THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0085 OF 2012

Coram: *Hon. Justice Cheborion Barishaki, Stephen Musota and Christopher Madrama, JJA*

CHRISTOPHER KAYOBOKE::APPELLANT

VERSUS

1. **JOSEPH BYAMUGISHA**
2. **AZARIA BARYARUHA:::RESPONDENTS**

(Appeal from the decision of the High Court of Uganda at Kampala before Zehurikize, J. dated the 24th day of January, 2012 in Miscellaneous Application No. 0158 of 2010 arising from Civil Suit No. 650 of 1991)

JUDGMENT OF CHEBORION BARISHAKI, JA.

This appeal is against the decision of the High Court (Zehurikize, J.) dismissing Civil Suit No. 650 of 1991, which was filed by the appellant against the respondents and another person, on grounds that no steps had been taken to prosecute the said suit for 13 years and that it had as a result become stale.

Background

The appellant sued the respondents and another person not party to this appeal vide Civil Suit No. 650 of 1991 in the High Court. The suit was a derivative action

instituted by the appellant, a shareholder of a company against three persons who were directors in the same company; Kampala Bottlers Ltd. Between 1991 and 1998, hearing of the matter to conclusion proved difficult for different reasons; such as disappearance of Court files, elevation of Kikonyogo J. who was then handling the file and the departure from the bench of Judge Rajasingham. The appellant alleged that the difficulties were compounded when his then counsel Mr. J.N Mulenga was appointed to the Bench in 1997. From 1998 to 2010, the appellant did not take any steps to have the matter fixed for hearing.

On 11th November, 2010, the respondents moved the High Court to have Civil Suit No. 650 of 1991, dismissed. The respondents stated that since 26th August, 1997, the appellant had failed to fix the suit for hearing, which was a ground for dismissal under Order 17 rule 2 of the Civil Procedure Rules, S.I 71-1. The respondents further argued that the suit had been overtaken by events because the assets of the company at the Centre of the dispute in the relevant matter had been sold off and the respondents were no longer involved in management of the company. Further, that Mr. Amos Agaba, who was jointly sued along with the respondents, and who was the Managing Director of the relevant company, and therefore the principal witness for their case had died.

The appellant's reply to the respondent's motion was that he was interested in proceeding with the hearing of the matter, and had instructed new lawyers for the purpose. The appellant further stated that failure to take further steps to

have the suit heard had been occasioned solely by factors that could not be attributed to him.

The learned trial Judge, however, agreed with the respondents and ordered for dismissal of the suit. He held that the appellant was at fault for failing to instruct new lawyers so as to prosecute the relevant suit for a period of 13 years from 1997 to 2010. The learned trial Judge took the view that the appellant's actions were those of a person who was not interested in prosecuting the matter. The learned Judge observed that during the 13-year period, the status of the relevant company had changed, with its assets sold and the respondents removed as directors. He then held that due to the passage of time, it was no longer possible to have a fair trial of the relevant suit.

Being dissatisfied with the learned trial Judge's decision, the appellant now appeals to this Court on the following grounds:

1. *The learned Judge erred in law and fact when he visited the alleged delay by the appellant's former advocates to prosecute the main suit on the appellant.*

2. *The learned trial Judge erred in law and fact by not considering the impact on the prosecution and disposal of the suit by the successive losses of the Court file and the several re-allocation of the suit to different Judges.*

3. *The Court a quo erred in law and fact in dismissing the suit which was part heard and evidence of the appellant already taken.*

4. *The learned Judge a quo erred in law and fact in not properly evaluating the evidence on record showing that the nature of the suit survived the resignation or death of any company official and/or defendants to the suit.*

5. *The learned trial Judge a quo misdirected himself in law and in fact in making findings of fact about the company's assets, business and affairs without hearing the suit fully.*

6. *The learned trial Judge a quo erred in law and fact by holding that the respondents cannot have a fair trial.*

The appellant prayed this Court to allow the appeal, set aside the orders of the High Court made in Miscellaneous Application No. 198 of 2010 dismissing Civil Suit No. 650 of 1991 filed by the appellant against the respondents and another; and to order the High Court to hear and determine the relevant suit on its merits. The appellant also prayed for costs of the appeal and those in the Court below.

Representation

Both learned counsel Mr. Mulema Mukasa and Mr. Kevin Nsubuga, jointly appeared for the appellant. Mr. Albert Byamugisha appeared for the 1st respondent. Neither the 2nd respondent nor his counsel appeared at the date of hearing. The Court granted leave to the parties to proceed by way of written submissions and the same have been considered in this Judgment.

I have carefully studied the Court record, and considered the submissions for both sides and the law and authorities cited by Counsel in support of the submissions. This is a first appeal against a decision rendered by the High Court in exercise of its original jurisdiction, and the duty of the Court in such appeals is to reappraise the evidence and come to its own conclusions. See: ***Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules S.I 13-10 and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997***.

It is not disputed that the Civil Procedure Act, Cap. 71 and the Rules made thereunder empower a Court to dismiss a suit should the plaintiff fail to take steps to prosecute it for a considerable length of time. The Court may do so on its own motion or on application of the defendant. The decision to dismiss a suit is reached in exercise of discretion of Court, and such discretion is expected to be exercised judiciously. As earlier stated the learned trial Judge, in exercise of discretion, reached the decision to dismiss the appellant's suit because he felt that it was the proper and just thing to do.

At the heart of this appeal is a contention that the learned trial Judge failed to exercise his discretion judiciously. Thus, although, the appellant raised six grounds of appeal, they, in substance relate to one thing, that is whether the learned trial Judge exercised his discretion judiciously. The grounds are considered below.

In ground 1, counsel for the appellant submitted that the learned trial Judge had erred in finding that the appellant shouldered blame for the lengthy delay in

taking steps to pursue the relevant suit, in that for a period of 13 years between 1997 and 2010, the appellant failed to instruct lawyers to prosecute the suit. Counsel submitted that it was the appellant's former lawyers, M/S Mulenga & Kalemera Advocated who had neglected to take steps during that period. The appellant had discovered the laxity of his former lawyers in 2010, at which point he acted quickly to appoint his current lawyers. It was therefore erroneous for the learned trial Judge to visit the mistakes of the appellant's former lawyer on the appellant, and counsel cited the decision of the Supreme Court in ***Banco Arabe Espanyol vs. Bank of Uganda Civil Appeal No. 8 of 1998,*** where it was emphasized that the fault of professional advisors should not be visited on litigants.

It was further submitted that when last steps were taken to prosecute the relevant suit, the appellant was informed that his file had gone missing. In counsel's view, the appellant as a lay man, and who should be assumed not to know the Court processes, was incapable of determining that he needed to apply to Court to be allowed to open a duplicate file. This further strengthened the appellant's case that the failure to take steps to prosecute the relevant suit was a fault of his former lawyer which ought not to be visited on him. Counsel prayed this Court to resolve ground 1 in the affirmative.

The 1st respondent supported the finding of the learned trial Judge that there was no justifiable reason for the appellant's failure to instruct another lawyer to prosecute the relevant suit for a period of 13 years.

I have considered the submissions on ground 1. I note that an appellate Court will not interfere with exercise of discretion of the trial Court unless it can be shown that a wrong principle had been applied or that irrelevant matters had been taken into consideration in reaching the impugned decision. See: ***Agnes Nanfuka Kalyango et al vs. The Attorney General and Another [2005] 2 ULSR 348;*** *per* ***Okello, JA*** *citing the decision in* ***DAPCB vs. Jaffer Brothers Ltd, Supreme Court Civil Appeal No. 9 of 1998 (unreported).***

In the present case, counsel for the appellant contends that the learned trial Judge ought to have found that the lengthy delay in prosecuting the relevant suit was occasioned by the appellant's former lawyers. I am unable to accept those submissions. In my view, a litigant who retains the services of an advocate to prosecute a suit should not be indifferent as to the advocate's handling of the suit. After all, it is the litigant who expects to benefit from any decree which may arise from the suit. It cannot, therefore be reasonably stated that any Court should encourage a litigant who is indifferent to the conduct of a suit, and who has waited 13 years before he/she realizes that no steps are being taken by his lawyers with a view to prosecuting the suit. A prudent litigant is expected to follow up on the progress of his suit on at least a weekly basis, and take necessary steps should he/she discover that the suit is not being prosecuted. I would find that the appellant must shoulder blame for the lengthy delay to prosecute the relevant suit. Ground 1 of the appeal must therefore fail.

In ground 2, the appellant alleges that the learned trial Judge erred in failing to consider that the delay in prosecution of the relevant suit was caused by losses of the court file and involvement of more than one judge. Counsel pointed out that the suit was handled by at least two different Judges. Further, that on several occasions, when the appellant went to follow up on the suit, he was told that the case file could not be traced. Counsel faulted the learned trial Judge for failing to take into account the chequered history of the relevant suit, when reaching his decision. In counsel's view, the appellant had suffered injustice caused by the justice system over which neither the appellant nor his advocates had control. According to Counsel, this was sufficient to overturn the learned trial Judge's ruling.

In reply, counsel for the 1st respondent submitted that the chequered history of the case was not in issue, and that this had been acknowledged by the learned trial Judge, who had in reaching his decision, focused on the appellant's failure to take steps to prosecute his case, in the period after 1997. The issues raised by the appellant occurred in the period prior to 1997. Therefore, counsel supported the learned trial Judge's decision.

I agree with the submissions for the 1st respondent. In my view, while exercising his discretion, the learned trial Judge was expected to weigh each material factor in the case. The fact that he mentioned that the case had a chequered history means that this weighed on his mind, contrary to the appellant's assertions to the contrary. The judge took into account the peculiar circumstances of the case

and reached he decision he considered just, fair, right, equitable and reasonable. Ground 2 of the appeal, too, must therefore fail.

I will next consider grounds 3, 5 and 6, jointly. In connection to these grounds, the appellant asserts that the learned trial judge exercised his discretion erroneously. I observe that the learned trial Judge held that due to the lengthy delay in prosecution of the relevant suit, it could no longer be possible to conduct a fair trial of the matter if hearing of the suit had gone ahead. Counsel for the 1st respondent relied on the decision in **Sheikh vs. Gupta and Others [1969] EA 140** citing **Fitzpatrick vs. Batger & Co. Ltd [1967] 2 ALLER 657** where it was stated:

"Per Denning, M.R:

> *"I said that it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961. If we allowed this case to be set down now, it would not come on for trial before the end of this year. That would be some six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. The action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution . . . This will not prejudice the plaintiff personally. He has, as far as I can see, an unanswerable claim against his solicitor for his neglect . . ."*

Salmon, L.J stated:

> *"I entirely agree . . . grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance in the interests of justice that these actions should be brought to trial with reasonable expedition . . . I am quite satisfied that, in the circumstances of this case, where there has been such grossly inordinate delay without any real excuse, the discretion below was wrongly exercised. As far as this case is concerned – each case must turn on its own facts and circumstances – I have no doubt but that the proper order is to dismiss the action for want of prosecution . . ."*

Winn, L.J stated:

> *"I agree completely with both judgments . . . Salmon, L.J., has used the expression, 'grossly inordinate delay'. I respectfully adopt that expression . . ."*

In the aforementioned case, the Court stated that if there was gross inordinate delay in prosecuting a case, and an application for its dismissal was made, the proper course would be for Court to dismiss the case. In the present case, the learned trial Judge was of the view that given the gross inordinate delay of 13 years, in taking steps to prosecute the relevant suit, it was no longer possible to conduct a fair trial. These conclusions were well founded. On the effect of inordinate delay, this Court (per Okello, JA) had this to say in the **Agnes Nanfuka Kalyango case (supra):**

"From its filing...the case has delayed for 10 years. This is by any standard a very long delay indeed. No fair trial is possible after such a length of delay as some witnesses may have changed addresses or have even died. Even if they all present, lapse of memory of what actually has taken place is bound to affect the accuracy of their testimonies."

There was inordinate and inexcusable delay in the prosecution of the case on the part of the plaintiff and his lawyers. The delay has given rise to a substantial risk that a fair trial of the case will no longer be possible. The period of 13 years during which the appellant took no steps to prosecute the relevant suit amounted to "gross inordinate delay", which should not be excused. A lot had changed with regards to the affairs of the company in the period from filing of the relevant suit until 2010, when it was dismissed. Amos Agaba the Managing Director of the company at the material time had since died, and it would not have been helpful to substitute him, a person who had intimate knowledge of the affairs of the Company with which the suit was concerned. A legal representative would probably have no such advantage. All the circumstances of the case weighed heavily in favor of dismissing the suit, irrespective of whether it was true as alleged by the appellant that there had been part hearing of the suit.

Grounds 3, 5 and 6, must therefore fail.

All in all, the learned trial Judge exercised correct principles when he dismissed Civil Suit No. 650 of 1991. I would therefore find that this appeal lacks merit and

I would dismiss it. The respondents shall have the costs of this appeal and in the Court below.

I so order.

Dated at Kampala this ..... 23rd ..... day of... Sept .....2021.

Cheborion Barishaki

Justice of Appeal

THE REPUBLIC OF UGANDA

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VERSUS

1. **JOSEPH BYAMUGISHA**
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CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Cheborion Barishaki, JA.

I agree with his analysis and orders he has proposed. The learned trial Judge exercised correct principles when he dismissed HCCS No. 630 of 1991. Therefore, this appeal lacks merit and I would dismiss it too. Costs of this appeal and the court below are awarded to the respondent.

Dated this 23rd day of Sept 2021

Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

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VERSUS

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2. AZARIA BARYARUHA} .....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Zehurikize, J dated 24th January, 2012 in Miscellaneous Application No. 0158 of 2010 arising from Civil Suit No 650 of 1991)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA.

In addition to the authorities cited by my learned brother in his judgment, I wish to add that Article 126 (2) (b) of the Constitution provides that *"justice shall not be delayed"*. Article 126 (2) (b) of the Constitution is couched in mandatory terms and commands courts not to delay justice, a principle which is consistent with article 28 (1) of the Constitution which confers on litigants, a right to speedy trial *inter alia* in civil suits.

In the premises, I concur with the decision and orders of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA and have nothing useful to add.

Dated at Kampala the 22nd day of Sept 2021

Christopher Madrama

Justice of Appeal