

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**

**MISCELLANEOUS APPLICATION No. 594 of 2023**  
**(ARISING FROM CIVIL APPEAL No. 60 of 2018)**  
**(ARISING FROM CIVIL SUIT No. 212 of 2012)**

**EDWARD SERUGUNDA ===== APPLICANT**  
**VERSUS**

**JOHN HENRY SERWANIKO===== RESPONDENT**

**BEFORE: HON. JUSTICE FLAVIA NASSUNA**

**RULING**

**1. INTRODUCTION.**

This application was brought under the provisions of Order 9 rule 23 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act. It was seeking for orders that;

- a. The order dismissing Civil Appeal No. 60 of 2018; be set aside.
- b. Costs of the Application be provided for.

It was brought by notice of motion which was supported by an affidavit sworn by the applicant. The grounds of the application were laid in the notice of motion and affidavit in support. Briefly the grounds were that;

- i) The applicant was prevented by sufficient cause from attending court when Civil Appeal No. 60 of 2018 came up for hearing as he was upcountry, sick and expected his

former lawyers to either inform him of the hearing date and/or attend court.

ii) That the non-appearance of the applicant/appellant and his counsel in court when Civil Appeal No. 60 of 2018 came up for hearing was due to the fact that both the applicant and counsel were not aware of the hearing date as service of the hearing notice for the 14<sup>th</sup> February, 2023 was not effected upon them.

iii) That the applicant was vigilant in attending court during the hearing of the application for security for costs vide Miscellaneous Application No. 1254 of 2019 until he became sick and bedridden

iv) That unless the dismissal of Civil Appeal No. 60 of 2018 is set aside, the applicant is likely to lose his land without court determining real issues in controversy in Civil Appeal.

2. The Respondent filed an affidavit in reply by which he called upon the court to dismiss the application with costs. Briefly he stated that;

i) The application was frivolous and vexatious and intended to buy and waste court's time, as the subject matter of litigation was currently being sold, wasted and delineated by the applicant.

ii) The applicant's affidavit in support of the application did not disclose any sufficient cause for the reinstatement of the said appeal.

iii) That the alleged sickness and retreat to the village by the applicant were all false as he had never left Makindye.

- iv) That the applicant never effectively instructed any lawyer to prosecute this appeal and his former lawyers served a notice of withdrawal of instructions owing to the applicant's failure to effectively instruct them.
  - v) That for this reason, the applicant could not attribute his failure to prosecute his appeal to the reluctance, incompetence or indifference of his lawyers.
  - vi) That the applicant had never, raised or initiated any matter of professional misconduct against the law firm of M/s Lubega & Co. Advocates or other lawyers for letting him down in prosecuting his appeal.
  - vii) That the applicant had at all material times relaxed and deliberately took no further steps in the appeal process. He only woke up when the respondent embarked on steps to enforce the lower court's judgment and decree.
  - viii) That the application and its supporting affidavit were full of falsehoods.
3. The applicant filed an affidavit in rejoinder in which he stated that;
- i) The application was competent and properly brought before court.
  - ii) The applicant was a resident of Zzira Village, Namungo sub-county in Mityana district and his sickness or stay in the village are not an after-thought.
  - iii) That he had effectively instructed his lawyers, but since they let him down, he was prompted to instruct the current lawyers.

ix) That the applicant had never sold part of the suit land and had only been acting as an administrator of the estate of the late Namusoke Getrude.

#### **4 ISSUES.**

- a. Whether Civil Appeal No. 60 of 2018 should be reinstated.
- b. What remedies are available to the parties?

#### **4. LAW APPLICABLE.**

- The Constitution of the Republic of Uganda 1995.
- The Judicature Act Cap 13.
- The Civil Procedure Act Cap 71.
- The Evidence Act Cap 6.
- The Civil Procedure Rules.
- Common Law and Case Law.

#### **5. SUBMISSIONS BY COUNSEL FOR APPLICANT.**

Counsel for the applicant filed written submissions which I have carefully studied and need not reproduce them here. Briefly he submitted that pursuant to Order 9 rule 23 of the Civil Procedure Rules, all the applicant had to prove was that he had sufficient cause for his inability to appear and defend the suit when it came up for hearing. He cited the cases of **Kibuuka v. Uganda Catholic Lawyers Society & 2 Ors.**<sup>1</sup> and **Florence Nabatanzi v. Naome**

---

<sup>1</sup> Misc. App No. 696 of 2018

**Binsobedde<sup>2</sup>** where courts emphasized where there is sufficient cause, then a matter should be reinstated, and that the negligence of counsel in such incidents should not be visited on the litigant. He also submitted that the applicant had been diligent in pursuing the appeal and had filed this application without undue delay.

#### **6. SUBMISSIONS BY COUNSEL FOR THE RESPONDENT.**

Counsel for the respondent also filed written submissions in reply which I have carefully studied. Briefly he submitted that the applicant had not instructed any lawyer effectively at the time and for five years, he had not pursued the appeal. For that reason he did not have sufficient cause to reinstate the matter.

That the alleged sickness had not been proved and was a false statement in the affidavit. He cited the case of **Wakabala & Co. Advocates v. Banyenzaki Christopher**,<sup>3</sup> in which the allegation of sickness was found to be false and the application was dismissed. He thus called upon court to dismiss this application.

#### **7. DECISION OF COURT.**

**Whether Civil Appeal No. 60 of 2018 should be reinstated.**

- a) As already stated above, counsel for the applicant submitted interalia that the applicant had shown that there was sufficient reason for reinstatement of the said appeal. That O.9.r.23 of the Civil Procedure Rules empowers court to set

---

<sup>2</sup> SC Civil Application No. 6 of 1987

<sup>3</sup> High Court Misc. App. No. 802 of 2019

aside dismissal order once sufficient cause has been shown. That the applicant was sick and thus unable to attend court while his counsel was not notified of the scheduled hearing date. He cited several authorities in support of his case that explain what amounts to sufficient cause which I have carefully studied.

- b) Counsel for the Respondent on the other hand submitted inter alia that the appeal was properly dismissed for want of prosecution after the applicant had failed to prosecute the appeal. The applicant had not given instructions to his lawyers to prosecute the said appeal, he was duly served with court process but opted not to attend court. He also cited several authorities in support of these submissions which I have carefully studied.
- c) After carefully studying the record of proceedings and submissions of both parties I established as follows:
  - i) The current application is for reinstatement of an appeal that was dismissed for want of prosecution.
  - ii) Whereas the applicant brought this application under Order 9 rule 23, and both counsel based their submissions on the same provision, this provision is inapplicable as it relates to dismissal of suits and not appeals by the High Court.
  - iii) The law on dismissal of appeals for want of prosecution is contained in Order 43 rule 31 (2) of the Civil Procedure Rules which states that;

*“Notice of the listing shall be served in such a 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.”*

iv) Order 43 rule 31 is silent on the course of action to be taken by an appellant in case his or her appeal is dismissed for want of prosecution. None the less in my view where an appellant shows sufficient cause, then the application can be granted in accordance with the provisions of S. 98 of the Civil Procedure Act. In **Rosette Kizito v. Administrator General & Ors**<sup>4</sup> it was stated that “...sufficient reason (cause) must relate to the inability or failure (of the applicant) to take a particular step in time.”

v) In the instant case, the applicant claimed that his previous counsel in conduct of the matter was negligent and that he (the applicant) was sick and thus unable to attend court or pursue the appeal.

vi) Counsel for the respondent, however, maintained that the applicant had not effectively instructed his counsel during this period of time and as such, he could not plead negligence of counsel. In support of this fact, he availed a notice of withdrawal of instructions which was attached to the affidavit in reply as Annexure “C”. This notice of withdrawal of instructions was by the applicant’s former lawyers, M/s Lubega – Matovu & Co. Advocates. It was drafted on the 25<sup>th</sup> of October, 2022 and filed at court on the 26<sup>th</sup> of October, 2022. This was several months before the appeal came up for hearing in February, 2023. It is

---

<sup>4</sup> S.C.C.A No. 9 of 1986

thus clear that at the time the appeal was dismissed previous counsel no longer had instructions and therefore there is no way the applicant could have sought to rely on him. Therefore, the specific allegations in the affidavit of the applicant that his lawyer did not inform him were definitely false and cannot be relied on by court.

vii) The respondent also attached two affidavits of service of hearing notices attached as Annexures "E". These affidavits show that initial service was effected upon former counsel at M/s Lubega-Matovu & Co. Advocates who received in protest and stated that he no longer had instructions while the second service was individually effected upon the applicant in Makindye and he refused to acknowledge receipt of the service. I had no reason to doubt this because perusal of the record of proceedings of the lower court shows that the applicant was a resident of Makindye , Madirisa zone.

viii) The applicant did not refute these claims in his affidavit in rejoinder but simply claimed to be a resident of Mityana and also that he was let down by his previous Counsel. In the case of **Samwiri Musa vs. Rose Achen**<sup>5</sup> it was held that facts that are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. Similarly in the instant case since the applicant did not rebut the facts sworn by the respondent to the effect that he was personally served at Makindye ,the assumption is that this fact is true.

---

<sup>5</sup> 1978 HCB 297

- ix) The applicant also claimed that he was sick and thus unable to attend court. In paragraph 7 of his Affidavit in support, he claimed to have suffered from presbycusis. However, no medical reports were attached to prove this fact. Section 101 of the Evidence Act requires a party who seeks to rely on a particular set of facts to prove the same which the applicant did not do.
- x) I note that Civil Appeal No. 60 of 2018 was filed at court on 12/6/2018. The record shows that no attempt was ever made by the applicant or his advocate to have the appeal fixed. The record further shows that it was the respondent who kept making several correspondences to court to fix this appeal. When the appeal was fixed for hearing the applicant's advocate was served and he declined service. The applicant was then served in person but still he did not appear. On 14/2/2023, when the appeal was called it is only the respondent who was in court where upon the court on its own motion dismissed the same for want of prosecution.
- xi) Dismissal for want of prosecution presupposes that the judge has carefully and critically studied and analysed the casefile and come to the conclusion that the party has failed to prosecute his case and therefore dismisses the same.
- xii) Perusal of the record shows that the appeal was filed on 12/6/2018 and was dismissed on 14/2/2023. For a period of close to 5 years the applicant had failed to prosecute his appeal. No reason has been given as to why the applicant did not prosecute the said appeal. The claims that he was let down by his previous advocate and that he was sick have not been proved to the required standard which is on a balance of probabilities.

The applicant was guilty of dilatory conduct and can not blame his lawyers.

xiii) I have not found any special circumstances that would warrant this court to invoke its inherent powers under S. 98 of the Civil Procedure Act to reinstate the appeal. As a matter of fact, the applicant had failed to prosecute his appeal and the same was rightly dismissed for want of prosecution.

xiv) This application therefore hereby fails and the same is accordingly hereby dismissed with costs to the respondent.

Dated at Kampala this 25<sup>th</sup> day of October 2023.

  
**FLAVIA NASSUNA MATOVU.**  
**Judge.**