IN THE COURT OF APPEAL

AT MENGO.

(CORAM: MANYINDO V/P., LUBOGO, AG, J.A. ODOKI, J.A.) CIVIL APPEAL NO. 14 OF 1984

BETWEEN

NATIONAL INSURANCE CORPORATION.....APPELLANT.

AND

MUGENYI & CO., ADVOCATES .....RESPONDENT.

(Appeal from the Ruling and Order of the High Court of Uganda (P.A.P.J Allen, J) in CIVIL SUIT NO. 306 OF 1984.

JUDGMENT OF LUBOGO AG. J.A.

This appeal arises out of HCCS 306/82 which was an offshoot of HCCS 703/81. The facts are as follows:-. The respondent, Mugenyi and Company, Advocates had been acting for, the appellant the National Insurance Corporation for a number of years. The appellants withdrew instructions from the respondent before professional fees had been paid. The respondent then filed several actions against the appellant. These civil actions were consolidated in - BCCS 7O3/81. The respondent having been successfully applied for execution of the decree by way of attachment of the alleged appellant's building situated at Plot 13B Kampala Road known as Amadinda House. The appellant filed objection proceeding under rule 5 of Order 19 through Mr. Mulira Advocate stating that the building could not be the subject of attachment for the liabilities of the appellant since the appellant Was a constructive trustee for and on behalf of the people who held life insurance policies with it. This application was dismissed by Asthana J as he then was, on 29/4/82. The appellant then filed a suit No. HCCS 306/82 against the respondent. The suit came before Allen J, as he then was, on a number of occasions only to be adjourned for various reasons. Finally it came up before Kato Ag. J., who dismissed it since the appellant's advocate was absent. The suit came up before Allen J. on a Notice of Motion for reinstatement. The Notice of Motion was supported by affidavits sworn by Tumusiime, Kateeba and Mulira. The application for reinstatement Of the suit was dismissed. Hence this appeal.

However, the application having been dismissed the applied for, stay of execution against the ruling of Allen J. before Ouma Ag. J., the learned judge ordered that the decretal amount

already paid in court be detained in court pending the disposal of the appeal. The respondent was not satisfied with this order. Another application came before Kityo J's decision was not quite clear. However, the case reached this court in regard to the Order of Allen J. of 18/4/84.

There were six grounds of appeal. However, before the appeal was heard Mr. Mulira for the appellant applied for amendment of the Memorandum of Appeal by including the prayer that this honourable court set aside the order of Allen J, dated 18/4/84 and to order the reinstatement of HCCS 306/82 and to make orders as to costs. This application was not opposed. Mr. Mulira, then dealt with all six grounds of appeal jointly. During the course of these submissions, Mr. Mugenyi rose on a point of objection in that the memorandum was filed out of time. After listening to both parties the hearing was adjourned. On resumption Mr. Mugenyi abandoned his objection and the hearing continued.

In his submissions Mr. Mulira stated that his Notice of Motion was supported by three affidavits in which substantial issues were raised but the judge did not consider them with the relevant authorities he had cited before him. He stated that the learned judge ignored the provisions of Order 18 rule 4 of the C.P.R. by not giving reasons for his decision. Counsel cited a number of authorities to substantiate his argument. He referred specifically to Jamnadas Sodha v. Gordhandas Hemraj (1952)7 U.L.R. 7 where it was stated that the court should consider the nature of the case and the defence if any. He submitted that the nature of this instant case was unique in that it was filed under Order 19 rule 60 of the Civil procedure Rules which permits a second suit to be filed contrary to res judicata rules., He submitted that the Insurance DecreeNo.19/78 raised legal points one of which is whether the appellant is a constructive trustee in connection with the Amadinda House which was the subject of attachment. For this reason the learned trial judge should have reinstated the suit; and not just dismiss it on the ground that it was res judicata when that legal point was not argued before him.

In his submission counsel for the respondent stated that he had no interest in the case. He said the application had been brought under Order 19 rule 20. Under the provisions o that order the court is enjoined to exercise its discretion on two grounds namely whether there is a sufficient cause and whether there is likely to be a miscarriage of justice. He referred us to Karsan v. Raghvajee 10 E.A.C.A. 10 in which it was stated that the appellate court should not

interfere with the finding of the lower court He went on to say that the appellate court could only interfere where there has been a miscarriage of justice as in the case of the Bank of India Ltd. v. Baniblia M. Patel Ltd. (1965) E.A. 638.

In his short ruling the learned judge had this to say when dismissing the suit:-

> "Obviously counsel should not wander out of court when waiting for a case to be heard as it is seldom not possible to tell what will happen from one minute to the next.
>
> On the question of merit and whether or not there has been a miscarriage of justice I have earlier in this case in November 1982 expressed the view several times that the plaintiff's claim was res judicata and I am still of that opinion. I do not see why the matter is still pressed. Therefore, I cannot hold that the dismissal of the suit would result in a miscarriage of justice.
>
> Parties must attend court and stay in court on hearing days or take the consequences.
>
> This application to re-instate the suit which was dismissed on, 9/3/84 is refused and dismissed with costs."

Obviously the learned judge did not consider the affidavits filed or the authorities cited to him. In his affidavit Mr. Tumusiime said he had arrived at 9.05 a.m. in the judge's chambers and found the judge trying to telephone for a court clerk. Mr. Mugenyi and Mr. Kateeba were present. Mr. Tumusiime nipped out at the time when the judge was trying to get a court clerk, when he came back five minutes after his case had been called out and Mr. Mugenyi had asked for dismissal and it had been done. Mr. Kateeba also swore to the same facts.

Lake Victoria Bottling Co. Ltd. v. Anthony Constance, Civil No.6 of 1962 was cited t us as well as in the lower court. The facts of this appeal can be distinguished from that case. In that case an application to set aside the order of dismissal of the suit was dismissed on the ground

that the, applicant did not do his best in that he did not take a taxi from Kampala to Jinja in time so as to being court at a specified time. The learned judge, Keating J., while dismissing the application further said that the test to be applied as a general rule was to see whether the party applying honestly intended to be present at the hearing of the suit and did his best to do so.

A five minute walk out while the judge was looking for a court clerk cannot be referred to as "wander out of court." There must have been a reason.

In his submissions, in the lower court, Mr. Mulira did refer to a number of cases but all of them were ignored by the learned judge. No reference was made whatsoever to them. In his submission to us Mr. Mugenyi rightly stated that a trial judge has a discretion in the matter, and this discretion must be exercised on two grounds namely whether there is sufficient cause, and whether there is likely to be a miscarriage of justice. That submission would be in conformity with Order 9 rule 20 of the Civil Procedure Rules. However, the learned judge did not consider the issue of whether there was sufficient cause, but only the issue whether miscarriage would result. His finding was that no miscarriage would be caused because ho has a preconceived opinion that the suit was res judicata which issue was never before him on the three occasions when this matter came up. If he had considered the issue of sufficient cause probably he would have applied the authority in Girado V. Alam & Sons (U) Ltd. (1971) E.A. 448 where no sufficient cause was shown, nevertheless that court set aside the dismissal of the suit by invoking the inherent jurisdiction of the court; this course was open to the learned judge. The provisions of section 101 of Civil procedure Act has a wider application than the provisions of Order 9 rule 20 which merely refers to "sufficient cause' as it was stated in Kalemera v. Salaama Estates Ltd. (1971) E.A. 284. In Jamnadas Sodha v. Gordhandas Hemraj (1952)7 U.L.R. 7 already referred to the same issues were considered and this is what Ainely J., had to say;

> "In my view that (i.e. the poverty of the excuse) is not the sole matter which must be considered in cases of this kind. The nature of the action should be considered, the defence, if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can be reasonable, be

> compensated by costs for any delay occasioned
> should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court"

See also Sebei District Administration v. Gasyali & Others. (1968) E.A. 300.

It would appear that the learned judge did not even look at the plaint o satisfy himself as to the nature of action that was being brought. Paragraphs 5 and 6 of the plaint show clearly the nature of action that was being brought. If the learned judge had done so he would have had the occasion to change his opinion that the matter was not res judicata.

In Mbogo and Another v. Shah (1968) E.A. 93
This East African Court of Appeal case laid down the principle to be followed if the appellate court should reverse the decision of the High Court. Newbold P., had this to say at page 96,

> "For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself 'in some matter and as a result he has arrived, at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

I do agree with that principle as stated by the learned President. It is a sound principle to go by in the instant appeal. As I said before, the learned trial judge did not consider the affidavits or the authorities nor did he peruse the plaint. The plaint averred in paragraph 5 that under section 13 of the Insurance Decree 1978 the premises were not liable to attachment. This alone', in my opinion, would have justified the setting aside of the dismissal of the suit by Kat J., taken together with other circumstances in the case. It ha been stated on many occasions in our courts that the poverty of excuse is not the only criterion.

On the whole the learned judge did not avail himself of the judicial basis available to him in the exercise of his discretion.

For the reasons discussed above, I would allow the appeal with costs here and in the court below.

The order dismissing the suit would be set aside.

DATED at Mengo this 30th day of May, 1986.

Signed:

D.L.K. Lubogo,
AG. JUSTICE OF APPEAL.

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JUDGMENT OF MANYINDO, V-P.

I had the opportunity to read the judgment of Lubogo, Ag.J.A. in draft. I agree that thin appeal should be allowed. As can be seen from his Ruling, Allen, J (as he then was)

dismissed the application on two grounds: firstly, that counsel for the appellant should have been in chambers of Kato J. when the case was, called out for haring and, secondly, that there was no point in restoring the suit for hearing since it was res judicata and therefore doomed to fail.

With respect, I agree with the statement of Allen, J (as he then was) that counsel should go to court and stay there until their case is called on and disposed of. However, I think this particular case should have been considered by him differently,
given its rather peculiar facts. These were that at the time counsel for the appellant went out of Judge Kato's Chambers the court was not ready to procee1 with the case as there was no court clerk to assist the trial judge. Counsel had left his books on the table in the judge's chambers and, apparently, he remained outside very briefly.

It should also be remembered that counsel for the respondent was personally interested in the case which was brought by his firm of which he is apparently sole proprietor. Naturally he would have wanted a quick and positive result. As it is, he got it just like that. It would perhaps have been more prudent for him to act with restraint in the matter.

The main test for reinstatement of a suit is whether the applicant honestly intended to attend the hearing and did his best to do so. See; Girado V. Alan & Sons (U) Ltd. (l971) EA 448 and Lake Victorial Bottling Co. Ltd. V. Anthony Constance, H.C.C.S. NO. 6 of 1962. These cases also refer to two other tests namely, the nature of the case and whether there is a prima facie defence to that case. These two cases were cited in the court below by counsel for the appellant, but were completely ignored by Allen, J. (as he then was) In. the circumstances of this case it seems clear to me that the appellant's counsel did intend to appear before Kato, J and prosecute the application to reinstate the suit.

Allen, J (as he then was) certainly felt very strongly on the question of res judicata. He gave no reason why he thought that the appellant's suit was res judicata and the matter does not appear to have been argued before him at all. He even made no reference to Order 19 rule 60 of the Civil procedure Rules under which a suit may be filed to assert a right to attached

property after the interested party has lost objection proceedings against execution as was the case here**.**

I am therefore inclined to agree with counsel for the appellant that the question of res judicta was not open to Allen, J (as he then was) to decide and that in any case, it was not properly considered. In the result I would allow this appeal, set aside the Orders of Kato, J and Allen J, (as he then was) and order that the suit be reinstated for hearing. I agree to the order for costs proposed by Lubogo. Ag. J.A., and as Odoki J.A. also agrees, it is so ordered.

S.T. MANYINDO)
VICE PRESIDENT
COURT OF APPEAL
30.05.86

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JUDGMENT OF ODOKI, JA

I consure in the judgment delivered by Lubogo Ag J.A.

(B.J. ODOKI)

JUSTICE OF APPEAL

DATED AT KAMPALA THIS 30TH DAY OF MAY 1986

Mr. Mulira for the Appellant.

Mr. Mugenyi for Respondent

I certify that this is a true copy of the Original

REGISTRAR/COURT OF APPEAL.