

**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HCMA NO 90 OF 2015**

**(ARISING FROM HCCS NO 159 OF 2012)**

**CANSTAR RAGS (U) LTD}.....APPLICANT**

**VS**

**STANBIC BANK U LTD}.....RESPONDENT**

**AND**

**1. BAHABUR KARMALI}**

**2. RIIYAZ MITHANI}.....THIRD PARTIES**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant commenced this application under Order rule 23 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act Cap 71 for reinstatement of HCCS 159 of 2012 and for costs of the application to be provided for.

The grounds of the application are that there is sufficient cause to set aside the order dismissing HCCS 159 of 2012. Secondly the Applicant's previous lawyer who had personal conduct of the matter did not inform the Applicant or its new lawyers of the hearing date on the 8th of May 2014. Thirdly it is averred in the notice of motion that the application has been brought without unreasonable delay. Fourthly Counsel Yiga Roscoe's failure to inform the Applicant or its new lawyers of the hearing date should not be visited on the Applicant. Lastly it is averred that it is just and equitable that the application is allowed. The application was filed on 10 February 2015.

The grounds are further contained in the affidavit of Hebert Kiggundu Mugerwa, Counsel of the Applicant who deposes as follows: He is conversant with HCCS 159 of 2012 before this court because it was handled by the now dissolved Muwema and Mugerwa Advocates and Solicitors of PO Box 6074, Kampala, a firm in which Counsel Yiga Roscoe was a part of. Before the law firm was dissolved on 1 December 2014 Counsel Yiga Roscoe who had personal conduct was at all times aware of what was going on in the suit. Prior to or on the 8<sup>th</sup> of May 2014 Counsel Yiga Roscoe had neither informed his law firm of the suit nor did he inform the Applicant of the hearing date. On the 8<sup>th</sup> of May 2014 when the suit came for hearing neither Counsel Yiga Roscoe, the Applicant or any member of his law firm appeared before the court. Hebert Kiggundu further deposes that it was the mistake of Counsel Yiga Roscoe which caused the dismissal of the suit for want of prosecution. Furthermore he deposes that they had written various letters to Counsel Yiga Roscoe requesting him to hand over the file in respect of HCCS 159 of 2012 but the mentioned Counsel Roscoe Yiga deliberately refused or neglected to do so and according to copies of the letters annexed to the affidavit and dated 28<sup>th</sup> of January 2015 and 3<sup>rd</sup> of February 2015 copied to the court.

Counsel Hebert Kiggundu Mugerwa further deposes that the mistake of Counsel should not be visited on an innocent litigant and that the Applicant is still interested in prosecuting HCCS 159 of 2012. That it would be just and equitable if the application for reinstatement of the suit is granted.

In reply Sarah Nambasa, an advocate of this court employed by the Respondent as a legal manager deposes that he is conversant with HCCS 19 of 2012 between the Applicant, the Respondent and third parties namely Bahadur Karmali and Riyaz Mithani. Having read the application for reinstatement of the suit she agrees that Counsel Roscoe Yiga hitherto represented the Applicant in the suit. However she deposes that the Applicant's suit is legally misconceived and an abuse of the court process and the grounds thereof are as follows:

The Court dismissed the Applicant's suit on the 8<sup>th</sup> of May 2014 for failure to comply with scheduling directions of court. The court order was delivered in the presence of Counsel for the Respondent and the second third party. Following the dismissal order, the Applicant became aware of the said order and subsequently filed Miscellaneous Application Number 401 of 2014 to reinstate the suit. The application was heard by the court and a ruling was delivered on 8

September 2014 and the Applicant succeeded in obtaining an order of reinstatement of the suit. Subsequently upon the reinstatement of the suit the court adjourned the matter for a scheduling conference to be held on 17 November 2014. On 14 November 2014, Counsel for the Respondent and the second third party attended court but neither Counsel for the Applicant nor any of Applicant's directors attended court. Owing to the non attendance of court by Counsel for the Applicant or any Applicant's representative, the suit was dismissed for want of prosecution.

By virtue of her training as a lawyer Sarah Nambasa is of the opinion that the dismissal order which was issued by the court on the 8<sup>th</sup> of May 2014 and set aside on 8 September 2014 cannot be set aside again as sought in the current application before the court. In the premises the mistake attributed to Counsel Roscoe Yiga in not attending court on the 8<sup>th</sup> of May 2014 was dealt with in Miscellaneous Application Number 401 of 2014 and the matter is now *res judicata*. She further deposes that the Applicant and his Counsel have hitherto not shown any serious interest or diligence in prosecuting the suit. In the premises her prayer is that it is in the interest of justice that the application before the court should be dismissed.

Turinawe Patrick of Messieurs Oketcha Baranyanga and company advocates, an advocate of the High Court deposes a similar affidavit in reply on behalf of the second third party. He deposes that the order sought in the application for reinstatement of the suit was already granted. Secondly granting the current application would be an abuse of court process. He further believes that the Applicant has not interested in prosecuting the suit which had been dismissed on the 8<sup>th</sup> of May 2014 for nonappearance of both the Applicant and his Counsel however which had been reinstated on 17 November 2014 and again dismissed for nonappearance of both the Applicant and its Counsel. He deposes that on 24 September 2014 when the matter was adjourned to 17 November 2014, the representative of the Applicant and its Counsel were present in court and were fully aware that the cause was coming up on 17 November 2014 but did not appear in court on the said date. Consequently it is in the interest of justice that the Applicant should be denied the orders sought in the application.

The Applicant is represented in this application by Counsel Brian Kabayiza of Messieurs KMA Advocates. The Respondent is represented by Counsel John Fisher Kanyemibwa of Messieurs Kateera & Kagumire Advocates. The second third party is represented by Counsel Seninde Saad

of Oketcha Baranyanga and Company Advocates. Counsels addressed the court in written submissions.

### **Ruling on Preliminary Objection**

I will first consider the preliminary objection to the application on the ground that the orders sought in the application have already been granted and the application is as a consequence barred by the doctrine of *res judicata*.

The Respondent's Counsel based his submissions on the facts contained in the affidavit of Sarah Nambasa the Respondent's legal manager. The facts contained in the pleadings of both parties and which is not contentious is that the court dismissed the Applicant's suit on the 8<sup>th</sup> of May 2014. What is not disclosed in the Applicant's application for reinstatement of the suit is that the dismissal order issued on the 8<sup>th</sup> of May 2014 was set aside and the suit restored. The dismissal order is annexure SBU 1 to the affidavit of Sarah Nambasa. Secondly the order of reinstatement in Miscellaneous Application Number 401 of 2014 is annexure SBU2 to the affidavit of Sarah Nambasa. In that order, it is written that the order dismissing the Applicant's suit is set aside and the suit is reinstated. The order is dated 8th of September 2014.

Ground 2 of the notice of motion avers as follows:

"That the Applicants previous lawyer, who had been in personal conduct of this matter, did not inform the Applicant or its new lawyers of the hearing date on the 8<sup>th</sup> of May, 2014."

Particularly the affidavit in support of Hebert Kiggundu Mugerwa deposes to facts which showed that prior to the 8<sup>th</sup> of May 2014 Counsel Yiga Roscoe never informed his law firm of the suit nor did he inform the Applicant of the hearing date. Secondly in paragraph 5 and 6 he deposes as follows:

"5. THAT on the 8<sup>th</sup> of May 2014 when the suit came up for hearing neither Counsel Yiga Roscoe, the Applicant nor my law firm entered appearance before this Honourable Court.

6. THAT it was Counsel Yiga Roscoe's mistake that caused the dismissal of the suit for want of prosecution."

Finally in paragraph 8 Hebert Kiggundu deposes that the mistake of Counsel should not be visited on an innocent litigant.

The facts in support of the application are the facts prior to and after the dismissal of the suit on the 8<sup>th</sup> of May 2014. I have taken the liberty to peruse the record to confirm what actually happened on the 8<sup>th</sup> of May 2014. The record of the court shows that on the 8<sup>th</sup> of May 2014 Counsel John Fisher Kanyemibwa appeared for the Defendant but Counsel Roscoe Yiga who represents the Plaintiff was not in court. The second third party was represented by Counsel Michael Oketcha. Counsel John Fisher Kanyemibwa prayed that the suit is dismissed for want of prosecution with costs. Counsel Michael Oketcha concurred and the ruling of the court is as follows:

"Court:

The Plaintiff and Counsel are absent when the suit was called for conferencing today 8<sup>th</sup> of May 2014. However the matter goes beyond mere absence. The Plaintiff did not comply with directions issued by the court dated 26<sup>th</sup> of March 2014 and for Counsel to meet and work out points of agreement and disagreement under order 12 of the CPR on the 14<sup>th</sup> of April. The Plaintiff's Counsel did not turn up and therefore the preliminary conference which had been fixed for today could not take place. Secondly he has not turned up today. The record shows that he was present on the 26<sup>th</sup> of March 2014 when the suit was mentioned and fixed for conferencing today with directions to meet on the 14<sup>th</sup> of April 2014. In the circumstances the suit is dismissed with costs under the provisions of Rule 7 of the Constitution (Commercial Court) (Practice) Directions for non compliance with the directions of the commercial judge coupled with failure to appear on a scheduled date for conferencing."

The suit was dismissed under rule 7 of the Constitution (Commercial Court) (Practice) Directions which provides as follows:

"Failure by a party to comply in a timely manner with any order made by the commercial judge in a commercial action shall entitle the judge, at his or her own instance, to refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim, in whole or in part, or to award costs as the judge thinks fit."

Subsequently the Applicant filed High Court Miscellaneous Application Number 401 of 2014. The Applicant was represented by Counsel Roscoe Yiga while Paul Ahimbisibwe represented the Respondent bank. Both parties filed written submissions. The application was for reinstatement of the dismissed suit. Ground one of the order sought is that the court order dated 8th of May 2014 dismissing Civil Suit Number 159 of 2012 be set aside and the suit reinstated and fixed for hearing. The ruling of the court was delivered on 8 September 2014. In that ruling the court noted inter alia that the dismissal at the stage at which the suit had reached and under rule 7 of the Constitution (Commercial Court) (Practice) Directions was not on the merit. The ruling of the court in the last paragraph at page 24 of the ruling is as follows:

"In this case the ends of justice would be furthered by reinstating the suit and hearing it on the merits other than by dismissing it. In the premises the dismissal of this suit will be set aside but the order for costs shall not be set aside. Costs occasioned up to the date of dismissal of this suit remain as awarded to the Respondent. In any case the dismissal was not on the merits. Secondly this application succeeds with costs awarded to the Respondent. The Plaintiff's suit is accordingly reinstated."

I agree with the Respondent's Counsel that parties are bound by their pleadings. There was no attempt by the Applicant's Counsel to either withdraw the application and file a fresh application or concede that the application seeks to set aside an order of dismissal which has since been set aside. Even if the order is granted, it would be in vain because the suit was subsequently dismissed after reinstatement. The suit was subsequently dismissed on 17 November 2014. The Applicant's Counsel based his submissions on facts which are not in the application namely that the Applicants previous lawyer Mr Yiga Roscoe with personal conduct of the matter did not inform the Applicant or the new lawyers when the matter was coming up for scheduling conference on 17 November 2014. He submitted that Counsel Yiga Roscoe who had personal conduct of the matter did not duly inform the Applicant or new lawyers of the hearing date of the scheduling conference.

I have further considered the preliminary matters raised by the Respondent's Counsel. I agree with him that the grounds submitted on by the Applicant's lawyers is extraneous to the application on record and meant to circumvent the affidavit in reply that the application is *res judicata*. This is because it is the Applicant's contention in the pleadings and in the affidavit evidence that the Applicant's previous lawyer did not inform the Applicant or its new lawyers of the hearing date of 8<sup>th</sup> of May 2014. Secondly he contended that the parties are bound by the pleadings. The Respondent's Counsel further submitted that the application is an abuse of the court process because the Applicant seeks to reinstate a suit which had been reinstated after it was dismissed on the 8th of May 2014.

It is incredible in such circumstances to maintain in an application that the Applicant was not aware of such facts. The Applicant was not only aware but also instructed the law firm to file another application to reinstate the suit in Miscellaneous Application Number 401 of 2014. The court was addressed in written submissions and the Applicant's Counsel even file an affidavit in rejoinder and his application to court was granted with costs against the Applicant. In the premises the Applicant's application cannot graduate into another province which has not been pleaded without any application to amend the pleadings or even an attempt to withdraw and file a fresh action for reinstatement. The suit has been dismissed twice under rule 7 of the Constitution (Commercial Court) (Practice) Directions. Any application should address both the doctrine under rule 7 of the Constitution (Commercial Court) (Practice) Directions and the facts and circumstances. New grounds cannot be smuggled in submissions. In the premises I agree with the Respondent's Counsel that the Applicant is bound by his pleadings and the application consequently lacks merit. The order sought in the application is in vain.

Res judicata is a statutory doctrine that bars a subsequent suit and is provided for by section 7 of the Civil Procedure Act. It bars a court from hearing a matter that has been determined in a previous suit. The matter barred must have been directly and substantially in issue in a former suit between the same parties or those litigating under the same title. Section 7 of the Civil Procedure Act cap 71 provides in part that:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties..."

The Court of Appeal of Uganda in the case of **Semakula vs. Magala & Others [1979] HCB 90** held in determining whether a suit is barred by res judicata, the test is whether the Plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. In **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263, the East African Court of Appeal** in the lead judgment of LAW, Ag. V.-P with the concurrence of Spry Ag P and Mustafa J.A. at page 265 gave the test in determining when a matter is res judicata. The test inter alia is whether:

“... the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

In the premises the Applicant has put before the court a matter that has already been adjudicated upon. The Applicant cannot argue another matter which is not pleaded. The final result is that the Applicant’s application is barred by statute and is incompetent and accordingly is struck out with costs to the Respondent and the second third party.

Ruling delivered in open court on 11<sup>th</sup> of January 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Yusuf Mutamba for the Applicant

Counsel John Fisher Kanyemibwa for the Respondent



Parties absent

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**11/01/2016**