

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 893 OF 2004.
(Arising out of H.C.C.S. No 1017 of 2000)

1. LUGEYA SAMUEL
2. HOSMISDAS MULINDWA APPLICANTS

VERSUS

1. UGANDA COMMERCIAL BANK LTD.RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE MOSES MUKIIBI

RULING.

This is an exparte application brought by Lugeya Samuel and Hosmisdas Mulindwa, the plaintiffs in H.C.C.S. No. 1017 of 2000 (hereinafter referred to as “the main suit”), who are now the applicants, seeking for an order that the judgment and Decree passed in the main suit on 28th June, 2004 be set aside. The application is brought by Notice of Motion under Section 98 of the Civil Procedure Act, and Orders 21 rules 1 and 4 and 48 rules 1 and 3 of the Civil Procedure Rules. It is supported by an affidavit sworn by the second Applicant dated 27th October, 2004.

When the application came up for hearing the applicants were represented by learned Counsel Mr. Semakula Augustine. The grounds of this application are generally stated in the Notice of motion as follows:

- (a) The judgment and decree passed on 28th June, 2004 are a nullity by the reason that when they were passed the defendant had been struck off the register by the Registrar of Companies and was legally dead.
- (b) That it is necessary for this court to set aside the judgment and decree and to have the case re-opened after impleading the legal representative/successor of the respondent.

The back ground to this application is given in the affidavit as follows:-

Para. 2: That I and Lugeya Samuel sued Uganda Commercial Bank Ltd in a representative capacity when it was still an existing legal entity.

Para: 3. That the plaintiff and the Defendant closed their cases by 24th April, 2002 in H.C.C.S. No. 1017 of 2000 when Uganda Commercial Bank Ltd was still a legal entity.

Para: 4: That on 30th December 2003 Uganda Commercial Bank Ltd, the defendant in the said suit was struck off the Register of Companies. (A copy of the gazette attached).

Para: 5: That judgment in H.C.C.S. No. 1017 (of 2000) (sic) was passed on 28th June, 2004 and the Decree was extracted.

Para: 6: That at the time when the judgment and Decree were passed the Defendant/Respondent, Uganda Commercial Bank Ltd had been struck off the Register of Companies and had legally died.

Learned Counsel for the applicants submitted that the judgment and decree having been passed after the defendant/respondent had ceased to exist were a nullity. He submitted that it is necessary for the ends of justice to set aside both the judgment and the Decree so that the case can be re-opened after impleading the legal representative/successor.

I have looked at the gazette which was annexed to the affidavit. It contains a publication of a Notice couched in the following words:

“Notice to strike off Uganda Commercial Bank Limited.

Pursuant to Section 343 (5) of the Companies Act, notice is hereby given that M/s Uganda Commercial Bank Limited is struck off the register with effect from the publication of this Gazette.

Dated this 30th day of December, 2003. Registrar of Companies.”

It was published as General Notice No. 18 of 2004 on 30th January, 2004. So in my view, in effect, M/s Uganda Commercial Bank Limited was supposed to be struck off the register on 30th January, 2004, the date of publication of the Gazette. It was the Notice which was dated 30th December, 2003.

The 2nd applicant asserted in Parag. 4 that on 30th December, 2003 Uganda Commercial Bank Ltd was struck off the Register of Companies. This is not a correct statement. From reading the Notice itself the effective date for striking that company off the register is the date of publication of the Gazette, which was 30th January, 2004.

The assertion in Parag 4 of the affidavit is not correct for yet a different reason.

It is my view that the Registrar of Companies acted illegally and without authority when he issued the Notice to strike off Uganda Commercial Bank Ltd purporting to act Under Section 343 (5) of the Companies Act (Cap. 110).

Subsection (5) of Section 343 of the Act provides as follows:-

“343 (5): If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for six consecutive months, the registrar shall publish in the Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (3).

The question is: What kind of Notice is provided for in subsection (3) of Section 343 of the Act?

Subsection (3) of Section 343 provides as follows:

“343 (3). If the registrar either receives an answer to the effect that the company is not carrying on business or in operation, or does not within thirty days after sending the second letter receive any answer, he or she may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of the notice the name of the company mentioned in the notice will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.”

In my view, for purposes of subsection (5) of Section 343 “ a like notice as is provided in subsection (3)” would have to state that at the expiration of three months from the date of the notice the name of the Company will, unless cause is shown to the contrary, be struck off the register and the company dissolved.

Subsection (6) of Section 343 provides for consequences as a follow up from Subsection (5) of the same section.

It provides:

“343. (6). At the expiration of the time mentioned in the notice, the registrar may, unless cause to the contrary is previously shown by the company, or the liquidator, as the case may be, strike its name off the register, and publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved.”

In my view it is very important that the Registrar of Companies strictly follows the law, and applies the correct law. Section 343 of the Act appears to me to be punitive, and contravention of its provisions may spell grave consequences.

An example may suffice.

Section 344 of the Act provides that where a company is dissolved all property and rights vested in it immediately before its dissolution shall be deemed to be bona vacantia, and shall accordingly belong to the Government.

Since it has been brought to my attention I must say that General Notice No. 18 of 2004, the Notice to strike off Uganda Commercial Bank Limited, Published in the Gazette on 30th January 2004, is not the kind of Notice which is provided for under Subsection (5) of Section 343. In my view by issuing the Notice that M/s Uganda Commercial Bank Limited was struck off the register the Registrar of Companies acted contrary to clear Provisions of Subsection (5) of Section 343, the law under which he purported to act. Section 343 provides for punitive actions which may entail serious consequences. On the basis of what has been produced before court (the gazette) I find that in issuing the Notice which was published in the Gazette on 30th January, 2004 the Registrar of Companies acted outside the Provisions of the law cited in the Notice, and the said Notice was therefore illegal and un effective. It is apparent on the face of the Gazette, and the affidavit in support of this application, that M/s Uganda Commercial Bank Limited could not have been struck off the register as at 30th January, 2004 because the action of the Registrar of Companies was outside the law, done without legal authority and therefore, illegal. It is my

view that the illegal Notice published on 30th January, 2004 could not take the effect which had been intended, that is, to give an effective date to the striking of the said company off the register.

By this application I have been asked to recognize as a fact that on 30th December 2003 M/s Uganda Commercial Bank Ltd was struck off the Register of Companies. I am equally required to conclude from the evidence presented to me that M/s Uganda Commercial Bank Limited became legally dead by reason of having been struck off the Register of Companies. I am supposed to use that as a basis to state that on 28th June, 2004 when judgment in the main suit was passed and a Decree extracted there was no defendant, and that the same were a nullity. I have been asked to exercise power given to this court under Section 98 of the Civil Procedure Act.

Section 98 of the Civil Procedure Act provides:-

“98. Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the court.”

The applicants also cited 0.21 rules 1 and 4 (1) of the Civil Procedure Rules.

Rule 1 provides:

“1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”

Rule 4 (1) provides:

“Where _____ a sole defendant _____ dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.”

The present application has not been brought for the purpose provided for by the above rule. So, in my view, the rule is irrelevant to this application.

IN ALI BIN KHAMIS V. SALIM BIN KHAMIS KIROBE and 2 others (1956) 23 EACA 195 at page 200 BRIGGS, J.A. said: “It must then be noted that a party ceases to be a party on death.”

It follows that a person who dies Pendente lite before a decree is passed against him is not a judgment debtor. If the defendant dies before the suit is concluded and yet a decree is passed without bringing his legal representatives on record, the decree is a nullity and incapable of execution.

On the death of a defendant in a suit the court should bring the legal representative on the record before proceeding further with it. The duty of applying for bringing in the proper legal representatives on record ultimately rests on the plaintiff. The object of the application is that the fact of the death of the party should be brought to the notice of the court, and the court should be appraised of the fact as to who the legal representatives of the deceased are.

MULLA on the Code of Civil procedure Act V of 1908 (14th Edition) Volume II at page 316 commented as follows: “A decree is a nullity when it has been passed by a court having no jurisdiction or against a dead person.”

In A.I.R Commentaries on the code of Civil Procedure (1908) 7th Edition, Volume III at page 3382 on the subject: Decree against a dead person, D.V.CHITALEY and S. APPU RAO wrote as follows:

“A decree passed against a dead person without impleading his legal representatives is a nullity.” The learned authors observed that the decree can be set aside, and the legal representatives impleaded, the case re-opened, and the legal representatives given an opportunity to present their case before court.

I respectfully agree with the above as a statement of the correct legal position.

[The learned authors were commenting on 0.22 rule 4 which provision is similar in all material respects to the Uganda provision in 0.21 rule 4 (1) of the Civil procedure Rules].

There is no doubt as to the jurisdiction of this court in a proper case to set aside its own judgment, decree or order.

However, having found that the Notice Published on 30th January, 2004 in the gazette was illegal, and that, therefore, it could not have the effect of providing an effective date to the purported action of the Registrar of Companies of striking M/s Uganda Commercial Bank Ltd off the register, I am unable to say that on 28th June, 2004 when judgment in the main suit was passed, and a Decree extracted, there was no defendant. I cannot, therefore, hold that the said judgment and Decree were a nullity by reason of the defendant, Uganda Commercial Bank Ltd having been legally dead.

In my view illegality once brought to the attention of court overrides all questions of pleading, including any admissions made in the affidavit of the 2nd applicant.

See: Makula International Ltd V. Cardinal Nsubuga and Anor (1982) H.C.B. 11 (CA).

In my view the court can, and should always, step in to correct an illegality. The basis of the present application, the assumed validity of the action of the Registrar of Companies of striking Uganda Commercial Bank Ltd off the Register of Companies, and that of the Notice published in the Gazette intended to give such action an effective date, having revealed an illegality to this court, perpetuating such a misconception would amount to an abuse of the process of this court. It is my view that the publication of the Notice in the gazette dated 30th January, 2004 did not operate to give effect to the purported striking off the register of Uganda Commercial Bank Ltd by the Registrar of Companies. So I cannot take that date (that is 30th January, 2004) as the date when the defendant in the main suit became legally dead.

I do not consider this a proper case for this court to exercise its inherent jurisdiction to set aside the judgment passed on 28th June, 2004, or the Decree extracted there from. I decline to make the order sought by this application and proceed to dismiss it. I make no order as to costs.

MOSES MUKIIBI

JUDGE

11/11/2004.

11/11/2004 at 2.42 pm.

Mr. Semugera Ronald holding brief for Mr. Augustine Semakula Counsel for the Applicants.

Both Applicants are in court.

Ngobi: Court Clerk/Interpreter.

Court: The ruling is delivered in Chambers.

MOSES MUKIIBI

JUDGE

11/11/2004.