

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 347/2017

(arising in CS53/2005)

[2018] SCSC

**DANIEL MELLIE
EXECUTOR OF THE ESTATE OF LATE CECILIA MELLIE**

Petitioner versus

**CLAUDE HAVELOCK
GRAND ANSE PRASLIN**

Respondent

Heard: 3 May 2018
Counsel: Mr Charles Lucas for petitioner
Miss Kelly Louise for respondent
Delivered: 2 July 2018

RULING ON MOTION

R. Govinden, J

[1] This is a Ruling delivered following the hearing of the Notice of Motion filed by Counsel for the Plaintiff upon the dismissal of the Plaint as a result of non appearance of the Plaintiff and his Counsel.

- [2] In his application Learned Counsel for the Plaintiff, Mr Charles Lucas, move this Court that the Plaint that was dismissed be reinstated to the Cause List, this for reasons stated in the said application.
- [3] In the Affidavit in support of the application Counsel deponed as to why he believes that the case should be reinstated. It is his testimony that the matter was prior to fixed for hearing before Judge Robinson on the 1st of September 2017. This date was aborted as a result of him notifying the Court of his indisposition as a result of a medical trip that he had to make overseas.
- [4] Learned Counsel deponed further that upon his return to this jurisdiction, he was informed that the case would be taken up on the 11th of October 2017 before the same Learned Judge in order to fix a new hearing date. According to his further averments Mr Lucas says that during the same period, the particular Learned Judge was appointed as a Justice of Appeal and she indicated that the case would be passed on to another Judge of the Supreme Court.
- [5] Mr Lucas further aver that upon a telephone enquiry by his office, he was informed that the matter would be heard on the 19th of January 2018 at 9.30 a.m. and that the case was then put for mention in order to fix a new hearing date before this Court without him being notified by the Registry of this new date. As a result he says that the case was called without him or his client being present and as a result dismissed due to his non appearance.
- [6] According to the Learned Counsel due to the fact the he had not taken many instructions there was no compelling reasons for him to verify the Cause List in order to verify the dates. And that moreover as his client had specifically instructed him to attend to all mention cases given the former's professional commitments, his client was not present at the said mention date.
- [7] Accordingly, Mr Lucas prays to this Court that the case be reinstated to the list and that the order of dismissal be set aside as he is of the view that the order of dismissal has caused a miscarriage of justice.

- [8]** In his reply, the Defendant opposes the said motion. The Defendant based his opposition in law. In his reply to the application Counsel for the Defendant avers that once a plaint is dismissed it cannot be reinstated to the list again for hearing. According to the Learned Counsel this is the dictate of the law, as reflected in Section 133 as read with Section 67 of the Seychelles Code of Civil Procedure. According to the Defendant the only recourse available to the Plaintiff would have been to him making an application for reinstatement of the Plaint through a fresh action and this he has failed to do.
- [9]** During the course of the hearing Learned Counsel for the Defendant essentially repeated the gist of her objection to proceed and her written submissions file in support.
- [10]** Counsel for the Plaintiff on the other hand strenuously objected to the applicability of Section 67 and Section 133 of the Civil Procedure Code in this case. According to the Learned Counsel Section 67 finds its application only on the date fixed in the summons for the plaintiff to appear and in this particular situation the proceedings was well passed this date. It is his further submissions that Section 133 is also not applicable as this Section talks about judgment being delivered ex parte and that this implies and in fact particularly means that if the Defendant is absent on the date of hearing, the judgment shall be given ex parte. According to him, this was not the case here because the Plaintiff was absent, Plaintiff Counsel was absent for good reasons as he was indisposed and this was supported by a document given to the Court in support of the motion.
- [11]** According to Learned Counsel, the applicable provisions of the Civil Procedure Code that he is relying upon is that of Section 194(c) of the Code.
- [12]** I have gone through the application of the Learned Counsel for the Plaintiff and opposition to proceed of the Defendant in the light of the oral submissions and written submission on record.
- [13]** To my mind this matter involves a straight forward point of law. That is whether or not this Court is empowered to dismiss the plaint at the point that it did in the judicial process, for reasons of non appearance of the Plaintiff and his Counsel.

- [14] To my mind it's abundantly clear that this Court has been empowered to do what it did through the provisions of Section 67 as read with Section 133 of the Civil Procedure Code.
- [15] Section 67 of the Code provides as follows "*If on the day fixed in summons when the case is called the defendant appears and the plaintiff does not appear then the Plaintiff suit is entitled to be dismissed.*"
- [16] On the other hand Section 133 of the Code provides that "*if on the day to when a hearing has been adjourned by the Court the parties (including the Plaintiff) fails to appear the Court may proceed to dispose of the suit in the same manner directed on that behalf, by S67 or make such order as it think fit.*"
- [17] Neither Section 67 nor Section 133 of the Code talks about that sometimes several mentions that takes place, or used to take place, between the date one party appear for the first time on summons and the date the respective parties appear for the hearing of the suit. However we have an abundance of case laws both from this Court and the Court of Appeal that has interpreted the provisions of Section 67 and Section 133 jointly to mean at any time that the suit is mention or is taken up before the Court, whether for the first time or any time thereafter. Vide *Francis Gill and Ors v/s Ansalt SCA 23 of 2009* and *that of Cedric Petit v/s Margrita Bonte SCA 9 of 1999*.
- [18] This broad and purposive interpretation of these provisions has empowered a Court to dismiss a case for non appearance of a Plaintiff in the context that this Court did whether it be for first time non appearance or at the date fixed for hearing.
- [19] The Learned Counsel for the Plaintiff seek to imposed a literal interpretation on those two provisions, which literally speaking indeed speak about only two situations that I have aforementioned. However if this approach was to be accepted there would be serious difficulty in our law. The Plaintiff would be able to get away with laches and non appearance at will or for frivolous reasons and leaving this Court with no or little remedy to redress the situation by ultimately dismissing the plaint and hence seriously undermining the administration of justice.

- [20] As to what should be the remedy and what should this Court do as a result of the dismissal Learned Counsel for the Plaintiff submitted that he relies on Section 194(c) of the Civil Procedure Code. And as a result and as a consequence of the Court finding in his favour in this application, this Court should proceed to order for a new trial in terms of that Section.
- [21] This Court finds that this submission is misplaced for 2 reasons. First, the Notice of Motion of the Plaintiff is entitled “*Application for setting aside as order of dismissal*”. The content of the said application reflects the title. It relates to an application for setting aside an order for dismissal for non appearance of the Applicant. Section 194(c) on the other hand clearly relates to an application for a new trial, when it appears to the Court to be necessary for the ends of justice. Accordingly, I find that this application is not properly brought under Section 194(c) of the Code.
- [22] Secondly, it is abundantly clear that in this matter that no trial was effected before this Court, neither *ex parte* nor *inter parties*. Hence, even if the application was properly drafted, it would have been incompetent as it would not have been the appropriate application given the facts and circumstances of this case as there had been no trial in this matter.
- [23] When the case was called before this Court on 24th of October 2017 the Learned Counsel for the Plaintiff was represented by Mr Nichol Gabriel who informed the Court that Mr Lucas was indisposed. The case was then fixed on the day that it was dismissed with full knowledge of the parties, including Counsel standing in for Mr Lucas. On that said date the Plaintiff and his Counsel failed to appear and the Court dismissed the case for non-appearance.
- [24] I find that such decision was proper in all circumstances of the case. The case cannot be reinstated. Hence, I will dismiss the application for reinstatement. The Plaintiff is at liberty to enter a fresh suit, as this matter is not affected by the principle of “*res judicata*”.

[25] I make no order as to cost.

Signed, dated and delivered at Ile du Port on 2 July 2018

R. Govinden, J
Judge of the Supreme Court