

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

CIVIL DIVISION

MISC APPLICATION NO. 498 OF 2012

(Arising From Misc Application No. 237 of 2012)

(Arising From Civil suit No. 790 of 2002)

ALEX MULYABINTU ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. CASE WESTERN RESERVE

UNIVERSITY (OHIO)

2. MAKERE UNIVERSITY ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

RULING

This is an application brought under Section 98 of the Civil Procedure Act and Order 52 of the Civil Procedure Rules for orders that the order issued by this Honourable Court on 1st October 2012 dismissing Miscellaneous Application No. 237 of 2012 for want of prosecution (non appearance) be set aside and the application be reinstated for hearing and that the costs of the application be in the cause.

The application was made by a Notice of Motion supported by the affidavit of the applicant setting out the grounds which are briefly:-

1. That the applicant was in Court at the stipulated time, but did not hear his case file being called.

2. That the application is for amendment of the plaint in Civil Suit No. 790 of 2002, hearing the application would avoid a multiplicity of suits.
3. That it is in the interest of justice that the said order be set aside.

The background to this application is that the original Civil Suit No. 790 of 2002 was filed on 20.02.2002 against three defendants, namely, Makerere University Kampala, Case Western Reserve University Cleveland Ohio and the Attorney General of Uganda. The action against the three defendants was for compensation for injury while at work as provided by the Workers Compensation Act 2000. The plaintiff claims to have contracted Tuberculosis as a result of exposure to T. B patients in the course of his work. Only the 1st and 3rd defendants were served with the Summons to file a defence which they duly complied with. For various reasons not relevant to this application the hearing of the suit stalled. Then by a decree dated the 4th July, 2007 the suit against the 1st and 3rd defendants was withdrawn. It is to be noted the suit was withdrawn against the defendants who had been served with a summons to file a defence leaving the party who had not been served. Following the withdrawal of the suit against the 1st and 3rd defendants an amended plaint was on 10.07.2007 filed against CASE WESTERN RESERVE UNIVERSITY OHIO. From the record this amended plaint has never been served on the defendant.

On 25.05.2009 the Deputy Registrar (Civil) dismissed an application that had been filed to extend time within which to serve the summons to file a defence.

The suit was called for hearing on 03.07.2009 when Mr. Kafuko Ntuyo counsel for the plaintiff reported to court that they had served the defendant by post but that the defendant had not replied. Court observed that there was no evidence of service on court record. The hearing of the case was set for 08.04.2010 and court ordered for the hearing notice to be served and evidence of service to be on record before the hearing date. There was no evidence that any service was effected.

On 24.02.2011 court noted that the plaintiff had met challenges to serve the present defendant with summons to file a defence but given that the Deputy Registrar had dismissed the application for Leave to extend the time within which to effect service of the Summons there was no basis for court to have issued fresh Summons under Order 1 Rule 3(b) and Order 1 Rule 3(c) of the Civil Procedure Rules applied. Court dismissed the suit “forthwith vide Order 1 Rule 3 of the CPR.”

On 14.03.2012 an application to reinstate the suit against Case Western Reserve University (Ohio) was heard and granted. It was also ordered “that the present defendant be substituted and

replaced by Makerere University and Case Western Reserve University (Ohio) T/A Uganda – CWRU Research Corroboration as defendant. It was following that order that the plaintiff filed Misc. Application No. 237 of 2012 against CASE WESTERN RESERVE UNIVERSITY (OHIO) and Makerere University all defendant jointly T/A UGANDA – CWRU RESEARCH CORROBORATION for orders that Leave be granted to amend the plaint in Civil Suit No. 790 of 2002 by adding the defendants as parties to the suit and as such it is only fair and prudent that since the parties to the suit have changed, the applicant be granted Leave to amend his plaint to reflect the said changes. The amended plaint was annexed to the Chamber Summons.

The application was set down for hearing on 01.10.2012 at 9.00 am but when it was called at 9.10 am neither the applicant nor his counsel was in court. It was dismissed under Order 9 Rule 17 of CPR which provides that *“where neither party appears when the suit is called for hearing, the court may make an order that the suit be dismissed.”* This application is for setting aside the order dismissing the suit so that the application is reinstated for hearing.

At the hearing of this application the applicant was represented by Mr. Isaac Mugerwa and Mr. Ivan Mutyaba. Apart from the grounds on which the application is based I asked counsel to address court on the fate of the original suit when the defendant for more than eleven years has not been served with Summons to file a defence. I raised this issue because according to the authority of **National Insurance Corporation Vs Mugenyi & Co. Advocates [1987] HCB 28** relied on by counsel for the applicant, while the main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so, it is not the only test. There are two other tests, namely the nature of the case and whether there was a prima facie defence in that case. While Court is satisfied that the applicant honestly intended to attend the hearing, court has to look at the other tests given the fact that since the filing of the suit on 20.12.2002 the defendant has never been served with a summons to file a defence. What is the status of this suit?

Under Order 5 Rule 1 sub-rule 2 of the Civil Procedure Rules, service of Summons issued under sub-rule (1) of the rule shall be effected within twenty one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty one days, showing sufficient reasons for the extension.

Under Rule 1 sub-rule 3 where the summons have been issued under this rule, and –

- a. *service has not been effected within twenty – one days from the date of issue; and*
- b. *there is no application for an extension of time under sub-rule (2) of this rule; or*
- c. *the application for extension of time has been dismissed,*

the suit shall be dismissed without notice.

In the instant case summons have not been served for over eleven years. There had been an application for extension of time which was dismissed for want of prosecution. The dismissal of the application spelt the end of the suit which was indeed dismissed by the Hon. Justice Benjamin Kabiito on 24.02.2011. The reinstatement of the suit on 14.03.2012 by the same court could not provide any remedy to the plaintiff's non compliance with Order 5 Rule 1 Sub-rules (2) and (3) cited above and even if it was to be assumed that the reinstatement provided a cure it is my view that on reinstatement of the suit the plaintiff still had to serve the defendant with the summons before any application to amend the suit to substitute the defendant can be entertained. The implication of the failure by the plaintiff to serve the defendant with a summons to file a defence is that there is no suit before this court to merit an application for amendment as prayed in the dismissed application.

Applying the tests in the case of **National Insurance Corporation Vs Mugenyi & Co. Advocates** (supra) the nature of the case is that there is no suit before this court that can be amended and on this consideration alone the application for reinstatement cannot be sustained. It is dismissed.

I make no orders as to costs

Eldad Mwangusya

J U D G E

15.03.2013

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