

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

M.A. NO. 1149 OF 2015

(ARISING FROM HCCS NO.771 OF 2013)

- 1. EMTEC CONSTRUCTION SERVICES LTD**
- 2. ENG. EMMY MUHWEZI::::::::::::::::::::: APPLICANTS**

VERSUS

BARCLAYS BANK (U) LTD::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE DAVID K. WANGUTUSI

R U L I N G

This application brought by EMTEC Construction Services Ltd. and Eng. Emmy Muhwezi against Barclays Bank (U) Ltd. seeks to set aside the judgment entered in the Counter claim and Decree. It is grounded on the following:

- 1. That the judgment was entered by court erroneously.**
- 2. That the Registrar of the court did not have jurisdiction to enter judgment in the counter claim.**

Record shows that on the 27th June 2016 the Respondent applied to the Registrar to dismiss the suit under Order 17 Rule 6 of the Civil Procedure Rule. They wrote;

“Pleadings in the above matter were closed on the 18th February 2014, with the filing of the Plaintiffs’ reply to the written statement of defence. It is now over two (2) years and three (3) months and the Plaintiffs have not taken any steps in the suit aimed at either prosecuting or disposing off the same. It is against the above background that we humbly write to you, praying that you invoke your powers under Order 50 Rule 10 of the CPR

(Added judicial Powers of Registrars Civil Practice Direction No.1 of 2002) and be pleased to accordingly dismiss the Plaintiffs' main suit under Order 17 Rule 6 of the CPR with costs."

The Registrar then dismissed this suit on the 4th of July 2016 under Order 17 Rule 6 of the Civil Procedure Rules giving the reason;

"As no step was taken for over two years by the Plaintiffs."

Order 17 Rule 6 provides for the dismissal of a suit where no steps have been taken for two years or more in these words;

"In any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed."

The foregoing rule of procedure means that for a suit to be dismissed under Order 17 Rule 6 it must have been lying in the registry with no activity towards its disposal for two years. I have gone through the record and found that the Registrar summoned the parties to appear before the Judge on the 15th September 2015.

Record indicates that the Registrar called the parties but only the 2nd Applicant who was also the Managing Director of the 1st Applicant appeared in court. The 2nd Applicant told court that his advocate could not attend because he was upcountry. Court then adjourned the matter to 1st December 2015.

I said earlier that for Order 17 Rule 6 to come into play, the case must have been in abeyance without activity towards its disposal for two years.

In the instant case, the Applicants appeared before the court on the 15th of September 2015 and the matter was adjourned to 1st December 2015. Certainly the period from 15th September 2015 to 4th July 2016 when the suit was dismissed is far less than two years of inactivity. In any case, this suit had been fixed for 1st December 2015 and it cannot be the Applicants' fault that the court did not sit.

Court therefore finds that the dismissal was done prematurely and surprisingly by the Registrar who had summoned the parties to appear in court for fixture less than a year of his dismissal of the suit.

It was done outside Order 17 rule 6 and therefore illegal. The dismissal is therefore set aside and the suit reinstated.

On the issue of whether the Registrar had jurisdiction to enter judgment the Applicants contended that they had filed a Reply to the Counterclaim. And that having done so the Registrar had no jurisdiction to entertain an Application for Judgment.

The Respondent contended that at the time they applied for the judgment the Applicants had filed a reply to the Defence but not the counterclaim. Record indicates that a Reply to Counterclaim was filed on the 18th February 2014. The Counterclaim and the Reply were on record by 27th May 2016 when the Registrar entered judgment.

It is my view that once the Reply was filed, the Registrar lost the jurisdiction to enter ex-parte judgments because the matter had now become contentious.

In the Affidavit of support of the Application, the Applicants averred that for fear that they had filed their Reply to the Written Statement of Defence late; they filed another Application on the 1st December 2015 through their new advocates Agaba & Co. Advocates seeking to enlarge time within which to reply to the Counterclaim.

The Applicants further contended that their previous lawyers had failed and neglected to serve the replies to the Respondent. And that in any case they had the right to reply to the counterclaim since the pleadings were not complete.

The Respondent filed an Affidavit in Reply on the 13th December 2016. It contended that the Registrar was vested with the jurisdiction on admission in the counterclaim for the failure of the Applicants to respond to the Counterclaim. And that the Registrar was legally justified in granting both the Order and the Decree.

I have looked at the court register in which Miscellaneous Applications are recorded, it shows that on the 1st of December 2015, the Applicants filed Miscellaneous Application 991/2015 in

which they sought enlargement of time to file a reply to the counterclaim. This Application was filed much before the default judgment was entered. Having filed it, the duty to fix it and place it before a Judge fell on the Registrar.

The Registrar did not perform his role most probably because the Registry clerks did not bring the Application to his attention. It was necessary to dispose of this Application and remove the contention between the parties before the Registrar could proceed to enter judgment. The fault of the court cannot be visited on the litigants. The presence of that Application filed over a year before he entered judgment made the matter contentious and therefore deprived the Registrar of the jurisdiction to act the way he did.

We have now moved from the passive judge to the proactive one where the court should move to fix Applications that are filed without being prompted by the Applicants. The Applicants in this case expected court to give a date and place the matter before the judge for disposal. It did not do this. It instead went ahead to enter judgment in default. Such judgment cannot stand. It is set aside. The Registrar is directed to issue and fix the Application for enlargement of time.

Since the parties are not responsible for the mishap, court makes no orders as to costs.

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David K. Wangutusi

JUDGE

Date: 14th March 2017