Norah Nakiriddo Namwandu v. Hotel International Ltd

High Court (Kalanla Ag.J.): November 13th, 1987

(Civil Suit No. 701 of 1987)

Civil Procedure - affidavit - contents-where affidavit in reply contains matters of law, argumentative and irrelevant to matters to be replied to - such affidavit incompetent oppresive and an abuse of Court process - and to be struck out with costs

Civil Procedure - dismissed action - application for restoration-applicant to show sufficient cause - sufficient cause means applicant had honest intention to attend hearing and did his best to do so - and was diligent in applying - sickness of Counsel constitutes just cause.

Civil Procedure - resjudicata - application - to constitute matters in issue should be heard and determined on merit for resjudicata to apply matter ought to have been heard and determined - where not heard resjudication does not apply.

Evidence - witnesses - Counsel - swearing affidavit in support of action by Counsel does not necessarily make him witness.

This was an application to reinstate the plaintiff/applicant's application for arrest and detention in civil prison of the defendant/respondent's director for disobeying the Court's temporary injunction of 17th July 1987. The application was brought under O.9 rr.19,20 and O.48 r.1 of the Civil Procedure Rules (S.I. 65 - 3) and was supported by affidavits of Counsel for the applicant and that of the applicant's son.

The background of this application was that a temporary injunction was granted to the applicant on the 17th July 1987 against the respondent which it was alleged was disobeyed by the respondent then on September 15th 1987 the applicant brought an application to have the defendant/respondent detained in civil prison for the disobedience. This application was however, defective and was dismissed as incompetent. A second application was later brought but was dismissed as Counsel for the applicant did not appear on the hearing date. From this dismissal the applicant brought the present application to set aside that dismissal and to reinstate the application.

The grounds of the application were that Counsel for the applicant was prevented from attending the hearing by sickness, that a message sent by his son through his chambers arrived in Court too late; further that the applicant's son too located the right Court too late [the [after application had been dismissed. He argued however, that there was sufficient cause for his failure to attend. Turning to the respondent's affidavit in reply to the applicant's Counsel argued that this affidavit did not disclose any fact, it was argumentative, irrelevant and vexatius and should be dismissed with costs. In reply Counsel for the respondent prayed that the Court should strike out the affidavit of Counsel for the applicant on the ground that as the affidavit and its contents was evidence in the application, by presenting the same that Counsel was giving evidence and further that the first dismissed application which is sought to be set aside acted as resjudicata having been decided on merit.

HELD: 1 For resjudicata to apply the matter ought to have been heard and determined. Where the merits of the matter was not heard and determined the doctrine of resjudicata does not apply. Relating this law to the facts of this application when the first application came to court, it was not decided finally, it was merely dismissed. The doctrine of resjudicata which Counsel for the respondent strongly argued did not apply to this application.

2 All that Counsel for the applicant deponed to in the application was that he was sick, that he sent his son to inform people in his chambers of how he would not attend Court. There was nothing to make Counselfor the applicant by deponing to the facts as he did becoming a witness in the application.

3 As regards the respondent's affidavit in reply it was very irrelevant to say the least. Counsel for the applicant deponed to the reasons why he did not attend court but the reply touched on matters of law, fact that were completely irrelevant to the application. The affidavit was unnecessarily and oppressively long and in some cases was insult to the purpose for which it was supposed to serve. Although there is no rule of court specifically giving power to the court to take affidavits off the file for prolixity, the court had an inherent power to do so in order to prevent its record from being the instrument of oppression. The affidavit would be removed from the Court's record.

4. In considering whether there was sufficient cause why Counsel for the applicant did not appear in Court on the date the application was dismissed, the test to be applied in cases of that nature was whether under the circumstances the party applying honestly intended to be present at the hearing and did his best to attend. It was also important for the litigant to show diligence in the matter. From the affidavits for the applicant's, it was clear that counsel did his best to appear in court but was prevented by illness. The son of the applicant did in fact come to court and that showed diligence on the part of the applicant.

Application to reinstate the dismissed application allowed. Costs to abide the outcome of the main suit. As regard the removed affidavit for the respondent the deponent of the same condemned to pay costs of Shs.2,000/= only to the applicant under 0.17 r 3 (1) (2) Order accordingly.

Legislations considered:

Civil Procedure Rules (S.I. 65 - 3) 0.9 rr.19,20
0.17 r 3 (1) and (2)
0.48 r.1

Cases cited:

Gandesha v. Kilingi Coffee Estate Ltd. [1969] E.A. 299

Jafferali v. Borrisco [1971] E.A. 165

Keharehad v Jan Mohamad [1919 - 21] 8 E.A.L.R. 64

Lake Victoria Bottling Co. Ltd v... Constance M.B.I of 1963

Pronta v. Afro - Traders Promoters Ltd [1978] H.C.B. 238

Hill v. Hart - Davis (1884) 26 Ch.D 470

Walker v Poole (1882) 21 Ch. D 83 J

Other materials considered:

Halsbury's Laws of England Vol. 3 para 103

(C. A. O.)