THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISC. APPLICATION NO. 44/1995

1. NGOBI NKOOBE KIREGEYA)
2. AMULAFIRE KISAMBIRA) ..... APPLICANTS

VERSUS

1. HENRY MULOKI)
2. SAM MUWUMBA) ..... RESPONDENTS

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

RULING

This is an application to set aside the dismissal of suit no. 16/93. The application was lodged by the two applicants Ngobi Nkoobe Kiregeya and Amulafire Kisambira and the two respondents are Henry Muloki and Sam Muwumba. The application is by notice of motion dated 25-10-95 and it was based on the provisions of Order 9 rules 24 and 26 of CPR, it is supported by an affidavit sworn by the learned counsel for the applicants Mr. Michael Akampurira. The affidavit is dated 25-10-95. Mr. Mutyabule Kisadha the learned counsel for the two respondents also swore an affidavit in reply.

The facts leading to this application are that the two applicants filed a suit before this court against the two respondents. The suit was fixed for hearing on 5-9-95 but before the hearing of the suit the two applicants in their joint letter addressed to the District Registrar of Jinja intimated that they wished to withdraw the suit against the two respondents under Order 22 rule 1 of Civil Procedure Rules. The two applicants were however served with a hearing notice for 5-9-95 as per affidavit of the process server Patrick Mukama. When the case was called for hearing on 5-9-95 the plaintiffs were not in court and the learned counsel for the respondents/defendants moved the court to have the case dismissed under Order 9 rule 19 of CPR. He argued that the court should not allow the withdrawal of the suit as requested by the plaintiffs because the application for withdrawal was not properly before the court. The court

..../2

agreed with his argument and the suit was accordingly dismissed with costs to the respondents/defendants.

In the present application the learned counsel for the applicants Mr. Akampurira argued that the dismissal by this court was improper because according to him at the time the suit was dismissed it did not exist because the plaintiffs had withdrawn it. In his view the proper order to be made by the court should have been to acknowledge the intention of the plaintiffs and accept the withdrawal of the suit and at any rate leave of court was not required for such a withdrawal on the authority of the case of: Ezekeri Mulondo v. Fenekansi Semakula (1982)HCB 27. He further argued that the plaintiffs had a reasonable cause for not appearing in court on 5-9-95 because as far as they were concerned by that date they had no case in court since they had already withdrawn their case.

On his part Mr. Mutyabule the learned counsel for the two respondents argued that this application had no merit and it should be dismissed as no reasonable cause had been shown as to why the applicants did not attend court on 5-9-95 and that the affidavit sworn by the learned counsel for the applicants was materially defective as it was a mere hearsay and that the notice of withdrawal was not served upon him. Mr. Mutyabule further argued that no interest of justice would be served by this application being granted.

During the course of his argument Mr. A kampurira clearly indicated that this application was to serve two purposes: First was to show that the refusal by the court to accept the withdrawal of the case by the plaintiffs was wrong, secondly that the court record should be set right by showing that the case was withdrawn but it was not dismissed. Reasons for this last ground are understandable from legal point of view because where a case is dismissed under Order 9 rule 19 of CPR the plaintiff's remedy is only to apply for setting aside the dismissal under Order 9 rule 20 of CPR but he cannot file the same case again but a case withdrawn under Order 22 rule 1 of CPR may be reinstituted subject to the law of Limitation.

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Another point which came out of Mr. Akampurira's argument was the mode of terminating this case. In my considered opinion the substance remained the same because there is nowhere where the plaintiffs have shown that they are anxious to follow up their suit. The main reason why Mr. Akampurira wanted the case withdrawn is that it would have reduced the costs of the suit since the learned counsel for the defendants would not have attended court on 5-9-95. This argument might be a valid one but it is doubtful whether by bringing this application Mr. Akampurira was in any way reducing the costs of his clients in this matter. In any case the issue of costs could have been easily raised before the taxing master.

Be that it as it may, Order 9 rule 24 of CPR under which this application was lodged gives this court discretation to set aside an ex-parte judgment or decree if it is shown by the applicant that there was reasonable cause as to why the applicant did not attend court on the day the case was called for hearing or he was not served. At this point it may be pointed out that, the learned counsel for the applicant's did not tell the court why he decided to proceed under rule 24 and not rule 20 of Order 9 under which the suit was dismissed.

In the present case the learned counsel for the applicants is saying that the parties (plaintiffs/applicants) had a reasonable cause in a sense that they assumed that their letter to have the suit discontinued had put an end to the suit so there was no reason for them to appear in court on 5-9-95. Their assumption that they had nothing to do with court after writing their letter withdrawing the suit must have been misplaced because the two applicants have not shown anywhere that the application or their letter for withdrawal of the case was ever communicated to Mr. Mutyabule the learned counsel for the respondents/defendants. At any rate on that date (5-9-95) as prudent plaintiffs they should have come to court to know what was happening to their case or to ascertain whether their letter had been acted upon after they had been served on 27-8-95 with hearing notice for the same case. In my view the failure by the plaintiffs to appear before the court on 5-9-95 was not caused by any reasonable excuse, therefore this court was in order to have acted in the way it did act on 5-9-1995.

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Regarding Mr. Mutyabule's contention that no interest of justice will be served by granting this application I, with due respect do agree with him because if it is a question of saving costs the costs have already been incurred by the behaviour of the plaintiffs who have filed an application which in my view is bound to cost them more which ever way the application may end. The position would have been quite understandable if the plaintiff's complaint was that their case is still in existence and they want to follow it up.

Finally I would like to point out that since Mr. Akampurira's approach to this matter was essentially questioning the jurisdiction of the court in entertaining a matter which had been withdrawn, in my view the best remedy to rectify that situation would have been by way of appealling to a higher court on the ground that at the time the court sat on 5-9-95 there was no matter before it to entertain that would have probably saved the situation in a better way because Order 9 rule 24 of CPR under which this application was lodged specifically covers a situation where the matter was dealt with under Order 9 rule 19 of CPR but I do not think that rule would cover where the court has acted illegally. The purpose of Order 9 rule 20 or rule 24 is to enable the court to set aside an ex parte decision so that they party who was not present may pursue his claim, but I do not think that the Order was intended to give power to the court to correct its own mistakes or irregularities. To set aside the Order of 5-9-95 whereby this court rejected the purported withdrawal would be tantamount to revising that decision; the position would have been entirely different if the court had only dismissed the suit and had not declined to entertain the withdrawal in the same Order of 5-9-95. In my view the remedy here is not to have the dismissal set aside but to appeal against the dismissal because the appellate court may have a wider scope to deal with the two issues of refusal to grant the withdrawal and the dismissal of the suit.

In all these circumstances I find that this application has no merit and I accordingly do dismiss it with costs to the defendants/respondents.

C. M. KATO

JUDGE

30-11-1995