

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 145 OF 2015

ARISING FROM CIVIL SUIT NO. 53 OF 2012

JACK RWIHANDAGAZA.....APPLICANT/5TH DEFENDANT

VERSUS

1. PAUL SENGENDO

2. LUCIA NABWAMI

3. NAMUSISI NABAKA

4. NALWANGA MARIA

5. NAKIMULI GERTRUDE.....RESPONDENTS

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application brought under Order 17 rule 5 of the Civil Procedure Rules (CPR) for orders that Civil Suit No 53/2012 be dismissed for want of prosecution, and that costs of the application be provided by the respondents. The grounds of the application, which are also stated in the supporting affidavit of the applicant Jack Rwihandagaza, are that:-

1. Ever since the filing of the civil suit, the respondents have adamantly neglected and or failed to fix the matter for hearing since 11th December 2013.
2. Since the filing to date, the respondents have neglected to have the matter fixed for hearing and final disposal or to take steps to have the matter heard since the 11th December 2013 the date when the matter was adjourned for mediation.
3. The respondents appear to have actually lost interest in prosecuting this matter hence it would be just and equitable to have it dismissed for want of prosecution, and it would not be prejudicial to them as they are not barred from bringing the suit again when they are ready to prosecute the matter.

The application is supported by the affidavit of the applicant Jack Rwihandagaza. The 1st respondent filed an affidavit in reply. When the matter came up for hearing, the respondents and their counsel were not present. There was an affidavit of service on record indicating that the respondents were served through their counsel by this court's process server and they acknowledged service by signing and stamping on the court's copy of the hearing notice. In that regard, this court granted the applicant's prayer to proceed *ex parte*. However, whether a matter proceeds *ex parte* or not, the burden on part of the plaintiff to prove the case to the required standards remains, as was held in **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**.

This takes me to the merits of the application. Order 17 rule 5 of the CPR provides as follows:-

“If the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery of the counterclaim, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on hearing of the application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as the court may seem just.”

The applicant's affidavit evidence is that the civil suit was filed on 26th April 2012 and he filed a response to it; that he appeared for the hearing on 05th March 2013, upon which 26th November 2013, later adjourned to 11th December 2013, was set as a mediation date on the request of the plaintiff's counsel; that the matter never carried on (sic) and neither the respondent nor his Advocate has attempted to have the suit fixed for hearing and final disposal, making the matter to be pending since November 2013; that his counsel has advised him that such case warrants dismissal for want of prosecution; that it is clear from the plaintiffs' conduct that they have no desire of pursuing the same; and that a dismissal would not be prejudicial to the legal rights of the respondents as the law does not prevent them from instituting the suit when they have prepared themselves but the defendant should not be kept at ransom by the plaintiffs.

The record shows that the suit was filed by the plaintiffs on 26th April 2012. The 1st defendant filed his/her Written Statement of Defence (WSD) on 06th June 2012. The 2nd and 3rd defendants filed their WSD on 07th June 2012. The 4th defendant filed his WSD on 09th April 2013. On 15th February 2013 the plaintiffs' counsel, M/S Zawedde Lubwama & Co

Advocates wrote a letter to the Registrar of this Court, requesting for a default judgement against the 4th, 6th, 7th, 8th, 9th, and 10th defendants on grounds that they were served with summons to file a WSD but they did not do so within the required 15 days. This request was apparently not heeded since there is no entry of such default judgement on record.

On 7th March 2013 the plaintiffs' counsel wrote a letter to the Registrar of this court, which was received by this court on the same date, that the matter had been given time for a possible Alternate Dispute Resolution (ADR), and counsel proposed various dates for the said ADR. The matter eventually first went under mediation on 26th November 2013. All the plaintiffs, except the 5th plaintiff, attended court. The Registrar also recorded that three defendants were present but did not show which one was in court. On 12th February 2014, all the parties and their counsel did not attend the mediation but two beneficiaries did. The Registrar adjourned the matter to 02nd April 2014, stating that on failure to attend, the matter would be referred back to a Judge. It appears the mediation ended informally at that point, since there is no record of proceedings for the said date of 02nd April 2014. There is also no mediation report on record.

On 16th January 2015, the applicant's (5th defendant) counsel wrote a letter addressed to the Registrar of this court requesting for a hearing date of the case. The Registrar re allocated the case to me on 30th January 2015. The file was placed on my desk in the first week of February 2015. On 22nd May 2015, the applicant filed this application. The matter was called for hearing by this court on 24th May 2015 and 13th July 2015, but on each such occasion, court ordered the applicant to serve the respondents as there was no affidavit of service indicating that they were served with the application or the hearing notice. Eventually, the 1st respondent filed an affidavit in reply on 21st September 2015.

It is clear from the record that the plaintiffs endeavoured to pursue and attend mediation though it was apparently not concluded by the Registrar who eventually re allocated the case. In **Okurut V Alpha Global Joint Venture Ltd MA 536/2012 Arising From Civil Suit No 23/2009, Commercial Court**, which was cited by the applicant's counsel, the counterclaim was dismissed for want of prosecution because the respondent (counterclaimant) failed to set down the suit for hearing for over one year after mediation had failed. In that case the Mediator's report was on record. This is distinguishable from this case where the record shows that the file was under mediation where the plaintiffs participated but the Registrar did

not conclude the mediation or write a mediation report, and instead, re allocated it to a Judge for trial.

In the instant case where the record shows the plaintiffs/respondents participated in the mediation before the file was re allocated by the Registrar to a Judge for trial without concluding the mediation, I would hesitate to condemn them for failing to prosecute the suit against the applicant.

I therefore find no merit in the application and accordingly dismiss it. I make no order as to costs since the matter was heard *ex parte* without the participation of the respondents.

Dated at Kampala this 29th day of October, 2015.

Percy Night Tuhaise

Judge.