extracted for the 10th day of December, 2014, with parties being Sesam Energetics 1 Ltd v Electricity Regulatory Authority issued by the learned Registrar of this Honourable court and was addressed to M/s Kyazze , Kankaka & Co. Advocates, M/s Tusiime, Kabega & Co. Advocates and M/s J.B. Byamugisha Advocates, the citation of the notice itself shows that it was for High court Civil Suit No. 027 of 2014 and not High Court Civil Suit No. 509 of 2014 which seems to be the matter at hand. Thus it would appear that to me that no effective service in regards to the matter at hand was issued to warrant the grant of the subsequent dismissal order by this Honourable Court for the notice was defective in *pari materia* since it had that latent registration in regards to a different matter than the instant one.

The other aspect which shows that the decision to grant the order sought to be set aside can be seen from the fact that it appears that no sufficient opportunity was granted to the applicant to pursue this matter for the decision to dismiss the suit appears to have been a snap one which under the circumstances and was not warranted taking into account that the applicant was not granted the opportunity to be heard as to the alleged non taking of the necessary steps to have the matter heard failure of which the court would have had sufficient materials before it to invoke the relevant rules to dismiss the matter the suit as can be seen from the records of proceedings for there is nothing on record to show that the applicant was warned that if it did not take the necessary steps then the suit would be dismissed at its own peril yet as rightfully pointed out by Mr. Kankaka, learned counsel for the applicant, the applicant had taken the necessary steps to have the matter be fixed for mediation with these contentions clearly brought out under paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 in the affidavit in support of this application

and even with communication in that regard having notified to the respondent through the use of electronic media such as e-mails and in addition to the actual mediation notices which are attached to this application as Annextures A, B and C.

While I agree with the submission of learned counsel for the respondent that that in practice and from experience, matters such as this one are required to be fixed for mediation within two weeks after the completion of pleadings matter as indicated in paragraph 3 of the affidavit in reply, it would seem to me that this was not a licence to disregard Rule 4 of the Judicature (Mediation) Rules which provides that the court must refer every civil action for mediation before proceeding with its trial. Additionally, I find that Rule 7 of the Judicature (Mediation) Rules makes its mandatory for the parties to a suit to be notified of the process of mediation.

Thus in my view if the affidavit in support of this application is to be believed and which is not disputed, it can be safely concluded that the applicants took the necessary steps to actually have the matter proceed to mediation as is required by the law and indeed the applicant gave ample communication to the respondent in that regards thus making the respondent adequately informed of the efforts in that direction.

Another point for consideration which seems to make the case of the applicant to be seen as warranting the grant of this instant application is the fact which is contained in Paragraph 6 of the affidavit in support of this application which show that a week after the defence in this matter had been filed, the applicant took the necessary step to approach the registrar of this court in charge of mediation to have the matter fixed for mediation and indeed it was fixed for the 16th day of January,2015 but it appears that counsel respondents was not amenable to attend the mediation process on that date for on record there is an indication that learned counsel stated so for he communicated his inability of not being able to appear on that date maybe this could have made the said learned counsel to rush before this court to seek the orders which was given for the court was never offered any information in that regard when learned counsel appeared before it on the 10th day of December, n2014 but merely applied to court to have the matter dismissed without favoring the court with the information in regards to the factors in regards to mediation process. When all these are taken into account, it would be my considered opinion that while concrete steps were being taken which were in the knowledge of the applicant, the court was not

made aware of those steps which seems to have been taken by the Applicant showing that indeed the Applicant was at all times interested in having this matter under go the required procedures and was thus interested in its prosecution at all times.

The other point which I would wish to make is that under Order 17 rule 5 of the Civil Procedure Rules a defendant who wishes to have a matter pending before court proceeded with and thus subsequently dismissed would seem to be required to make that move by taking the necessary steps while utilising the appropriate procedures and for those steps like the instant one where no appropriate procedure is provided, it would seem to me a defendant seeking to have a suit dismissed under Order 17 Rule 5 of the Civil Procedure Rules would have to move the court by using the procedure pointed out by Order 52 rule 1 of the Civil procedure Rules which provides for such applications to be brought by way of motion with Order 52 rule 2 providing for the notice to be communicated to the other party yet in this matter it apparent that ears that the other party was unaware of what was taking place in court justifying the reason further for the court to consider that indeed the applicant was ambushed with the court order dismissing its suit

From the above, therefore, it is the conclusion of this court that it is apparent that the applicant, which having did taken all the reasonable steps to have this matter fixed for mediation and indeed the process of mediation did started for even a mediator appointed, was unnecessarily locked out of its pursuit of its claim in the main suit yet it was at all times alive to the procedure to taken before it could be condemned to the action which was eventually taken by this honourable court for it is clear to this court that the applicant had at all times had interest in the resolution of the main suit on its merit save for the fact that it was never given a fair hearing since it's matters was prematurely scuttled at the point where it was so thus denying the applicant a fair hearing which is indeed is a constitutional right.

In the premises, therefore, I would seem to agree the applicant that the order dismissal of High Court Civil Suit No.509 of 2014 was erroneously and prematurely granted for the Applicant has proved by affidavit evidence that while it was taking the necessary steps to have the matter properly proceeded with and while it was preparing to have the matter disposed off on its merit, it was ended up being dismissed on a technicality and thus condemning it unheard.

6: Ruling on application for reinstatement of a suit dismissed for want of prosecution under Order Rule 5 of the Civil Procedure Rules: Per hon. Justice Henry Peter Adonyo, May, 2015.

Having said so above , this court would for those reasons that jot only was an improper notice issued for parties to appear before the court resulting in the dismissal of the main suit but that the applicant has shown that it had taken all the necessary steps which are procedurally allowed to have the matter resolved on its merits and thus a case has been shown for the grant of the orders sought in this application which I do hereby grant with further orders that each party would bear own costs . Consequently I do set aside the order dismissing the main suit and order that it be reinstated accordingly.

6. **Orders:**

i. This application is allowed with each party to be its own costs,

ii. The order dismissing High Court Civil Suit No. 509 of 2014 is set aside,

iii. High Court Civil Suit No. 509 of 2014 is ordered reinstated.

I do so order accordingly.

Henry Peter Adonyo

Judge

8th May, 2015

7: Ruling on application for reinstatement of a suit dismissed for want of prosecution under Order Rule 5 of the Civil Procedure Rules: Per hon. Justice Henry Peter Adonyo, May, 2015.