



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Application No. 20 of 2018

In the matter between

ATTORNEY GENERAL **APPLICANT**

VERSUS

NABCO ENTERPRISES LIMITED **RESPONDENT**

Heard: 18 April, 2019.

Delivered: 16 May, 2019.

Civil Procedure — *setting aside order to proceed ex parte* — *Insufficient period of notice of the hearing date is a justifiable ground.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application under Order 9 rule 21 of *The Civil Procedure Rules*, where the applicant seeks an order setting aside one that granted the respondent to proceed *ex parte*. The applicant seeks to be heard in answer to the suit as if she had appeared on the day fixed for her appearance. She did not appear on that day when the suit was called on for hearing. The court having been satisfied that the notice of hearing was duly served, it granted the respondent leave to proceed *ex parte* and reserved its judgment. The applicant contends there was good cause for her non-appearance on that day, due to the extremely short notice given on that occasion, yet she had earlier fixtures before the High Court in Lira.

[2] The respondent has opposed the application by way of an affidavit in reply by a one Mr. Odong Charles, the respondent's Managing Director. The respondent disputes the fact that the applicant's counsel was attending another hearing before the High Court in Lira on the material day and contends that an interlocutory judgment was entered against the applicant due to non-appearance. The application was filed three months after that date, which constitutes inordinate delay.

General considerations;

[3] It is important to remember that the right to a fair trial in civil matters is guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995*. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Entailed in that right to a "speedy hearing" is the right to a trial within a reasonable time, often termed the right to be tried without undue delay or the right to a speedy trial. For the realisation of this right, all parties, including the courts, have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article. The overriding objective under article 28 (1) of *The Constitution of the Republic of Uganda, 1995* and *The Civil Procedure rules* in general is that courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party.

[4] It is for that reason that under Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the notice of hearing was duly served, it may proceed *ex parte*. However, under rule 21 thereof, where the court has adjourned the hearing of the suit *ex parte*, and the defendant at or before the hearing appears and assigns good cause for his or her previous

nonappearance, he or she may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he or she had appeared on the day fixed for his or her appearance.

[5] When considering applications in that regard, the court not only considers the reason for non appearance on the material day, but also the overall impact of the inherent delay involved in allowing the applicant to be heard in answer to the suit as if he or she had appeared on the day fixed for his or her appearance, on the justice of the case. It was suggested in *Phelps v. Button* [2016] EWHC 3185 that in situations of delay, the court ought to consider the following factors. First, the length of the delay; secondly, any excuses put forward for the delay; thirdly, the degree to which the claimant has failed to observe the rules of court or any court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case.

[6] It requires examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored.

Insufficient period of notice is a justifiable ground;

[7] I have examined the record of proceedings and found that service was effected on the applicant on 17th February, 2017 when suit was fixed for 21st February,

2017. Hence the applicant was given only four days' notice. Under Order 9 rule 20 (1) (c) of *The Civil Procedure Rules*, if the court is satisfied that the notice of hearing was served on the defendant, but not in sufficient time to enable him or her to appear and answer on the day fixed, or that the defendant was for other sufficient cause unable to appear in person or cause appearance to be made on his or her behalf, it shall postpone the hearing of the suit to a future day to be fixed by the court and shall direct notice of that day to be given to the defendant. Without alluding to the time, the court instead invoked Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, and granted the respondent leave to proceed *ex parte*.

- [8] What constitutes sufficient time of notice to enable a party appear and answer on the day fixed, will vary from case to case. It is such time as suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. Considering the relatively short period of notice given to an advocate in the public service, I am inclined to believe that she already had committed herself to attend the earlier fixture of a suit in the High Court at Lira.
- [9] Under Order 9 rule 21 of *The Civil Procedure Rules*, where the court has adjourned the hearing of the suit *ex parte*, and the defendant at or before the hearing appears and assigns good cause for his or her previous nonappearance, he or she may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he or she had appeared on the day fixed for his or her appearance.
- [10] The applicant has shown sufficient cause for her non-appearance when the suit was called on for hearing on 21st February, 2017 when the court decided to proceed *ex parte*. I have found nothing in counsel for the applicant's conduct manifesting a clear intention not to bring the proceedings to an expeditious conclusion. Neither have I found circumstances to suggest that a fair trial is no

longer possible despite the prolonged delay nor anything to suggest that it would be contrary to the public interest in the integrity of the justice system that a trial *inter parties* should take place. In any event, only one witness testified for the plaintiff and the respondent's case was closed. Cross-examination of that witness and calling defence witnesses can be concluded expeditiously without any further delay. In the circumstances, justice can still be done after hearing both parties.

Order :

[11] In the final result, the application is allowed. Accordingly;

- a) The order to proceed ex-parte is set aside. The suit is set down for hearing inter parties on 17th October, 2019.
- b) The costs of the application are to abide the result of the suit.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

For the applicant : Ms. Twesigomwe Doris, State Attorney.

For the respondent : Mr. Gard Wilson.