**THE REPUBLIC OF UGANDA**

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

**COMMERCIAL DIVISION**

**MISCEALLANEOUS APPLICATION NO.142 OF 2015**

**MK FINANCIERS LTD ………………………………………APPLICANT**

**VERSUS**

**NATUKUNDA ALICE………………………………………RESPONDENT**

**BEFORE HON. JUSTICE HENRY PETER ADONYO:**

**RULING:**

1. **Background:**

This is an application brought by way of notice of motion under Order 9 Rules 17 and 18 Civil Procedure Rules, Order 52 Rule 1, Order 37 Rule 3 and Section 98 of the Civil Procedure Act seeking for orders that High Court Civil Suit No.777 of 2014 be reinstated on the register with judgment on summary suit entered in favor of the Plaintiff upon the terms contained in the plaint and for the costs of this application to be in the cause.

The application is supported by the affidavit of Mr. Male H. Mabirizi K. Kiwanuka and it sets out the grounds under which the application is brought.

1. **Grounds for this Application:**

Briefly, the grounds as contained in the affidavit in support are that the Applicant was never informed of the court’s own motion of fixing of the suit, that the Applicant was properly following up the case having filed an affidavit of service and was preparing to apply for judgment and decree, that the suit is by way of summary suit where the Defendant never applied for leave to appear and defend within the stipulated time period and that it was in the interest of justice that this application be allowed.

1. **Submissions:**

During the hearing of the application, Mr. Maale Mabirizi the Managing Director of the Applicant represented the Applicant. The Respondent was absent and not represented as the matter proceeded ex parte based upon the provisions of the law under which it was brought.

Mr. Male Mabirizi confirmed to this Honourable court as to the representations of the parties in this application as stated above for he informed the court that he was personally representing the Applicant as he has done so before and was capable of doing so his a trained lawyer with the competency to argue the application on behalf of the Applicant. On that basis, he was allowed to argue the application for parties before a court of law have a right either to argue matters before court by themselves or through own chosen representatives.

In his submissions, Mr. Male Mabirizi contended this application was brought up by the Applicant as a result of the applicant having not been afforded the right to be heard contrary to Article 28 of the Constitution of the Republic of Uganda of 1995 as amended even when the applicant still was within the required time to file an affidavit of service. In making this statement he relied on Order 17 Rule 6 of the Civil Procedure Rules which he stated gives a matter a latent period of two years before the court could exercise its powers to dismiss a suit after no steps are taken by a party. He stated that in respect of the dismissed suit the applicant had extracted the summons to file a defense to be served upon the defendant/ respondent in November, 2014 yet the suit was dismissed in February, 2015 which he believed was premature since that matter being a summary suit would only come up for hearing after leave for defending the suit has been filed and granted or after an application for judgment thereof filed. He submitted that without those stages being followed by the Honourable Court, and then court would have no powers to set the suit for hearing without giving notice to the Plaintiff. That the maximum would be that the court would order new service thus resulting in the decision of the court to dismiss the suit to be high handed and illegal which necessitated the reinstatement of the dismissed suit since the affidavit of service in the main suit was on the record and that he had showed by affidavit evidence those facts which points to the inevitable decision of the court to be that of reinstating the main suit. He further prayed for the costs of this application to be provided for.

1. **Resolution:**

In resolving this application, I note that he Applicant has cited Order 9 Rules 17 and 18, Order 52 Rule 1, Order 37 Rule 3 of the Civil Procedure Rule and Section 98 Civil Procedure Act with a view that based upon these provisions of the law, this Honourable court would be pleased to grant the orders sought.

Under Order 9 Rule17 of the Civil Procedure Rules, the court is empowered to dismiss a suit where it is called for hearing but neither party appears. Under Order 9 rule 18 of the same Civil Procedure Rules, the court is empowered to set aside suit which dismissed if it is satisfied that there were sufficient grounds which caused the parties in as suit not to appear when a suit is set for proceeding on such a day as set by the court.

Order 52 Rule 1 of the Civil Procedure Rules also provides for commencement of applications such as the instant one by notice of motion where no specific procedure is provided.

On the other hand Order 37 Rule 3 of the Civil Procedure Rules provides thus:

**“… a vendor or purchaser of immovable property or their representatives respectively may at any time or times, take out an originating summons returnable before a judge sitting in chambers, for the determination of any question which may arise in respect of any requisition or objections, or any claim for compensation, or any other question arising out of or connected with the contract of sale, not being a question affecting the exercise or validity of the contract’’.**

This provision of the Civil Procedure Rules raises doubt as to its applicability in the instant matter for it seems misplaced since the very provisions of the law cited and relied upon would help the court to arrive at an appropriate decision thus in my view I would consider that Order 37 Rule 3 of the of the Civil Procedure Rule would not be called upon to help a party who seeks from the court the reinstatement of a dismissed suit. That being so while , the other cited provisions of the law could be considered appropriate, I would find that this particular rule was misplaced and thus inapplicable for it is trite law that parties must be bound by their pleadings and I would find no singular reason as to why this court should depart from this well settled principle of the law where there is a clear mix up of the provisions of the law which the instant applicant would want this court to consider and thus eventually grant the orders sought for such a technicality can be cured by the invoking of Article 126(2) (e) of the Constitution 1995 which requires the court to handle matters before them without undue consideration to technicalities. This to me seems to be the holding which was enunciated in the case of **Libyan Arab Uganda Bank v Messrs Interno Ltd [1998] HCB 73.** Thus if that were so then this ground alone would dispose of this application for I would consider that the mix up of the provisions of applicable would not help the case of the applicant.

However, the justice of a matter would require that the court does not merely jump to a conclusion upon citing such situations as referred above but would proceed to look at the purpose of an application as a whole and closely examine why in the first place it was made like in the instant one where it is seemingly being argued that the major aspect of this application was fo the court to consider reinstating a dismissed main suit. In that respect, it is of uttermost importance that an examination of the legal provisions which relates to the reinstatement of suits be had

One of the leading authorities in this area is the case of The case of **National Insurance Corporation v Mugenyi And Company Advocates [1987] HCB 28** where the test to be considered by a court in deciding whether to reinstate a dismissed suit or not. These tests include as to whether a applicant honestly intended to attend the hearing of his or her suit and did his or her, the nature of the case and whether there was a *prima facie* defence to the case in question.

According to Mr. Male Mabirizi for the Applicant , it was contended that the fact that suit which was dismissed it is required by law that before such a suit is dismissed , a defendant was required to be notified of the existence of such a suit for it was a summary suit and was required to apply to the court after notification for leave to appear and defend the suit meaning that such a suit could not be set for hearing unless and until the process had been followed and the defendant by his or her volition chose not to seek for such leave or that the court was satisfied that adequate notice had been given to a defendant who chose to ignore it and thus the court would proceed to set the matter for hearing. It is contended by Mr. Male Mabirizi that this was not done in regards to the instant matter for the dismissed suit was filed in November 2014 and was eventually dismissed in February 2015 yet the defendant had been properly notified of the suit and there was an affidavit of service to that effect on the on record in the main suit and thus the next step would have been for the defendant either to apply for leave to appear and defend or the applicant to apply to the court on the failure of the defendant to apply for such leave or the court having refused to grant such leave for judgment and a thereafter a decree would follow but when the applicant’s managing director was fulfilling the lawful requirement of filing such an application he was informed by the staff at the court’s registry that the suit had been dismissed which in the view of the Applicant was a high handed act in the circumstances.

In resolving this matter, I have had the benefit of perusing the main file in regards to this matter which is High Court Civil Suit No. 777 of 2014. The parties in that matter is as they appear on the plaint are stated to be **MK Financiers Ltd v Natukunda Alice** which is at synch with this application. However, what is quite revealing is that the alluded to affidavit of service filed on its record is in regards to a totally different case referred to as **MK Creditors Ltd v Kazooba Francis** registered **High Court Civil Suit No. 778 of 2014.** This affidavit which is stated to have been put on record to support the contention of the applicantthat it was I n the process of making an application for judgment as against the defendant would seem to be relating to another matter altogether than the instant one meaning that if this court were to ignore that affidavit then there would be no return of service in regards to the instant matter for the submissions of the applicant that the decision of the court to dismiss his suit yet he was engaged in following the right procedure not to hold true by the process server for there would indeed be no action having taken by the applicant within the time when pleadings are allowed by law to be completed to stop the court from proceeding as it did by dismissing the main suit for the purpose of commencing a suit under summary procedure is to enable a plaintiff to obtain quick remedies to its grievances as against a defendant who it is presumed has no defence at all to such a suit thus party who files such suit making the use of summary procedure is presumed to be exercising such vigilance showing that he or she is eager to obtain judgment presently.

Thus regarding the summary suit of which this application seeks reinstated, the record shows that it was filed in October 2014 however no affidavit of service was put on record thereafter though the one which is on which did not apply to it was filed twenty days after. Thereafter, up to the time when the matter was dismissed in February, 2015, over four months had passed without taking any step to ensure that the matter proceed to its logical conclusion. This kind of laxity on the part of the Applicant in a commercial matter cannot be entertained by this court for suits in this court are managed in such a manner to enable quick and efficient disposal of suits to enable parties go back as soon as possible to pursue their businesses and develop the economy of this country for the benefit of all.

Thus the irregularities as noted above led to the disposal of the suit for want of prosecution.

Therefore, I would find that due to the irregularities which could have resulted from the fact that the applicant was represented by its own managing director though said to be a qualified lawyer without instructions to external legal representatives which is not a sufficient cause as held in the case of **Mitha v Ladak [ 1960] EA 1054** to have caused the laxity in the follow up of the required procedure therefore leading to the non identification of the irregularities mentioned above thus making the applicant to not act as required .

On the whole therefore I would find that this application is incompetent for not there exists latent mix up on the procedure adopted by the applicant but there is clearly no sufficient grounds shown for the reinstatement of the suit shown to warrant this court to act as prayed.

In the circumstances I would be constrained to dismiss this application accordingly with no orders as to costs.

The Applicant would well be advised file the proper application if it has sufficient reasons for doing so for the reinstatement of the dismissed suit in any event.

I do so order accordingly.

**Henry Peter Adonyo**

**Judge**

**7th May, 2015.**