THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-OO-CV-MA-0263-2007

1. D. A. LUBEGA BYAYI::

2. NUWE MUGERWA :: **PLAINTIFFS**

VERSUS

1. MAKAMBIRA OLIVE KIGONGO:::::::::::::::::::::::::::::::::::

2. UGANDA NATIONAL CHAMBER OF COMMERCE & INDUSTRY:: **DEFENDANTS**

BEFORE: THE HONOURABE MR. JUSTICE YOROKAMU BAM WINE

RULING:

The application was brought under 0.9 r.23, 0.52 r r. 1, 2 and 3 of the Civil Procedure Rules and S.98 of the Civil Procedure Act. It is for orders that:

(I). The dismissal order dated 20-2-2007 be set aside and case be heard on merit.

(ii). The execution of the costs against the applicants/plaintiffs in this suit be stayed.

(iii). Costs of this application be in the cause.

It is supported by the affidavit of the first applicant, D. A. Lubega Byayi.

The respondents have objected to the reinstatement of the dismissed suit. The grounds for the objection are contained in the affirmation of Abdul Kasule, the Acting Secretary General of the 2id defendant/respondent.

From the records, HCT-00-CV-CS-0235-2004 was filed here on 31/05/04. On 10-11-2004, Mary I.D.E. Maitum, Judge referred the case file to the Deputy Registrar of this court. The

problem was that the court found that the issues for determination had hit a snag on account of the interpretation to be assigned to a Consent Judgment:
Did the consent judgment supercede the Uganda National Chamber of Commerce Constitution?

The then learned trial Judge preferred that the file be placed before Justice Tabaro who had heard the case in the first place. She reckoned that if she went ahead to determine the issues before her, she would end up reversing what had been agreed in the consent Judgment.

The gist of the plaintiffs' case in the main suit is that after the conclusion of HCCS NO. 500 of 1997, in 2001 the nominated and appointed election committee members were to conduct elections of all office bearers of the second defendant, Uganda National Chamber of Commerce and Industry. It is the contention of the plaintiffs in the suit that when the first defendant came to power she ignored the court order and conducted the District Elections of office bearers on her own without following the law and set down procedure which has undermined the proper functioning of the second defendant.

Hence the prayers for:

(a). A temporary injunction to restrain to District office bearers of the second defendant from carrying out and/or performing the duties of the second defendant until finalization of the suit.

(b). A declaration that the election of District office bearers of the second defendant were null and void and their offices should fall vacant forthwith.

(c). Costs of the suit.

As I said earlier on, the trial judge directed that the file be put before Justice Tabaro, because of his role in the consent Judgment in HCCS NO. 500 of 1997.

From the records also, on 11-10-2006 the file was put before another Judge, Hon. Justice Remmy Kasule. One Kavuma Godfrey appeared for the defendants and the first plaintiff appeared in person. The case was fixed for hearing on 20-02-2007 at 9 a.m. Come that date, neither the plaintiffs nor their Counsel appeared. The court dismissed the suit under 0.9 r.22 of the Civil Procedure Rules with costs to the defendants. Hence the application for reinstatement.

At the hearing of the application, Mr. Ssetimba for the applicants intimated to court that on 11-10-2006, the 1st applicant appeared in person. His advocate was absent. That the case was adjourned to 20- 02-2007 which the applicant misheard to be 26-02-2007. Hence the dismissal in his absence and that of Counsel. He also said that 20-02- 2007 when the suit was dismissed and 24-05-07 when the instant application was filed did not constitute a delay to warrant rejection of the application for reinstatement. Learned Counsel for the respondents, Mr. Bob Kasango does not agree. In his view, there was undue delay in applying for reinstatement. In any case, the suit has been overtaken by events in that between the elections of 2002 and the present day, two other elections have been held. The office bearers have since changed and yet the applicants want the impugned election nullified. In his view, the orders sought will serve no practical purpose. He invited me to uphold the decision of Hon. Justice Kasule and dismiss the application with costs to the respondents.

I have addressed my mind to the able arguments of both Counsel.

From the pleadings, the case came up for hearing on 20-02-2007. Neither the applicants/plaintiffs nor their Counsel was present.
Order 9 rule 22 provides for the procedure when the defendant only appears. It reads:

> ***"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 .....***"
> *(emphasis mine).*

The section is couched in mandatory terms: if both plaintiff and Counsel are absent and defendant present, suit is dismissible with costs to the latter. Under 0.9 r.23, the party whose suit has been dismissed (under 0.9 r.22) may apply for an order to set the dismissal aside. In an application for restoration of a dismissed suit, the applicant must show sufficient cause, that is, that he had an honest intention to attend the hearing, and did his best to do so; and was diligent in applying. It would appear to me that mishearing the date as in the instant case would constitute sufficient cause for non- appearance of a party, depending on the party's conduct upon learning of the true state of affairs. Whether or not a person misheard something is in my view a mental state of affairs incapable of proof by way of direct evidence. In the instant case, the case was dismissed on 20-02-2007. The first applicant learnt of the dismissal on the very day the suit was dismissed, and so did his lawyer. He took no action against the dismissal for a period of over three months. In ***Marisa vs. Uganda Breweries Ltd p1988 — 901 HCB 131*** the court observed that although the rules do not provide for a time limit, the application to set aside an order of dismissal must be brought within a reasonable time. The applicant had in that case waited for over a year, and some months to file his application and almost another year to set down the same for hearing. Court was of the view that all this went to show that the applicant and his Counsel were not serious.

I was invited by learned Counsel for the applicant to find that waiting for three months to file the instant applicant did not show lack of diligence on the part of his client. I am unable to accept that argument.

This was an old case of 2004 centred on or around the events of or around 1997. From the records, even after the filing, the plaintiffs took no steps to apply for a hearing date. It took court initiative on 29-06-2004 to summon both parties for the hearing of the case on 19- 08-2004. Hearing appears to have stalled between 10-11-2004 and

11-10-2006 because of court's inability to do the needful. However, the 20th of February, 2007 was agreed upon by the parties in the presence of each other. Come that date, neither the plaintiffs nor their Counsel appeared. And as we have already seen, although the plaintiffs and Counsel learnt of the dismissal on 20-02-2007, they took no steps to seek restoration of the dismissed suit till 24-05-2007, a period of over three months. In these circumstances, I am unable to accept learned Counsel's submission that the plaintiffs exercised due diligence in the matter. The long silence between dismissal and the application for restoration was in my view inconsistent with their alleged interest in the outcome of the suit. The delay was simply inexcusable. It has given court the impression that the decision to restore was an afterthought, a stratagem to frustrate the execution process for recovery of costs.

Turning now to the second leg of Mr. Kasango's submission, the issue of the case being overtaken by events, under paragraph 9 of the plaint, the defendants are said to have caused in February 2003 the District office bearers of the 2nd defendant to be elected by means other than in accordance with the court order. This they claim gave them a cause of action. However, they did not challenge the defendants' alleged illegal acts until March 2004 when the suit was filed.

From the affidavit of Abdul Kasule, paragraph 12 thereof, the terms of office of the contested chairpersons expired and the 2nd respondent's annual delegates conference (ADC) took place sometime in 2006 and elected new office bearers in and of the second respondent. Learned Counsel has submitted that the office bearers have since changed and yet the purpose of the case against the defendants is to declare the impugned election a nullity and the office bearers to be holding the office illegally. If elections have been held twice since then, he wonders of what use the outcome of the case will be to the applicants. Learned Counsel for the applicants is of the view that if the suit is reinstated and election of former office bearers is declared null and void, it will mean that election of current office bearers is also null and void, implying that the current administration is in office illegally.

I think this is a typical case of a person trying to flog the proverbial dead horse.

The first prayer is for a temporary injunction to restrain the district office bearers of the 2nd defendant from carrying out and/or performing the duties of the second defendant until finalization of the suit. For over four years, this suit has been pending in court. In the

meantime, those office bearers targeted in the application have since vacated office under fresh elections. It does not matter in my view that some of them may have been returned in subsequent elections. They are in office under a fresh and different mandate. To that extent I would agree with the submission of learned Counsel for the respondents that the applicants' case has been overtaken by events. The discretionary power of the court to stop litigation has only recently been recognized by the law maker. It now has a statutory basis. The Judicature (Amendment) Act of 2002, Act 3/2002, recognizes this power under Section 4. Under this law court is empowered to exercise its inherent power to prevent abuse of the process of the court by curtailing delays in trials and delivery of judgment, including the power to limit and discontinue delayed prosecutions. In ***Birkett vs. James p19781 A. C 297*** the court held that the power should be exercised only where the plaintiff's default has been intentional or where there had been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant.

I agree.

In the instant case, I have already noted that the delay to file the application was inexcusable. In the 4 years of the existence of the suit, the 2 defendant is said to have held two elections to replace the impugned executive. The office bearers returned in the alleged illegal election have since left office or have been returned in subsequent elections. In view of the explanation offered by the defendants herein, I'm inclined to the view that setting aside the dismissal order would be against the spirit of the law as contained in Act 3 of 2002. Besides, it will serve no useful/practical purpose. Applicants' failure to seek restoration in good time constituted an abuse of the process of the court. It offends against Article 28 of the Constitution which seeks to promote fair and speedy hearings of cases.

For the reasons stated above, I disallow the application.
As regards costs, considering the peculiarities of this case, I would order each party to bear its own costs herein. The order of costs attendant to the dismissal of the suit on 20-02-2007 shall not be interfered with.

Orders accordingly.

Yorokamu Bamwine

JUDGE

10-11-2008

10-11-2008:

Mr. Ssetimba Peter for applicant

1st Applicant present

Court:

Ruling delivered.

Yorokamu Bamwine

JUDGE

10-11-2008