

UGANDA / JUDGMENT

**COMTEL Intergrators Africa Limited v
National Social Security Fund
(Miscellaneous Application No. 772 of 2016)
[2017] UGCommC 5 (24 February 2017)
[2017] UGCommC 5**

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 772 of 2016

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 772 OF 2016

(ARISING FROM CIVIL SUIT NO 54 OF 2013)

COMTEL INTERGRATORS AFRICA LIMITED}..... APPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUND}..... RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant brought this application under the provisions of Order 52 rule 1 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for an order to set aside the dismissal of HCCS 54 of 2013. Secondly, it is for reinstatement of HCCS No. 54 of 2013. Thirdly, it is for the costs of the application to be provided for.

The grounds of the application are that the Applicant and the Respondent have been engaged in several discussions/meetings in respect of an amicable resolution of the suit which meetings culminated in an agreement in principle on a compromise settlement arrived at between the parties in the last fortnight (by 5th of August 2016). Secondly, on 8th June 2016 the Applicants Counsel wrote a letter to the court seeking to have the suit dismissed for want of prosecution and the suit was accordingly dismissed on that basis on 22nd June, 2016. Thirdly, the Applicants Counsel's letter seeking dismissal of the suit in June 2016 at the very same time as the parties

were discussing and were on the precipice of concluding a settlement was either inadvertent or made in bad faith. Lastly, the Applicant avers that it is in the interest of justice that the dismissal of HCCS No. 54 of 2013 is set aside and the suit reinstated so that it is either settled or disposed off on the merits.

The application is supported by the affidavit of work Basil Tyaba, an Information Technology Consultant working with the Applicant who deposes that he is fully conversant with the circumstances of the case and deposed to the contents of the affidavit in that capacity. The facts in the affidavit are that the Respondent and the Applicant engaged in several discussions/meetings in respect of an amicable resolution of the suit which meetings he attended on behalf of the Applicant. The meetings reached an agreement in principle on a compromise settlement arrived at in the last fortnight. On 18th June 2016 the Applicant's Counsel wrote a letter to the court seeking to have the suit dismissed for want of prosecution and the suit was accordingly dismissed on 22nd June 2016. He further repeats the other grounds in the notice of motion. The letter of the Respondents Counsel dated 8th of June 2016, addressed to the Registrar, High Court of Uganda, Commercial Division is the attachment annexure "A" to the affidavit in support.

In reply Richard Byarugaba, the Managing Director of the Respondent deposed that he read and understood the application and supporting affidavit and his response is as follows:

The Applicant instituted HCCS 54 of 2013 against the Respondent on 7th February, 2013 and the Respondent filed a defence on 21st February, 2013. At the time of filing of this suit, the Respondent was represented by its in-house Counsel from its Legal Services Department who participated in the mandatory mediation process 2013 and the mediation failed to reach a settlement. In May, 2013 the Respondent engaged the services of Messieurs Ligomarc advocates who took over the full conduct of the defence. Accordingly Messieurs Ligomarc advocates filed a Notice of Change of Counsel and served it on the Applicant's lawyers on 18th June, 2014. During the last mediation session in July 2013 the Applicant undertook to provide the Respondent and the Mediator relevant documents which would facilitate further discussions but the Applicant declined to provide the documents and did not make any further communication on the matter. The Applicant's Counsel was informed that the Respondent had handed over the conduct of this suit to the Respondent's external lawyers and advised the Applicant to channel all correspondences on the issue to its external lawyers.

On the basis of information of the Respondent's advocates Messieurs Ligomarc advocates, he deposes that he believed it to be true that the Applicant has not engaged at all for further negotiations and it has not pursued its case in court since July 2013 up to May 2016 when there was resort to update on the status on progress of the case. The Applicant having not taken any step to prosecute the matter since July 2013, the Respondent formally instructed its advocates to have the suit dismissed for want of prosecution according to a copy of letters of instruction attached. The advocates moved the court to have the Applicant's suit dismissed and the same was accordingly dismissed on 22nd June 2016. Following the dismissal of the Applicant's suit, he contacted the Applicant seeking to enter into negotiations on the matter with the Respondent and no settlement been arrived at the time of making the affidavit. Failure to reinstate the suit by the

court will not stifle the Applicant's intended negotiations. The advocates did not act in bad faith because at the time of applying for dismissal there were no negotiations for settlement between the parties who acted on the Respondent's formal instructions.

On the basis of information of his advocates he deposed that the Applicant's failure to take reasonable steps to prosecute the suit against the Respondent for over three years is sufficient justification for dismissal for want of prosecution. Furthermore, the Applicant has not shown any justification for its failure to take any step in prosecution of its suit against the Respondent to warrant this court to exercise its discretion in its favour so as to reinstate the suit. The application would prejudice the Respondent which had been burdened by the suit that had been filed in February 2013. In light of the passage of time and the Applicant's lack of interest in the dismissed suit, he deposes that the justice of the matter requires the Applicant's application to be denied.

In rejoinder Basil Tyaba deposed that he read the affidavit of Mr Richard Byarugaba. He deposed that the Respondent was served with summons on 8th February, 2013 but failed to file a defence in time when the default judgment and decree was entered against it for the full quantum of claim. In the spirit of amicable resolution of the matter, the Applicant on request of the Respondent agreed to have the default judgment set aside and consented to the Respondent filing a written statement of defence whereupon the matter went for mediation. He further deposed on the contents of the Applicants claim's which include a claim for consulting fees in respect of work for 2749 consulting hours provided by the Applicant to the Respondent for the period September 2008 to March 2009 for various ICT support services in respect of the Respondent's Integrated Management Information Systems. Secondly, the Applicant filed a claim for reimbursable expenses incurred by the Applicant for the same period of time. Thirdly, the Applicant filed a claim for a refund of the payment by the Applicant for the renewal of the Respondents Oracle software licence, for use in relation to the Integrated Management Information Systems for the period 16th of October 2008 up to 16th of October 2009. Lastly, the Applicants claim was for general damages, interest and costs.

By the Respondents e-mail dated 14th of May, 2013 to the Applicant's lawyers, the Respondent's legal officer, forwarded a working document containing the position on the claim in which they agreed that the unpaid consulting hours due to the Applicant where 2749 hours. Secondly, the parties deferred with the Applicant on the hourly rate applicable to the unpaid hours, asserting that the rate of over US\$75 per hour totalling to US\$206,175 as opposed to the rate of US\$250 per hour advanced by the Applicant. In other words they asserted that US\$51,201 should be paid as opposed to the amount of the Applicant of about US\$288,530. Furthermore they asserted a refund of the renewal of the Oracle license of US\$42,000 as opposed to the Applicant's claim for US\$95,532. They asserted and interest rate on the above claims at the rate of 6% per annum as opposed to the rate of 12% per annum claimed by the Applicant.

On the 20th of May 2013 in meeting was held between the Applicant and the Respondent on the basis of the working document and the Respondent revised the unpaid 2749 consulting hours upward from US\$75 per hour to US\$100 per hour while the Applicant insisted that the rate should be US\$250 per hour. It was agreed that the Applicant would have the receipts evidencing payment

of its consultants at the rate of US\$250 per hour and the receipts would be validated by the Respondent and formed the basis for further negotiations. On reimbursable expenses it was agreed that the Applicant will aver in supporting receipts for the additional sum claimed beyond the US\$51,201 previously agreed. On the Oracle license refund the Respondent improved its offer from US\$42,000-US\$55,000. On the interest the Respondent improved its offer from 6% per annum to 12% per annum.

For the period June 2013 to June 2014 the Applicant met with various officials of the Respondent and provided the documentation requested to support the reimbursable expenses and the hourly consultancy rate culminating in a meeting with the Respondents then managing director Mrs Geraldine Ssali around July 2014 where the meeting further discussed the working document in which meeting the Applicant and the Respondent achieved the following:

There was an increase in the hourly rate applicable to the unpaid 2749 consulting hours from US\$100 per hour to US\$150 per hour. Secondly, an increase on the Oracle license refund from US\$55,000-US\$70,000.

Negotiations between the Applicant and the Respondent stalled between July 2014 and April 2016 due to various changes to the Applicant's top management and an impasse in decision-making. However in May and early June 2016 the Applicant held the final round of meeting with the Respondent's current Managing Director Mr Richard Byarugaba, including a meeting held on 2nd June, 2016 in which there was a further narrowing of differences only working document and final settlement was achieved.

The Applicant and the Respondent effectively agreed to payment as follows:

Firstly, the parties reached a compromise hourly rate of US\$150 applicable to the unpaid 2749 consulting hours amounting to a sum of US\$412,350. Secondly, they agreed to reimbursable expenses in the sum of US\$51,201. On the Oracle license refund, the agreed sum was US\$70,000. Lastly on the rate of interest it was agreed to be 6% per annum. This brought a total of the sums payable inclusive of interest to US\$757,642.

In the premises he contended that it was not true that negotiations and discussions between the Applicant and the Respondent with a view to amicable settlement of this suit were only engaged in subsequent to 22nd June, 2016 when the suit had been dismissed. The Applicant continued to exhibit willingness to pursue and resolve its claim by engaging the Respondent and the parties are clearly in agreement that there was a substantial sum of money due to the Applicant for services and advance payments rendered to it on behalf of the Respondent. In the premises it is in the interest of justice that this suit is reinstated to enable adjudication on admissions of liability and quantum and should that fail, the suit should be tried on the merits. If this suit is not reinstated, the Applicant will suffer irreparable injury and injustice and the Respondent would be unjustly enriched as a further claim by the Applicant will be fraught with challenges on the ground of limitation.

In further reply to the rejoinder of the Applicant's Basil Tyaba, Rachel Nsenge, legal Counsel of the Respondent company and one of the advocates on the legal team having personal conduct of the case deposes that she read the affidavit in rejoinder. She generally agrees that there was a default judgment which was set aside by consent and the matter went for mandatory mediation. Furthermore, they developed a working document to bolster the discussions. Subsequent to her e-mail on the 14th of May 2013 forwarding the party's mediation working document, a meeting was held on the 20th of May 2013 where the Respondents officials requested for documents and Applicants officials undertook to avail the documents to enable progress of the negotiations. The information was not availed by the Applicants and the settlement could not be reached. In July 2011 another meeting was held with the Applicant where the Respondents officials emphasised the need for the documentation requested for to enable them to make progress in the matter and the Applicant did not refer to the Respondent with information and documents requested for. Since July 2013, the Applicant did not engage the Respondent at all regarding the matter.

Because they believed that the Applicant was no longer interested in progressing further with the negotiations, in May 2014 the Respondent engaged its external advocates take over conduct of the matter. During the negotiations no settlement was reached and the parties only had a working document to guide the talks during the mediation process and no final position was reached. Secondly, on the basis of information of the Respondent's Managing Director Mr Richard Byaruhanga, she deposes that the Applicants only approached him for possible negotiations in July 2016 after the suit had been dismissed. Furthermore, there was no agreement or consensus reached between the Applicant and the Respondent in respect of the dismissed suit.

The reinstatement would cause injustice to the Respondent and shall amount to an abuse of the process of court.

In a further affidavit in rebuttal Richard Byaruhanga the Managing Director of the Respondent confirmed that he was contacted by the Applicant's representative seeking a meeting in respect of the matter sometime in July 2016 for an appointment. At the time they contacted his office he had no information regarding the matter and they agreed to meet the Applicants representative to hear him out. Subsequently they had a meeting in July 2016 where he was presented with a document said to be working document that had been prepared during negotiations with the Respondent. He made notes from a further appraisal by the Applicants for purposes of presenting to the Team that had been actively involved in the matter in order to get an appraisal on the status of the dispute. No compromise or settlement was reached in respect of the dispute between the Applicant and the Respondent.

The court was addressed in written submissions. The Applicant was represented by Counsel Masembe Kanyerezi assisted by Counsel Timothy Lugayizi Messrs MMAKS Advocates while the Respondent was represented by Counsel Olivia Kyalimpa Matovu of Messrs Ligomarc Advocates.

The court was addressed in written submissions.

Applicant's submissions

The Applicant's Counsel submitted that the dispute between the parties is essentially on the quantum of the sum payable as the parties differ on the applicable rates payable for those services. He submitted that case law indicates that an Application to set aside a suit dismissed for want of prosecution under the court's inherent jurisdiction is based on Judicial discretion which is only exercised when a fresh suit cannot be filed by reason of limitation; where triable issues in relation to the underlying suit are disclosed provided the Applicant pays the costs thrown away by reason of the dismissal and reinstatement proceedings. He submitted that the Applicant's suit sought to be reinstated was filed on 7th February, 2013 but the Respondent failed to file its Defence in time and a default judgment was entered against it for payment of the full quantum of the claim plus interest and costs. Upon being requested by the Respondent and without having to file an Application to set aside, the Applicant consented to setting aside of the default judgment and the suit was sent for Mediation failing of which it was to be disposed of by trial on its merits.

The Applicant raised five issues for resolution of the Application as follows;

1. Whether there are any triable issues disclosed
2. Whether not setting aside the dismissal and trying the case on its merits would cause unjust enrichment
3. Whether a fresh suit is barred by limitation
4. Whether the suit was properly dismissed without notice to the Applicant
5. Whether the Applicant should pay costs thrown away by the dismissal and reinstatement proceedings

Counsel addressed issues (i) and (ii) jointly. He submitted that the Applicant has a valid claim disclosed in the plaint and the parties engaged in various meetings subsequent to the suit being filed to negotiate on various items of the claim. He relied on the two affidavits in support and in rejoinder. On the basis of the evidence disclosed therein he submitted that it is not in dispute that the Respondent conceded to owing substantial sums of money to the Applicant as such there are triable issues in the suit. If the dismissal is not set aside there would be grave injustice to the Applicant and unjust enrichment to the Respondent. With regard to unjust enrichment the Applicant's Counsel relied on **Steel Makers Ltd vs. AB Steel Products (U) Ltd, H. C. C. S No. 824 of 2003** for the proposition in the holding of Justice Geoffrey Kiryabwire that at common law a party as a general rule will not be allowed to unjustly benefit from another.

The Respondent having admitted owing the Applicant an amount in the region of US\$757,000 they would be unjustly enriched if the application is not granted.

In resolution of **issue iii) on whether a fresh suit is barred by limitation** the Applicant's Counsel submitted that the Applicant's claim arose in or about April 2009 and is unable to bring a fresh claim as the six (6) year limitation period has lapsed. He relied on **Meera Investments Limited vs. Uganda Investment, Misc. Application No. 114 of 2015****, where the court held that a suit

dismissed under Order 17 rule 6 (1) can be instituted afresh subject to the law of limitation. There would be no need to apply for reinstatement if the suit is not statute barred. On that basis the court ought to exercise its discretion in the interest of justice to reinstate the suit.

In resolution of **Issue iv) on whether the suit was properly dismissed without notice to the Applicant**, the Applicant's Counsel submitted that the dismissal of the suit at the instance of the Respondent as opposed to the Court on its own motion was invalid at law. He contended that the Respondent's letter seeking dismissal of the suit was not brought to the notice of or copied to the Applicant as would have been the case under Order 17 Rule 5 which requires the Application to be inter partes and the dismissal was accordingly effected ex parte. He relied on **Meera Investments Limited vs. Uganda Investment (supra)** at page 12, Para 2 for the holding of this court that: "...the action of the Respondent's Counsel of moving without notice to the Applicant was not an act which can go unchallenged." He submitted that the dismissal is challengeable on this ground.

In answer to **issue (v) on whether the Applicant should pay costs thrown away by the dismissal and reinstatement proceedings**, the Applicant's Counsel submitted that it is trite that exercise of judicial discretion is required to be balanced and on this basis it is only proper that the Applicant concedes to the costs thrown away by the dismissal of this Application. He prayed that the application be allowed and the suit reinstated.

Respondent's submissions

The Respondent's Counsel opposed the application and addressed the court on three grounds. Firstly she submitted that the dismissal of the suit under order 17 rule 6 was valid and justified. Secondly the issue is whether the Applicant has furnished sufficient cause for the failure to take steps for a period of three (3) years and lastly the Court's discretionary powers to reinstate suits should not be abused by a negligent Plaintiff.

In resolving the **first ground on whether the Dismissal of the suit under order 17 rule 6 was valid and justified**, the Respondent's Counsel submitted that the Applicant's suit was dismissed under **Order 17 Rule 6 of the Civil Procedure Rules** which provides for suits to be dismissed if no step is taken by either party for a period of two (2) years or more. She submitted that the Plaintiff may argue that Court was harsh by striking out the Plaintiff's suit but opted to rely on Lord Denning MR's decision in **Allen vs. Sir Alfred McAlpine & Sons Ltd [1968] 1 ALL ER 543 at pp 546 & 547** that: "The delay of justice is a denial of justice ... To no one will we deny or delay the right or justice..." It is impossible to have a fair trial after a long time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should be dismissed for want of prosecution."

She submitted that **Order 17 rule 6** enables the Courts to satisfy their Constitutional mandate to ensure that justice is not delayed in accordance with **Article 126 (2) (b)** and it is the duty of the Plaintiff to set down his or her suit for hearing in so doing enable Court to have the matter brought to trial with reasonable expedition. She submitted that **Order 17 rule 6** does not envisage

the need for a formal application or notice being given because a whole two (2) years or so passed and the Court can dismiss the suit on its own motion. If the Plaintiff/counterclaimant were interested in their matter, they would have taken some steps towards ensuring that the suit/counterclaim progresses and such a case is categorized as backlog. She prayed that court looks into the substance of the dismissal and not merely the form and that such step to be considered in the context of the aforesaid rule must be taken on Court Record. She relied on **Duhaime's Civil Litigation & Evidence Law Dictionary** for the definition of 'want of prosecution' which is defined as:

***"an application to a judge to dismiss a law suit alleging that the litigant has inexcusably delayed moving the litigation along and that under the circumstances, the litigation ought to be dismissed."

The leading case on want of prosecution is decision of **Allen vs. Sir Alfred McAlpine & Sons (1968) 1 A11 ER 543**, which sets out a three part test: (i) Inordinate delay; (ii) That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable; and (iii) Defendants are likely to be seriously prejudiced by the delay*.* She submitted that the learned Registrar properly exercised his discretion to dismiss the suit under **Order 17 rule 6 of the Civil Procedure Rules**.

In resolving ground ii) on whether the Applicant has furnished sufficient cause for the failure to take steps for a period of three (3) years, the Respondent's Counsel submitted that the Applicant/Plaintiff cannot justify its failure to prosecute its case on the basis of any action taken by them and on perusal of the Applicant's application and affidavit in support deposed by Mr. Tyaba, it is clear that the Applicant had no justifiable reason to advance. The Applicant only relied on correspondences and a *'Working Document'* which had been exchanged as at May 2013. Even after being notified about the change of advocates, the Applicants still did not engage the Respondent's Advocates at all. He submitted that the Respondent denies the Applicant's claims that they were engaged in negotiations and the Respondent has documentary evidence to prove that the Applicant's claims are false. In any case, Courts have stated that the steps to be considered as steps taken must be steps that are evident on the court record and there are none. In the premises, she submitted that the Applicant has not shown sufficient cause for her failure to appear in the matter and prosecute her case.

In resolution of **Ground 3 on whether Court's Discretionary Powers to reinstate suits should not be abused by a Negligent Plaintiff**, the Respondent's Counsel submitted that it is trite law that where a specific provision of the law provides for a remedy, a party should not seek to invoke general remedies, **Order 17 rule 6 (2)** provides for the right to file a fresh suit subject to the law of limitation therefore the Applicant should pursue that remedy. Furthermore, the Applicant has not furnished sufficient cause for its inaction to justify the court's exercise of its discretion to invoke general provisions to grant a reinstatement other than insisting on the remedy already provided for under **Order 17 rule 6**. In addition the facts in the case of **Meera Investments** are distinguishable from those in the instant case as in this case the Respondent's denied the claim that any discussions had taken place since July 2013 yet the matter was dismissed in June 2016

which is different from the 12 days difference in the **Meera case**. She submitted that the Applicant has a heavier duty to prove that there was justification as to why he did not take reasonable steps to prosecute the case. In the case of **Dr. James Akampumuza vs. Eddie Tukamushaba Kuroboza, Makerere University Business School & 2 others**, it was held that:

"O. 17 r 6 of the Civil Procedure Rules ... enable the Courts to manage their work load by eliminating all cases which appear rather redundant from its system. This is part of Court Case Management tools applied by the Judiciary. This Order can be invoked by either party or by the court on its own motion."

In *Nilani versus Patel & Others* [1969] EA 340 Dickson J held that: "a Plaintiff who is in pursuit of a remedy, should take all necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches..."

He prayed that Court be pleased to maintain the order dismissing Civil Suit No. 54 of 2013 and the Application should be dismissed with costs to the Respondent.

In rejoinder the Applicant's Counsel responded to the three grounds raised by the Respondent as follows;

In response to **ground one** the Applicant's Counsel with reference to the **Meera Case (Supra)** submitted that the interpretation of **Order 17 Rule 5 of the CPR** can only be invoked when there has been no action taken by either party not where one party moves court to dismiss a suit in the absence of another. He further submitted that it is also questionable that the Registrar in this case did not give reasons for exercise of his discretion to dismiss the main suit. He submitted that the Applicant has shown that it is still interested in this matter which was dismissed without giving it a chance to have a say on the dismissal and prayed that the dismissal of the suit be set aside.

In response to **ground two**, the Applicant's Counsel submitted that **Order 17 Rule 6 (2)** has an inbuilt remedy where a suit has been dismissed under sub rule (1) and that is to file a fresh suit. Further that if filing of a fresh suit is barred by limitation, as would be in this case, then the Applicant would suffer the for failure to pursue the matter and submitted that court can invoke its discretionary powers in such circumstances. He submitted that the Applicant was still in contact with the Respondent with a view of settling out of court when the Respondent moved court to dismiss the suit without notice to the Applicant. He further submitted that it is only fair for the suit to be set aside as the Applicant also agreed to set aside a default judgment without the Respondent having to apply for setting aside. He also submitted that requiring the Applicant in this case to file a fresh suit that would be barred by limitation would result in an injustice that can be remedied by Court invoking its inherent powers to reinstate a dismissed suit as the Respondent has not demonstrated that it will suffer any prejudice if the main suit is reinstated. He submitted that the Applicant is willing to pay costs thrown away by the dismissal if court deems it fit and prayed that the above ground makes out sufficient cause for failure to pursue the main suit within 2 years and prayed that court grants the application.

In response **ground three** the Applicant's Counsel submitted that **Meera Investments Limited case (supra)** is applicable both in fact and in law because in that case court held that such dismissals are to be made by Court on its own motion and not upon Application by the Defendant in the main suit; suits dismissed under **Order 17 Rule 6** can be reinstated at the discretion of Court especially when it would defeat justice to require an Applicant to file a fresh suit that will be barred by limitation. He reiterated his submissions in chief and prayed that the Application be allowed and the suit be reinstated.

Ruling

I have carefully considered the Applicant's application together with the responses thereto by the Respondent's officials as well as the detailed affidavits in support, in reply, in rejoinder and in rebuttal to the rejoinder. I have also considered the attachments thereto and the submissions of Counsels together with the authorities relied on.

Starting from the first premises, the first question that emerges is whether the suit was dismissed for want of prosecution or it was dismissed under Order 17 rule 6 of the Civil Procedure Rules for failure to take any steps by both parties within two years with a view to proceeding or progressing with the suit. Want of prosecution is provided for under Order 17 Rule 5 of the CPR while making no application or taking no steps for a period of two years by either party with a view to proceeding with the suit is provided for under Order 17 Rule 6 of the CPR. The two rules do not deal with the same circumstances for dismissal of the suit and I will set them out for ease of reference:

"5. Dismissal of suit for want of prosecution.

If the Plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery of the counterclaim, 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 the application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as to the court may seem just.

6. Suit may be dismissed if no step taken for two years.
- (1) In any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed.
- (2) In such case the Plaintiff may, subject to the law of limitation, bring a fresh suit."

The Applicant's Counsel seems to gravitate between the two rules emphasising that it was wrongly dismissed for want of prosecution which requires notice to the other side. For that reason I have considered the dismissal dated 22nd of June 2016. In a letter dated 8th June, 2016 Messieurs Ligomarc advocates Counsel for the Respondent wrote to the Registrar, High Court of Uganda, Commercial Division seeking dismissal of the suit under Order 17 Rule 6 of the Civil Procedure Rules. The last paragraph reads as follows:

"In the premises, we pray that this honourable court invokes its discretion under *Order 17 rule 6* to dismiss the suit with costs."

The Registrar's order is written on the letter itself which was filed on the court record on 22nd June, 2016 at 9:46 AM. This is what he wrote:

"Suit dismissed for want of prosecution."

As noted above, the Respondent's Counsel applied for dismissal of the suit under Order 17 Rule 6 of the Civil Procedure Rules which has been quoted above. Secondly, Order 17 rule 5 of the Civil Procedure Rules caters for a situation where the Plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, within 10 weeks from the delivery of the counterclaim, set down the suit for hearing, then the Defendant may move the court to set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution and on the hearing of the application the court may order the suit to be dismissed accordingly. In other words the application has to be heard and therefore has to be a formal application with notice to the Plaintiff or Counterclaimant as the case may be. In this case the suit was dismissed without notice.

It is my holding that this suit was dismissed under Order 17 rule 6 of the Civil Procedure Rules which had been invoked by the Respondent's Counsel. I have further considered the submission of the Applicant's Counsel that such a dismissal had to be on the motion of the court and not on the Defendant Counsel's motion. While moving court by application that may be true with Order 17 Rule 5, it is inapplicable with rule 6 of the Civil Procedure Rules. The honourable Registrar did not quote any rules. Anyway the suit was dismissed on 22nd June 2016 and it could only have been validly dismissed under Order 17 rule 6 (1) of the Civil Procedure Rules which order was superimposed on the Respondent's letter quoting the rules. I have also considered the argument that the court was moved by the Respondent's Counsel. That argument does not prejudice the orders made by the court if the court moves under Order 17 Rule 6 (1) of the Civil Procedure Rules which faults both parties for not making any application or taking any step with a view to proceeding with the suit. The Registrar moved according to the letter and the context of the order is clear that it was a dismissal under Order 17 rule 6 (1) though the court is silent on this. Can this be implied is the question.

I have consequently perused the record and established that on 25th August, 2016 the Registrar endorsed an order drawn by Messieurs Ligomarc advocates and the two orders were worded as follows:

1. The suit is dismissed for want of prosecution under O. 17 r. 6.
2. Costs are awarded to the Defendant."

This was supposed to be an order made on 22nd June, 2016 upon application of Messieurs Ligomarc advocates in a letter dated 8th of June 2016.

The words "want of prosecution" can be termed as a misnomer because the correct rule is cited. It becomes another problem to read the second order which was never made on 22nd June, 2016 that costs are awarded to the Defendant. This was a brand-new order issued by the Registrar on the 25th of August 2016.

With reference to Order 21 rules 7 (4) of the Civil Procedure Rules, it is provided that: "any order, whether in the High Court or in the Magistrate's Court, which is required to be drawn up shall be prepared and signed in like manner." The preceding rules give the process and manner of preparation of decrees and orders. Order 21 rules 6 of the CPR gives the contents of a decree and provides that the decree shall agree with the judgment and it shall specify clearly the relief granted or other determination of the suit. The procedure for approval of decrees is contained in Order 21 Rules 7 of the Civil Procedure Rules which stipulates that a party who is successful in the suit should prepare without delay a draft decree and submit it for approval of the other parties to the suit who may approve with or without amendment or reject it without undue delay. The draft is approved by the parties, shall be submitted to the Registrar of the court and if he or she is satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly. If all parties and the Registrar do not agree with the terms of the decree within the time the Registrar shall fix, it shall be settled by the judge who pronounced the judgment. The principle to be derived from the above two rules is that the Order should originate from the judgment. In other words the order can only be derived from the judgment and is merely a formal expression of the judgment. It cannot contain what has not been ordered. Section 2 of the Civil Procedure Act defines an "order" to mean: "the formal expression of any decision of a civil court which is not a decree, and shall include a ruling nisi." In other words it is a summary of the judgment or expression of any decision of a civil court which is not a decree. The Judicial Powers of Registrars (Practice Direction Number 1/2002) and Direction 6 thereof provides that the Registrar may handle order 17 rules 2, 5 and 6 of the Civil Procedure Rules. For purposes of proceedings under Order 50 of the Civil Procedure Rules, rule 6 provides that the Registrar shall be deemed to be a civil court. A decision made under rules 5 or 6 of order 17 of the Civil Procedure Rules results into an order of dismissal. There was no order for costs in the decision of the court dated 22nd of June 2016 and therefore the order extracted by the Respondent's Counsels is illegal since it is not derived from the decision of the Registrar dated 22nd of June 2016.

For emphasis I agree with the Applicant's Counsels that there was no order or decision based on Order 17 rule 5 of the Civil Procedure Rules, which is the specific rule under which a decision to dismiss the Plaintiff's suit for want of prosecution can be taken. The rule specifically provides that 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 the application the court may order the suit to

be dismissed accordingly or make such other order, on such terms, as the court may deem just. There was no application that was served on the Plaintiff's Counsel and there was no hearing as envisaged by the rule. A dismissal for want of prosecution would be untenable and cannot stand.

I have struggled with the wording of the decision of the Registrar which is contained in the decision of 22nd of June 2016 wherein he wrote: "suit dismissed for want of prosecution" as well as the order which was extracted from the decision. I conclude that the registrar used the word generally to mean failure to prosecute the suit and delay by the plaintiff in the context of the Respondent's letter. On grounds of the application the Applicant's Counsel argued that they relied on the decision of this court in **High Court Miscellaneous Application No 114 of 2015, Meera Investments Ltd vs. Uganda Investment Authority** which I will consider after taking into account the other grounds of the application that I find lacking. Going back to the grounds of the application the first one is that the underlying merits of the claim in this suit and whether triable issues are disclosed.

The underlying issues in this suit cannot be the basis for setting aside any dismissal under Order 17 rules 5 or 6 of the Civil Procedure Rules in terms of the rules themselves because the dismissal is not on the merits but a decision to dismiss is based on the rules and due in general to delay in prosecuting the suit. The application will be confined to the grounds for setting aside any dismissal. Triable issues cannot form the basis for granting an application to set aside a dismissal for delay. For that reason the first ground of the application cannot be taken into account in this application without prejudice to exercise of discretion on any just grounds.

The second ground is whether the exercise of discretion in not setting aside the dismissal and trying the case on its merits would result in unjust enrichment of the Respondent.

I would summarily disregard this ground because the Plaintiff may have a very good case on the merits but fail to prosecute it for which reason it may be dismissed either for want of prosecution under Order 17 rule 5 or failure to take steps with a view to proceeding with the suit for two years or more under Order 17 rule 6 of the Civil Procedure Rules.

Both rules deal with the failure to prosecute the suit or fix it for hearing within the specified time lines in the rules. In either case it has nothing to do with whether the Plaintiff's case or the counterclaimant's case has merit and it is not related to what benefit the Defendant will retain by such a dismissal. If that were the case most dismissed suits would be reinstated because the Plaintiff has reawakened and seeks to pursue the claim. In the premises the ground where it is argued that there is a question as to whether the dismissal would lead to unjust enrichment does not hold water and should not be considered in the facts and circumstances of this case as I will demonstrate below.

The third ground of the application is whether a fresh suit is barred by the law of limitation. Secondly, the fourth ground is whether the suit was properly dismissed at the instance of the Respondent and without notice to the Applicant under the provisions of Order 17 Rule 6 of the Civil Procedure Rules. I will consider grounds 3 and 4 of the application together since they are doctrinally intertwined. This is because the grounds for dismissal under Order 17 rules 5 and 6 of

the Civil Procedure rules differ materially and therefore the grounds, if any, for setting aside any dismissal there under may vary. A rule 5 dismissal is preceded by failure by the Plaintiff/Counterclaimant to set the suit down for hearing eight weeks after delivery of the written statement of Defence or ten weeks after delivery of the counterclaim whichever is applicable. Secondly the question of limitation of actions is intertwined with whether this court can reinstate the suit under rule 6.

On the question of whether the suit is barred by the law of limitation, the Applicant's Counsel argued that paragraph 3 (i) - (iv) of the plaint indicates that the cause of action arose in or about April 2009 and it followed that the Applicant is unable to file a fresh suit. He relied on a decision of this court in **High Court Miscellaneous Application No. 114 of 2015, Meera Investments Ltd vs. Uganda Investment Authority** at pages 11 and 12 that the question of whether the suit is barred by the law of limitation is relevant in the exercise of the courts discretion. The relevant part of the ruling is as follows:

*"Where a suit has been dismissed under Order 17 rule 6 (1) of the Civil Procedure Rules it can be instituted afresh subject to the law of limitation. There would be no need to apply for reinstatement if a fresh suit was not statute barred. Obviously in this case the Plaintiffs suit was filed in the year 2006 and the correspondence giving rise to the cause of action against the Respondent arose earlier and is, at the time of this application in February 2015, caught by the law of limitation. I have considered the case cited by the Applicant's Counsel of **Rawal vs. The Mombasa Hardware Ltd [1968] EA 392** and of the East African Court of Appeal."*

In that case I quoted from Law JA that the inherent jurisdiction of the High Court was not excluded in the special circumstances of the case. Secondly, that the Defendant had not been deprived of any defence that he originally enjoyed or that he had originally pleaded. It is being deprived of what may be called an acquired defence which accrued to him solely to the action taken by the court. I also noted that the rule is invoked where either party have not taken a step or made an application with a view to proceeding with the action. The rule is not invoked for want of prosecution by the Plaintiff alone. Want of prosecution by the Plaintiff is provided for by Order 17 Rule 5 of the Civil Procedure Rules. I considered the act of the Respondent's Counsel moving court when the two parties were engaged in discussions. The question in those cases is whether the court has any discretionary power to reinstate the suit dismissed under Order 17 Rule 6 (1) of the Civil Procedure Rules.

I have accordingly again read through the decision relied upon in that case of **Rawal vs. The Mombasa Hardware Ltd [1968] EA 392**. In that case a suit had similarly been dismissed for failure to take any step on the motion of the court without notice to the parties. The Plaintiff applied to the High Court for the order of dismissal to be set aside and for the suits to be restored. On the question of limitation Law JA of the East African Court of Appeal sitting at Mombasa held at page 393 as follows:

“Mr. Inamdar’s second submission is that even if the court has a residue of discretion in this case, the court will not exercise its discretion where the effect is to deprive a part of a defence such as the protection of limitation and in that respect again I think that the cases relied on by Mr. Inamdar were not altogether in point having regard to the peculiar position here. The Defendant, if the case is restored, is not being deprived of any defence that he originally enjoyed or that he originally pleaded; he is being deprived of what one might call an after-acquired defence which has accrued to him solely through action taken by the court of its own motion of which he was not even aware. I personally consider that in the special circumstances of this case the remedy provided for in r. 6, that is of bringing a fresh suit, was not intended to be exhaustive and that the inherent jurisdiction vested in the court by s. 97 (98) of the Civil Procedure Act is for that reason not excluded.”

It is apparent that the court took into account the fact that the dismissal was on the motion of the court. In other words the Defendant who was not even aware of the dismissal was not deprived of the defence of limitation. And in the special circumstances of the case, the court would restore or reinstate the suit. The point is made clearer by Sir Charles Newbold P at pages 394 and 395. After reference to the judgment of Law JA on the issue of limitation he said:

*“Turning to the second point urged by Mr. Inamdar, he has urged that, in fact, Wicks, J. exercised his discretion. I regret I cannot accept that. It is true that in the course of his judgment Wicks, J. did say that a court should not take action which would result in defeating the protection of the law of limitation. I consider, however, that those words were spoken in relation to the consideration of the interpretation of the rule and not to whether, in the circumstances of the case, he should exercise discretion. On this matter I should like to agree entirely with what Law, J. A. has said. *This is not a case of taking away a benefit which the Defendant had of the protection of the law of limitation. The Defendant had no such protection, no such right, at the time that he filed his defence. As my brother has pointed out, this right has come into existence by the action of the court itself*.” (Emphasis added).*

In both judgments their Lordships noted that the Defendant did not enjoy a defence of limitation because it was the courts action which brought it into existence. The Defendant did not have a defence of limitation, until the court on its own motion dismissed the suit.

The Applicant concedes that it cannot file a fresh suit which will be caught by the law of limitation. Its only remedy is to set the dismissal of the court aside. Such an argument can only be made on the basis of a dismissal under Order 17 Rule 6 (1) of the Civil Procedure Rules. On the separate point my conclusion is that the Registrar dismissed the suit under Order 17 Rule 6 of the Civil Procedure Rules which is the rule on which he was moved by the court. Just like I concluded, a motion under Order 17 Rule 5 of the Civil Procedure Rules has to be a formal application with notice to the opposite side coupled with the hearing before a dismissal decision can be made. On the other hand an Order 17 Rule 6 dismissal is discretionary and is on the motion of the court. The rule does not provide that any notice shall be given to the opposite side neither does it debar one of the parties from applying informally for dismissal. The Respondents Counsel wrote a letter addressed to the Registrar seeking dismissal. The Registrar was prompted by the letter to dismiss the suit which invoked Order 17 rule 6. It is my conclusion therefore that this suit was dismissed for want of action by either of the parties with a view to proceeding with

the suit. Unlike the case of **Rawal vs. The Mombasa Hardware Ltd [1968] EA 392** where the Defendant was not involved at all, in this case there was a letter written by the Defendant's Counsel.

On questions of fact I have considered the evidence and I agree with the Respondent's Counsel that the Applicant did not take any steps after 2014 and only woke up after this suit was dismissed in June 2016. For that reason, the circumstances of this case are distinguishable in the sense that the Defendant's Counsel/Respondents Counsel approached the Registrar for dismissal by a formal letter and the order was even written on the copy of the letter. Secondly, there was a period of about two years when the parties were not engaged in negotiations. The parties were supposed to conduct a court annexed mediation which has time lines for completion and not negotiations outside the auspices of the court except within the timelines for mediation which is three months under rule 8 of the Judicature (Mediation) Rules, 2013. This is unlike the case of **High Court Miscellaneous Application No. 114 of 2015, Meera Investments Ltd vs. Uganda Investment Authority** when the parties were recently in touch discussing costs and settlement thereof and where there was a consent order on the main suit and the court was influenced by the fact that the Respondent in that case attempted to go behind the back of the Applicant under the circumstances. The decision of the court is very clear in the last paragraph that:

"In light of the recent communications between the parties I am inclined to invoke the inherent powers of the court which I hereby do and hereby set aside the dismissal of the suit without commenting on the merits of the suit or the defence."

I also noted that:

"The action of the Respondent's Counsel of moving without notice to the Applicant was not an act which can go unchallenged since both parties were in touch on the question of costs for purposes of settling the suit."

There was already a consent judgment between the parties and what remained was a discussion on the issue of costs. For that reason I agree with the submissions of the Respondent's Counsel on this point. When was the recent communications between the parties? I agree with the Respondent's Counsel that in the circumstances of this case there was no communication between the parties for over a year. The last communication was in June 2014 when the Respondents In-house Legal Counsel wrote to the Applicants Counsel a letter dated 28th May 2014 concerning a last meeting in July 2013 where the Applicant was requested to avail documents to prove certain claims and thereafter decided to hand over conduct of the Defence to the Respondent's External Lawyers Messrs Ligomarc Advocates (See paragraph 9 of the affidavit in rebuttal of Rachael Nsenge). During earlier negotiations no settlement was reached and subsequently the Applicant moved for discussions after the suit had been dismissed in June 2016 two years later. This is confirmed by the MD of the Respondent Richard Byarugaba in paragraph 5 of his affidavit in rebuttal that the Applicant approached him in July 2016 after the suit had been dismissed. When he was approached he was not aware of what stage the matter was in and he sought a brief on the same from officials handling.

The question before this court is not whether this court has discretion in the matter. The question is whether exercise of the discretion would deprive the Respondent of the defence of limitation as argued. I am bound by the decision in **Rawal vs. The Mombasa Hardware Ltd [1968] EA 392**. The defence of limitation was not unavailable to the Defendant because the Court exercised its jurisdiction without the Defendant's knowledge to dismiss the suit. In this case the Defendant knew and moved the court. Should they be deprived of the defence of limitation by the Applicant filing a fresh suit? In the above East African Court of Appeal case, the court held that it would exercise discretion in special circumstances. Law JA held (supra)

"I personally consider that in the special circumstances of this case the remedy provided for in r. 6, that is of bringing a fresh suit, was not intended to be exhaustive and that the inherent jurisdiction vested in the court by s. 97 of the Civil Procedure Act is for that reason not excluded."

Which special circumstances were these? The special circumstance was that the court on its own motion dismissed the suit under rule 6 (1) and the Defendant had nothing to do with it. The situation was clearly explained by Sir Charles Newbold P in the following quote above namely:

**"This is not a case of taking away a benefit which the Defendant had of the protection of the law of limitation. The Defendant had no such protection, no such right, at the time that he filed his defence. As my brother has pointed out, this right has come into existence by the action of the court itself*."*

In this case the right to the defence of limitation came about by the intervention of the Defendant. Can it be taken away?

Last but not least I have considered the decision of the Court of Appeal in **Allen v Sir Alfred Mcalpine & Sons Ltd Bostic v Bermondsey and Southwark Group Hospital Management Committee Sternberg and Another v Hammond and Another [1968] 1 All ER 543**. The facts of that case are distinguishable as they deal with considerable delay and the suit was dismissed for want of prosecution and not a rule in **pari materia** with Order 17 rule 6 (1) of the Civil Procedure Rules. It is inapplicable to the circumstances of this case and because of the wording of the Ugandan rule 6 (2) of Order 17. In the circumstances of this case, Order 17 rule 6 (2) provides that where a suit is dismissed, the Plaintiff may subject to the law of limitation file a fresh suit. The Defendant is protected from a further action if the subsequent action is barred by the law of limitation as in this case. Last but not least I find nothing in the rule to bar the Defendant from moving the court by letter or otherwise. In **Meera Investments Ltd versus Uganda Investment Authority** (supra) I held that the Defendant ought to have notified the Plaintiff before moving court. The facts were that the parties were in touch on the question of costs and the rest of the suit had been resolved. The circumstances of this suit are distinguishable and the law needs to be applied as it is. A reinstatement defeats a defence of law of limitation which the Defendant availed itself by moving the court under Order 17 rule 6 (1) of the Civil Procedure Rules.

Last but not least I have considered whether the court can exercise its discretion to take away the defence of limitation that the Defendant availed itself.

In the premises I am not inclined in the circumstances of this case where the Plaintiff did nothing for a period of 2 ½ years to pursue the suit to exercise such a discretion if any. The rule seems hard on a Plaintiff with a meritorious claim and I leave it at that. Let the Rules Committee consider whether it should be retained in the form it is if the Plaintiff wakes up from delay and starts pursuing his or her suit after the limitation period of the cause of action expired. In the circumstances of this suit I do not need to consider the rest of the grounds. Before concluding the parties are still in negotiations outside court and the process can continue. If there is any acknowledgement of indebtedness by the Respondent a suit dismissed by court under Order 17 rule 6 cannot prejudice a fresh action based on a new cause of action as the matter is not res judicata.

I accordingly dismiss the Applicant's application on the ground that it defeats the defence of limitation that the Defendant/Respondent had availed itself by having the suit dismissed for inaction of over two years. Each party shall bear its own costs of the application. The Order of the Registrar awarding costs under Order 17 rule 6 in the extracted order is hereby set aside for being illegal.

Ruling delivered in open court on the 24th of February 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Joan Nakaliika holding Brief for Counsel Olivia Kyalimpa Matovu for the Respondent.

Counsel Timothy Lugayizi for the Applicant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

24th February 2017

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