

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISC. APPLICATION NO. 053/2014

ARISING FROM CS NO. 055/2012

MISC. APPLICATION NO. 92/2013

AMURU DISTRICT LOCAL GOVERNMENT:.....APPELLANT

VERSUS

BOAZ OKELLO OKUMU:.....RESPONDENT

RULING

This application was brought by Notice of Motion Under S. 98 of the Civil Procedure Act O9r, 10 and 27, 0.51 r 6 and 0.52 r 122 of the Civil Procedure Rule seeking reinstatement of MA No.92/2013 which was for leave to file a defence out of time.

The genesis of the case is that the Applicant was an employer of the Respondent. The Respondent services were terminated by the Applicant which termination was challenged vide HCCS No. 55/2012. The Applicant never filed a defence. This was followed by MA 92/2013 seeking for leave to file a defence. This application was dismissed by Hon. Justice Eudes John Keitirima for want of prosecution.

The Applicant has now filed this application seeking for reinstatement.

Both Counsel, Walter Okidi Ladwar for the Applicant and Dr. John Jean Barya for the Respondent filed written submissions in support of their respective cases. I do not have to reproduce them here but will refer to them as and when necessary.

Counsel for the Respondent raised two preliminary objections. I will start with
5 them.

The first objection was that the application is res-judicata.

He submitted among others that the application was heard by Hon. Justice Eudes John Keitirima on 6/2/2014 and was dismissed with costs to the respondent as neither the Applicant nor their lawyer appeared to prosecute the application.

10 Indeed perusal of the court minute on 6/2/2014 reveals that the application was dismissed in the following words “*There is proof of service on the Applicant’s Counsel and no reason has been adduced for the Applicant and his Counsel’s absence.*

The application will therefore be dismissed under 0.9 R 22 of the Civil Procedure
15 *Rule with costs to the Respondent”.*

Counsel Walter Okidi Ladwar for the Applicant contends that this application is different. The application was never heard as it was dismissed for absence of Counsel and the Applicant under 0.9 r 22. The same Order under r.23 bars filing a new application. However under 0.9 r 27 allows the court to set aside the
20 dismissed order and reinstate the Suit or Application like in the instant case.

I have looked at the Principal of Resjudicata. This is a Doctrine under our law Under S.7 of the Civil Procedure Act which provides “ *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 a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that Court”

I associate myself with the finding of Hon. Mr. Justice Christopher Madrama in the case of **Barclays Bank of Uganda Ltd vs JingHeng and Guo Dong Civil Suit No. 35/2009** in the commercial Division of the High Court relied upon by Counsel for the respondent where he said on page 7 last sentence that the question of whether the subject matter was directly in issue in a former suit is a question of fact.

Under the law, Order 9 r 23 of the Civil Procedure Rules, the Applicant is barred from bringing a fresh suit but he/she can apply for an order to set the dismissal aside. The fact in this case is that the application was not heard in the legal sense. The trial Judge did not listen to all the facts in the case in court in order to make a legal decision. The applicant did not argue his application. The advocate and the applicant were absent. The laws are not put in place in vain. They serve a purpose of making ends of justice to meet. That is why there is a procedure for applying to set aside an Ex parte Order.

Where a case is dismissed for non attendance of Counsel and his client before it is heard and finally determined, it does not pass the test of Resjudicata.

Counsel for the Respondent relied on the case of **John Semakula vs Pope Paul Social Club, CACA 67/2004** where the test of Resjudicata was set in the following words by Hon. Lady Justice Byamugisha J.A. (RIP) “*Is the plaintiff in the subsequent suit or action trying to bring before the court, in another way and form a new cause of action, a matter which has already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated*

upon? If the answer is in the affirmative, the plea of res-judicata applies not only to the point upon which the first court was required to adjudicate but to every point which properly belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have put forward at the
5 time”

With due respect to learned Counsel for the Respondent, the Applicant did not put forward their points before court for determination. The application was never argued. It does not therefore pass the test of Resjudicata. The first preliminary objection is therefore overruled.

- 10 The second Preliminary objection was on the failure by the Applicant/Defendant to file its submissions in time as ordered by court on or before 25/11/2014.

The practice of this court is to give time schedules incase the advocates are to file written statements. Respect of the time schedule is expected from Counsel to enable court deliver the ruling or judgment on the due date. Unfortunately some
15 advocates do not respect the time set for one reason or the other.

Unlike the statutory time, breach of which has serious legal consequences and the court may not exercise discretion if it is mandatory, in the instant case, the court is allowed to exercise its discretion. This does not mean that Counsels are at liberty to disregard the time lines. In case the case is for judgment on a set date and it is
20 not ready due to failure of counsel to file submissions on time, such unprofessional conduct can be punished by way of costs. In any case, submissions are prepared by counsel not the client, and strict observance which may require proceedings without the submissions of one party or expunging them from the record if filed late may cause injustice to the innocent party, the client.

Much as I condemn the act of not filing the submission as agreed in court substantive justice demands that all sides should be heard.

Consequently, the second preliminary objection is also overruled.

5 This takes me to the main issue of whether MA. No. 92/2013 for leave to file the defence out of time should be reinstated and heard on merit.

Both Counsel have submitted in respect of the main application. This is an application which is arising from the main suit HCC No. 55/2012 where the applicant applied for leave to file a defence vide MA 92/2013 which application was dismissed for non attendance of counsel and the applicant under 09 r 22 of the
10 Civil Procedure Rule.

The affidavit in support of the application sworn by Unzia Martine is to the effect that the applicant's advocates did not inform them of the hearing date, neither did he attend court after he was served. Counsel Moses Oyet led his client down by not attending court. Matters are even made worse when the respondent in paragraph 3
15 states that Counsel Oyet Moses was around court but did not enter appearance.

This has been construed by this court as a deliberate move by Oyet to frustrate his client as there cannot be any other explanation for his conduct.

Counsel for the Respondent submitted that negligence of counsel binds his/her clients relying on the case of Mohamad Kasasa vs Jaspher Buyanga Sirasi
20 Bwogi CACA 42/2008. Reported in KALR 275 at page 280 and Twiga Chemical Industries Ltd vs Viola Bamusedde T/A Tripple B Enterprises reported in 2005 (2) EA 325.

The above principle of the law is however applicable where the advocate is executing the instructions of the client. The court would hold the client bound by

the actions of his advocate where it is proved as a fact that the client knew of the date, came around court and decided to disappear with his advocate.

In the instant case, participation of the applicant in taxation after dismissal by another advocate after they were served with the taxation notice does not in any way prove that they were aware of the proceedings on 6/2/2014.

I do agree with the ruling of Hon. Justice Twimomujuni J (RIP) in the case of **Muwanga Estates and Another vs NPART CA No. 49/2001** where he held that *“It is now an established principle of the law that a vigilant litigant who is not guilty of dilatory conduct should not be debarred from pursuing his rights in court because of the negligence of his counsel”*

In the instant case, there is no evidence that the applicant is merely delaying this case. They have instructed another Counsel who is following up the case.

It would be unfair if they are condemned unheard as it is against the principles of natural justice.

The above said, this court is of the view that the applicant has established a reasonable ground of negligence of counsel which should not be visited on them. Dismissal of the application was as a result of their first Counsel’s negligence.

I have not considered the other argument of the case being of public concern or having a good defence.

The above issues should be resolved in the application which will be reinstated.

In the result the application is allowed reinstating MA No. 092/2013 with the following orders:

1. Both the main suit and Application be transferred to the Industrial court Kampala as this is a purely labour suit.
2. Execution be stayed pending the outcome of Misc. Application No. 92/2013.
3. Costs of this application be in the cause.

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Margaret Mutonyi
Judge
17/02/2015

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