THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 448 OF 2016

OKELLO OKIDI SIMMONS}.....APPLICANT/DEFENDANT

VERSUS

ACACIA FINANCE LIMITED}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant/defendant applied to have Civil Suit 502 of 2015 dismissed with costs for want of prosecution and for costs of the application to be provided for. The grounds averred in the notice of motion are as follows:

1. That the respondent has neglected to take any steps to have the matter heard and disposed of since 11th of February, 2016 when the written statement of defence was filed and served unto the respondent.
2. The respondent appears to have lost interest in prosecuting this matter.
3. The respondent will not be prejudiced as it is not barred from bringing the suit again when ready to prosecute the matter.
4. It will be just and equitable to have the suit dismissed for want of prosecution.

The application is supported by the affidavit of the defendant/applicant which gives the facts of the application. On 12th August, 2015 the respondent filed High Court Civil Suit No. 502 of 2015 by summary suit for recovery of Uganda shillings 162,960,000/= with interest at 22% per annum from the date of filing until payment in full and costs. Judgment was entered against the applicant on 25th August 2015 by the deputy registrar in default of an application for leave to defend the summary suit. The default decree was set aside in Miscellaneous Application Number 22 of 2015 and the applicant was granted leave to file a defence on 29th January, 2016. The applicant filed his written statement of defence on 5th February, 2016 and served on the plaintiff's advocates on 11th February 2016. Since that time the respondent neglected to take any steps to have the suit disposed of. He deposed that the respondent seems to have lost interest in prosecuting its perceived cause of action.

The plaintiff/respondent to the application opposed the application. The affidavit in opposition is that of Kenneth Tumusiime Kagaju an advocate practising with Greystone advocates. His

principle the position is that the applicant indeed filed a written statement of defence but not file a mediation summary as provided for by the Judicature Mediation Rules of 2013, which rules are mandatory. In fact counsel for the respondent wrote to the registrar mediation requesting that the matter is fixed for mediation according to the copy of the letter dated fourth of March 2016. The mediation could not be conducted because the defendant/applicant never filed or refused to file his mediation summary. Because the defendant/applicant never filed his mediation summary/notes pleadings for the defendant/applicant have not been closed. The applicant cannot now seek to have the suit dismissed for want of prosecution when he has not completed filing his pleadings. Under the Judicature Court Mediation Rules, the suit, be set down for hearing before the matter has been referred for mediation. In the premises the application of the defendant is premature.

In rejoinder Mr Patrick Lugwanirya of Tumwebaze, Kasirye & company advocates, the court process server, filed an affidavit. His principle contention in the rejoinder is that the mediation file was closed because judgement had been entered against the defendant and it has never been reopened. It followed that his efforts to file the defendants mediation summary were futile.

The application was fully argued when Counsel Kizito Kasirye appeared for the applicant and Counsel Bill Mamawi appeared for the respondent on the 26th of October 2016.

The applicants counsel submitted that the issue is whether the respondent neglected to take any steps for eight weeks from the date of filing WSD. The respondent was served through its advocates with WSD on 11th of Feb 2016. Until now no step has been taken by respondent to have this matter fixed or set down for hearing being a period of close to 8 months. The suit is for recovery of 162 million with interest of 22% per annum. The longer the case stays on court record it exposes applicant to risk of paying colossal sums as interest. He submitted that he understood the Mediation Rules 2013 which makes it mandatory for every case to be referred for mediation. Where a mediation file is open the practice is to remind counsels to file mediation. The mediation file was closed as a result of judgment entered. A period of eight months is unreasonable delay and he moved court to have the main suit dismissed with costs to applicant under Order 17 rule 5 of the Civil Procedure Rules.

In reply Counsel Bill Mamawi submitted that there is an affidavit in reply on court record giving the respondents answer to the application. The defendant never filed a mediation summary which is a mandatory requirement under rule 5 of the Judicature Mediation Rules 2013. Secondly the respondent wrote on 4th of March 2016 to registrar mediation for the matter to be fixed for mediation after the defendant had filed his WSD. The defendant was aware it was a summary suit and they were granted leave. It should have been accompanied by a summary of mediation. They have not attached any mediation summary to prove that a mediation summary was prepared. The plaintiff's matter has not even been forwarded for mediation in the absence of the mediation summary. Mandatory mediation for a statutory period has not taken place. This

application was filed in June 2016 about four months after filing of WSD and three months after respondent had requested for mediation to take place. He contended that the application is premature and prayed that it is dismissed and the court makes two orders that the defendant/applicant is ordered to file mediation summaries and the matter is forwarded for mediation with costs to the respondent.

In rejoinder Counsel Kizito Kasirye submitted that his colleague has not disputed that the mediation file was closed. For mediation to proceed the file has to be re-opened to allow the applicant/defendant file his mediation summary. This has never happened until presently. The letters attached to the affidavit in rejoinder disclose the practice of the mediation registry. He contended that his colleague relied on his letter to the registrar March 2016. He submitted that the applicant was inclined to believe that a mediation file would have been opened and would have filed a mediation summary. No service of the letter was made on the applicant who could have averted this application. He reiterated submissions that the respondent has shown little interest in prosecuting the suit and prayed that it is dismissed.

Ruling

Order 17 rule 5 of the Civil Procedure Rules provides as follows:

> "If the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery of the counterclaim, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on the hearing of the application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as to the court may seem just."

The rule provides that if the plaintiff does not within eight weeks from the delivery of any defence or where a counterclaim is pleaded then within 10 weeks from the delivery of the counterclaim, set the suit down for hearing, then the defendant may apply to the court to dismiss the suit for want of prosecution. The rule gives the court discretionary power as to whether to dismiss the suit or to make such other order as it deems fit. The rule has been modified and cannot be strictly construed in light of the subsequent rule under Order 12 rule 1 of the Civil Procedure Rules for holding of a scheduling conference. The rule to conduct a scheduling conference is mandatory and was promulgated after Order 17 rule 5 of the Civil Procedure Rules. A scheduling conference is expected to be conducted within seven days after the order on delivery of interrogatories or within 28 days from the date of the last rejoinder in the pleadings. 28 days is 4 weeks. The question is what happens if a scheduling conference is not conducted within the timelines under Order 12 rule 1 of the CPR? Under Order 17 rule 5 of the CPR the suit is supposed to be fixed for hearing within eight weeks which is a period of 56 days from the filing of the defence. The plaintiff is entitled to a reply to the defence and Order 12 rule 1 of the

CPR has further been overtaken as far as timelines are concerned by the mandatory requirements of the mediation rules which must take place before conducting a scheduling conference. Order 12 rule 1 provides as follows:

> "1. Scheduling conference.
>
> (1) The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement—
>
> (a) within seven days after the order on delivery of interrogatories and discoveries has been made under rule 1 of Order X of these Rules; or
>
> (b) where no application for interrogatories and discoveries has been made under rule 1 of Order X of these Rules, then within twenty-eight days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these Rules, except that the time may be extended on application to the court, showing sufficient reasons for the extension."

Even after the mandatory court annexed mediation, the court is required to conduct a scheduling conference before fixing the suit for hearing. Scheduling conference is conducted before the suit is fixed for hearing by the court.

Rule 4 (1) of the Judicature (Mediation) Rules, 2013 provides as follows:

> "(1) The Court shall refer every civil action for mediation before proceedings for trial."

The rule is mandatory and requires the court to refer the civil action for mediation. This compromised the timelines under order 17 rule 5 of the CPR which must be read in harmony with Order 12 rule 1 of the CPR and the Mediation rules of 2013. I have carefully considered the facts and circumstances and there is evidence that the plaintiff/respondent made efforts to have mediation proceedings commence and failure of which the matter may then be sent for the scheduling conference.

In the circumstances of this case where the defendant did not file mediation summaries coupled with the fact that the plaintiff was frustrated by the registry staff upon closure of the mediation file when judgement in default was entered, the role of the plaintiff's counsel was to seek to have been filed reopened. The plaintiff wrote on the 1st of March 2016 to the registrar to fix the case for mediation at the earliest possible convenient date. This application was filed on 7th June, 2016. In the premises the plaintiff did make efforts with a view to having progress made in the suit. It would be absurd for a plaintiff who had obtained judgement, albeit which has been subsequently set aside, not to be interested in pursuing the suit. In the premises, the application cannot succeed and I am of the opinion that the suit should be heard on the merits. The application is accordingly dismissed with costs to abide the outcome of the main suit. The dispute shall be forwarded for court annexed mediation by the registrar. Secondly, the defendant

is directed to file its mediation summaries within seven days from the date of this order. The costs of this application shall abide the outcome of the suit.

Ruling delivered on 28th October, 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Kizito Kasirye for the Applicant

Bill Mamawi for the Respondent

None of the officials of the Applicant or Respondent in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

28th October 2016