

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

MISCELLENOUS APPLICATION NO. 57 OF 2002

(Arising from High Court Civil Suit No. 1380 of 1986)

ATTORNEY GENERALAPPLICANT/DEFENDANT

VERSUS

OSOTRACO LIMITED.....RESPONDENT/PLAINTIFF

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. This application is brought by the Attorney General seeking to set aside an order of this court allowing the plaintiff to proceed in the absence of the defendant, and to be granted an opportunity to defend the head suit. It is brought by notice of motion and is supported by an affidavit sworn by the Director of Civil Litigation, Mr. Deus Byamugisha. The respondent opposed the application and filed an affidavit in that regard.
2. The brief background to this matter is that towards the close of last year this case, along with three hundred and twenty others was allocated to me. It was one of the oldest having been filed in 1986. I proceeded to offer it a hearing date. It was heard on the 15 and 16 January 2002. I adjourned it to the 28th January 2002. I warned the parties with the following words, “Both parties are warned to bring all their witnesses on that day.”
3. On the 28th January 2002, neither the defendant’s counsel nor its witnesses turned up in court. The Plaintiff applied to proceed in their absence, and I granted him leave to do so. He closed his case and addressed court on the agreed issues. I fixed the case for judgement. Before I could deliver the judgment the defendant applicant applied to set aside those proceedings, hence this ruling.
4. The grounds advanced by the Attorney General would appear to be set out in the affidavit in support of its application. There are no grounds set out in the notice of motion. As far as I can gather from the affidavit sworn by Mr. Deus Byamugisha the story told is that on the 25th January 2002 he was served with a list of authorities in Supreme Court Civil Appeal No. 17 of 2001 and the clerk effecting service informed him that this case was

due to be heard on the 28th January 2002. He attached a copy of the list of authorities served on him to the affidavit sworn in this case.

5. Mr. Deus Byamugisha states in his affidavit that he then instructed Mr. Chebrion Barishaki and Miss Mutesi Patricia who had been in charge of that case to appear in the Supreme Court on that date and oppose the appeal. Ms Mutesi informed Mr. Byamugisha that she had been due to appear before me in this case on that day. She was instructed to write to court and inform it of the circumstances accordingly, and she did write to the Registrar to that effect. At the same time Mr. Byamugisha issued written instructions reallocating the file to Mr. Henry Oluka to appear before the High Court and apply for an adjournment, and gave the same to a Mr. Wafula, a filing clerk to hand over the file to Mr. Henry Oluka.
6. Mr. Deus Byamugisha states further in his affidavit that inadvertently, Mr. Wafula informs him, that he did not pass the file to Mr. Henry Oluka but filed it away. As a result no one turned up in court on behalf of the defendant. It is argued that this is sufficient cause for the absence of the defendant's counsel.
7. I asked Ms Mutesi Patricia, learned counsel who argued this application on behalf of the Attorney General what happened when they went to the Supreme Court as instructed. She replied that on reaching there they were informed by the Registrar of the Supreme Court that the appeal referred to was not listed for hearing that day. It had been listed the previous week, and in fact dismissed. In other words there was no appeal.
8. What has baffled me is that the Attorney General was not served with a hearing notice issued by court but was merely notified by a clerk of the opposite party. No attempt was made to cross check this information. A telephone call to the Registrar, Supreme Court would have elicited the true facts. In addition I am aware that the Supreme Court issues cause lists for its civil sessions, and copies of the same are forwarded to the Attorney General. A diligent check on this cause list, even on the one pinned on the court notice board, on the 25th January 2002 would have bared the facts to the officers of the Attorney General.
9. I am mindful of the obvious position in law that the Supreme Court takes precedence over all other courts in this country and if counsel has to unexpectedly appear before the Supreme Court then the appearance before this court could be deferred. Nevertheless

Counsel cannot hope to use this excuse indiscriminately. There must be business before the Supreme Court before it can turn appearance before the Supreme Court into sufficient cause for not appearing before the courts below. And even where there is business before the Supreme Court in which counsel is appearing, he may have to show that the multiple fixtures are not his handiwork. For there must be efficient use of all courts' time and other resources.

10. In the instant case there was no business before the Supreme Court that led Ms Mutesi Patricia to that court instead of appearing before this court as she had been warned to do. The information that Mr. Deus Byamugisha had received that triggered the course of events put before me, was in my view, insufficient to seek an adjournment from this court. It had to be verified, as there was no document from the Supreme Court notifying of them of a hearing date. What counsel have to understand that even appearances before this court, indeed before any court, are serious matters that should not be trifled with as the circumstances of this case show.
11. Apart from the fact that a letter written to this court intimating that there will be an application for an adjournment is no application for adjournment. This court cannot act on it. There is double jeopardy when its contents turn out to false. The claim that Supreme Court Civil Appeal No. 17 of 2001, Mpungu and Sons Transporters Ltd vs Attorney General & Another was due for hearing implicit in the letter written to the Registrar by Mr. Bireije, Commissioner for Litigation of 25th January 2002 and annexed to the affidavit of Mr. Deus Byamugisha was at best misleading, if not false.
12. This application was filed after the 28th January 2002 and it was couched in such a manner that it omitted to inform court of the true state of affairs much as by then it was clear that no such case as mentioned in the letter of 25th January 2002 to the Registrar of this Court had been scheduled to be before the Supreme Court on 28th January 2002.
13. As borne out by the Court record and the affidavit of Mr. James Ochaya the defendant has in the past not turned up in court twice without any excuse when this case was due for hearing. This was on the 28th May 2001 and 3rd July 2001. What happened on the 28th January 2002 was not just a single incident. I am unable to accept the reason provided by the applicants as forming sufficient cause for their failure to appear in court on the 28th January 2002 with their witnesses, as previously ordered by the court.

14. Another reason is advanced as to why this application should be allowed. It is claimed in the affidavit of Mr. Deus Byamugisha that the defence in this case raises ‘very novel points of law and fact and has a high likelihood of success’. These very novel points of law are not set out in the affidavit. When I asked Ms Mutesi what these novel points were, she responded that she was not prepared to discuss them at this stage but would only raise in her final submissions. I shall set out my notes on this matter below.
15. ***Court: What are the novel points of law and fact that are said to exist in Mr. Deus Byamugisha’s affidavit?*** **Counsel for Applicant: The points of law will be revealed in our submission if the application is granted.** ***Court: Are you serious Ms Mutesi?*** **Counsel for the Applicant: I am serious. That is my response.** ***Court: What is the defence of the applicant?*** **Counsel for Applicant: In submissions we are going to depart from the pleadings in as far as we shall be denying liability for the action of the tenants. We shall also be alleging fraud on the part of the plaintiff in registering the suit property. I wish to proceed to ground no. 2.”**
16. It may be a novel approach to advocacy to allege fraud in final submissions rather than specifically plead the same in a party’s pleadings. It may equally be novel for learned counsel to plan to depart from a party’s pleadings in the final address to this court. But both do not amount to ‘very novel points of law and fact’ in my most respectful view.
17. The applicant has failed to satisfy me that there is justification to set aside my order of 28th January 2002 allowing the plaintiff to proceed with his case in the absence of the defendant. I dismiss this application with costs.

Dated at Kampala this 20th day of March 2002

FMS Egonda-Ntende
Judge

Registrar,
High Court of Uganda

Please deliver the above judgement in my absence.

FMS Egonda-Ntende
Judge
20/03/02