

UGANDA / JUDGMENT

Katushabe & 18 Others v Mbabazi & Another (Miscellaneous Application 39 of 2023) [2024] UGHC 532 (25 January 2024)

[2024] UGHC 532

COURT
High Court of Uganda

BEFORE
Mugabo, J

CASE / FILE NUMBER
Miscellaneous Application 39 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC APPLICATION NO. 039 OF 2023 (ARISING FROM CIVIL APPEAL NO. 005 OF 2023)

KATUSHABE JAMADA & 18 OTHERS ::::::::::::::::::::::::::: APPLICANTS

VERSUS

1. GORRETTI MBABAZI

2. MUSABE RICHARD

::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO RULING

This application was filed by way of notice of motion under section 98 of the Civil Procedure Act Cap. 71, Order 43 Rule 16 and Order 52 Rule 1 and 3 of the Civil Procedure Rules SI 71-1 seeking the following orders:

- I. The order dismissing Civil Appeal No. 005 of 2021 be set aside.
- II. Civil Appeal No. 005 of 2021 be readmitted and heard on merit.
- III. Costs of this application be provided for.

The grounds of this application are set out in the affidavit of Katushabe Jamada, the 1st applicant, the gist of which is that:

- a) The applicants filed Civil Appeal No. 005 of 2021 against the respondents in this honourable court within the prescribed time.
- b) The applicants filed a memorandum of appeal and a letter requesting a typed and certified copy of the record of proceedings before this honourable court on the 6th and 7th day of April 2021, respectively.
- c) The trial court delayed furnishing the record of proceedings to the applicants and did not send the same to this honourable court.
- d) The record of proceedings was later availed to the applicants on the 4th day of November 2022.
- e) The applicants and their counsel while attending another matter at court were informed by a court clerk that Civil Appeal No. 005 of 2021 was scheduled for 24th February 2023.
- f) On 5th December 2022 counsel for the applicant wrote to the respondents informing them that the matter was fixed for 24th February 2023.
- g) On 24th February 2023 when counsel for the applicant appeared in court, he was shocked to learn that the matter had been dismissed on the 24th of January 2023.
- h) There was no physical service of the hearing notice concerning the hearing date of 24th January 2023.
- i) The appeal was dismissed in the absence of all the parties who were not aware of the hearing date.
- j) The applicants have a good record of attendance in the lower court.
- k) Re-admission of the appeal does not in any way prejudice the respondents.

The respondents opposed this application by an affidavit in reply, deponed by Gorretti Mbabazi, the 1st respondent, stating that:

- a) The applicants did not take the necessary steps to prosecute the appeal against a judgement that was given on the 9th of March 2022.
- b) The letter requesting for the typed and certified copies of the record of proceedings allegedly filed before this honourable court on the 7th of April 2021 was not served on the respondents and has not been attached to this application.
- c) The applicants or their lawyers are duty-bound to move this honourable court to call for the file from the trial court so that the appeal can be fixed and heard.
- d) There is no evidence that the applicants extracted a hearing notice which is a known method of fixing cases.

- e) The letter communicating the hearing date of 24th February 2023 was never served on the respondents.
- f) If the applicants had filed a record of proceedings of the trial court before this court, they were duty-bound to take the necessary steps to prosecute the appeal.
- g) This honourable court has inherent powers to weed out appeals where the appellants have not taken essential steps to prosecute their appeal, to among others, prevent unnecessary backlog or abuse of the process.
- h) The record of proceedings was filed before this honourable court on the 5th of December 2022 and the application does not disclose sufficient reasons why the applicants failed to fix the appeal for hearing.
- i) There is no evidence that the applicants took particular interest in following up on the appeal the same way they have been following other cases.
- j) That the application does not disclose sufficient reasons for readmission of civil appeal No. 005 of 2021
- k) A substantial bulk of the lower court record had already been typed in by the year 2018 and therefore it is not true that it took long to prepare the record of the lower court.

The applicants filed an affidavit in rejoinder to rebut the respondents' claims and stated as follows;

- a) That the letter requesting a record of the proceedings had been served on the respondent on 7th April 2021, but the respondents did not acknowledge receipt which was their method of receiving documents.
- b) That the appellants were all the time interested in prosecuting the appeal.
- c) That the applicants moved court several times to have the matter fixed for hearing.
- d) The fact that the record of appeal was filed on 5th December 2022 was an indication that the applicants were interested in the matter which was later dismissed in January 2023.
- e) That the appeal involves human rights issues and therefore should be re-admitted and heard on its merit.
- f) That the applicants were only availed the certified record of the trial court on 4th November 2022.
- g) That the advocate who prepared the affidavit in reply had been disqualified from the case and the court should not believe documents prepared through illegality.

Background

The applicants filed Civil Suit No. 09 of 2014 before the Chief Magistrate's Court of Kyenjojo against the respondents for, inter alia, a declaration that they are the rightful owners of the suit land situate in Matiri Village, Matiri Parish, Kihura sub-county, Kyenjojo district, a permanent injunction and order for eviction and vacant possession. In his judgement delivered on the 9th of March 2021, H/W Muhumuza Asuman, the trial Magistrate Grade I, held that the suit land belongs to the defendants/ the respondents herein and issued a permanent injunction restraining the applicants from interfering with the suit land. Being dissatisfied with the judgement and orders of the learned trial Magistrate, the applicants filed Civil Appeal No.

005 of 2021 in this court by way of a memorandum of appeal on the 6th of April 2021 but did not take essential steps to prosecute it. This court dismissed the same for want of prosecution on the 24th of January 2023 under Order 43 Rule 31 of the Civil Procedure Rules. This application seeks to move this court to set aside its dismissal order and re-admit Civil Appeal No. 005 of 2021 so that it is heard on merit.

Representation and hearing.

The applicants are represented by *M/S Kesiime & Co. Advocates* while the respondents are represented by *M/S Stanley Omony & Co*. Advocates. Both counsel filed submissions which have been considered in this ruling.

Issues for determination

The issue for determination is whether the application raises sufficient grounds for this court to set aside its dismissal order and re-admit Civil Appeal No. 005 of 2021.

Submission by Counsel

Counsel for the applicants submitted that section 98 of the Civil Procedure Act enjoins this court to make such orders as may be necessary for the ends of justice. Counsel also cited Order 43 Rule 16 of the Civil Procedure Rules which provides for readmission of an appeal dismissed for default.

Counsel submitted that the delay in prosecuting the appeal was beyond the applicant's means since the trial court had delayed providing a record of proceedings to the appellants as well as to this honourable court.

Counsel submitted that although the applicants had filed a Memorandum of Appeal and a letter requesting a typed record of proceedings in time, the court dismissed the appeal before a lapse of 2 years as provided under the law.

Counsel argued that the appeal had been dismissed without service of the hearing notice on either of the parties and therefore this court had the discretion to readmit the appeal which, moreover, has a likelihood of success.

Counsel argued that the applicants had been evicted from their ancestral land and were currently living in rented houses and doing casual work to earn a living. Counsel also relied on Article 126(2)(e) of the 1995 Constitution of the Republic of Uganda to argue that this court should administer substantive justice without undue regard to technicalities.

Counsel also argued that even if there was negligence in prosecuting the appeal, such negligence should be visited on the lawyers but not the applicants. Counsel also submitted that the applicants had relied on the legal advice of their lawyer which could have led to the dismissal of the appeal. Counsel cited the case of **Joel Kato & another Vs. Nuulu Nalwoga SCMA No. 004 of 2012** where the Supreme Court held that applicants cannot be condemned for the delay in securing the proceedings of the lower court since such matters squarely fall within the province of professional lawyers.

Counsel also cited the case of **Banco Arabe Espanol Vs. Bank of Uganda SCCA No. 008 of 1998** where it was held that mistake, negligence, or oversight or error on the part of counsel should not be visited on the litigants.

On the other hand, counsel for the respondents submitted that conditions for readmission under Order 43 Rule 31 of the Civil Procedure Rules require that the applicants prove to the court that there are sufficient reasons that prevented them from attending court. Counsel cited the case

of **Eternal Church of God Vs. Sunday Kasoke Joseph HCMA No. 011 of 2016.**

Counsel for the respondents also argued that the applicants had not proved that they had been given a different hearing date by the clerk which occasioned their absence on the day the appeal was dismissed. Counsel argued that the averments of the applicants were full of falsehoods.

Counsel also argued that the applicants or their lawyers had the duty to extract the hearing notice and serve the respondents if they were interested in prosecuting the appeal. Counsel argued that it was due to the negligence and abuse of the court process that the applicants did not attend court on the day that the appeal was fixed for hearing.

Counsel for the respondents also argued that the proposition that the applicants were prevented from prosecuting the appeal due to delay by the trial court in availing the proceedings was not true since the record shows that the same proceedings were availed to this honourable court on 5th December 2022.

On whether the intended appeal had a likelihood of success, counsel for the respondents argued that the applicant had not proved to this court how the appeal would succeed.

Counsel for the respondents also argued that the maxim of not visiting negligence of counsel on the litigants is a mere excuse of new advocates to get themselves clients. Counsel submitted that just like his advocate, a litigant ought to know the hearing dates of his case. *Counsel cited the case of *Eternal Church of God Vs. Sunday Kasoke Joseph (supra)*.* Counsel further argued that the applicants were represented by the same lawyers both in this application and in Civil Appeal No. 005 of 2021 and

therefore the argument that the mistake of counsel should not be visited on them was not a sufficient ground to grant the orders sought.

Counsel also argued that this court has inherent powers under section 17(2)(a) of the Judicature Act to prevent the abuse of the court process and this is what exactly the court did when it dismissed the appeal for want of prosecution.

Counsel argued that since the trial court had issued an incomplete record of the proceedings in 2018, it was possible that the applicants could have been availed a complete record of the proceedings in record time but it is their lack of interest in the appeal that prevented them from accessing the record.

Counsel for the respondents further argued that there must be an end to litigation and this court should find it proper to dismiss the application with costs to the respondents. Counsel cited the case of **Bushenyi District**

***Counsel Vs Musisi Fred HCMA 304 of 2021*.**

In his submissions in rejoinder counsel for the applicants reiterated that there was a sufficient cause that prevented the applicants from prosecuting Civil Appeal No. 005 of 2021. Counsel submitted that when the record of proceedings of the lower court was availed to the applicants, the respondents were notified of the same and genuinely believed that the matter had been fixed for 24th February 2023.

Counsel also relied on the case of **Elimu John Vs. Akello Hellen MHCMA No. 153 of 2022** and the case of **Abel Belemesa Vs Yesero Mugenyi HCMA No. 126 of 2019** in defining what amounts to sufficient cause.

Consideration by Court

The record of the court shows that Civil Appeal No. 005 of 2021 was dismissed for want of prosecution on the 24th of January 2023 under Order 43 Rule 31 of the Civil Procedure Rules in the absence of all parties. While dismissing the appeal, this court observed that the Memorandum of Appeal was filed on the 6th of April 2021 and no action had been taken ever since and therefore there was no sufficient reason for further adjournment.

Order 43 Rule 31 of the Civil Procedure Rules provides thus:

"31. Dismissal for want of prosecution.

(1) Where there has been undue delay in the hearing of an appeal, the registrar may obtain the directions of a judge for the listing of the appeal at the next ensuing sessions of the High Court.

(2) Notice of the listing shall be served in such manner as the judge may think fit upon the appellant and respondent or their advocates, and upon the hearing thereof the court may order the dismissal of the appeal for want of prosecution or may make such other order as may seem just"

Prior to its dismissal, the matter had been cause-listed for 24th January 2023 as verified from the court cause list and the diary. The cause list was placed on the court's notice board and supplied to all members of the bar through the Uganda Law Society email and other bar-bench platforms.

I note that where an appeal is dismissed for want of prosecution, the Civil Procedure Rules are silent on the remedy available to an aggrieved appellant. A re-admission of appeal under Order 43 Rule 16, which the applicants are relying on, is only applicable to the dismissal of appeal for the appellant's default or failure to deposit costs in accordance with Rules 14 and 15 of Order 43 of the Civil Procedure Rules, respectively.

Nonetheless, courts have held that for an appellant whose appeal is dismissed due to want of prosecution under Order 43 Rule 31 of the Civil Procedure Rules, he or she can rely on Article 126 (2)(e) of the 1995 Constitution and Section 98 of the Civil Procedure Act to request the court to reinstate the dismissed appeal. In the case of **Abel Balemesa v. Yesero Mugenyi, HCMA No. 126 of 2019** Justice Gadenya Paul Wolimbwa held thus:

> *"Whereas Order 43 of the Civil Procedure Rules is silent on how to reinstate a dismissed appeal under Order 43 rule 31 of the Civil Procedure Rules, an affected party can rely on article 126 (2)(e) of the Constitution and section 98 of the Civil Procedure Act to request the court to reinstate a dismissed appeal if they have good reasons why the appeal should be reinstated. I should, however, caution that the inherent powers of the court should only be invoked in very compelling circumstances and in a limited manner."*

However, an applicant invoking Article 126(2)(e) of 1995 the Constitution of Uganda and section 98 of the Civil Procedure Act must establish a compelling case or sufficient reason as to why the court should set aside its dismissal orders and readmit the appeal.

In the case of **Bishop Jacinto Kibuuka Vs. The Uganda Catholic Lawyers Fraternity & 2 Others HCMA No. 696 of 2018** Justice Ssekana Musa citing with approval the Kenyan case of **Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR** defined sufficient cause as:

"Sufficient cause" means that the party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

In the case *Abel Balemesa Vs. Yesero Mugenyi (supra)*,* it was held that:

"What constitutes sufficient cause is left to the court's discretion. While exercising this discretion, the judge has to decide whether there has been an abuse of process, which amounts to an affront to the public conscience that requires the proceedings to be stayed. Where there has been a serious abuse of the process the court should express its disapproval by refusing to prolong the proceedings any further."

In the instant application the applicants by way of affidavit set out circumstances which prevented them from attending court when the matter was fixed for hearing on the 24th of January 2023. The applicants contend that their counsel had been given a different date of 24th February 2023 by the Court's clerk, and their counsel had gone ahead to inform the respondents of the later date in a letter dated 5th December 2022.

On the part of counsel for the respondents, it is argued that the failure by the applicants to attend was due to their negligence and lack of interest in prosecuting the appeal which amounts to abuse of the court process. Counsel for the respondents also argues that there was no proof that the court clerk had given the later date to the applicants and that in any case, it was incumbent upon the applicants or their counsel to extract a hearing notice and notify the respondents of the date that the matter was fixed for hearing.

On the issue of negligence, counsel for the applicants also counter-argued that if there are any instances of negligence, they should not be visited by the litigants.

I note that Civil Appeal No. 005 of 2021 was instituted on the 6th of April 2021. Although counsel for the applicants contended that the failure to prosecute the appeal in time was due to the delay of the trial court to furnish him with the typed and certified record of proceedings, one would have expected him to inform this court of his failure to access the record.

Be that as it may, I am cognisant of the fact that a certified record of the lower court proceedings was availed to counsel for the applicants on the 4th of December 2022. Counsel took the initiative to serve the same record to the respondents with a forwarding letter dated 5th December 2022 which was also filed in this court's registry. In that letter, counsel also informed the respondents that the fixed date for hearing Civil Appeal No. 005 of 2021 was 24th February 2023.

While the information on the hearing date as relayed by counsel for the applicants is erroneous, I am inclined to believe that it was relayed and relied on out of bona fide mistake. There are also hallmarks that counsel for the applicant acted in good faith without any intention to mislead either the court or the respondents. The same letter also shows that the applicants were interested in prosecuting the appeal since it was written almost one month before dismissing the appeal.

In the case of **Banco Arabe Espanol Vs. Bank of Uganda (Supra)**, the supreme held that:

> *"A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits."*

I am satisfied that a bona fide mistake on counsel believing that the matter had been fixed for 24th February 2023 cannot be visited on the applicants and this constitutes a sufficient cause in the circumstances.

In considering this application, the test is whether dismissing or allowing it will meet the ends of justice. Citing the Kenyan case of **Ivita Vs. Kyumbu (1984) KLR 441**, Justice Gadenya Paul Wolimbwa in **Abel Balemesa Vs. Yesero Mugenyi (supra)** held thus:

> *"The test is whether the delay is prolonged and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from the lapse of time. The defendant must however satisfy court that he will be prejudiced by the delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the**

****court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time."***

In this application, counsel for the applicants has demonstrated that failure to attend court on the date the appeal was dismissed was due to a bona fide mistake which in my view should not prevent the applicants from being heard so that the appeal is determined on its own merit. Besides, the respondents have not shown this court that granting this application will in any way prejudice them.

It is trite that courts should strive to sustain rather than dismiss suits particularly when justice can be served and a fair trial had, despite any delays.

In the case of **Kingstone Enterprises Ltd and 2 Others Vs Metropolitan Properties Ltd HCMA No.314 Of 2012** court held thus:

> *"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights."*

In the premises, it is my considered view that this is a case that requires substantive issues in the appeal to be investigated and decided on their own merits. Therefore, for the greater good of justice, I will vacate the order dismissing Civil Appeal No. 005 and re-admit the appeal so that it is heard on merit.

Resultantly, this application is allowed with the following orders;

- (a) Civil appeal No. 005 of 2021 is readmitted.
- (b) Costs of this application shall abide by the outcome of the appeal.
- (c) Civil Appeal No. 005 of 2021 is fixed for mention on the 26th day of March 2024.

I so order.

Dated at Fort Portal this 25th day of January 2024.

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Vincent Emmy Mugabo Judge

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