THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 557 OF 2019

(Arising out of Misc. application no. 554 of 2014 and HCCS No. 237 of 2003)

TAMALE JOHN & 22 ORS ::APPLICANTS

VERSUS

UNILIVER UGANDA LIMITED ::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application seeking for orders of review and setting aside of the dismissal order of Misc. Application No. 554 of 2014 as well as reinstatement of that application brought under **Order 9 Rule 23 of the Civil Procedure Rules**.

The applicants are judgment creditors in **HCCS No. 237 of 2003 Benedict Mugisa & 22 others vs Unilever Uganda Ltd** formerly employees of the respondent company whose services were terminated in April 2007. They successfully sued the respondent however since they had not specifically pleaded the quantum of their terminal benefits, salary arrears and allowances, the court left it to the parties to compute the said benefits and have the same paid to the applicants. The parties met to agree on the quantum of the awards but the meetings were unsuccessful.

On the 10th November 2014, the applicants filed **Misc. Application No. 554 of 2014** seeking a consequential order that the respondent be ordered to pay the applicants' salary arrears and allowances in sum of **UGX 6,114,010,633** as at 31st October 2014.

The applicants further prayed that the said sum admitted by the respondent be paid to the applicants and the balance allegedly owed to them be assessed by court.

On 31st July 2015, the parties and their counsel appeared before the Ag Registrar and it was agreed that court appoints an officer in the Auditor General's office to determine how much the respondent owed the applicants. By an internal memo of the same date, the Ag Deputy Registrar sought the trial judge's directions on recording a judgment on admission during court vacation. The trial judge directed the Ag Registrar to record the judgment and further directed that the parties jointly assist court to identify an official from the Auditor General's office who was to determine whether the applicants were entitled to any further payments in excess of the said sum under the consent judgment.

On the 10th August, 2015 the Registrar signed and sealed a consent judgment on admission for a sum of UGX 140,766,242 in favor of the applicants. The said sum was duly paid to the applicants through their lawyers.

There is no evidence on the court file showing that any action was taken on the said trial judge's direction with regard to the assistance required from the parties in identifying the said officer until 4th April 2017 when the trial judge recorded the following minute;

When the suit was fixed for hearing on 19.05.2015 the parties appeared in court. It would appear that the claimants were contented with the consent order. This suit is dismissed under O17 Rule 3 CPR.

The application was supported by an affidavit sworn by Benedict Mugisa the 23rd applicant whose grounds were briefly that;

a) The applicants were not aware of the hearing date of 4th April 2017 when Misc. Application No. 554 of 2014 was dismissed.

b) The applicants have at all material times been interested in prosecuting the said application.
c) That the court's decision that the parties had presumably lost interest in the said application because they had been satisfied with the said payment was an apparent error on the face of the record.
d) That the parties had entrusted court to contact the Auditor General
e) The application had been brought without unreasonable delay.

The respondent filed an affidavit in reply opposing the application on the following grounds;

a) That the court dismissed the said suit because of the applicants, apparent disinterest in assisting court identify the said officer from the Auditor General's office.
b) That there was no hearing notice for when the file was called because the trial judge called and dealt with the said file on the said date on his own motion without involving the parties.
c) That this application for review and setting aside of the said dismissal order is bad in law.

Counsel for the plaintiff submitted that Order 9 Rule 23 of the Civil Procedure Rules demonstrates that a party who fails to appear in court when summoned, has to give sufficient reasons in court for his or her non-appearance before court allowing an application for setting aside its orders.

Counsel submitted that in the instant case, there was evidence on the record and in the parties' pleadings that there was no service of any summons. It was not in contention that the matter was called by court on the 4th day of April 2017 without the knowledge of all parties and their respective advocates.

Counsel further submitted that it is a settled position of the law where a party has not been served for hearing, he would not be condemned for non-appearance and if any order is made for dismissal, such order is a nullity.

Counsel for the plaintiff submitted that Misc. Application No. 554 of 2014 was dismissed by court on its own motion in the absence of both parties and their respective counsel. Court never fixed the matter and the parties as well as their advocates were aware when it came up for hearing.

Counsel concluded that in dismissing the application, the learned trial judge made an oversight opinion that may be the applicants were satisfied with the amount of money which was consented to partly.

Counsel prayed that the court set aside the orders issued on the 4th day of April 2017 and allows the parties to proceed with the suit on its merits since the suit has been in court for over some good years.

On the other hand, counsel for the respondent submitted that for the applicants to succeed in obtaining an order for setting aside the said dismissal under Rule 23, they have to demonstrate that Misc. Application No. 554 of 2014 was called for hearing on the 4th of April 2017 and that the respondent or its counsel appeared before the trial judge on the said date and that trial judge dismissed the suit in terms rule 22 CPR. In addition the applicants would have to prove that when the said application came up for hearing on the said date they had cause that prevented them from attending the hearing.

Counsel submitted that when court pronounced a dismissal order of Misc. Application No. 554 of 2014 the trial judge called the file on his own motion not for the purpose of any hearing of the application as pleaded by the applicants since there is no evidence of any hearing notice on the record to any parties which too is conceded to by the applicant's counsel. The respondent's counsel submitted that with the said

concession that the respondent its officials or counsel did not appear in court on the said date in terms of Rule 22 CPR, it is submitted that in the same breath counsel for the applicants conceded that Order 9 Rule 23 is not helpful to the applicants' application. There is no evidence on record to prove that the dismissal order was made pursuant to rule 22 CPR for 23 CPR for the applicants to argue their application under the said rule.

Counsel for the respondent submitted that given the lack of activity on the file for a long period following the said consent judgment, the trial judge called the said file on his own motion for management of his case backlog. On that basis, counsel submitted that the authorities cited by the applicants' counsel are highly distinguishable and not helpful to the applicants' application as they do not apply to a situation where the judge calls the file on his own motion.

Counsel further submitted that according to the dismissal minute, the application was dismissed on the ground that the applicants appeared to have lost interest in the said application which conclusion was borne out of the fact that following the partial consent judgment for a sum of UGX 140,766,242 on the 24th April 2015, which court endorsed on the 10th August 2015, there was no follow up for nearly 20 months by the parties in court to establish what was going on.

Counsel submitted that it was inconceivable that the applicants who claimed to be entitled UGX 5,000,000,000 and their lawyers could sit back for nearly 20 months from the time of the consent judgment was recorded and do nothing at all for all the said period to make a follow up and ensure that court was attending to the said claim. It was submitted that as found by the trial judge in the said minute, the inordinate delay for nearly 20 months without any follow up at court by the parties showed a lack of interest in the matter.

Counsel further submitted that the applicants never pleaded any credible reason as to why they did not follow up with court to find out whether any steps had been taken for nearly 20 months following the said partial judgment for the determination of the remaining issue. It is not one of the grounds in the notice of motion that the applicants had no knowledge of the trial judge's said directions for the parties to assist court in identifying an officer in the Auditor General's office to carry out the said assignment.

Counsel prayed that the court find that the applicants had not made a proper case for review and setting aside of the said dismissal order as submitted by the applicants. Counsel accordingly prayed that the application be dismissed with costs to the respondent.

Misc. Application No. 554 of 2014 was dismissed under Order 17 Rule 3 CPR. The judge noted; "*When the suit was fixed for hearing on 19.05.2015 the parties appeared in court. It would appear that the claimants were contented with the consent order. This suit is dismissed under O17 Rule 3 CPR."*

Order 17 rule 3 provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed for that purpose by Order IX of these Rules, or make such other order as it thinks fit.

The applicants being aggrieved by the dismissal filed this application under order 9 rule 22 to set it aside.

For the applicants to succeed in this application, they ought to show sufficient cause for non-appearance on the day Misc. Application No. 554 of 2014 was called by the judge. From the record of the court, the matter was never called for hearing on the day it was dismissed but rather it was called by the judge for dismissal under the presumption that the applicants were contented with the consent order. The record also shows that it was agreed by the parties that the court appoints or directs the

appointment of an officer of the Auditor General's office to determine whether the applicants are entitled to any more claim over and above the agreed UGX 140,766,242.

It is clear that the applicants were not satisfied with the consent order. The applicants filed the application demanding UGX 5,000,000,000 outside of the money that had been consented to.

The matter was not fixed for hearing on the date, the parties were both unaware of the file being called on that day hence did not enter appearance. It therefore could not be dismissed under Order 17 Rule 3 as the rule requires that the suit be dismissed upon nonappearance of the parties on the date when the suit is set down for hearing.

An application for reinstatement has to be carefully scrutinized and that a court would only grant the relief as an exception rather than as a rule. The courts have to be able to ensure that litigation in this country is carried on with dispatch and efficiency. These efforts should not be undermined by being indulgent towards dilatory parties. ***Moguntia –Est Epices SA v Sea-Hawk Freight Pte Ltd [2003] 4 SLR (R)429***

The applicants has satisfied this court that they are innocent of any significant failure to conduct the case with expedition and there non-attendance in court on that day was excusable since the court moved itself and dismissed on mistaken view that they had been satisfied with the partial settlement.

I therefore find this sufficient cause under Order 9 Rule 23 and that the balance of justice indicates that the dismissed suit should be reinstated. The applicant has established a sound reason for failing to attend court and also proceed on the matter during this long period.

The dismissal order is hereby set aside.

Misc. Application No. 554 of 2014 is reinstated and will be determined on its merits.

Costs in the cause.

I so order.

SSEKAANA MUSA

JUDGE

30th/04/2021