THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPL. NO. 540/99

(from 1149/97)

TARLOCK SINGH :::::::::::::::::::::::::::::::.:::.::::: **APPLICANT**

versus

ROADMASTER CYCLES LTD & ANOTHER ::::::::::RESPONDENT

Before: The Hon. Principal Judge Mr. Justice J.H. Ntabgoba

RULING

This is **an** application on motion brought under Orders 15; 9 rule 20 and 48 rule 1 of the Civil Procedure Rules, as well as S. 101 of the Civil Procedure Act. It seeks orders that this court do set aside the dismissal order of 18.2.99 and reinstates H.C.C.S. No. 1149 of 1997. The second order sought is that costs of this application be provided for.

It is necessary to point out something about the dismissal by this court of H.C.C.S. No. 1149 of 1997 on 18.2.99. On that day which was the day for the hearing of the case Counsel Tibesigwa and Rugasira who represented the first and third defendants and the second defendant appeared ready for the hearing. As for the plaintiff, Counsel Sekatawa appeared and stated that he was holding the brief for Mr. Philip Karugaba, Counsel who had the conduct of the plaintiff's case. Mr. Sekatawa stated as follows:

> "My instructions are to seek an adjournment for the following reasons: -
> 1. Mr. Karugaba has conduct of this matter. He is held up in Kasese

in a matter which extended into this morning and was thus unable attend Court this morning.

2. Even if Mr. Karugaba were to be present, this matter would still not be heard owing to the fact that the plaintiff did not travel to Kampala in time, despite several reminders having been sent to him. In his absence the case cannot be heard. I pray that he be given a last chance. We will draw his attention to the fact that if he does not turn up the case will be dismissed."

Mr. Tibesigwa strongly opposing the application for adjournment, did not, in the first place, believe that Mr. Karugaba was held up in Kasese as alleged because he said: -

"Only yesterday he sent a note to me to say he would seek adjournment. Unless he went to Kasese this morning, I talked to him on telephone. His letter on record confirms he talked to me on telephone. His absence from court is deliberate. Secondly, from the record of proceedings, it is quite clear that Counsel for the plaintiff has lost (touch) contact of his client. When the case came for hearing on 8/9/98 Counsel intimated that he wanted to settle the matter and prayed for a short adjournment. The matter was adjourned to 14/10/98 for mention. Counsel told court that he had failed to contact his client. The Court directed that in that case, it should be fixed by the Registry and it was fixed for today. Counsel now says he has contacted his client who has not responded. No reason has been advanced I submit that the plaintiff has lost interest in this case."

Mr. Rugasira for the second defendant respondent associated himself with the arguments put forward by Mr.Tibesigwa. I dismissed the application for adjournment made by Mr. Sekatawa on behalf of Mr. Philip Karugaba for the plaintiff. I said:

> "The application for adjournment is dismissed. The case is also dismissed for failure of prosecuting it. The plaintiff should have at least strived to send a message to explain his absence. The lawyer is not serious about the case. The rest of the grounds for this dismissal will be given in a Ruling to be read on 19/2/99 at 2.30 p.m."

I have given this back-ground in full in view of the argument as to whether or not the application now being heard to set aside the dismissal of the suit and to reinstate it for hearing should have been brought under Order 9 rule 20 of the Civil Procedure Rules.

I agree entirely with Counsel for the respondents that the dismissal of the case on 18/2/99 was at a hearing that was conducted inter parties as opposed to ex parte. Therefore bringing the application pursuant to order 9 rule 20 of the Civil Procedure Rules was misconceived. However, Mr. Arthur Mugenyi, learned Counsel for the applicant, realised the misconception and applied for proceeding under S. 101 and order 48. 1 must say that the decision which is being sought to be reversed by setting aside the dismissal of the suit was arrived at pursuant to order 15 rule 4 which provides:

> "(4) Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."

I have to state that in dismissing the application for adjournment and the entire suit, I derived solace from the provisions of Rule 4 of Order 15 of the Civil Procedure Rules, as well as the uncertainty between the plaintiff and his Counsel which caused so much vacillation and inordinate delay. Needless to say, it was in order for the applicant to have brought this application under Order 15 rule 4 and Order 48 of the Civil Procedure Rules, as it was also nothing unusual to cite S. 101 of the Civil Procedure Rules in his aid.
Whereas, however, I agree that S. 101 of the Civil Procedure Act vests the judge with very wide

inherent discretionary powers which are beyond any powers provided by the Rules of procedure, I confess, I am unable to follow the decision of Goudie, Judge in Girado - vs - Alarm & Sons, Ltd [1971] 448 where at page 449 he states:"

> "At the same time all the authorities support the view that the court has inherent power to restore a suit dismissal for default even if no sufficient cause is shown."

Surely, some cause must be shown for the court to base its inherent powers to restore a suit, otherwise it would be merely a question of some application being made, and without a question the court merely restoring the suit. The inherent powers or discretionary powers of the court must be exercised judicially and that, to me, means that some facts must be put before the court for consideration before a decision.

As we revert to the case under consideration then what is therefore before me for consideration? The applicant alleges that he personally knew the case was coming up for hearing on 18/2/99. He says he wrote to his advocates to say that he had to attend to a relative who had suffered from a stroke and he had to attend to him. The applicant adduces a letter (Annexure 'A') to the affidavit by which he depones to in paragraph 2 and 3. That letter contravenes Rule 8 of the Commissioner for Oaths (Advocates) Rules (see Cap 53 of the Laws of Uganda which provides that:-

> "All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner (for Oaths) and shall be marked with serial letters of identification."

Apart from being identified with the serial letter 'A' the letter was not securely sealed under the seal of the commission. I can therefore not treat it as part of the affidavit because there is always the danger of falsifying such annextures.

In paragraph 4 of the affidavit, the deponent applicant depones that:-

> "Sometime early February I developed a serious eye problem, and I was advised by Dr. Margaret Whitehead not to travel to Uganda until I had been treated."

He states in paragraph 5:-

> "That I rang my lawyers M/s Mugerwa Matovu &company and informed one of the lawyers, who did not disclose his name to me, of my inability to attend court on 18/2/99."

As Mr. Rugasira observes, the applicant cannot be telling the truth. If he wanted court to believe him he should have produced the written advice of Dr. Margaret Whitehead advising him not to travel to Uganda until his eyes had been treated. Equally, he should have endeavoured to identify that one of the lawyers in the firm of Mugerwa, Matovu & Co. Advocates whom he talked to on telephone telling him of his inability to attend court on 18/2/99. In any case, if the applicant had told one of the lawyers about his inability to attend court, Mr. Sekatawa would not have beaten about the bush when he was applying for an adjournment of the case to give the applicant a last chance. Counsel Sekatawa would have straight away conveyed the applicant's message to court about his inability to attend Court on 18/2/99.

Finally, after listening to Counsel for the defendants' respondents on 18/2/99, particularly, after listening to Mr. Tibesigwa and reading Mr. Philip Karugaba's letter Ref. *PK/554/298/97* dated 17th February 1999, I disbelieved the story that Mr. Karugaba had been held up on a case at the Kasese Court. The reasons why I did not believe the story are not far to find: -

In the first place the letter states, and Mr. Tibesigwa confines, that Mr. Karugaba discussed with Mr. Tibesigwa in the morning of 17/2/99. Later on Mr. Karugaba wrote to Mr. Tibesigwa confirming the mornings' telephone discussion. Mr. Sekatawa told the court from the Bar that Mr. Karugaba left for Kasese on 17/2/99 at mid-day. If he was going to attend court in Kasese then he would attend on 18/2/99. In such circumstances then he cannot be said to have been held up at the Kasese Court. He would have deliberately left for Kasese with the intention not to attend this court on 18/2/99.

The question arises why should he have preferred appearance in the Kasese Court. I do not know what Court at Kasese but it must be the Magistrates Court, unless it was a Court other than a Court within our system. It was also not made clear whether the court he was attending was a Civil or a Criminal Court, bearing in mind that where a person is confronted with attending two Courts at the same time, he/she should attend the higher one. Why then couldn't Mr. Karugaba attend this court and ask Mr. Sekatawa to hold his
brief in the Kasese Court?

It is for the above reasons that I did not believe the story about Mr. Karugaba having been held up in Kasese. And it was for the reasons I have already given, namely, under Order 15 rule four of the Civil Procedure Rules, for the fact also that Counsel was not fully in touch with his client, and the vacillation occasioning inordinate delay rampantly clogging our case system. I am not disposed, for the same reason, to reinstate this suit. One other reason advanced by Mr. Mugenyi for the applicant is the reason often advanced by negligent Counsel. This is that the faults of Counsel should not be visited against his client.

In this case, Mr. Mugenyi shifted the blame against Mr. Sekatwa. Counsel says that Mr. Sekatawa's instruction from Mr. Karugaba was only to seek an adjournment. Mr. Mugenyi says that Mr. Sekatawa exceeded his mandate when he went as far as informing the Court that the applicant was not interested in the case anymore.

Although, I have not been able to find any statement of Mr. Sekatawa on the Court record, I do not borrow the argument that the faults of the advocate should not be visited on his client. If they should not be visited on the client of the faulting advocate, then on whom should they be visited? Certainly not on the client of tile advocate who has conducted his clients' case diligently. I think that either the client who engaged the negligent Counsel should suffer the consequences, or his Counsel should. In that case then, why should the client not sue his negligent Counsel to be indemnified?

In the result I dismiss this application to restore the suit and to allow it to proceed to hearing. The applicant will pay the costs consequent hereupon.

J.H Ntabgoba

Principal Judge

28/5/1999