

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HODERN AT ARUA
MISC. APPLICATION NO. 0004 OF 2013
(Arising from DLT/AR/CL/0020 of 2006)

MUHAMED BASHIR ----- **APPLICANT**

=VERSUS=

JUMA AMIN ----- **RESPONDENT**

BEFORE HON: JUSTICE OKWANGA VINCENT

RULING

This application was brought under S.83 of the CPA and 0.52 rr (1) & (3) CPR, by Notice of Motion for orders that:-

1. The orders of the trial Magistrate Grade I His Worship Matthew Longole given in Civil Suit No. DLT/AR/CL/0020 of 2006 dated 11/4/2012 be revised and set aside.
2. That the trial Chief Magistrate's orders dismissing Civil Suit No. 0020 of 2012 dated 21/11/13 be revised and set aside as well.
3. That the orders for stay of execution in the said judgment and decree in Civil Suit No.DLT/AR/CL/0020 of 2006 be granted.
4. And for the correct orders and relief this Hon. Court deems fit in the circumstances and for costs of the application.

The application is supported by the affidavit of the applicant Mr. Muhamed Bashir dated 30/02/2013.

The background to this application is as follows:-

In mid 2006, the applicant filed Civil Suit No. DLT/AR/CL/0020 of 2006 against the respondent herein before the Chief Magistrate's Court Arua for the recovery of land at Obolokofuku village, River Oli division, Arua Municipality of Arua District. Since filling no, action was taken by either party to have this matter heard until 11/04/2012 when the matter come up for hearing before the Grade I Magistrate, His Worship Matthew Longole, both parties nor their advocates being absent the court dismissed the suit for want of prosecution under 0.17 r 5 of the CPR.

On learning of such dismissal the applicant filed a fresh suit Civil suit No. 0020 of 2012 before the Chief Magistrate Arua, His Worship Moses Angualia who dismissed it with costs on the basis that the suit was res judicata on 11/11/2013 the applicant now filed this application in court here to revise and set aside the respective orders of dismissals in the two suits above and for costs and any other reliefs this Hon. Court may deem necessary and proper in the circumstances.

In his submission Mr. Komakech Denis Atine who appeared for the applicant argued that the applicant's civil suit No. DLT/AR/CL/0020 of 2006 was heard and determined not on its merits by the trial Magistrate G.I in the absence of both parties on 11/04/2012. That the dismissal of that suit under 0.17 r 5 was erroneous and done under the wrong rule of procedure. The correct procedure, counsel argued would be to dismiss the matter under 0.17 r 6 of the Civil Procedure Rules on the basis of inordinate delays. In his affidavit in support of the Notice of Motion, the applicant avers that the subject matter in the suit is land situate at Obolokofuku village, River Oli division, Arua Municipality in Arua District and that following the advise of the trial Magistrate Grade I, he subsequently filed Civil suit No. 0020 of 2012 which was subsequently dismissed by the Chief Magistrate, His Worship Moses Angualia for being res judicata. Counsel for the applicant argued that under 0.17 r 5 the trial court has discretion to either dismiss the suit only on application by the defendant or court may make such other orders and on such terms as court may deem just. In the instant case there was no such application for dismissal from the defendant to warrant the trial court dismissing the matter under 0.17 r 5 for want of prosecution as both parties were absent in court on that date.

Counsel cited the case of **Ayub Suleiman =Vs= Salim Kabambalo – Civil Appeal No. 0032 of 1995**; it was Justice Kileoyogo (as she then was) held that 0.15 r 5 (now present 0.17 r 5) CPR was not applicable in that case because the defendant fixed the case for hearing after many adjournments and had not filed an application for dismissal as provided by 0.15 r 5 (now 0.17 r 5 CPR).

That court further held that section 101 (now S.98) of the Civil Procedure Act would have been more relevant as it gives court unfettered powers to make such orders as may be necessary to meet the ends of justice or prevent abuse of the court process.

I share the view with counsel for the applicant that the trial Magistrate Grade I should have dismissed the matter under 0.17 r 6 on the basis of inordinate delay in prosecuting the matter. Counsel prays that the orders of dismissal by trial Magistrate Grade I in civil suit No. 0020 of 2006 be revised and set aside as well as the orders of dismissal of civil suit No. 0020 of 2012, made by the Chief Magistrate on 21/11/2013 made on the basis of the earlier erroneous orders of dismissal by the Grade I Magistrate as above.

Mr. Henry Odama who appeared for the respondent opposed for the application and relying on the affidavit of the respondent in reply objected to this application being granted.

He supported the trial Magistrate's findings and decision in dismissing civil suit No. DLT/AR/CL/0020 of 2006 under 0.17 r 5 CPR and in filing a subsequent suit, counsel argued the applicant never sought any legal advice and therefore the Chief Magistrate was right in dismissing the subsequent suit on the basis of res judicata. He did this while properly acting within the law and the right procedure he was allowed to take in such circumstance.

Counsel for the respondent argued that the applicant should have brought this application first immediately in April 2006, soon after the dismissal of civil suit No. DLT/AR/CL/0020 of 2006, instead of rushing to another court to file another suit which offends the rules of procedure and justice.

He prays that the application be dismissed with costs.

Perusing through the court's records I find that the applicant in his application is actually making an omnibus applications seeking to set aside two separate orders of dismissals in two different suits, dismissed by two different trial Magistrates of different jurisdictions on two different occasions; that in civil suit No. DLT/AR/CL/0020/2006 dismissed by the trial Magistrate Grade I on 11/04/2012 and civil suit No. 20 of 2012 subsequently dismissed by the trial Chief Magistrate on 21/11/2013. I am of the view that the proper procedure was for the counsel for the appellant to bring two separate applications/petitions in respect of each dismissal complained of before each trial Magistrate respectively. This is the position as shown by the grounds of the application in paragraphs I, 3 and (b) of the Notice of Motion filed for the applicant dated 20/12/2013.

However, be that as it may, this Hon. Court being seized with inherent power to make such orders as may be necessary to meet the ends of justice and make revisionary orders where in its opinion there is an error detected or apparent on the records or procedure of any lower court, I shall proceed to handle and dispose of this application on its merits any procedural irregularity notwithstanding as I am satisfied that by doing so no injustice shall be occasioned to the respondent or anybody with interest herein.

Under section 83 CPA this Hon. Court may call for the record of any case which has been determined under this Act by any Magistrate's Court, and if that court appears to have:-

- a) as exercised a jurisdiction not vested in it in law;
- b) failed to exercise a jurisdiction so vested, or
- c) Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice. The High court may revise the case and may make such orders in it as it thinks fit; but no such power of revision shall be exercised.
- d) Unless the parties shall first be given the opportunity of being heard; or
- e) Where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

Accordingly, I find that the learned trial Magistrate Grade I, erred and misdirected himself in dismissing Civil suit No. DLT/AR/CL/0020 of 2006 under 0.17 r 5 of the CPR when both parties and their advocates were absent in court and no application for such dismissal was ever made by the defendant to that court as required. I am in total agreement with the counsel for the applicant, Mr. Kumakech Denis that the correct procedure was for the trial Magistrate Grade I to dismiss that suit under 0.17 r 6 of the Civil Procedure Rules due to inordinate delays.

Accordingly the said order of dismissal in Civil suit No. DLT/AR/CL/0020 of 2006 of the Magistrate Grade I Arua, His Worship Matthew Longoli given on 11/04/2012, dismissing the above suit is hereby revised and set aside.

The execution in Civil Suit No. DLT/AR/CL/0020/2006 dated 11/04/2006, is stayed until further orders of this Hon. Court.

Regarding the dismissal of the applicant's fresh suit Civil Suit No. 0020 of 2012 by the Chief Magistrate, Arua on the ground of res judicata basing on the orders of dismissal of the applicant's Civil suit No. DLT/AR/CL/0020 of 2006 under 0.17 r 5 CPR, by the Grade I Magistrate on 11/04/2012, I find the provisions of section 210 of the Magistrate's Courts Act (Cap. 16) relevant:- it states:-

“210 Res judicata

- 1. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in account competent to try the subsequent suit or the suit in which the issue has been heard and finally decided by such court.***
- 2. The expression “former suit” shall denote a suit which has been decided prior to the suit in question.....”***

I find that the learned trial Magistrate Grade I had not heard the issues raised in Civil Suit no. DLT/AR/CL/0020 of 206 before dismissing the same under 0.17 r 5 as he did, and having not heard any such issues raised he could not decide 'finally' on such issues.

Accordingly I find and hold that by dismissing Civil Suit No. DLT/AR/CL/0020 of 206, on 11/04/2012, under 0.17 r 5 CPR, the learned trial Magistrate Grade I, did not only do so in error but did it without hearing and finally deciding on the issues raised in the applicant's said suit.

It therefore follows that the plea of res judicata in civil suit No. 0020 of 2012 before the trial Chief Magistrate His Worship Angualia Moses on 21/11/2013, was erroneously accepted and relied upon as a basis of dismissing the applicant's fresh suit Civil suit No. 0020 of 2012 on the doctrine of judicata.

With due respect to the learned trial Chief Magistrate, I am of the view that a case dismissed under the wrong section of the law without the court having heard the parties on the issues raised and without such a court adjudicating on those issues and pronouncing itself on those issues finally to decide the matter, cannot be said to be res judicata as envisaged under section 210 of the Magistrate's Courts Act, (Cap.16) and S.7 of the Civil Procedure Act (cap.71).

In agreement with learned Counsel for the applicant Mr. Komakech denis Atine. I find the Supreme Court's decision in the case of Ayub Suleiman =Vs= Salim Kabambalo, Civil Appeal No. 032 of 1995, Mukasa Kikonyo (as she then was) useful on the interpretation of 0.15 r 5 (now 0.17 r 5) of the Civil Procedure Rules.

Accordingly, I further find that the subsequent dismissal of the applicant's fresh suit No. Civil Suit No. 20 of 2012, by the learned trial Chief Magistrate on the 21/11/2013 on the claim of res judicata was done in error such orders of dismissal by the Chief Magistrate dated 21/11/2013, in Civil Suit No. 0020 of 2012, were issued in error and are hereby revised and set aside. This application is allowed and the following orders granted as hereunder:-

ORDER:

- a) The orders of the trial Grade I Magistrate Arua in Civil Suit No. DLT/AR/CL 0020 of 2006, dismissing the said suit for inordinate delay under 0.17 r 5 CPR on 11/04/2012 is hereby revised and set aside.
- b) The orders of the trial Chief Magistrate Arua, His Worship Angualia Moses issued on 21/11/2013, dismissing Civil Suit No. 0020 of 2012 for being res judicata is hereby revised and set aside as well.
- c) The orders of execution in Civil Suit No. DLT/AR/CL 0020 of 2006 dated 11/04/2012, be stayed until further order of this Hon. Court.
- d) The costs of this application is awarded to the applicant.
- e) The applicant not having specifically prayed for the reinstatement of Civil Suit No. DLT/AR/CL 0020 of 2006, in any of their heads of prayers herein this Hon. Court shall be reluctant to grant such an order.

Accordingly, the applicant's said Civil Suit No. DLT/AR/CL 0020 of 2006, having been filed in early 2006, and no action have been taken to prosecute the same for over 2 (two) years since, stands dismissed under 0.17 r 6 of the Civil Procedure Rules. In such a case the applicant has the option to bring a fresh suit subject to the law of limitation.

It is hereby ordered!

VINCENT OKWANGA

JUDGE

16/04/2015