THE REPUBLIC OF UGANDA

THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA

LABOUR DISPUTE MISC. APPN. NO. 036 OF 2015

(*Arising from LABOUR DISPUTE NO. 06 Of 2014*)

BETWEEN

IRENE REBECCA NASSUNA.......................... CLAIMANT

AND

EQUITY BANK (U) LTD. .... RESPONDENT

BEFORE

1. The Hon. Chief Judge, Asaph Ruhinda Ntengye
2. The Hon. Judge, Linda Lillian Tumusiime Mugisha

Panelists

1. Mr. Ebyau Fidel
2. Ms. Tukamwesiga Peninah
3. Mr. Habiyalemye Dominic

RULING

This is an application that seeks reinstatement of Civil Suit No. 35/2010 and costs arising therefrom.

The applicant was originally an employee of the Respondent. She discussed together with another both filed C.S. 35/2010 and 34/2010 respectively in the Civil Division of the High Court. The High Court stayed Civil Suit 35/2010 (of the applicant) pending disposal of C.S. No. 2010.

In the meantime C.S. 35/2010 was transferred to this court when judgment was delivered in Civil Suit 34/2010, the applicant sought to continue with the case only to find the suit had been discussed by the court for non prosecution. She then instructed another lawyer to follow up her case and hence this application. 2

When the matter came up for hearing, counsel for the respondent raised a preliminary objection on the ground that the applicant was brought under a wrong law and ought to be struck.

He contended that the application was commenced under 09 rule 23 of the CPR whereas the suit was discussed under 09 rule 22. He argued that rule 23 was for settling aside and not reinstatement of the suit, contending that the applicant should have set aside the dismissal before applying for reinstating the suit. He argued that the application was for an order that was not provided for under the rule. He submitted that rules of procedure were hand maids of justice which must be strictly followed and that Article 126 (2) for the constitution should not be used to aid Counsel is sloppy drifting of proceedings.

He relied on the authorities of **Dr. S. KINYATTA Vs KAGGA LTD. & another MA. 67/2011 and TORORO CEMENT LTD. Vs FROKINA INTRNATIONAL C.A 2/2001**.

In reply, counsel for the applicant argued that provision of rule 23 of the CPR presuppose that there was a dismissal of the suit and that they provide for reinstatement. He submitted that a Judge may or may not say that he has set aside the dismissal of a suit but by reinstating the said, the dismissal is set aside.

Rule 22 of Civil Procedure Rules provides:

"Where the defendant appears and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it in which case the court shall pass a decree against the defendant upon such admission, and, when part only of the claim has been dismissed, shall dismiss the suit so far as it relates to the remainder."

Rule 23 of order 9 of court Procedure Rules, provide:

"where a suit is wholly or partly dismissed under Rule 22 of this order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he or she may apply for an order to set the dismissal aside and if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.” 3

In the respondent's counsel's contention, under Rule 22 once the suit is dismissed, unless an order setting aside the dismissal is secured, the same suit cannot be reinstated.

This court on 22/12/2014 dismissed labour claim 006/2014 for non prosecution. The matter had been fixed in his presence of both counsel for hearing on this date each of them having committed to have filed the necessary documents by then. Because of the laxity of the claimant counsel, he did not file any documents and neither was he nor his claim in court on 22/12/2014, hence the dismissal of the claim.

In our considered opinion, Rule 22 of order 9 provides for dismissal of the suit at the court's own volition once the plaintiff or the claimant does not appear on the date fixed for hearing within the knowledge of such plaintiff without informing the court of any reason for non attendance. Rule 23, in our opinion, gives a remedial or claimant whose suit has been dismissed under rule 22. He is, under rule 23, expected to have the dismissed suit reinstated in the register or on the record once he satisfies court that it just and equitable to set aside the dismissal of the suit. We do not think that the legislators intended that after an order setting aside the dismissal, the successful party was required to make another formal application for reinstating the suit. We agree with the submission of counsel for the applicant that the fact of setting aside the dismissal automatically reinstates the original suit to the court record.

In the same way, we are of the opinion that an order reinstating the dismissed suit has the effect of setting aside the dismissal of the same suit. We think it is a matter of semantics as to whether the court has to pronounce the order "setting aside" the dismissal or the order "reinstating the suit" and whether each of these orders makes a difference to the suit in question.

The applicant under order 9 rule 23 applied for reinstatement of civil suit No. 36/2010. Having not used the works "setting aside dismissal" in our view did not make the application incompetent. The application was properly before the court and we consider the interchangeable use of the words "setting aside dismissal" and "reinstating the suit" in respect to rule 22 and rule 23 of order 9 as some of the technicalities envisaged under Article 126 (2) if the constitution which 4

implores the courts to administer substantive justice without being obstructed by technicalities.

The objection is therefore overruled.

On the question whether or not the application showed be allowed, counsel for the applicant submitted that the applicant`s previous counsel were negligent and that such negligence should not be visited onto the litigant. He also submitted that once the applicant got to know about the dismissal of the matter she quickly instructed a new counsel to pursue the case. He received on the case of **Julius Rwabinumi CA 14/2009 (Supreme Court).**

In reply, counsel for the respondent submitted that the conduct of the applicant (failure to instruct counsel after inquiring from the High Court registry) inferred reluctance and utter unwillingness to pursue the case and therefore the matter ought not to be reinstated. He argued that the applicant did not exercise vigilance to come to this court to find out about her case.

In order for the court to set aside the dismissal of a suit for non appearance and non prosecution, the applicant must show sufficient cause as to why there was no such appearance leaving to the dismissal of the suit. In the case of **NOCHOLAS RAUSSOS Vs H.G. HABIB VIRAN, & ANUR** CA/9/1993 (Supreme Court) cited by counsel for the respondent. It was held that failure to instruct an advocate was not sufficient cause. It was also held that a mistake by an Advocate though negligent, may be accepted as sufficient cause.

According to the affidavit of the applicant, she instructed M/s. Nangwala & Rezida & Co. Advocates who originally filed civil suit No. 35/2010 in the High Court and when the matter was transferred to this court she was not in the know until she, as the followed up the case, a clerk in the high Court civil Division informed her of this position. She came to the court only to find the matter had been dismissed for her and her counsel's none appearance. She then engaged the present counsel for this application.

According to the affidavit in reply, the applicant's lawyers disrespected the court's directions to file documents by certain times. On the date for hearing neither counsel nor the applicant were present.

After perusing both the application and the affidavit in reply, we are of the view that the fact that the applicant did not know personally of the case of hearing of the case is not controverted. Neither is the fact that after checking on the court file and finding an order of dismissal, she engaged and her lawyer for this application.

In our considered opinion, the fact that the High Court decided to hear civil suit No. 45/2010 and left civil suit No. 35/2010 pending till the determination of the former, the fact that in the meantime the file of the applicant trusted to this court which the lawyers did not inform her about, and the fact that she did not know of the date fixed for hearing the case in this court, all tend to suggest that her lawyers were negligent. We are not convinced by the submission of counsel for the respondent that the conduct of the applicant in instructing new counsel was afterthought intended to hoodwink this court to set aside the dismissal because there is no evidence to this effect in the affidavit of reply or any other submission to this court.

On the contrary we are of the considered view that her first lawyers were negligent and this negligence cannot be visited on to her in the circumstances since we think she was vigilant enough. We do not think that there would be any prejudice occasioned to the respondent if the applicant, just like her colleague was heard in the civil suit No. 34/2010, is heard in this court. The order dismissing labour claim No. 006/2014 is therefore hereby set aside with the result that the said labour claim is reinstated. Costs of this application shall abide the outcome of the main Labour claim order accordingly.

21/07/2011 Mr K. Mwebembezi …….

For Mr. F. Kiiza for respondent.

………………………..for claimant

Claimant absent.

Court: Ruling delivered in open court. 6

Signed:

1. The Hon. Chief Judge, Asaph Ruhinda Ntengye.........................

2. The Hon. Judge, Linda Lillian Tumusiime Mugisha ....

Panelists:

1. Mr. Ebyau Fidel ....

2. Ms. Tukamwesiga Peninah...

3. Mr. Habiyalemye Dominic ....

Delivered on 21st of July 2015