

UGANDA / JUDGMENT

Nasande and Another v Kafeero and 3 Others (Miscellaneous Application 132 of 2023) [2024] UGHC 427 (19 April 2024)

[2024] UGHC 427

COURT
High Court of Uganda

BEFORE
Byaruhanga Rugyema, J

CASE / FILE NUMBER
Miscellaneous Application 132 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

MISC. APPLICATION NO. 132 OF 2023

(Arising from Misc. Application No. 17 of 2023) (Formerly MSD Misc. Application No. 95 of 2022)

1. NASANDE JULIET

2. CONSULANTA NAKABUGO ::::::::::::::::::::::::::::::

VERSUS

- 1. YOZEFU KAFEERO

- 2. NDAGANO EDWARD

- 3. BONABANA CONSTATINO

- 4. ISIRIYALI AJUB ::::::::::::::::::::::::::::::

Before: Hon. Justice Byaruhanga Jesse Rugyema

RULING

- This is an application brought under Articles 126(2)(e) and 139 of the \$[1]\$ Constitution, S.33 of the Judicature Act, Ss.64 (e) & 98 CPA, O.9 r.23 and 0.52 r.1 & 2 CPR for orders that

- 1. The orders dismissing Misc. Application No.17 of 2023 (formerly MSD Misc. Application No.95 of 2023) be set aside and the Application be reinstated and fixed for hearing on its merits.
- 2. That an order of stay of execution in Misc. Application No.17 of 2023 be issued pending the hearing of the Applicants' Application.
- 3. Costs of this Application be provided for.
- The Application is supported by the affidavit of Ms. Nasande Juliet, the 1st Applicant wherein the grounds of the application are stated. Briefly, they are;
- a) That the Applicants were prevented by sufficient reason from appearing on 10th November 2023 when Misc. Application No.17 of 2023 (formerly Masindi Misc. Application No.95 of 2022) was dismissed because the Applicants were in hospital.
- b) That the Applicants honestly and intended to be present when the case was due for hearing since there are substantial questions to be determined with very high chances of success in so far as its crucial in respect of the Applicant's pending appeal.
- c) That it is fair, equitable and in the interest of justice that the Application be allowed and the dismissed application be reinstated and heard on merits.
- The Respondents filed affidavits in reply in opposition of the Application 3rd deposited by the 2nd , 3rd and 4th Respondents stating that the Applicants were not prevented by any sufficient reason because the Applicants were at home and only took court for granted by filing applications which they did not prosecute including Misc. Application No.17 of 2023. That the main suit was decided in the Respondents' favour, no costs were awarded and therefore there is nothing to execute against the Applicants. The Respondents further averred that the Applicants' intended appeal has no chance of success.

Counsel representation

4 The Applicants were represented by Mr. Claude Arinaitwe of M/s K R K Advocates, Fort portal and the Respondents were represented by Mr. Arinaitwe Gideon of M/s Kazungu Kakooza Alinaitwe & Co. Advocates, Mityana. Both counsel filed their respective submissions for consideration of this court in the determination of this Application.

Background of the Application

5 The Applicants sued the Respondents vide Chief Magistrate's court of Kibaale at Kagadi, Civil Suit No. 15 of 2018 inter alia, for trespass and the suit was decided on the 26th day of May 2021 in favour of the Respondents. At the time of judgment, the 1st Respondent who is the father in law of the 1st Applicant and grandfather of the 2nd Applicant, had died.

The Applicants sought to evict the 4th Respondent who was in possession of the suit land. On the 12th day of August 2021, the Respondents filed Misc. Application No. 28 of 2021 for contempt of court of orders in C. S. No. 15 of 2018 that was decided in favour of the Respondents against the Applicants. The Applicants filed an appeal and also Misc. Application No.71 of 2021 seeking for stay of execution of C. S No.15 of 2018 and for extension and or validation of the Applicants' memorandum of Appeal that had been filed out of time. Misc. Application No.71 of 2021 was decided on the 19th day of January 2022 in the favour of the Applicants with conditions to furnish security for due performance of the decree of Ugx \$1,500,000/=, file and serve the memorandum of appeal. The order was accordingly issued on 7th February 2022. The security for due performance of the decree amounting to Ugx 1,500,000 was to be paid within 2 weeks from the date of the order, i.e, by 21st February 2022. The Applicants did not comply with the terms and conditions as set by court. The Applicants filed Misc. Application No.17 of 2023 (formerly MSD No.95 of 2022) for extension of time and or validation of the Applicants' payment of the security for costs as ordered by court in H. C. M. A No.71 of 2021. It is this Application which was dismissed on 10th November 2023 for want of prosecution hence the instant Misc. Application No. 132 of 2023 for its reinstatement.

Counsel submissions

- Counsel for the Applicants submitted that the Applicants have always and \$[6]\$ duly attended court save for those dates when the trial court was indisposed and that on the 10th day of November 2023 when Misc. Application No.17 of 2023 was dismissed, the 1st Applicant was in hospital together with her daughter, the 2nd Applicant who got complications with her pregnancy as per annexure NA 6(a) and (b)) thus unable to attend court. Relying on the authority of Nicholas Rousous Vs Gulam Hussein Habib Virani & Anor, Civil Appeal No.9 of 1993 counsel contended that among other circumstances that amount to sufficient cause, is illness of a party which applies to the applicants in this case.
- Counsel for the Applicants further submitted that the dismissed \$[7]\$ application, if reinstated has a very high chance of success and is not a
- desperate ploy to deny the Respondents justice. Counsel concluded and prayed that it would be in the interest of justice to set aside the order dismissing Misc. Application No.17 of 2023 and the same be reinstated for hearing on merits and also order for stay of its execution pending its hearing and determination.
- Counsel for the Respondent submitted in reply that the Applicants have \$[8]\$ advanced only one reason i.e illness that prevented them from attending court on the day the impugned Application was dismissed. 2ndly, that the documents attached to the Applicant's affidavit show that she was never admitted. 3rdly, counsel questioned the authenticity of the medical reports; annexure NA 6(a) & (b) because according to him, it is practically impossible that the Applicant who was pregnant last year, is still pregnant. Counsel further contended that

the Applicants have not come to court with clean hands because they evicted the \$4^{\rm th}\$ Respondent yet court had declared the Respondents as owners of the suit land hence making the Applicants contemnors. He concluded and prayed that the Application be dismissed with costs for no sufficient reason has been advanced by the Applicants.

Determination of the Application

\$[9]\$ O.9 r.22 CPR provides thus;

"Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed,....."

O.9 r.22 CPR is couched in mandatory terms and therefore, when the suit and/or application is called for hearing and the defendant/respondent appears but the plaintiff/applicant does not appear, the court ought to dismiss the suit and/or application.

[10] In the instant case, the record of \$10^{\text{th}}/11/2023\$ show that the Applicants had sought for hearing of Misc. Application No.17 of 2023 (Formerly Msd No. 95 of 2022) on \$16^{\text{th}}/11/2022\$ but none appeared. The matter was adjourned thrice but the Applicants were absent on the 3 occasions. Now, even though on those days the trial judge was indisposed, this was no excuse for the Applicants not to attend court because the \$2^{\text{nd}}\$ & \$4^{\text{th}}\$ Respondents always attended court. Later on, the record shows that the

- parties were given directions to file submissions and the matter was
- adjourned to \$10^{\text{th}}/11/2023\$. On this day, only the \$2^{\text{nd}}\$ & \$4^{\text{th}}\$ Respondents were present in court. Neither the Applicants nor their counsel attended court and on its own motion, court accordingly dismissed the Application.

[11] O.9 r.23 CPR upon which this application is brought provides that; "Where a suit is wholly or partly dismissed under Rule 22 of this order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he or she may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for non-appearance when the suit was called for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit....."

[2] The issue here is whether there was sufficient cause for the nonappearance of the Applicants on the date Misc. Application No.17 of 2023 was called on for hearing.

[13] In Hikima Kyamanywa Vs Sajjabi Chris C. A. C. A No. 1 of 2006, it was held that;

> "Sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time"

In the case of Boney M. Katatumba Vs Waheed Karim Civil Application No.27/2007 (SCU), Mulenga JSC as to what constitutes sufficient reasons, observed thus;

> "What constitutes "sufficient reason" is left to the court's unfettered discretion. In this context the court will accept either a reason that prevented an applicant from taking the essential steps in time, or other reasons

In the instant case, the reason given by the Applicants for their failure to \$[14]\$ attend court is illness. That they were both in the hospital because the \$2^{\text{nd}}\$ Applicant was in the hospital with pregnancy complications and the \$1^{\text{st}}\$

Applicant as her next of kin, was there as her helper. I don't find this as sufficient reason for not attending court on the due date the hearing had been scheduled;

firstly, the issue at court being an application, it did not necessarily require the presence of the Applicants. It nevertheless required the presence of counsel for the Applicants to appear and argue the Application. The Applicants have not shown any cause why their counsel did not appear in court to argue the Application yet their counsel was present on the previous date of the hearing when the matter was adjourned to \$10^{\text{th}}\$ November 2023 when the Application was dismissed.

2ndly, though however, counsel for the Respondents submitted that the medical documents attached on the Application are photocopies which are not certified and therefore not authentic, there is no evidence to support his claim because he did not challenge the annexures in any form be it applying to have the original or certified copies presented or cross examination of the Applicants on the same. Counsel cannot therefore challenge them at this stage of final submissions by the parties. There is however evidence that the Applicants are self-confessed contemnors who have disobeyed court orders that decreed the suit land to the Respondents and for that reason they have not come to court with clean hands so as to benefit from discretionary orders. See Jingo Livingstone Vs Hope Rwaguma CACA No.190 of 2015 [2021] UGCA and in Housing Finance Bank & Anor Vs Edward Musisi, M. A No.158/2010 the Court of Appeal held that "A party in contempt of court by disobeying existing court orders cannot be heard in a different, but related cause or motion unless and until such a person has purged himself or herself of the contempt."

This court also found that contempt of court may be deduced from any conduct 'which interferes with the administration of justice or impedes or perverts the cause of justice'.

[15] In the instant case, it is evident that the lower court decided C. S No.15 of 2018 in favour of the Respondents and they were declared as the rightful owners of the suit land. On the \$26^{\text{th}}\$ day of May 2021, the 1st Respondent passed on/died before the delivery of the judgment but nevertheless, the Applicants proceeded and evicted the surviving Respondents from the suit land. Then thereafter, the Applicants proceeded to file M. A No.71 of 2021

- seeking inter alia an order for stay of execution of the judgment and be allowed to appeal out of time. This Application was granted on 19th January 2022 on condition that they pay security for due performance of the decree within 2 weeks and serve the memorandum of appeal upon the Respondents. It is evident that neither of these terms were complied with by the Applicants.
- 3rdly, in Goyal Vs Goyal & Ors, C. A. C. A No.109 of 2004, failure to deposit \$[16] security for costs within the stipulated time was considered contempt of court's orders. In this case, it has not been shown by the Applicants that they purged themselves of the contempt of the court orders of the lower court so as to deserve a listening ear in Misc. Application No.17 of 2023 and the present Application.
- It is evident that the Applicants were granted leave to file their appeal out \$[17] of time with a condition that they pay security for due performance of the decree within two weeks from the 19th day of January 2022, and serve the memorandum of appeal. The Applicants however, have not shown that they fulfilled the conditions as set by this court or why they failed and or refused to fulfil them. As a result, the file was sent back to the lower court for its final conclusion. So, there is no pending appeal as a basis for the Applications brought by the Applicants before court. In the absence of any evidence that the security for due performance has been paid, therefore, M. A No.17 of 2023 has no likelihood of success.
- \$[16] In my view, basing on the Applicants' conduct above, the Applicants appear to be motivated by other reasons to wit, delay the Respondents' enjoyment of fruits of their litigation in view of the fact that the suit land was decreed to them on 26th May 2021. Therefore, from the foregoing, I am not persuaded by the reason advanced by the Applicants to reinstate the dismissed Application No.17 of 2023.
- \$[17] In premises, I find that the Applicants have not given and/or advanced satisfactory reason or sufficient cause for setting aside the order dismissing Misc. Application No.17 of 2023 and order for its reinstatement. The interests of justice in the circumstances of this case, tilt in favour of the Respondents and therefore, require that this

application be dismissed. As a result, the application is accordingly dismissed with costs to the \$2nd, \$3rd, and \$4th Respondents.

Dated this 19th day of April, 2024.

Byaruhanga Jesse Rugyema JUDGE.

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Prepared on 14 October 2026 · Esheria