

UGANDA / JUDGMENT

Kyotamanyire Langton Madvan v Magambo Fred (MISC. APPLICATION No. 0108 of 2024) [2025] UGHC 239 (31 January 2025)

[2025] UGHC 239

COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

MISC. APPLICATION No. 0108 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT HOIMA MISC. APPLICATION No. 0108 OF 2024 (Arising From Civil Appeal No.006 of 2022) (Formerly MSD Civil Appeal No.026 of 2019) (Arising From Civil Suit No.054 of 2014)

KYOTAMANYIRE LANGTON MADVAN ::::::::::::::::::::::::::: APPLICANT

VERSUS

MAGAMBO FRED ::: RESPONDENT

Before Hon. Justice Byaruhanga Jesse Rugyema

RULING

- [1] In this application brought under Ss.33 of the Judicature Act, 98 of CPA and O. 43 r.31, and 52 rr.1 & 3 of CPR, the Applicant is seeking the following orders;
- a) **The order dismissing Civil Appeal No.006 of 2022** be set aside and the same be reinstated and heard on merit.
- b) Costs of this application be provided for.
- [2] The grounds of the application are set out in the affidavit of the Applicant which briefly are:
- 1. That the Applicant sued the Respondent vide **Civil Suit No.054 of 2014** which was decided in favour of the Respondent.

- 2. That the Applicant immediately filed **Civil Appeal No.006 of 2022 (formerly MSD Civil Appeal No.026 of 2019)** and before he could fix the same, the country was placed under lock down and upon lifting the same, before he could have the appeal fixed, he fell sick with a liver disorder and went for treatment.
- 3. That upon recovery, he approached his lawyer to have the appeal fixed and his lawyer found when the matter had been

dismissed on 16th/11/2023 for want of prosecution yet he had not been served with the hearing notice of the matter.

- 4. That he has always been interested in prosecuting his appeal but was prevented by sufficient cause from fixing the appeal.
- 5. That the Applicant has brought this application without reasonable delay and that it is in the interest of justice that the application is allowed for his appeal has high chances of success.
- [3] The Respondent opposed the application by an affidavit in reply which briefly state as follows;
- 1. That the Applicant filed **Civil Appeal No.006 of 2022 (formerly MSD Civil Appeal No.026 of 2019)** on 8/5/2019 and after a period of four years, the appeal was on 16/11/2023 dismissed for want of prosecution.
- 2. That it is an excuse for the Applicant to state that the he was unable to attend court due to sickness because he was represented by his lawyers who could have attended in his absence and or followed up the matter which had been cause listed on the court notice board for 2 weeks.
- 3. That the Applicant is guilty of dilatory conduct since the Appeal was dismissed on 16/11/2023 and the application to set aside the dismissal was filed on 17/06/2024 after a period of one and a half years which shows a clear lack of interest in the matter.
- 4. That the Applicant has not shown sufficient cause for reinstatement of the dismissed appeal and that the Application is only intended to delay the Respondent from realizing the fruits of his successful litigation.

Counsel Legal representation.

4]. The Applicant was represented by the firm of **M/s Baryabanza & Co. Advocates, Kampala** while the Respondent was represented by **M/s Mwebaza & Co. Advocates, Hoima**. Both counsel filed their respective submissions for consideration in the determination of this application.

Background.

- [5] The Applicant sued the Respondent vide **Civil Appeal No.06 of 2022 (formerly MSD Civil Appeal No.26 of 2019)** and the suit was decided in favour of the Respondent. Being dissatisfied with the judgement and orders of the trial court, the Applicant appealed the decision of the trial court vide a memorandum appeal dated 8th/05/2019. On 16th/11/2023, the appeal was dismissed for want of prosecution. As result, on 16/06/2024, the Applicant filed this instant application for reinstatement of the dismissed **Civil Appeal No.06 of 2022 (formerly MSD Civil Appeal No.26 of 2019)**.

Consideration of the Application.

Issue No. 1: Whether this Application is properly before this court.

- [6] It is apparently clear that the Applicant's appeal was dismissed for want of prosecution although the order didn't indicate or bear the law under which the appeal was dismissed. However, looking at the order which reads thus:

> **"Court: The Appeal was cause listed for today and publicly served upon parties. In the absence of the Appellant, I do dismiss the appeal for want of prosecution with costs to the Respondent."***

It appears the appeal was dismissed under **O.43 r.31 CPR** which provides thus:

Rule 31 (1):

"Where there has been undue delay in the hearing of an appeal, the Registrar may obtain the direction of Judge for the listing of the appeal at the next ensuing sessions of the High Court".*

Then **rule 31 (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 order as may seem just".*

- The appeal that the Applicant seeks to reinstate was instituted on \$[7]\$ \$9th/05/2019\$ by a Memorandum of Appeal dated the \$8th/05/2019\$. The Appeal was cause listed along with other "overdue appeals" on the High Court Notice Board for hearing on the \$16th/11/2023\$. It is not in dispute and it is a glaring fact that there had been undue delay in the hearing of the Appeal in question which had stayed in the system for almost a period of 4 years. Notice of the listing was by way of publicity on the Court's Notice Board in accordance with **0.43.r.31 (2) CPR**. On the due date of \$16/11//2023\$, in the absence of the Applicant and his counsel, the Appeal was dismissed for want of prosecution.

- \$[8]\$ A dismissal under **0.43 r.31 (2) CPR** is neither on merit nor a final order that is amenable to appeal. The rules are silent on the remedy of a party whose appeal is dismissed under **0.43. r.31 (2) CPR**. In the case of *Abel Balesesa Vs Mugenyi*, HC. Misc. **Application No. 126 of 2019**, it was held that an appeal dismissed under **0.43, r.31(2) CPR**, may be reinstated under **S.98 CPA** since **0.43** is silent on how to reinstate a dismissal of an appeal under **0.43 r.31(2) CPR**. In *Abel Balesesa Vs Mugenyi* (supra), the court observed thus:

"...the Courts are given inherent power under **Section 98 of the Civil Procedure Act** to ensure that Justice is rendered in instances where the law may be silent on a particular point. The High Court is also granted powers under **S.33 of the Judicature Act** to grant such remedies as may be just in the circumstances of the case. Therefore reading all these *provisions together, it is the finding of this court that where* **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 reason why the appeal should be reinstated".

In the premises, I find that whereas **0.43 CPR** is silent on how to \$[9]\$ reinstate the dismissal of an Appeal made under \$0.43\$, \$r.31\$ (2) **CPR**, an affected party can rely on **Ss.98 of the CPA** and **33 of the Judicature Act** to move court to reinstate an appeal. **S.98 CPA** saves inherent power of the court to make such orders as may be necessary for the ends of justice. The Applicant having proceeded under **Section 98 CPA & Section 33 of the Judicature Act**, the present application is found to be properly before this court.

Issue No.2: Whether the Applicant was prevented by sufficient cause to prosecute his appeal.

- [10] Counsel for the Applicant submitted that the Appellant truly wanted his appeal prosecuted but he was diagnosed with a liver disorder and therefore was unable to instruct his lawyer to fix the appeal for hearing. He prayed that court finds that the Applicant's sickness prevented him from fixing his appeal hence sufficient cause proved.
- [11] Counsel for the Respondent on the other hand submitted that the medical documents attached to the affidavit in support of the Application show that the Applicant was not in a critical condition, he was an outpatient who would occasionally go for reviews and checkups at different intervals. That therefore, if the Applicant had genuinely been interested in prosecuting his appeal, since he was not an admitted patient, he would spare time and pass by his lawyers' office to instruct them to prosecute the appeal. 2ndly, that the Applicant has not shown to court the steps he took to follow up his matter which has been in court for a period of about 4 years.
- [12] It is trite that it is the duty of the Applicant and his lawyers to prosecute and follow up the appeal to its conclusion. However, on the date the appeal was dismissed, neither the Applicant nor his lawyers were present in court. No reason was advanced by the Applicant's

lawyers as to why, in their client's absence, they did not heed to the court notice on the due date yet as court users they were expected to be aware of the notice that was displayed on the Court Notice board for a period of **2 weeks**. The Applicant on the other hand alleged sickness of which he was required to occasionally have reviews and regular checkups. It is however noted that the firm of advocates representing the Applicant in this

Application, it is the same firm of lawyers who had filed the memorandum of appeal. There is no explanation as to why the Applicant's counsel failed upon filing the memorandum of Appeal, to take the necessary steps to prosecute the Appeal. The absence or sickness of the Applicant would not hinder his counsel from taking steps to prosecute the Appeal unless counsel has been stripped off instructions to do so which is not the case in this Application. Further, an examination of the medical evidence on record as presented by the Applicant (**annextures A1 – A5**), it is apparent that all along from **24th/10/2022** to **28th/5/2023**, the Applicant was an Out-patient save for **20th/10/2023** when it is claimed he had been admitted and discharged (there is no proof of when he was admitted). I find that prior to his alleged sickness, during his sickness and after recovery, the Applicant surely, had all the opportunity to prosecute his appeal but the truth is that, he had abandoned the Application until court dismissed it for want of prosecution. The Applicant did not do anything but sat on his rights only to wake up and find that his Appeal was dismissed.

- [13] From the foregoing, I find both the Applicant and his lawyers left the appeal to be a responsibility of the court. The court cause listed the Applicant's appeal for hearing because the matter was long overdue but neither the Applicant nor his lawyers appeared on the due date for hearing of the Appeal. Justice delayed is justice denied, see **Kalembe Vs Kiwanuka H. C. C. S No. 38 of 2008 [2017] UGHCCD 199**. The Respondent has all the rights to enjoy the fruits of his litigation.
- [14] In the premises, in view of the above, I find that the Applicant has not demonstrated sufficient cause to warrant the setting aside of the dismissal order of **Civil Appeal No. 06 of 2022 (formerly MSD Civil Appeal No.26 of 2019)** and reinstatement of the same. The Application therefore stand dismissed with costs.

Dated at Hoima this 31st day of January, 2025.

Byaruhanga Jesse Rugyema JUDGE

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