

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE MISC.APPLICATION NO. 064/2021
ARISING FROM LABOUR DISPUTE REFERENCE 127/2014 ARISING FROM CIVIL
SUIT NO.110/2012

BETWEEN

NATIONAL INSURANCE CORPORATION LTD APPLICANT

VERSUS

THEREZA NAMATOVU..... RESPONDENT

BEFORE

1. THE HON. HEAD JUDGE, RUHINDA ASAPH NTENGYE

PANELISTS

- 1. MS. ADRINE NAMARA**
- 2. MR. MICHEAL MATOVU**
- 3. MS. SUSAN NABIRYE**

RULING

This is an application by notice of motion, under **Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Section 8 (2) and Section 40 of the Labor Dispute (Arbitration & Settlement) Act, and Order 17 rule 6 (1) as amended by Rule 4 of the Civil Procedure Rules.** It seeks for an order of this court to dismiss Labour Dispute Reference No. 127/2014 for non-prosecution.

The application is supported by an affidavit sworn by one Dennis Bruno of M/S. Shonubi Musoke & co. Advocates. The affidavit mainly states that this claim having been originally filed in High court was transferred to this court on

22/4/2014 and that since then the claimant never filed any memorandum of claim despite the registrar's notice issued in the newspapers warning that the claim was in danger of being dismissed. According to the affidavit the claimant demonstrated inordinate delay in prosecuting the claim and this is an abuse of court process which in the interest of justice should call for allowing the application.

In reply to the application, an affidavit in reply sworn by one Lillian M. Khalayi of M/s. Kahuma, Khalayi & Kaheeru Advocates state mainly that having instructed her clerk to follow up the matter with a view of fixing it for hearing and having personally followed up the court registry, staff informed both of them that the file was misplaced. According to the affidavit in reply neither the respondent nor her lawyers knew about the notice of the registrar in the newspapers and yet the respondent is willing and ready to pursue her claim and in the interest of Justice the application should be denied and the claim be allowed to proceed on merits.

Representations:

The applicant was represented by Ms. Brigitte Kusiima Byarugaba of M/S. Shonubi, Musoke & Co. advocates while the respondent was represented by Mr. Andrew Kahuma of M/S. Kahuma, Khalayi & Kaheeru advocates.

Submissions

It was the submission of counsel for the applicant that the respondent caused an inexcusable delay in prosecuting her own case and that this was a ground of dismissal of the claim for want of prosecution. Counsel asserted that the respondent was likely to be seriously injured by the delay and that therefore the balance of justice demanded dismissal of the claim. Counsel argued that in the absence of any letter from counsel for the respondent addressed to court in following up the matter, no evidence was in support of the follow up as **paragraphs 5 – 9 of the affidavit in reply** alleged. In her submission, this court had no duty to bring the publication of the notice of the registrar personally to the attention of the respondent since the New Vision was a newspaper of nationwide circulation. She argued that the fact that a memorandum of claim was only filed after this application was served onto the respondent was evidence that the delay was inexcusable. For the legal proposition that inordinate delay is cause for dismissal of a case, Counsel relied on **Order 17 rule 6 CPR**, the case of **Barclays Bank Uganda Vs Miriam Omorro, M.A 086/2018** and **Nantuka Kalyango & Others Vs Attorney General and Masaka District**

Administration C.A 64.2000 (Court of Appeal). In support of the proposition that where the defendant is likely to be seriously injured by the delay in prosecuting the case the application should be allowed, counsel relied on the authority of **Lonsuk Edward Vs Opira Thomas Mawadiri Misc. Appln. No. 0015/2018 (High Court at Arua)**

In reply to the above submissions, counsel for the respondent submitted that the respondent's counsel made various attempts to locate the file with a view of fixing it for hearing in vain as it could not be traced. He submitted that neither the respondent nor her counsel was aware of the notice to dismiss the case. He contended that as a sign that the respondent was interested in expeditious disposal of the claim, immediately she was served with the application she promptly filed a memorandum of claim, a witness statement and a proposed Joint scheduling memorandum in response to which the applicant filed a memorandum in reply. Citing **Article 126 (2) (e) of the Constitution**, counsel argued that this application was based on a technicality which this court should not allow. In counsel's view if the applicant honestly wanted the claim to proceed on its merits, she should have approached the registrar to issue a notice to the Respondent to file a memorandum of claim and no prejudice would occur to the applicant if the claim was heard on merits. Counsel submitted that the cases cited by counsel for the applicant show that courts abhor dismissal of cases without hearing except in exceptional circumstances and that the said cases were distinguishable from the instant facts. Counsel argued that whereas the **Barclays Bank Vs Aijukye Stanley** case was about stay of proceedings pending appeal, the instant case was about dismissal of the claim for want of prosecution and according to him different principles and different considerations apply to each of these cases. Counsel went on to argue, in an attempt to distinguish the instant case, that whereas there was no opposition to the dismissal in **Barclays Bank Vs Miriam Omoro**, the current application is being contested and the claimant is showing interest in the claim. It was counsel's contention that whereas the court dismissed the claim in **Stanbic Bank Vs Ntalo Mohammed**, the same court later on allowed reinstatement of the claim.

In rejoinder, counsel for the applicant argued strongly that the publication of the notice put the entire world on notice and the respondent was not an exception. According to counsel it was hearsay for counsel to depose an affidavit about feedback received by a clerk and that in the absence of an affidavit of the clerk who allegedly followed up the case, the respondent's testimony ought to be struck out.

Relying on **Kasirye Byaruhanga & Co. Advocates Vs Uganda Development Bank, SC Civil Appln. 2/97** counsel argued in rejoinder that reliance on Article 126 (2) of the Constitution was not a magic wand in the hands of defaulting litigants. Counsel reiterated that no competent justification was provided by the respondent to have this court consider the lack of activity for 7 years to be a mere technicality.

Decisions of Court:

We have carefully perused the notice of motion together with the affidavit in support of the same. We have at the same time perused both the affidavit in reply and the affidavit in rejoinder as well as the written submissions of both counsel both of which have been considered in this, our decision.

Order 17 rule 6 provides

"6 suit may be dismissed if no step taken for two years.

(1) In any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the Court may order the suit to be dismissed."

There is no doubt that the instant claim originated from the High Court and was transferred to this court on 22/04/2014. There is no doubt (as admitted by the respondent) that ever since the claim was transferred to this Court no step was taken by her with a view to proceeding with the claim until when through her lawyers she was served with this very application.

Rule 5 (1) of the Labour Dispute (Arbitration and settlement) (Industrial Court procedure) rules 2011 provides

"5 memorandum of each party

(1) The registrar shall within seven days after registering a reference, give notice to the parties that a dispute has been referred to the Court and require each party to file a memorandum and in the case of the claimant, the memorandum shall be within seven days after receipt of the notice. "

The registrar of this court issued a notice in the new vision of Monday 7, 2017 and the notice read

"This is to inform the General public that the under listed cases were transferred from the High Court Civil division to the Industrial court in

2014. However the parties have not made any follow up in regard to the cases. This is therefore to require all concerned parties to attend before the registrar within 15days from the date of this notice. Failure to respond to this notice will cause all respective cases to be dismissed and removed from the system forthwith."

Labour Dispute Claim 127/2014, the subject of this application was listed as one of the cases referred to. As admitted by the respondent, she never appeared before the Registrar as the notice required, the reason this application was filed. In our considered view, the only question to answer in this application is: **whether the notice issued by the registrar was sufficient notice within Rule 5(1) of the rules above mentioned and whether failure of the respondent to comply with the notice amounted to inordinate delay calling for dismissal of the Claim under Order 17 rule 6 of the Civil Procedure Rules.**

We find the evidence of the respondent that she tried to follow up the case and the file was missing unbelievable. There was need for the respondent to produce some written communication to the court impacting on the attempts to follow up the case. We agree with the assertion of the applicant that the respondent did not take any step in this court towards fixing the claim for hearing. The allegation that the file was missing from the registry is in our view a scape goat and an attempt to justify failure to follow up the matter after it had been transferred from the high Court to this court. Having said this, we must emphasize that under **Rule 5 (1) and (2) of the Labour Dispute (Arbitration and Settlement (Industrial court Procedure) Rules 2012**, this court through its registrar, is required to issue a notice to the claimant requiring him or her to file a memorandum constituting the particulars of the cause of action which the claimant must serve onto the respondent. It is therefore upon the notification by the registrar of a reference registered in the Industrial court that the claimant is obliged to start the litigation process in the court although a vigilant claimant is not precluded from starting the process even when this court has not notified him/her about the reference.

The registrar of this court in the instant case chose to notify the respondent (and others) via the news media, particularly the new vision newspaper. We agree with the submission of counsel for the applicant that, the new vision being a newspaper of nationwide circulation, was a good publication of the notice and as such court did not owe a duty to personally bring the publication to the notice of the respondent. We must state, however, that service of court process is fundamentally personal service, except in exceptional circumstance which may

demand alternative modes of service. On perusal of Labour Dispute Claim 127/2014 the subject of this application we find various documents indicating the address of counsel for the respondent as **Plot 2, Lumumba Avenue, Simbamayo House, Ground Floor P.O Box 2954, Kampala**. Although publication of the notice in the New vision was one of the modes of Services of Court process, in the circumstances of this case, it was not the most effective service. There is no reason shown as to why the court did not effect personal service onto the respondent given that the address and location was evident on the various documents on the file.

We appreciate and agree with the submission of counsel for the applicant that the notice of the registrar in the new vision was a notice to the whole world including the respondent but in our considered opinion the consequence of non-compliance as revealed in the notice would only be effective once no reasonable explanation or no sufficient cause of non-compliance was presented to the courts. In the submission of the respondent, neither the respondent nor her counsel was aware of the notice in the new vision. The evidence of the respondent under paragraph 10 of the affidavit in reply is that she was not served with annexure "B" which is the notice. There is no doubt that immediately the respondent was served with this application she swiftly filed a memorandum of claim and trial bundle and the applicant filed a response to the same memorandum.

In view of our holding that the registrar of the court should have effected personal service to the respondent so as to invoke the provision of **Rule 5 (1) and (2) of the Labour Disputes (Arbitration and settlement) Act (Industrial Court Procedure) Rules 2011** and given that on being served with this application the respondent filed a memorandum of claim and the applicant filed a response thereto in accordance with the said rule, it is our finding that the justice of the case can only be met not by dismissing it under 017 r 6 but by hearing it on its merits. The application fails with no orders as to costs.

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye

PANELISTS

1. Mr. Adrine Namara
2. Mr. Micheal Matovu
3. Ms. Susan Nabirye



Dated: **15/10/2021**