

UGANDA / JUDGMENT

Ojok & Another v Anyinge & 2 Others (Miscellaneous Application 68 of 2024) [2025] UGHC 11 (16 January 2025)

[2025] UGHC 11

COURT

High Court of Uganda

BEFORE

Okello, J

CASE / FILE NUMBER

Miscellaneous Application 68 of 2024

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5 THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA HOLDEN AT LIRA****MISCELLANEOUS APPLICATION NO. 68 OF 2024****(ARISING FROM LAND APPEAL NO. 003 OF 2013****(ITSELF ARISING FROM LAND CLAIM NO. 002 of 2005)**

| 1. OJOK SAM | |

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| | 2. OKAO JIMMY..... APPLICANTS |

VERSUS

| 20 | | |

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| | 1. ANYINGE FLORENCE | |

| | 2. APITA GEOFFREY | |

| | 3. OJOK PAUL.....RESPONDENTS | |

| | |

BEFORE: HON. MR. JUSTICE GEORGE OKELLO**RULING**

The Applicants seek to have the order of Gaswaga J dismissing land appeal No.003 of 2013 set aside and the appeal reinstated for hearing on merit.

35 They pray that costs of the application be in the cause.

The applicants commenced this action by Motion supported by affidavit of the 2nd Applicant. At the hearing, court was informed that the 1st Applicant is deceased. Court was not told whether he died before or after the filing

40 of this matter. No attempts were made by the co-applicant or member of

- 5 the deceased's family or his estate to move court to appoint personal representative or an administrator ad litem for the purposes of furthering the interests of the deceased. The authority of **Henry Mukasa Mawangala & 2 others Vs. George William Kalule, Court of Appeal Civil Application No. 1008 of 2023** (Eva K. Luswata, JA) comes in handy as 10 it guides on the circumstances under which court could make such appointment. The appointment of representative is also statutorily supported by section 218 of the Succession Act Cap 268 (formerly s.222 of the Act before the law revision of 31 December, 2023).
- 15 When the Motion was lodged on 25 August, 2024, there was no supporting affidavit of the deceased applicant. Given the lack of personal representative/ administrator ad litem, this application abates in so far as relates to the deceased (1st applicant). I accordingly strike out the application with no order as to costs as regards the 1st applicant. Not 20 awarding costs is on the backdrop that a non-existing person cannot be
- condemned in costs. See: **Fort Hall Bakery Supply Company Vs. Frederick Muigai Wangoe** [1959] E. A 474; **Benjamin Sejjabi t/a Namataba Vs. Timber Manufacturers Limited** [1978] HCB 202.
- 25 The above state of affairs means the 2nd applicant is the sole applicant. I shall, therefore, refer to him as the applicant and not the 'second applicant'.

What I gather from the Motion, the affidavit evidence, and the documents annexed thereto is that, the land appeal was dismissed by court on 29 June, 2023. Neither party was in attendance. The appeal was dismissed for want of prosecution, apparently under Order 43 rule 31 of the CPR

10 although not referenced. The Applicant some-what confuses the aspects of his averment when he claims the dismissal was due to non-appearance. Far from it, the dismissal was on account of want of prosecution. The applicant contends that because land dispute is contentious, the interest of justice dictates that this application is allowed and the appeal heard on

15 merit.

The Applicant avers that he has been diligently following the appeal from 2013 to 2022 when the appeal lost position. He claims the appeal file went missing. Basing on the information by lawyers, the applicant claims that 20 his lawyers were in touch with the Assistant Registrar who instructed a clerk of court to search for the file. The applicant claims the Appeal was subsequently fixed for 02 February, 2023 before the trial Judge but could not take off because court was indisposed and no new date was assigned. The applicant avers he was later informed by his advocate that the appeal 25 was dismissed without notice to the parties. According to the applicant, the appeal was not among the matters scheduled for weeding out in the month it was dismissed. The applicant claims there is no minute by the

- 5 learned Judge showing how the appeal was dismissed for non-appearance. The applicant asserts that he diligently followed up the appeal and had he been informed about the particular court sitting, he would have attended court. The applicant continues that the respondents have so far sold part of the suit land. He concludes that if the application is denied, he will 10 suffer prejudice and damage.
- There is no opposing affidavit. During the oral address by Mr. Isaac Okae, learned counsel for the respondents, he indicated he was opposing the

application on matters of law only. For the applicant, Ms. Kaheru Patricia

15 held brief for Ms. Apio Rebecca. She also addressed court orally. Learned counsel reiterated the grounds of the motion. She also responded to court questions on a few factual matters.

Learned counsel for the applicant stated from the bar that whereas the 20 appeal was filed in 2013, it took counsel five years to obtain the lower court record. She asserted that subsequently, the Appeal file went missing from the registry but was retrieved on 09 December, 2022. Asked why the lawyers did not document their follow-ups of the lower court record and the claim of the missing court file, learned counsel stated that her

- 5 colleague (Apio Rebecca) physically followed up the matter and verbally communicated to the responsible court officials. She added that she learnt about the appeal dismissal in February 2024. Learned counsel, however, did not explain why the present application was filed six months later after learning about the dismissal. In conclusion, the applicant who attended
- 10 the hearing, offered to pay the respondents shs. 2,000,000 in costs, should court be inclined to allow the application.

Submitting for the respondent, Mr. Okae argued that the chronology of events given by his learned friend show that the applicant (as appellant)

15 was not diligent in prosecuting the appeal from 2013. He emboldened his argument by alluding to the delayed lodgment of the present application. Learned counsel submitted that both the applicant and counsel have been dilatory in their conduct. He prayed for dismissal of the application with costs.

The sole issue for determination is whether there is a basis for court to set aside its order dismissing land appeal No. 003 of 2013, and reinstating it for hearing on merit.

Whereas there is no opposing affidavit, this court still has to consider the application and assess whether it is intrinsically tenable on its own. See: **Walimu Cooperative Savings and Credit Union Vs. Okumu Benjamin & Another**, Misc. Civil Application No. 101 of 2022 (Okello J); **Makerere 10 University Vs. St. Mark Education Institute**, HCCS No. 378 of 1993 digested in [1994] V KALR 36 (Lugayizi, J).

Since learned counsel for the respondent opposed the application on principle, it was within his right to do so.

I have perused the material supplied by the Applicant. The critical document is annexure D which is the record of proceedings of the appeal that came up before Gaswaga J. It is dated 29 June, 2023. The record shows that both parties and counsel were absent. Court remarked:

"For quite a long time the parties herein have not followed up nor taken any steps to have this matter heard and concluded. On 24/2/2022, counsel for the Appellant confirmed that she had lost touch with her clients. This is a clear indication that the parties have lost interest in having the matter* 25 *prosecuted and concluded. Accordingly, it is hereby dismissed and the file closed."*

- 5 It is clear from the record that the appeal was dismissed not for want of appearance as the applicant purports but for want of prosecution. The provision which I think court had in mind when it dismissed the appeal is O.43 rule 31 of the CPR. In moving this court, the Applicant invokes O.43 rule 16 of the CPR. That provision is inapplicable because it deals with
- 10 reinstatement of an appeal dismissed under rules 14 and 15 of O.43. Rule 14 provides for dismissal where the appellant fails to appear on the day when the appeal is called for hearing. Rule 15 of O.43 provides for dismissal of appeal where the appellant fails to deposit money for meeting costs of serving a hearing notice on a respondent consequent on which the
- 15 respondent fails to appear at the hearing. Thus under O.43 rule 16 CPR, an appeal may be readmitted for hearing if the Applicant (as an appellant) shows that, in the case of the dismissal under rule 14, he/she was prevented by sufficient cause from appearing for hearing, or in the case of dismissal under rule 15, he/she was prevented by sufficient cause from 20 depositing money required for effecting service of hearing notice.

In the present case, the only relevant law whose aid has been called to is section 98 of the CPA. The section provides for the inherent powers of the

- 5 court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The invocation of inherent powers of this court is dictated by necessity. Its operational field and sphere can neither be well defined nor circumscribed. The legislature found it necessary to provide for court power to take care of diverse 10 situations that could arise so as to do justice or prevent abuse of court process. It was thus not desirable to put such a wholesome and statutory
- power in a straitjacket. See: **Re Mahamaya Banerjee AIR 1989 Cal 106.**

This court has had the opportunity to interrogate the applicability of 15 section 98 CPA where an appeal was dismissed under O.43 rule 31 of the CPR. In **Obote David Vs. Odora Yasoni, Misc. Application No.50 of 2022**, the applicant sought to set aside an order dismissing his appeal. He prayed for reinstatement. Court noted, first, that, O.43 rule 31 and the entire CPR is silent on what an aggrieved appellant whose appeal is 20 dismissed for want of prosecution ought to do. Court considered the possibility of an appellant appealing to the court of appeal but noted that such appeal would require leave. And for leave to be granted, certain conditions ought to be met. For instance, a demonstration that novel points of law are involved which require further adjudication by the 25 appellate court. Court opined that this may be difficult to meet where an appeal was dismissed under O.43 rule 31. I should add that, appealing an order in such a case would not be the most effective remedy and would be

5 more costly. The ratio in **Obote Vs. Odora** case, therefore, is that, court may, on a proper case, exercise its inherent power under section 98 of the CPA to set aside an order dismissing appeal for want of prosecution. Court may reinstate the appeal for hearing on merit, to render justice, but of course, subject to terms as court may, in a given case, specify.

As I have stated, the exercise of inherent powers is not necessarily limited by any given legal situation. Court may look at the circumstances of each case. There are of course cases where court may decline to invoke its inherent powers. Such circumstances were discussed in **Obote Vs. Odora**,

15 but they are in no way conclusive.

In the instant case, the applicant ought to satisfy court that, at the time his appeal was dismissed for want of prosecution, he had demonstrated diligence in prosecuting it. He should demonstrate why court should 20 indulge him by invoking section 98 to set aside the dismissal order and readmit the appeal for hearing.

The Judgment of the Magistrate Court which was the subject of the appeal was given on 16 May 2013. The memorandum of appeal was lodged on 08 25 January, 2016 although the appeal number purports that it was filed in 2013. The grounds of the appeal which is not necessary at this juncture, are two. The first is that, the learned trial magistrate erred in law and fact

- 5 when he gave judgment in favour of the respondents whereas the respondents did not have any cause of action against the appellants thus occasioning a miscarriage of justice. The second ground is that the trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on the ground and gave judgment in favour of the respondents
- 10 thus occasioning a miscarriage of justice.

Apart from lodging the memorandum of appeal, the applicant did not prepare a certificate of the trial court for court endorsement showing when he obtained certified record of the proceedings from the court. That said,

- 15 the only communication relied on by the applicant is a letter written by Acan & Co. Advocates, dated 15 November, 2022, in which the advocates asked the resident Judge to fix the appeal together with other pending cases for hearing. The list of the cases are contained in annexure B. It includes the appeal under discussion which appears first. On receipt of
- 20 the letter, on 09 December, 2022, the Assistant Registrar did minute and directed the clerk of court to place the listed files before the Assistant Registrar by close of business. There is nothing to suggest that the Appeal file was missing, contrary to the applicant's allegation. In my view, a documentation that the file went missing was critical yet the applicant did
- 25 not avail any. The claim of the missing file remained a figment of the applicant's imagination. The applicant places reliance on the letter of 15 November, 2022 yet the letter does not speak to the allegation of the

5 missing file. On the contrary, by that letter, the learned Judge was requested to fix the appeal and other matters. That is all the letter says.

I have also considered the claim that the appeal was fixed for mention for 02 February, 2023 and that it was not mentioned. The claim could well be

10 true but there was a need for documentary proof, for instance, by way of a cause list or a hearing notice or the record of proceedings of the day, to buttress the claim.

In the record of the proceedings of 29 June, 2023, the learned Judge noted 15 that the appeal earlier came up on 24 February, 2022 during which learned counsel for the appellants informed court that she had lost touch with her clients. Other than that, there is no other record to show diligence save the one-off letter of 15 November, 2022. I thus find nothing to show serious diligence by the Applicant or counsel in prosecuting the appeal. By 20 the time the appeal was dismissed, the hearing had never taken off. In any case, the one-off letter was written after eight year hiatus. This demonstrates lack of seriousness on part of the appellant and counsel. Moreover, when the appeal was dismissed on 29 June, 2023, learned counsel says she learnt about it in February, 2024. This was another eight 25 months lack of diligence. It demonstrates that neither the applicant nor counsel bothered to follow-up the matter from June 2023 when the dismissal happened.

As if the delay was not bad enough, on learning about the dismissal, a further six months were spent before the present application could be lodged. The instant application was only filed on 26 August, 2024. These embolden my conclusion that the applicant and counsel have at all times

- 10 been dilatory in the conduct of the appeal. I find it surreal that the applicant had the audacity to lie on oath that there is no minute of the court showing why the appeal was dismissed yet he attaches the very record to his affidavit. Be that as it may, this court appreciates that land matters are important in this country and can sometimes be quite
- 15 sensitive. But this is no license for a litigant to sit back and do nothing to prosecute his case. It would be wrong for a litigant to expect court never to dismiss land matter, or where it is dismissed, to reinstate it as a matter of course. I also find it wrong for a litigant to warehouse a case and wake up to prosecute it at his/her convenience. Court does not act for litigants.
- 20 I am aware of decisions of courts where land suits have been re-admitted after dismissal, and heard on merit. Once such cases is **Chad Nyakairu Vs. Edrisa Nayakairu & Steve Williams, the Court of Appeal** (Kasule, Opio-Aweri, and Buteera, JJA, as they were). In that case, a Judge of the High Court dismissed the land suit under Order 17 rule 4 of the CPR. 25 Whereas the learned Judge observed that he was dismissing the suit under O.7 r.14, he noted that the suit had been dismissed before. The learned Judge also stated that he would not be party to creation or propagation of
- 5 backlog in the court system. On appeal, the learned Justices of Appeal held that the High Court Judge was wrong to dismiss the suit under O.17 r.4 as the record did not show that the appellant had been given time to produce evidence or cause the attendance of witnesses or to perform any other necessary act to further the progress of the case. In setting aside the
- 10 dismissal, the Court of Appeal observed that since the matter concerned property dispute, it ought to be heard on its merit. Their Lordships appreciated the concern of the learned Judge in fighting case backlog in the country but stressed that relevant provisions of the law ought to be invoked according to the circumstances of each case.

I am guided by the above binding precedent. I, however, think the statement of the Court of Appeal shows that their Lordships were cognizant of the fact that, depending on the circumstances of each case, land matters can in fact be dismissed. I should add that, where a suit is 20 dismissed, be it land or any other, a litigant should not treat it as a matter of course that courts will always set aside its dismissal orders. Courts should always look at the peculiar circumstances of each case before making appropriate orders.

25 In the instant matter, given that the decree of the trial court was issued over a decade ago in favour of the respondents, and by the Applicant's own word, the decree-holders have since sold part of the suit land, this court

- 5 is disinclined to re-open the gate wide for multiple suits when the applicant in the first place never bothered to prosecute his appeal for over a decade. He also never bothered to obtain a restraining order to protect his alleged interests in the suit land. I am afraid court cannot indulge the applicant in the exercise of the inherent powers. The applicant chose to warehouse
- 10 the appeal and sat back until court dismissed it. He woke up much later and now claims to exhibit seriousness in pursuing it. The applicant's offer of minimal costs, says it all. The wisdom of our apex court in **Uganda Baati Ltd Vs. Mubangizi Julius, Civil Application No. 07 of 2020** that a party
- cannot be allowed to warehouse proceedings until it is convenient to 15 pursue them, aptly sums up my views on the applicant's conduct. I wish to add that, a litigant who does not wish to prosecute his/her case, should never file it in the first place. If he/she files one but fails to prosecute, court can do no better than to discontinue it. Litigation should not be treated as an indefinite past-time. Litigants ought to appreciate the 20 pressure on the courts due to great increase in litigation and work-load which require courts to strike a balance between the need to conduct legal business efficiently in the interest of the whole community. Thus whereas courts will consider cases of pure negligence or genuine error or mistake by counsel where the client is not to blame or sufficient cause where court 25 is being indulged, of course depending on the law pursuant to which court is being moved, courts can no longer show the same level of indulgence

towards litigants whose conduct are dilatory in the particular litigation. It

- 5 is salutary to note that courts spend valuable time in hearing and deciding cases and we are no longer living in the leisured age. There will, therefore, always be cases in which justice will be better served by allowing the consequences of dilatory conduct to fall on the head of the guilty litigant.
- 10 In the final result, I decline the application and dismiss it with costs to be paid by the applicant to the respondents.

I so order.

Delivered, dated and signed this 16th January, 2025

11:56 Am 16/01/2025

25 Attendance

Ms. Patricia Kaheru, holding brief for Ms. Apio Rebecca, counsel for the Applicant present
Applicant absent

Respondents' counsel (Mr. Isaac Okae) absent (legal assistant Hasahya

30 Asaph seated in the Court Hall to listen to the ruling given lack of audience)

Respondent present in court Mr. Opio Esau, Court clerk

35 Ruling signed and read in open court.

George Okello JUDGE.

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