**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**MISCELLANEOUS APPLICATION NO. 536 OF 2012**

***(ARISING FROM CIVIL SUIT NO. 23 OF 2009)***

**OKURUT SAMUEL::::::::::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**ALPHA GLOBAL 21ST JOINT VENTURE::::::::::::::::::::RESPONDENT**

**BEFORE: HON. LADY JUSTICE HELLEN OBURA**

**RULING**

The applicant brought this application by Notice of Motion under the provisions of Order 17 rule 5, Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA) seeking for orders that the respondent’s counterclaim in Civil Suit No. 23 of 2009 be dismissed for want of prosecution and the costs of the application be granted.

The grounds on which the application is premised are stated in the affidavit in support of the application. They are firstly that on or about 2nd March 2011 this Court entered and/or registered a Consent Judgment in Civil Suit No. 23 of 2009 in favour of the applicant/plaintiff for the sum of Ug. Shs. 50,000,000/=. Secondly, that the enforcement and execution of the Consent Judgment was subject to the final determination of the counterclaim by the respondent/defendant. Thirdly, that there has been inordinate and inexcusable delay by the counterclaimant/respondent to set down the counterclaim for hearing as required by law. Fourthly, that the applicant has suffered and continues to suffer inconsiderable harm and expenses and as a result he has been severely prejudiced by the delay on the part of the counterclaimant/respondent. Fifthly, that the dilatory conduct of the respondent and/or failure to prosecute the counterclaim is an abuse of Court process deliberately intended to deny the applicant the fruits of the Consent Judgment in Civil Suit No. 23 of 2009. Lastly, that it is just and equitable that the orders sought be granted.

No affidavit in reply was filed by the respondent whose counsel indicated that it was not necessary as he intended to submit only on matters of law. When this application came up for hearing on 6th May 2013, the applicants were represented by Mr. Mugabi Silas Kahima while Mr. Abbas Bukenya held brief for Mr. Kabega Moses for the respondent. Counsels for both parties agreed to file written submissions which they did and are considered in this ruling.

The background to this application is that on 3rd February 2009 the applicant sued the respondent for recovery of Ug. Shs. 172,995,902/= being unpaid balance for labour services rendered to the respondent in Adjumani District Farm Institute buildings and access road projects, unpaid remuneration, general damages for breach of contract, interest and costs. The respondent filed a defence in which it denied the applicant’s claim and instead counterclaimed for compensation for loss of use of machines, to wit; a Concrete Mixer, Dumpy Level and Plate Compactors allegedly confiscated and converted by the applicant for his own use.

When Civil Suit No. 23 of 2009 came before this Court on 14th February 2011, counsel for the respondent/defendant/counterclaimant informed Court that on 4th February 2010 the parties executed an agreement whose content formed the basis of the claim in Civil Suit No.201 of 2010 between the same parties. According to counsel Civil Suit No. 201 of 2010 was seeking to enforce the agreement that was made in settlement of Civil Suit No. 23 of 2009. Counsel then submitted that it was their humble view that Civil Suit No. 23 of 2009 had been settled and what remained for trial was the counterclaim. Counsel for the applicant/plaintiff/counter-defendant in response submitted that there was a purported settlement which failed because the respondent/defendant/counterclaimant issued cheques which were dishonoured. He also informed Court that they never registered the agreement but the plaintiff tried to enforce it unsuccessfully. Both counsel then prayed for an adjournment to enable them harmonise the position of the matter which they conceded was very confusing. The matter was then adjourned to 2nd March 2011.

When the parties appeared on 2nd March 2011, they informed Court that they had agreed that the respondent pays the applicant a sum of Ug. Shs. 50,000,000/= as full and final settlement of all the monies due and owing. It was further agreed that enforcement of the Consent Judgment shall await the outcome of the counterclaim. Court then entered a Consent Judgment in Civil Suit No. 23 of 2009 in those terms.

However, the counterclaim is still pending before this Court hence this application for an order of its dismissal under Order 17 rule 5 and Order 52 rules 1 & 3 of the CPR. The applicant contends that two years have lapsed since service of the applicant’s reply to the counterclaim was effected on the respondent and no step has been taken to set down the counterclaim for hearing.

The applicant’s counsel submitted that for the applicant to succeed under Order 17 rule 5 of the CPR he has to show Court that the respondent/counterclaimant did not set down the case for hearing within eight weeks or ten weeks from the delivery of the defence or reply as was observed in ***Agard Didi vs Baku Raphael HCMA No. 117 of 2004.***

It was contended for the applicant that the inordinate and/or inexcusable delay or failure of the respondent to take a step and set down the counterclaim for hearing since March 2011 stands glaringly unchallenged and is not only a clear manifestation of lack of interest on the respondent but an abuse of Court process in bad faith, deliberate and calculated to deny the applicant the fruits of the Consent Judgment in Civil Suit No. 23 of 2009 whose execution is subject to the final determination of the counterclaim.

Counsel for the applicant submitted that the ends of justice demand that the application be granted and the counterclaim dismissed for want of prosecution to prevent the respondent’s abuse of Court process since the applicant has been religiously waiting on the respondent to set down the counterclaim for hearing. It is the applicant’s contention that the respondent ignored the matter despite the numerous concerns raised and efforts to cause the counterclaim to be set down for mediation and there is no justification for the respondent’s conduct in denying the applicant the fruits of his judgment.

On the other hand, the respondent’s counsel submitted that under Order 17 rule 5 of the CPR it is not mandatory that Court in all instances has to dismiss the case on application by the defendant unless the circumstances do deserve which is not the case in this matter. He argued that Order 17 rule 5 of the CPR should be read together with the Judicature (Commercial Court Division) (Mediation) Rules 2007 and the Commercial Court Division Administrative Direction No. 1 of 2011 since these two instruments regulate the practice in this Court besides the CPR.

The respondent’s counsel heavily relied on the Mediation Rules and argued that rule 8 makes it mandatory for mediation in all matters and that under rule 8 (4) all rules in the CPR cease to run from the date of referral order to mediation until after the report of a neutral person has been filed in the Court upon completion of the mediation process. He added that no report of the neutral party has been filed yet there was only one attempt at mediation.

It was further submitted for the respondent that the application is misconceived, brought in bad faith and is premature since the respondent does not control the mediation process within court. It was contended that the matter having failed to proceed on the day it came up before the Mediator, then a date ought to have been given by the mediator to the parties or at least a copy of any order or report made by such mediator given to the respondent so it may fix the matter or set down the suit for hearing.

Counsel contended that the respondent has interest in its matter which relates to its proprietary rights over the property illegally detained by the applicant to its detriment and unjust enrichment of the applicant. He argued that the respondent’s rights and claim of their violation deserves investigation by this Court and the best interest of justice would be served by Court ordering for completion of the mediation process as provided for in the Mediation Rules.

I have read the pleadings filed in this matter together with their attachments and given due consideration to the arguments made by both counsel. I have also had the benefit of perusing the records in Civil Suit No. 23 of 2009 as well as the mediation file. The only issue for determination is whether the counter claim should be dismissed for want of prosecution. As submitted by counsel for the applicant, section 19 of the Judicature Act Cap. 13 as amended by section 4 of the Judicature (Amendment) Act 2002, bestows upon Court inherent powers to make orders for expeditious trials, curtail delays in trials, limit and discontinue delayed prosecutions to prevent abuse of Court process.

On the other hand, I also agree with the respondent’s submission that under rule 8(4) of the Judicature (Commercial Court Division) Mediation Rules, SI 55 of 2007 when a matter is referred to mediation the time limits set by the CPR cease to run from the date of the referral order until the mediation report is filed in the Court upon completion of the mediation process. The pertinent question in this case is therefore whether this matter has been referred to mediation and if so, whether the mediation process has been completed or it is still ongoing.

Upon perusal of the records in Civil Suit No. 23/2009 with a view of getting answers to the above questions, I found a mediation report dated 13th day of March 2012 under Mediation Cause No. 013 of 2011. Much as the date of referral to mediation is not stated on the court file, I was able to establish from the mediation that it was opened on 20th January 2012. There is a letter on the mediation file dated 20th April 2011 by which counsel for the applicant/plaintiff/counter-defendant complained about the delay in setting down the counterclaim for hearing.

There is also a follow up letter dated 20th January 2012 by which counsel for the applicant/plaintiff/counter-defendant referred to their earlier letter and still complained about the delay and at the same time forwarded the plaintiff’s mediation summary to facilitate the mediation process. By that letter counsel also sought the indulgence of the Registrar of this Court to prevail over the counterclaimant to prosecute the case which was long overdue. Since the letter was copied to counsel for the respondent/defendant/counterclaimant, it appears they got the message and so they filed their mediation summary on 24th January 2012.

A notice for mediation was extracted on 15th February 2012 for a mediation which had been fixed for 13th March 2012 at 12.00 pm. According to the affidavit of service on record, the notice was served on the applicant/plaintiff/counter-defendant by one Simon Odil Ebiru a law clerk in the firm of advocates representing the respondent/defendant/counterclaimant.

When the matter came up on the date fixed for mediation it was only counsel for the plaintiff who appeared with his client. There was no appearance for the defendant. The mediator’s record states that the defendants were served but he (the mediator) also called their lawyer who did not come. He therefore closed the file and sent the case to the judge for trial. On the same day he filed a mediation report which indicated the mediation results as, “Non-attendance of the defendant and their lawyer(s)”.

I have taken time to highlight all the above records so as to put the respondent’s arguments in this application in its proper context as I answer the questions earlier raised in this ruling. It is quite apparent from the above records that mediation failed because the respondent/defendant/counterclaimant and its counsel who had served the hearing notice on the applicant/plaintiff/counter-defendant’s counsel and could not therefore claim to be unaware of the date deliberately kept themselves away to frustrate the process. I say deliberately because I have not come across any letter wherein the respondent’s counsel explained the reason for their non-attendance of the mediation proceedings or any record showing that they attempted to procure another date for mediation or even appealed for the mediation process to be reopened. All that I have found is that the mediation file was closed, a mediation report filed and the matter return before the judge for trial.

In light of the above fact, I believe the argument of counsel for the respondent that the matter is still pending mediation is not even convincing to them but how much more unconvincing to this Court. Counsel ought to know better that rule 11 of the Judicature (Commercial Court Division) Mediation Rules requires the mediation proceedings to be completed within thirty days from the date of order directing mediation. The respondent and its counsel could not therefore have failed to attend mediation proceedings on 13th March 2012, sat back without taking any steps to have another chance and expected that the proceedings would go on indefinitely.

In the circumstances, this Court is not at all satisfied with the reasons given by the respondent for failure to set down the counterclaim for hearing for over one year from the time the mediation report was filed way beyond the ten weeks anticipated by Order 17 rule 5 of the CPR. I wholly agree with the applicant that there is no justification whatsoever for this failure apart from the ill-intention of denying the applicant the fruits of the consent judgment. It is indeed an abuse of the Court process!

In ***Hussein Nsubuga Mpombe and Others vs Administrators of the Estate of the Late Gladys Ndagire Faaka HCMA No. 726 of 2011*** this Court observed that the administration of justice in this Court is also guided by the Constitution (Commercial Court) (Practice) Directions. According to direction 2(2) the Commercial Court was established “*to deliver to the Commercial community an efficient, expeditious and cost effective mode of adjudicating dispute that affect directly and significantly the economic, commercial and financial life of Uganda”*. This court cannot therefore be seen to sanction unjustified delays like in the instant case where it is manifestly clear that the respondent is not interested in prosecuting its case for selfish motive.

On the whole, I would exercise the power given by section 98 of the CPA, section 19 of the Judicature Act Cap. 13 as amended by section 4 of the Judicature (Amendment) Act 2002 and the discretion conferred by Order 17 rule 5 of the CPR and allow this application with the result that the respondent’s counterclaim is dismissed with costs. I so order.

 Before I take leave of this matter, I wish to observe that counsel for the applicant in his submission relied on the case of ***Agard Didi vs Baku Raphael*** (supra) and prayed that this Court also exercises its discretion under Order 17 rule 6 (1) to dismiss the counterclaim since for over two years no action had been taken by the respondent with a view to proceeding with the counterclaim. First of all, that rule refers to either party implying that if any of the party takes steps then the two year period starts running afresh after that action.

In the instant case, the summary of the records highlighted above shows that the last action on the case was taken on 13th March 2012 when the mediation proceedings failed to take off and a report was filed. It is therefore not true that no steps were taken for over two years as submitted. In the premises, Order 17 rule 6 (1) is not applicable to this case.

Dated this 6th day of December 2013.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.00 pm in the presence of:

1. Mr. Arthur Kirumira who was holding brief for Mr. Musa Kabega for the respondent, and;
2. Mr. Samuel Okurut the applicant whose counsel was absent.

**JUDGE**

**06/12/13**