THE REPUBLIC OF UGANDA

IN THE HIGH COURT CF UGANDA AT FORT PORTAL

CIVIL SUIT NO. DR. 1/89

CHRISTOPHER KATURAMU::PLAINTIFF

VERSUS

1. MALIYA KIIZA
2. JAMES KATENTA ::: :::DEFENDANTS
3. AUGUSTIN KASAIJA
4. VICTORIA NSUNGWA

BEFORE: THE HONOURABLE MR.JUSTICE I MUKANZA

RULING

This is an application by notice of motion brought under order 15 rules 2, 5 & 6 Order 48 Rule 1 of the Civil Procedure Rules and S. 101 of the Civil Procedure Act. The application is supported by an affidavit sworn by Peter Nyamutale counsel representing the applicant.

Mr. Nyamutale submitted that the plaintiff filed the suit on 4th January, 1989 and up to date has never set down the suit for hearing. He therefore submitted that under Order 15 rule 6 of the Civil Procedures the court could on its own motion dismiss the suit for want of prosecution because the suit has been pending here for the last two years. Alternatively he submitted that under order 15 rule 5 of the CPR where a counterclaim is pleaded and the plaintiff does not within ten weeks has not filed in a rely the court has the discretion to dismiss the suit for want of prosecution. The plaintiff had not filed in reply to the counterclaim and as such the suit be dismissed and counterclaim be proceeded with that there has been gross and inordinate delay in the prosecution of this case. The plaintiff's lawyer's chambers is situated in Fort Portal and there is no evidence on record that the applicant has ever been served with any hearing notes while the

applicant/defendants lawyers were in Kampala and they had never been summoned to attend court.

The learned counsel continued to submit that the respondent filed another suit in the Chief Magistrate's court which is substantially the same as the present case. That was to show therefore he was praying around with the court. That was an abuse of court process and wasting courts time. The respondent filed and obtained, a temporary injunction in the Chief Magistrate's court which he was using to harass the applicants. He referred me to the case of **Milan vs Manibhai B. Patel & others (HCB) 1969 P. 13** where the suit was dismissed because it was clear that there had been an inordinate delay on the part of the plaintiff in pursuing the suit. And that the adjournments had always been at his instance and for nearly five years the plaintiff did nothing. The suit was dismissed under Order 15 Rule 6 of the CPR.

Mr. Musana the learned counsel appearing for the respondent on the other hand submitted that the respondent/plaintiff was the registered proprietor of land comprised in Burahya Block 61 Plot 26 and the applicant/defendants are the customary tenants on that land. The respondents have a firm interest in that land and there have been a dispute between the parties. Since the suit was filed a lot has taken place. There had been correspondences between his client, the Inspector General of Government and the District Administrators. It was agreed by both parties that this suit should not be continued with and his client agreed not to continue with the suit on the understanding that he would compensate the defendants and others. And in fact the first defendant/applicant had his properties valued and the money is ready for collection in the District Administrator's office. There is a letter from IGG dated 14th December, 1988 where it is shown that parties reached an agreement and resolved not to proceed with Civil Suit No. 1/1989.

As to the contention that there was no reply to the counterclaim he submitted that was untrue. The reply was filed on 2nd March 1989. It dealt specifically with the counterclaim. With regard to the contention that no summons were served on the defendants he submitted that those were served to the defendants through Mugamba and Co. Advocates. That was as far back as 1988. In the circumstances the application was uncalled for since the parties had agreed that the suit be dismissed and some compensation has already taken place. He prayed that the application be dismissed.

In reply Mr. Nyamutale submitted that there was no affidavit in reply to the notice of motion so all that the counsel for the plaintiff was telling the court was not backed up by evidence. He wondered how the court could maintain such assertions when there was no reply to the notice of motion.

Perhaps it is proper at this time to note the events that led to the filing of the instant application. The records show that the suit was filed on 4th January, 1989. There is no dispute over this. What is disputed was that the respondent had even set down the suit for hearing. However on 6th February, 1989 M/S Nyamutale and Co. Advocates a firm representing the applicant entered appearance and lodged in his written statement of defence. On 2nd March 1989 the counsel representing the plaintiff filed in a reply to the counterclaim. It is stated in the records that a copy of the reply should be served upon the defendants though their advocates. There was no such service to the learned counsel representing the defendants.

On 2nd March 1989 the learned counsel representing the Applicant applied for a hearing date and the case was fixed for hearing on 5th April 1989. On that date all parties were present except the second defendant. Mr. Nyakabwa for the plaintiff was around. Mr. Nyamutale was no where to be seen. The matter was adjourned to 26/6/89 but because of the criminal session the case was never handled on that date. Hearing was fixed for 27/4/89. On the latter date both counsels were absent although their clients were in attendance the case was adjourned sine die by the District Registrar/Chief Magistrate.

On 13th November 1989 Mr. Nyamutale applied for a hearing date and the case was fixed for hearing on 23rd November 1989 but none of the counsels showed up in court at all on that date.

Then Mr. Nyakabwa went ahead and fixed a hearing date for 23rd February 1990 but both parties never showed up and the matter was adjourned sine die. Thereafter on 7th March, 1991 the learned counsel for the defendant filed in the present application.

From what has transpired above and more particularly with regard to the record it is evident that both counsels are somehow to blame when this suit was fixed for hearing and never showed up. I say so because on about two occasions the learned counsel for the defendant was well aware of the hearing date but did not show up. In almost a similar manner Mr. Nyakabwa did also on a

few occasions never showed up on the hearing dates. However on most dates where the case was fixed for hearing by the counsel for the plaintiff there was nothing on record to show that there was any service on the opposite party. It cannot therefore be said that for the last 2 years the learned counsel appearing for the plaintiff took no steps with a view to fixing a hearing date. See order 15 rule 6 of the CPR. Therefore the case referred me by the counsel for Applicant Mule Vs MB Patel Supra is not relevant to the instant case.

Similarly this is not the occasion where the court would make use of the provision of Order 15 rule 2 of the Civil Procedure rules which states:-

"Where the hearing of a suit had been adjourned generally the court may if no application as aforesaid is made within 12 months of the last adjournment give notice to the parties to show cause why the suit should not be dismissed and if cause is not shown to the satisfaction of the court the suit shall be dismissed."

As stated earlier I cannot make use of that provision of the law because the case has never been adjourned generally before me. And I do not think I need to be laboured over this.

It was however argued and submitted on behalf of the applicant that the court could also consider dismissing the suit under Order 5 Rule 5 of the Civil Procedure Rules which states :-

"If the plaintiff does not within 8 weeks from the delivery of any defence or where a counterclaim is pleaded thereof 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 the hearing of such application the court may order the suit to be dismissed accordingly or may make such other order and on such terms, as to the court may seem just."

The learned counsel for the applicant had submitted that there was no reply to the counterclaim and the same was never served on him but the position is that there was a reply on the records service on the applicant's advocate as not known. In his address to this court the learned counsel for the respondent submitted that service was through Mugamba & Co. Advocates another firm of Advocates not representing the applicant and since then much less effort were taken by the plaintiff's advocates to have this matter fixed for hearing as is evidenced from the submission by

the learned counsel for the plaintiff and the records there are no longer interested in the case because the counsel for the plaintiff alleges that matters were settled between the parties a fact not known either to the applicants advocate nor to the applicants themselves leave alone this court. My finding here is that though there is a reply to counterclaim filed in court record but the same was never served on the applicants advocate. So as far as this court is concerned there was no reply to the counterclaim and I therefore upheld the submission of the learned counsel for the applicant over this matter in that the defendants did not within 10 weeks from the delivery of the counterclaim set down the suit for hearing. It is the considered opinion of this court that the application succeeds under Order 5 rule 5 of the CPR and where consequent upon Civil Suit No. 1/89 is dismissed with costs to the Applicants and I order that the applicant proceeds with formal proof of the counterclaim.

I. MUKANZA

JUDGE

28/6/91