

UGANDA / JUDGMENT

Alesi v Alemi (Miscellaneous Application 83 of 2022) [2024]

UGHC 811 (29 August 2024)

[2024] UGHC 811

COURT

High Court of Uganda

BEFORE

Acellam, J

CASE / FILE NUMBER

Miscellaneous Application 83 of 2022

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT ARUA
MISCELLEANOUS APPLICATION NO. 0083 OF 2022 (ARISING OUT OF CIVIL APPEAL
NO. 0028 OF 2019) (ARISING FROM CIVIL SUIT NO. 0041 OF 2012 AT THE CHIEF
MAGISTRATES COURT OF ARUA AT ARUA)**

ALESI NESTA..... VERSUS ALEMI WILLIAM:::::::::::::::::::::::::::: BEFORE
HON. JUSTICE COLLINS ACELLAM

RULING

Brief Introduction 20

This is an application brought by way of Notice of Motion under Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13 and Order 43 rules 10,14,16 and 31, and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 for

- This Honourable Court be pleased to reinstate Civil Appeal No. 0028 of 2019 1. thereby setting aside its dismissal of the same. \$2.\$
- Costs of the Application be provided for.

Background

It is contended that a civil suit was filed against the Applicant in the Chief Magistrates Court of Arua at Arua, was heard and determined against her. That being dissatisfied with the decision of the trial court, she instructed her Lawyers to file an appeal in the High Court of Uganda at Arua which was done. Her Lawyers also wrote a letter to the trial court requesting for typed copies of the judgement and record of proceedings, then wrote reminder letters after, but to this date, none have been availed in order to prosecute the appeal.

That on 16th March 2022, in the absence of the parties and without serving her or her lawyers, Court entered a dismissal order of the Appeal for non-action by the Appellant. The Applicant now brings this application seeking Court to set aside the above order.

45 Grounds of the Application

The grounds on which this application is based are contained in the affidavit of the Applicant, ALESI NESTA, deponed on the 26th of October 2022 where she briefly states that judgement was entered against her in a civil suit filed in the Chief Magistrates Court of Arua at Arua. Being dissatisfied with the judgement, she instructed her Lawyers to file an appeal in the High Court of Uganda at Arua. Her Lawyers wrote a letter requesting for the typed copies of the judgement and record of proceedings, then after wrote

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reminder letters, but to this date, none has ever been availed to them in order to \$\mathsf{S}\$ prosecute the appeal. She is dissatisfied with the Ruling and orders of this Honourable Court dismissing Civil Appeal No. 0028 of 2019 entered on the 16th of March 2022, without any notice to the Applicant or her Lawyers.

10 Grounds in Opposition

In opposition, the Respondent, ALEMI WILLIAM vide his affidavit in reply deponed on 21st November 2022 contends that filing the appeal was the first and last step the Applicant and her Advocates ever took to prosecute the Appeal. Until this year, 2022 when the Respondent instructed his Lawyers to apply to this Court for this appeal, it had been in Court for close to three years without action. The Applicant didn't take any steps to pursue the Record of Appeal after filing the appeal. The various letters attached to the Applicant's affidavit in support are an afterthought, the Lawyers were rushed to file or backdate for the purpose of this application and that's why the references aren't consistent with the dates, and they weren't on the Court file when the Respondent applied to dismiss the appeal. The Appellate Judge read and referred to what was on file and those letters weren't. The Respondent's letter for dismissal was served on the Applicant's previous Lawyers who took all copies and refused to return any.

25 Grounds in Rejoinder

In rejoinder, the Applicant refutes the assertions of the Respondent and reiterates that whether or not filing the appeal was the first and last step she took doesn't render her the right of being ignored for that purpose, her former Lawyers were never availed with the typed record of proceedings to prosecute the appeal even when they wrote a letter requesting for them and sent reminders too, and the non-service of her and her Lawyers for the hearing of 16th March 2022 when her appeal was dismissed.

Representation

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During the hearing, the Applicant was represented by M/S Onyafia & Co. Advocates whereas the Respondent was represented by *M/S Bundu & Co. Advocates.*

Before I proceed to the merits of this application, I want to note that I have perused 40 through the application and all their supporting documents or affidavits and affidavit in reply, Both Counsel for the Applicant and Respondent filed their submissions which I have duly put into consideration to come up with this Ruling. There were rejoinder on record. I shall now proceed to enlist the issue in contention.

45 Issues

1. Whether there is any sufficient cause that prevented the Applicant from pursuing the Appeal?

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50 Determination

Submission of the Appellant

Counsel contends that the Applicant and her Lawyers tried to follow up the appeal by seeking for the typed record of proceedings and judgement but were frustrated by not being availed the same. The Applicant was therefore shocked to be summoned by the Resident District Commissioner Arua for a discussion of amicable eviction after Court Bailiffs had all worked out the eviction notices and relevant documents without serving or alerting the Applicant with any of the documents. The Applicant was denied her

constitutional right under Article 28(1) of the Constitution of the Republic of Uganda,

Counsel for the Applicant submits that the dismissal without notice to the Applicant, or 15 her Lawyers was contrary to Order 43 rule 31 Civil Procedure Rules SI 71-1 which requires that a notice of listing is served on both the Appellant and the Respondent before Court makes an order to dismiss the Appeal or make such order as may seem just. The Applicant duly filed a Memorandum of Appeal, and it was served on the 20 Respondent's then Lawyers M/S Alaka & Co.

Advocates, so it is not true that the Applicant only filed a Notice of Appeal. The Applicant maintains that she was never

served with notice for the hearing when her appeal was dismissed, or her Lawyers, which occasioned a miscarriage of justice.

Counsel concludes that since there is sufficient cause for her delay in prosecuting the \$25\$ Appeal & non-appearance on the date of the dismissal, she prays that this Court makes an order to set aside the dismissal and reinstate the appeal.

Submission of the Respondent

Counsel for the Respondent submits that the Learned Appellate Judge relied on Order 43 rule 1 of the Civil Procedure Rules SI 71-1 which requires every appeal to be preferred in the form of a Memorandum of Appeal and pointed out that since the notice was filed on 25th October 2019, nothing else had been done by the Appellant to prosecute the appeal. Basing on Section 17(2) of the Judicature Act Cap 13, which grants the High Court inherent powers to prevent abuse of process of Court as may be necessary for achieving the ends of justice, the Learned Judge dismissed the case. The provisions under Order 43 rule 31(1) of the CPR relating to listing and service of notice on the Appellant

Counsel adds that the only remedy available to a party aggrieved by a dismissal under Order 43 rule 31 CPR and Section 17(2) of the Judicature Act is to appeal against the decision, not to have it reinstated, as discussed in the wealth of authorities attached to the submissions. An Appeal to the Court of Appeal should have been the Appellant's remedy in the circumstances.

Counsel concludes that in any case, it has been 3 years of non-action and Counsel for the Applicant cannot claim that for all these three years he couldn't have obtained the record of proceedings from the Magistrates Court. Counsel quotes the Equity maxim, "Equity aids the vigilant" and calls upon Court to dismiss this application with costs.

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- Before I proceed to resolve the issue at hand, I must note that the parties in this $\$S$ Application defer from the parties stated in the Memorandum of Appeal filed under Civil Appeal No. 0028 of 2019 (Alesi Nesta and Abiria Kiliopa vs Alemi William) marked as Annexure B under the Notice of Motion for Miscellaneous Application No.
- 0083 of 2022 and these are similar to those in the Ruling of Civil Appeal No. 0028 of 2022. The Applicant also filed Miscellaneous Application No. 012 of 2022 to stay 10 execution of the judgement and orders issued under Civil Suit No. 0027 of 2010 which includes different parties, Alesi Nesta vs Asunta Driwaru and Apangu Pastore who are the same parties involved in the decree filed against the Applicant which orders the Applicant sought to appeal against in Civil Appeal No. 0028 of 2019. That

- notwithstanding, I shall concentrate on the issue of the application filed to reinstate 15 Civil Appeal No. 0028 of 2019.

Consideration of Court

Order 43 rule 16 of the Civil Procedure Rules SI 71-1 provides for readmission of appeal 20 dismissed for default and states that;

"Where an appeal is dismissed under Rule 14 or 15 of this order, the Appellant may apply to the High Court for readmission of the appeal; and, where it is proved that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit.

The above provision allows an Appellant whose Appeal is dismissed for failure to enter appearance to apply for its readmission. 30

In the case of Moses Makubuya vs Namuddu Beatrice HC Misc. Appeal No. 805 of 2021, Court stated that:

"In order for an Applicant to succeed under Order 43 rule 16 CPR, it must be shown that he or she was prevented by sufficient cause from appearing when the appeal was called for hearing."

It is the Applicant's submission in the instant case that her and her Lawyers were never served with hearing notices to notify them or require them to attend to Court on the day when the appeal was dismissed. The Applicant also states that her Lawyers continued to 40 follow up with the trial court after sending their requesting for a typed record of proceedings and judgement and even sent reminders.

The Respondent submits that the letters were not on file when the dismissal order was entered, that they were sneaked on record and that's why their dates don't align. That 45 even then, the Applicant could have done more than just sending a few letters to the Court; for instance, fixing a hearing date and informing the Judge of the failure to obtain the typed record of proceedings and judgement instead of waiting three years of nonaction on the file.

According to the Court record, Civil Appeal No. 0028 of 2019 was heard and dismissed on 16th March 2022, in the absence of Counsel for the Applicant and presence of

Counsel for the Respondent. The Learned Judge makes no mention of a Memorandum \$ \mathsf{S} of Appeal on record but relies on Order 43 rule 31(1) CPR regarding undue delay in the hearing of an appeal, he dismissed the appeal under Section 17(2) of the Judicature Act stating that since the Notice of Appeal was filed on 25th October 2019, nothing else had been done by the Appellant.

It is my finding that the only plausible explanation for having a Memorandum of Appeal on record with a High Court Arua Received Stamp of 25th October 2019 at 3pm not recognized under an order or ruling of the Resident Judge of Arua dated 16th March 2022 is that this Memorandum was sneaked on record by the Applicant and / or their Counsel.

- The Letters for request of record of proceedings; dated 26th October 2019, 24th August 2020 and 14th September 2021 face the same verdict. There is no way all these letters were actually filed and served, and still no feedback was attained from the lower court or even the High Court, for all these three years.
- Better yet, I agree with Counsel for the Respondent on this point, where he states that 20 the Applicant slept on the Appeal for 3 years and only issued just one letter per year to remind Court. Counsel could have done more than just sending letters to Court, for instance fix the Appeal for a hearing and address the Judge on this issue, than remaining laid back.

It is therefore my finding that the Applicant has failed to prove sufficient cause for failing to enter appearance when the Appeal was dismissed. Failure to serve the Applicant would be an option to explore if she had fulfilled her obligations in prosecuting the appeal.

Furthermore, in the case of Moses Makubuya vs Namuddu Beatrice HC Misc. 30 Application No. 805 of 2021, Court noted that the remedy available to a party whose appeal is dismissed for want of prosecution under Order 43 rule 31 (1) CPR, is to appeal against the order and not to apply for its readmission. I agree with this position and state that this application is improper before this Court.

Accordingly, issue 1 fails.

In light of the above, Issue 2 can be resolved while relying on the determination of Court in Issue 1. The prayer to reinstate Civil Appeal No. 0028 of 2019 cannot be sustained. The Applicant therefore is not entitled to any remedies before this Court as the Respondent is the successful party.

By virtue of Section 27 (2) of the Civil Procedure Act, costs follow the event, unless for some reason the court in its own discretion directs otherwise. A successful party can be denied costs if it proved that but for his or her conduct, the litigation could have been avoided. In the instant case, it appears to me that litigation has been dragged by the Applicant and it is for that reason that I award costs to the Respondent.

I hereby dismiss this application with costs to the Respondent and uphold the orders of the Learned Judge in dismissing Civil Appeal No. 0028 of 2019. Execution should 50

\$\mathsf{S}\$ I so order.

Dated this. 29th day of Aufret 2024

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..... Collins Acellam JUDGE

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