

UGANDA / JUDGMENT

Ntalo v Stanbic Bank Uganda Ltd (Miscellaneous Application No. 211 of 2017) [2018] UGIC 30 (21 December 2018) [2018] UGIC 30

COURT

Industrial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 211 of 2017

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THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

MISC. APPL. NO.211 OF 2017

(ARISING FROM MISC. NO. 051/2016)

(ARISING FROM LDC NO. 176/2014)

(ARISING FROM CIVIL SUIT NO. 135/2013)

BETWEEN

NTALO MOHAMED..... CLAIMANT

AND

STANBIC BANK OF UG. LTD.RESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

1. Mr. Rwomushana Reuben Jack
2. Ms. Rose Gidongo
3. Mr. Anthony Wanyama

RULING

This ruling arises from a Notice of Motion filed in this court on 21/12/2017 for orders that the order that dismissed L. D. C. No. 176/2014 be set aside and the said LDC be reinstated as well as for costs of the application.

The application was supported by affidavit of one Ntalo Mohammed, the applicant. An affidavit in reply was sworn by one David Ssemakula Mukibi of MMAKS Advocates.

The application was filed by Mr. Dhobuazi Richard as agent of the applicant. The affidavit supporting the application was to the effect that counsel for the applicant failed to follow up the case after it had been transferred to the Industrial court from the civil division of the High court and as a result it was dismissed for lack of prosecution.

The affidavit in reply is to the effect that the application was made after an inordinate delay the claimant having failed to file a memorandum of claim in the Industrial court and later on having failed to prosecute the same claim which was rightly dismissed.

The background of the application is that the applicant filed civil suit 135/2013 in the Civil Division of the High court on 17/05/2013 and a defense was filed on 4/06/2013. The file was eventually transferred to this court and registered as labour dispute claim No. 176/2014. There was no follow up by the claimant (now applicant) and the respondent filed Miscellaneous Application 51/2016 seeking for dismissal of the claim. This court, satisfied that the claimant (applicant) was aware of the application, on 8/08/2016 allowed the respondent to proceed *ex parte*. After listening to the submissions of counsel, this court allowed the application in a ruling dated 12/8/2016 and dismissed labour dispute claim No. 176/2014 with costs to the applicant (now respondent). This application therefore is an attempt by the respondent in the above application to reinstate the above dismissed labour claim.

In his submission, Mr. Dhobuazi, agent of the applicant responded to the affidavit in reply by arguing that he was the proper agent of the applicant who properly signed the application and that the application (to file the memorandum of claim out of time) was not time barred by virtue of **Section 3(1) of the Limitation Act**, although it was filed out time of the prescribed time by this court as it gave schedules of time within which to do certain things.

Mr. Dhobuazi blamed the former lawyers of the applicant for the delay to act within the time they ought to have acted.

In his submission counsel for the respondent argued strongly that under **rule 5(1) of the rules of this court** the claimant (applicant) was required to have filed a memorandum of claim after receipt of a notice of reference which to date the claimant has not done, and yet this application does not include any orders to extend time. He submitted that the application did not disclose any exceptional circumstances that justified court's exercise of discretionary power. Relying on the case of **Zena Abdalla Okello & 2 others Vs Mayan Aziz Misc. Appll. 118/2009**, Counsel contended that the applicant made no effort to enthusiastically follow up the claim and there was no reason given for his dilatory conduct.

Relying on the decision in **Captain Gerald Willee Okweyo & Anor Vs Odeke Ismail & Anor Misc. Appn. 217/2012 (Mbale)** Counsel submitted that a dismissal done by court under **017.rr4** was not available for setting aside under **09rr27**. For the same submission he also relied on the Supreme Court case of **A P Bhmji Limited Vs Micheal Opkwo, Misc. Appln. 423/2011**. He argued that the dismissal having been made under **order 17r4** determined the applicant's Labour claim conclusively and a reinstatement of the same was not tenable in law.

Counsel submitted that the applicant had not adduced any evidence by affidavit or otherwise to justify his absence or absence of his counsel when the matter proceeded *ex parte* and eventually the claim was dismissed. He relied on the case of **Okwi Vs Okwa Misc. Appln. 314/2012 (Land Division)**.

DECISION OF COURT

Rule 16 of the Labour Dispute (Arbitration and Settlement)(Industrial Court Procedure) Rules, 2012 provides that the registrar within five days after registering a reference requires each party to file a memorandum and any further and better particulars.

The High Court transferred civil suit No. 135/2013. The registry of this court registered the case as Labour Dispute claim 176/2014. On checking the register, it is not clear exactly when the Labour Dispute Claim was registered although it seems to have been one of the first files referred from the civil Division of the High Court in a single batch when this Court was starting.

The court record does not show whether on being registered the parties were at any time required to file a memorandum each in accordance with rule 16 above mentioned.

It seems to us that the respondent, followed up the matter and believing that the claimant had lost interest in the case applied via Misc. Appln. No. 051/2016 to dismiss the suit for non-prosecution.

It is true that the claimant having instituted the civil suit in the High court should have been keen to follow up the same in a bid to fix it for hearing. Having said this, it was also incumbent upon the registrar of this court after registering it in this court, to, in accordance with rule 16 of the rules of this court, issue directions to the claimant to file a memorandum of claim. We at the same time think it was perfectly in order for the respondent to file M/A No. 051/2016 seeking to dismiss the claim for non-prosecution given that the claimant had not taken any step towards prosecuting the same since 2014 when it was referred to this Court.

We shall begin with the issue as to **whether this application is barred by law.**

Misc. Appln. 051/2016 which was dismissed for non-prosecution was brought under order 17 rule 4 which provides:

“Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witness, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.”

In our interpretation the above rule applies either where the suit has been properly fixed for hearing and a party fails to adduce evidence or where a party having been given time to do any other act in furtherance of the progress of the case, such party fails to do either or both.

Unlike **order 9 rule 18 of the CPR**, 017r4 does not provide a window for setting aside the dismissal.

09 rule 18 CPR provides:

.....”where a suit is dismissed under rules 16 or 17 of this order, the plaintiff may, subject to the law of limitation, bring a suit or he or she may apply for an order to set the dismissal aside; and if he or she satisfies the court that there was sufficient cause for his or her not paying court fees charges if any, required within the time fixed before the issue of the summons or for his or non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.”

We have internalized the CPR as well as the decisions of the courts of judicature, relied upon by the respondent. The decision in **A. P Bhimji Limited Vs MichealOpkwo**(M. A. No. 423/2011, Civil Division) is to the effect that the dismissal of a suit under order 17 rule 4 is a final disposal of the suit. Although this court is mandated to apply the Civil Procedure Rules, it is at the same time governed by the **Labour Disputes (Arbitration and Settlement)(Industrial Court Procedure) rules 2012**, which do not provide for dismissals or reinstatements of claims.

In the instant case, the claimant was represented by an agent in compliance with **rule 8 of the rules of this court** and the agent was not an advocate or a professional lawyer. In his submission he contended that whereas the claimant had instructed legal counsel to follow up the case and file the necessary papers, his legal counsel did not do it and hence the claim was dismissed at the negligence of his counsel.

The court record shows that although M/s N. Victoria appeared for the respondent(now Applicant) on 11/07/2016 when the matter was adjourned to 25/07/2016, on this latter date the respondent was not represented. Because the quorum of the court was not full, the matter was adjourned to 08/08/2016. On this date, in the opinion...of the court, the respondent, having failed to appear on 25/07/2016 without any reason proceeded to hear and determine the application by dismissing the claim. The impression the court received then by none appearance of both the respondent and counsel was that they had lost interest in the case and therefore it was a waste of courts time to continue pursuing the same.

We are now convinced that it was by the mistake of counsel’s failure to attend court that the claimant’s claim was dismissed. By engaging an agent to apply for reinstatement of the claim, we see in the claimant a determination to have the claim decided on merits and since the rules of

this court unlike the Civil Procedure Rules, allow this representation, we form the opinion that it would be in the interest of justice for the claim to be heard on merits. In the circumstances we decline to hold that the application is barred by law since in our view the facts in this case are distinguishable from those in the cases cited by counsel for the respondent, the major distinction being the law allowing an agent in this court and the claimant having opted to engage the agent other than Counsel.

The next issue is **whether the application to reinstate a memorandum of claim filed out of time is properly before court.**

As pointed out earlier in this ruling, in accordance with **rule (5(1) of the rules of this court** it is incumbent upon the registrar of this court, after receiving a reference from a labour officer, to give notice to the parties about the dispute in this court and require each of them to file a memorandum.

The practice of this court has been to Cause list a certain number of cases in a pre-session. It is the Cause listed cases that will have been required to file memorandum for purposes of rule 5(1) above. The court record reveals that there was no such notice from the registrar and there was no requirement for the parties to file a memorandum each because the case was not Cause listed for any pre-session hearing. The law requires that a memorandum of claim be filed **seven days after such notice**. Consequently time for filing a memorandum of claim could not run out before the notice from the registrar was served onto the claimant and therefore the application for extension of time was redundant. On perusal of the record, the memorandum of claim was filed only after the dismissal of the claim.

The time referred to in **rule 5(1) of the rules of this court** does not start running from when the file is registered in this court as counsel for the respondent seeks this court to believe, but when the registrar issues the notice to the parties. Consequently we agree with the respondent that in this particular case if time was to run it would be in accordance with the **Limitation Act** which time the claimant still had. In the absence of a notice to the applicant as prescribed by rule 5(1) above mentioned it is our finding that the memorandum of claim is properly before this court and that it was not necessary to apply for extension of time.

The last issue is **whether the application discloses grounds for setting aside the dismissal order of this court.**

According to counsel for the respondent the applicant has not illustrated exceptional circumstances to justify the court's exercise of discretionary power to set aside the dismissal order. He submitted that there was no evidence by affidavit or otherwise to demonstrate the reason why his counsel who attended on 11/07/ 2016 failed to attend court on subsequent days.

In the affidavit supporting the application, the claimant swore that he instructed Lukwago & Co. Advocates who assured him he would be updated on the progress of the file but when he realized he was not getting updated from his lawyer he personally checked with the Industrial court only to find that the case had been not only transferred to this court from the High court but that the

claim had been dismissed. On discovery of this fact he instructed the same lawyers to reinstate the case but on checking with the court he found they had done nothing and since he had no more money to give instructions to other lawyers, he engaged an agent who filed this application.

Given that the claim was dismissed because counsel was properly instructed but failed to do as instructed, we think it is not in the interest of justice to hold the mistakes of counsel against his client. As already pointed out we form the opinion that the justice of the case will be done when it is heard on its merits. We find in the circumstances that failure of counsel to do as instructed together with the fact that the claimant engaged an agent to prosecute his claim, as sufficient reason for setting aside the order of dismissal.

Accordingly for the reasons here above, we hereby set aside the order of dismissal of Labour Dispute Claim 176/2014. The memorandum of claim filed on 21/12/2017 was not out of time and the claimant is ordered to serve the respondent who will be expected to file a memorandum in reply within the prescribed **7 days after receipt** of the memorandum of claim.

No order as to cost is made.

Signed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

1. Mr. Rwomushana Reuben Jack
2. Ms. Rose Gidongo
3. Mr. Anthony Wanyama

Date: 21/12/2018

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