THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC APPLICATION NO. 423 OF 2011

A P BHIMJI LIMITED :::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

MICHAEL OPKWO :: RESPONDENT

BEFORE: HON JUSTICE ELDAD MWANGUSYA

RULING

A suit between A. P Bhimji Ltd, now applicant in this application and Michael Opkwo, now respondent in this application was filed on April 13, 2006. The hearing of the case did not start until 12th May 2008 when the plaintiff testified in court. The plaintiff's testimony was not completed because he was not cross examined. The matter was then adjourned to the 7th July, 2008 at 9.00am for further hearing. There is nothing on the court record as to what transpired on 7th July 2008. The case was next cause listed for hearing on 15th April 2011 when only Mr. Ali Kankaka holding a brief for Mr. Andrew Kibaya counsel for the plaintiff appeared in court. He informed court that his instructions were to seek for a hearing date. He also informed court that the plaintiff's counsel undertook to effect service of the hearing notice on the defendant. Hearing of the suit was fixed for 20.09.2011 at 9.00 am.

The case was called at 9.20 am and neither the counsel nor the parties were in court. There was no evidence that the plaintiff's counsel had taken out any hearing notice to be served on the defendant's counsel as per the undertaking given on the 15th April 2011. Under Order 9 rule 17 Court could have proceeded to dismiss the suit. Instead court evoked the provision of Order 17 rule 4 which is set out hereunder:-

> ***"Court may proceed notwithstanding either party fails to produce evidence.***
>
> *Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately"*

The decision of the court was to dismiss the suit. The application before court is to set aside the order dismissing the suit and a direction that it be reinstated for its hearing and determination on merits.

The application was by a Notice of Motion made under Section 98 of the Civil Procedure Act (Cap 71) and Article 126(2)(e) of the constitution.

The application is supported by the affidavit of ANDREW KIBAYA and based on the following grounds:-

1. That the applicant sued the respondent vide Civil Suit No. 217 of 2006.
2. That the suit had proceeded and the plaintiffs had led evidence by calling one of his witnesses, Mr. Sameer Bhimji.
3. That the matter was heard by Justice Arach, who was first transferred to the Commercial Court and later to Court of Appeal and the matter was unheard for over two years.
4. That the suit was called for mention on 15th April 2011 and adjourned to 20th September, 2011.
5. That counsel for the applicant who had personal conduct of the matter, Mr. Andrew Kibaya was attending to his wedding which was on the 16th September 2011 and was out of office on the 20th September, 2011 and as such there was no attendance.
6. That the dismissal of the suit did not conclusively determine the rights of the parties regarding the matter in controversy.
7. That it would be just and fair that the order dismissing the suit be set aside and the case proceeds on its merits.

I wish to comment on two grounds before determining the merits of the application. The first is ground 3 which refers to the transfer of Hon. Justice Arach to the Commercial Court and the Court of Appeal. I do not understand the relevance of this ground because the concern of this court was the period between the 15th April 2011 and the 20th September 2011 when the plaintiff's counsel had undertaken to serve

the defendant with a hearing notice and he did not. On 20.09.2011 the plaintiff was required to adduce evidence or cause the attendance of his or her witness and he did not. It was on that basis that the suit was dismissed. It had nothing to do with the delay caused by other factors.

The other ground is ground 5 where it is stated that counsel who had personal conduct of the matter was involved in his wedding. This same counsel was not present on 15th April 2011 because he was reportedly indisposed. Mr. Ali Kankaka held a brief for him and court proceeded on the basis of the information given by Mr. Ali Kankaka. Counsel should have done the same on 20.09.2011 but even then there was no evidence that the defendant had been notified of this date. There was nobody to inform court as to the position of the case and the way forward. Hence the decision of the court to dismiss the suit under Order 17 Rule 4 which brings me to what I consider to be the main issue in this application and that is whether the suit dismissed under this Rule can be reinstated or the decision finally disposes of the matter.

In my view this court has to draw a distinction between a dismissal made under Order 9 rule 17 and a dismissal made under Order 17 rule 4. Order 17 rule 4 has already been set down. Order 9 rule 17 provides that were neither party appears when the suit is called for hearing, this court may make an order that the suit be dismissed. Order 9 rule 18 provides as follows:-

"Plaintiff may bring fresh suit or court may restore suit to file. Where a suit is dismissed under rules 16 or 17 of this order, the plaintiff may, subject to the law of limitation, bring a fresh suit <u>or he or she may apply for an order to set the dismissal aside; and if he or she satisfies the court that there was sufficient cause</u> for his or her not paying the court fee charges if any, required within the time fixed before the issue of the summons or <u>for his or non appearance,</u> as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit. (*underlining provided).*

There is no similar provision for reinstatement of a suit dismissed under Order 17 Rule 4. This court was provided with a Ruling of the Hon. Justice Yorokamu Bamwine for the proposition that since the order did not conclusively determine the rights of the parties with regard to the matters in the suit, the suit could be reinstated. This was in the case of **AKAMBA PUBLIC ROAD SERVICES LTD VS DAVIS MUCHUNGUZI MUTABIIRWA High Court Misc Application No. 155 of 2010 arising from HCCS No. 616 of 2006 (**unreported) where the Hon. Justice Bamwine sated as follows:-

"I have of course addressed my mind to the effect of a decision made under Order 17 Rule 4 in A.H. ZAIDI VS F.H HUMEIDAN [1960] EA 92 and TARIOL SINGH SACTGU VS ROADMASTER CYCLES (U) LTD CACA NO. 46 OF 2000. It was held that a decision made under this rule was a

decision on the merit which gave rise to decree. <u>The two decisions are of course still good law.</u> However their facts are distinguishable from the ones herein, I realize in this case that the suit had been given two hearing dates. Having failed to appear on 18.03.2010, the defendant would have appeared on 30.03.2010. The later fixture was not drawn to my attention by learned counsel for the plaintiff.

Even then the Order I made did not conclusively determine the rights of the parties with regard to the matters in controversy in the suit. The plaintiff had not even been cross examined to test the veracity of his testimony against the defendant. Judgment has not been delivered, the same having been reserved for delivery on a later date. There is therefore no appealable decree on the matter, preliminary or otherwise, as defined in Section 2 of the Civil Procedure Act. I would have come to a different conclusion if judgment or any appealable order had been entered against or in favour of any party under this Rule".

First of all since as Justice Bamwine rightly states **SALEM A. H ZAIDI VS F.H HUMEIDAN [1960] EA 92** is still good law. The position is that a judgment pronounced against a party under this rule "must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence and accordingly the matters in issue in the

first action must be deemed to have been heard and determined; the dismissal of the earlier action therefore operated as res judicata." The dismissal of the suit in this case is a final disposal of the suit as envisaged by Order 17 Rule 4. Secondly unlike in the case of Akamba where court found that the applicant took all reasonable steps to be present in court I find that no reasonable steps were taken by the applicant to appear in court. In the Akamba case the applicant had appeared in court but had only arrived late. In this case nobody appeared. The other factor taken into account in the Akamba case was that the case had been fixed for two days. In the case of Akamba the judgment had been reserved while this case no judgment had been reserved. The suit was dismissed without any reservation.

The respondent did not raise any objection to the application to reinstate the suit but on the authority of **SALEM AHMED HASSAN ZAIDI VS FAUD HUSSEIN HUMEIDAN** (supra) the matter was finally determined by the dismissal of the suit and for that reason a reinstatement is not tenable.

Therefore I decline to grant the order to set aside the dismissal order and reinstate the suit.

This application is dismissed with costs to the respondent.

Eldad Mwangusya

J U D G E

13.04.2012

13.04.2012 at 3.10 pm

Ms Bridget Kusiime holding a brief for Mr. Brian Tendo for the applicant

Neither the applicant nor his counsel is in court

Ms Jolly Kauma Court clerk

Court:

Ruling delivered in open Court

Eldad Mwangusya

J U D G E

13.04.2012