THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: TSEKOOKOS J.S.C. KANYEIHAMBA. KIKONYOGO J.S.C*)*

CIVIL APPEAL. NO. 32 OF 1995

AYUB SULEIMAN:: APPELLANT

AND

SALIM KABAMBALO::RESPONDENT

(Appeal from ruling and orders of high court of Uganda at Kampala(A.O Ouma J) dated 27th February in civil suit No.1388 of 1986)

JUDGMENT OF MUKASA.KIKONYOGO J. S. C.

This is an Appeal from the ruling and Orders of the high Court dismissing on application to review an earlier order of the Court sitting at Kampala dated 27th February 1995 in civil suit No.1388 of 1986.

The brief facts of the matter are that Ayub Suleiman hereinafter to be called the appellant way back in 1986 sued Salim Kabambalo hereinafter to be refered to as the respondent for recovery of land comprised in Kyadondo Block 244 plot 2944 measuring 0.20 hectares situated at Kisugu, Kampala.

The suit was first placed before the high court for hearing on 19/12/90. It did not proceed on that day but was adjourned. Subsequently at the instance of the appellant through his counsel the suit had to be adjourned for about four more times. Again when on 30/11/93 it was placed before Late Hon.Mr.justice Louis Ongom.counsel for the appellant applied for an adjournment. He complained that the suit had been fixed exparte had not been causelisted and in any case the appellant who was the plaintiff was in Hong Kong. The learned trial Judge rejected the application for an adjournment and instead dismissed the suit for want of prosecution under **Order 15 r *5* of The Civil Procedure Rules** with Costs to the Respondent (at that time the defendant). 0.15 rule 5 provides that “if a plaintiff’ does not within eight week from the delivery of the defence, or, where a counter-claim is pleaded, then within ten

weeks from the delivery 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 the Court may seem just".

Aggrieved by the dismissal the appellant instructed his Counsel to file an application on for a review of the dismissal orders of Late Hon. Justice Louis Ongom The application was on 15/2/95 heard by Hon. Mr. Justice A. 0. Ouma. After listening' to the submissions of both learned Counsel for the parties he dismissed the appellant's application in his ruling dated 27/2/95. The appellant has appealed against that ruling.

The Appeal is based on the following seven grounds: —

1. That the learned trial Judge erred in law when he heard the defendant in person when he was represented by a firm of Advocates from whom he had not withdrawn the instructions.
2. That the learned trial Judge erred in law when he failed to find that service misdirected is bad in law and no service at all.
3. That the learned trial Judge erred in law by not finding that Counsel's presence was not a substitute for proper service at all.
4. That the learned trial Judge erred in law and fact when h held that the appellant disguised his signature on the notice without any evidence to that effect.

5. That the learned trial Judge erred in law and fact when he failed to find that delay in filing the application was sufficiently explained.

6. That the learned trial Judge erred in law when in the interest of justice failed to set a date for hearing the case since there was no proper service and the case had not been cause listed.

7. That the learned trial Judge erred in law and fact when lie failed to appreciate the cardinal principle that as far as possible and especially in land matters litigation should be resolved on merit.

When on 13/2/98 the appeal was placed before the Supreme Court for hearing, the appellant's Counsel was absent. Admitting that lie had not paid the Counsel's fees, the appellant asked for an adjournment to give him time to get the necessary funds from abroad. His request was

granted and the appeal was adjourned to 26/2/98. On that day the appellant appeared in person and stated that even though he had received the funds to pay his fees, the Counsel found it too late to take on the appeal. However, he had with the assistance of his brother, a lawyer, prepared written submission which he asked the Court to admit. As Mr. Henry Kaala, learned Counsel for the respondent, had no objection to the written submissions, leave was granted by the Court allowing the appellant to put in the written submissions.

In a verbal reply Mr. Henry Kaala, submitted that there was no merit in any of the seven points on which the appeal was grounded. He pointed out that it was not only the application which was dismissed but the suit too and by two different Judges which clearly confirmed that there was no merit in the appeal. As far as Mr. Kaala as concerned the cases cited by the appellant were not relevant. Referring to Order [5 rule 5 and Order 9 rule 19 of The Civil Procedure Rules, Mr. Kaala pointed out hat rules of procedure were intended to be followed.

I have had a careful perusal of the record before Court, the written submissions of the appellant and I have listened to the reply by Mr. Kaala. I also examined the relevant law applicable and the authorities cited by the appellant namely M. B. Automobiles vs. Kampala Bus Service (1966) EA.480 and shabani Vs. Karanda Co. Ltd(1973) E. A. 497. The main issue for this Court to decide is whether, the learned trial Judge erred in law or fact when he dismissed the appellant's application for review of a ruling which dismissed his suit.

In my view order 5 rule 5 was not applicable in this case, because the defendant. fixed the suit for hearing after many adjournments and had not filed an application for dismissal as provided by 0. 15 rule 5. It appears Section 101 of The Civil Procedure Act would have been more relevant because it provides that:

'Nothing in this Act shall he 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."

As it was observed by the Supreme Court in the Civil Appeal No. 17 of 1993 **National Union of Clerical Commercial Professional and Technical Employees Vs National Insurance Corporation**, it is now settled that the existence of' a specific procedure provision or remedy

cannot operate to restrict or exclude the court's inherent jurisdiction under Section 101 of C.P.A the Statute See also Rawal vs. Mombasa Hardware Ltd. 1968 and Adonia Vs. Mutekanga.E.A (1970) 429.

The question whether a Court should invoke its inherent powers in a given case is a matter for the Courts' discretion which should be exercised judicially The learned trial Judge should have based tire dismissal on Section 101 of C. P A. bat he did not direct his mind to it .

Failure to apply the relevant provision of the law notwithstanding no injustice was caused by the dismissal of the suit under Order 15 rule 5 of The Civil Procedure Rules. The dismissal of both the application for an adjournment and tie appellant's suit was based on valid grounds.

Further the notice of motion from which the appeal before this Court emanates moved the trial Court to review the order of dismissal of the appellant's suit by Ongom J. On. 30/11/93. The Court was told by the counsel for the appellant that the said application had been filed under order 42 rule 2 of the civil Procedure Rules which reads that: -

'An application for review of a decree or order of a court of a Court upon some ground other than discovery of such new and important matter or evidence as is referred to in rule 1 of this order matter, or existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed".

Particular**y** any on the record before Court there was nothing to review in the ruling of Ongom, J. If the ground of the application before Ouma J. was to challenge the effectiveness of service for 30/11/93 an application under 0.42 rule 2, would be conceived. It should have been instituted under 0.9 rule 20 of the Civil Procedure which empowers the Court that dismissed the suit to set the dismissal order if the applicant satisfied the Court that there was sufficient cause for nonappearance when the suit was called for hearing.

On 30/11/93 when the appellant's suit was dismissed by Ongom J both parties representation. It could be urged therefore that the matter was decided inter-

The Counsel who appeared for the appellant's on that day requested for an adjournment on

the ground of non-attendance of the appellant but on that day was rejected and his suit dismissed. In the circumstance another course open to the appellant would have been to appeal to this Court but not apply for a review under order 0.42 r.1 .It follows, therefore, that the trial court should have dismissed the appellant's notice of motion under 0.42 rule 2 because it was misconceived.

That as it may the procedure adopted by Ouma J did not occasion miscarriage of justice. There is no doubt that the appellant was guilty of laches. There is no sufficient cause shown for such inordinate delay. Article 126(2) of the constitution relied on by the appellant is not a license for non-compliance with the procedure.

That the appellant's contention that Ouma.J failed to observe the cardinal principle as far possible and especially in land matters litigation should be resolved on merit. The learned trial Judge gave reasons for his decision to dismiss the application and not to restore the suit. He considered the 8 years the suit had been dragging on due to adjournments granted at the instance of the appellant. Clearly the appellant had lost interest in the case. In any case as already pointed out the application was misconceived and, hence, ought to fail.

For the aforesaid reasons, I find no merit in this appeal and I would dismiss it with costs to the respondent.

Dated at Mengo this 25th day of March 1998.

L. E. M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL

W.MASALU-MUSENE

REGISTRAR,THE SUPREME COURT.

JUDGMENT OF TSEKOOKO. J.S.C.

I had the advantage of reading in draft the judgment prepared by Mukasa Kikonyogo, J. S. C and agree with her conclusions and orders.

Court below the suit was adjourned on I9th December 1990, 16th May 1991 and delay 1992 owing to the absence of the appellant who was the plaintiff. His counsel, Mr. Womutuba, appeared on the occasions and applied adjournments. On 19th May 1992, the late Ongom, Ag. Judge, indicated the last adjournment. On 30th November 1993, it was the same Womutuba again appeared for the appellant and sought another adjournment before the same i J. The learned Judge declined to grant the adjournment and proceeded to the suit under 0 15 Rule *5* of the Civil Procedure Rules. This rule states -

*"0 15 r.*5 *If the plaintiff does not within eight weeks from the delivery to the defence,or……..set down the suit for hearing them 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 and on such terms as to the court may seem just."*

It appears to me that in this case none of the rules of 0.15 was applicable. **In the case of <u>Mukisa Biscuits Co. Vs. West End Distributors 1969</u> E.A. 696 the African Court of** Appeal considered corresponding provisions of Kenyan Order Civil Procedure Rules of Kenya. At page 698, Law, J A., referred to the rules following words: -

*"Order 16 provides for three ways a suit can be dismissed for want of prosecution. By r. 2 if no application is made within twelve months to fix a hearing date after a suit has been generally adjourned**,** the court may give notice to the parties to show cause why the suit should not he dismissed. By r. 5, if the plaintiff does not set down the suit for hearing within a prescribed period, the defendant may either set it down or apply for it to be dismissed or want of prosecution. By r. 6 the court may on its own motion dismiss a suit in which no step has been taken for period of three ears. By Order 9 rule 16 the court may order the dismissal of the suit where the summons has been returned unserved and the plaintiff fails within a year for the issue of fresh summons. DALTON.J, held in <u>Saldanha's</u> case purported to follow the decision of <u>WINDHAM, C.J,in Mulji vs Jadavi</u>,(1963)E.A 217 but all that case decided was the court's inherent jurisdiction could not be invoked where an alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I did not see how the court's*

inherent jurisdiction can be said to be fettered, as no alternative remedy existed. To take a hypothetical case, let us imagine that a plaintiff, who has taken no step in a suit for nearly three years, applies for a hearing date so as to prevent the court exercising its jurisdiction under 0.16.r.6 repeating the process every three years, merely to keep suit alive without intending to prosecute it surely a court could invoke its inherent jurisdiction and strike out the suit, under s.97 of the civil procedure code, to prevent the abuse of the process of the court and to avoid injustice? As sir Charles NEWBOLD, P, said in Rewal vs Mombasa Hardware Ltd (1968) E.A 392.

Now I think that any rule which purports to take away the inherent jurisdiction of the courts should be looked at very carefully before it is construed in such a manner ".

I am of the opinion that the provisions of the Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive, and do not fetter Court's inherent jurisdiction to dismiss in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the Court. With respect, I consider Saldanha's case (supra) to have been wrongly decided, in so far it holds that the court's inherent jurisdiction cannot be invoked in cases falling outside those specifically provided for the rules."

Order 9 Rule 16 is similar to our 0.9 Rule 16 of our Civil Procedure Rules The reasoning in the above passage is sound and I would respectfully adopt it here.

In my view even if 0.9 Rule 19 was inapplicable, the trial Judge had inherent powers under S. 101 of the Civil Procedure Act to dismiss the suit on the facts of this case.

For these reasons I would dismiss the appeal with costs to the respondent.

As Kanyeihamba J. S. C., and Kikonyogo J. S. C., also agree the appeal is dismissed with costs.

Dated at Mengo this 25th day of March 1998

J. W. N. TSEKOOKO

JUSTICE OF THE SUPREME COURT.

JUDGEMENT OF KANYEIHAMBA,J.S.C

I have read the draft judgments of my sister, Hon. Justice Mukasa-Kikonyogo, J S C. and of my brother Justice Tsekooko, J. S. C. and I agree with their reasoning and decision. I have nothing more useful to add. The appeal is dismissed.

Dated at Mengo this 25th day of March 1998

G K.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT