

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
MISCELLANEOUS APPLICATION NO. 0132 OF 2018
ARISING FROM CIVIL APPEAL NO. 0059 OF 2014
ALSO ARISING FROM CIVIL SUIT NO. 0069 OF 2011

NYANZIGE GLADYS & 9 OTHERS ::::::::::::::::::::::::::::::::::: APPLICANTS
VERSUS
ABDALLAH MUMWORI & 5 OTHERS ::::::::::::::::::::::::::::::::::: RESPONDENTS

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

This application is brought under S.33 of the Judicature Act Cap. 13, Article 28 of the Constitution of the Republic of Uganda 1995 Cap. 1, S.98 of the Civil Procedure Act Cap. 71, O.43 rr 10 (1), 31 & O.52 rr 1, 2 & 3 of the Civil Procedure Rules.

The application seeks orders that;

1. The dismissal order made on 17th October, 2018 by the Acting Assistant Registrar dismissing Civil Appeal No. 59 of 2014 be set aside and the appeal be reinstated, heard and disposed off on the merits.
2. The trial Court against whose decree appeal No. 59 of 2014 was preferred be directed to prepare typed and certified record of proceedings of Civil Suit No. MSD-OC-CV-0069 of 2011 and the same be availed to all the parties for purposes of expediting the hearing of High Court Civil Appeal No. 59 of 2014 on the merits.
3. Execution of the decree in Civil Suit No. MSD-OC-CV-0069 of 2011 be stayed.
4. Costs of this application be awarded to the applicant.

The grounds of the application are:-

1. The High Court Civil Appeal No. 59 of 2014 was irregularly dismissed.
2. The applicants have always been and are still interested in their appeal No. 59 of 2014 arising from Land Claim No. 0069 of 2011 being disposed off on merits.
3. The applicants did whatever was required of them to have Civil Appeal No. 59 of 2014 brought before this court and have been pursuing the typed record so that the appeal can be heard.

4. It is not the applicants' fault that the trial Court has not served the applicant nor their counsel with the certified record of proceedings in civil suit no. MSD-OC-CV-0069 of 2011 so that High Court Civil Appeal No. 59 of 2014 can be disposed off on the merits.
5. The applicants are not guilty of inordinate delay.
6. It is only fair, just and equitable that this application is granted to enable the parties resolve Civil Appeal No. 59 of 2014 (which is a land matter), on the merits.

The application was supported by the affidavit of Kiiza Bisuuha Wilson, the 7th Applicant. The gist of his affidavit is that Assistant Registrar illegally dismissed their appeal and yet they are still interested in pursuing the appeal. He also deponed that the Chief Magistrate's Court Masindi has frustrated them in getting the record of the lower court and that this made it difficult for them to pursue the appeal. He further deponed that they cannot therefore be blamed for the inordinate delay the appeal took a fact that led to its dismissal.

The Respondents through the affidavit of Mariam Nampeera blamed the Applicants for the inordinate delay in prosecuting the appeal. They also blamed the Applicants for not pushing the Chief Magistrate's Court, Masindi, hard enough to get the record.

The Applicants were represented by M/S Tugume-Byensi & Co. Advocates, while the Respondents were represented by M/S Lubega, Babu & Co. Advocates.

The Applicants submitted that the Assistant Registrar illegally and irregularly dismissed the appeal under Order 17 r.6 of the Civil Procedure Rules which governs dismissal of ordinary suits. He submitted that dismissal of appeals for want of prosecution is governed by Order 43 rule 31 of the Civil Procedure Rules.

He argued that according to this order, the Registrar should have listed the appeal and notified the parties before dismissing the appeal. In this case, the Registrar never followed O. 43 rule 31 of the Civil Procedure Rules and the dismissal of the appeal was irregular.

With regard to the record of appeal, counsel for the Applicants submitted that they had encountered insurmountably difficulties in obtaining the record, even after writing several reminders to the Court. He told court that up to this very day, they have not been able to obtain the record.

He submitted that the Applicants cannot therefore, be blamed for the delay or dilatory conduct in getting the appeal ready for hearing because they are not responsible for the weaknesses within the Court system.

Last but not least, the Applicants submitted that the Court should reinstate the appeal because it touches on property rights of the Applicants, that cannot be taken away without a hearing.

The Respondents opposed the application to reinstate the appeal. The Respondent submitted that although the Applicants were allowed to file their Memorandum of Appeal on 9/4/2015, the Applicants have never served them with the Memorandum of Appeal and the record.

Secondly the Respondents submitted that the Applicants have not been vigilant in pursuing the record of appeal from the Chief Magistrate's Court.

Last but not least, the Respondents blamed the Applicants for being guilty of dilatory conduct in prosecuting the appeal, a fact, which forced the Assistant Registrar to dismiss the appeal for want of prosecution. The Respondents asked Court to dismiss the application.

Resolution of the Application:

Although the Applicants have raised several issues in support of their arguments to reinstate the dismissed appeal, there is only one issue that is key in determining the application. The key question that must be answered is whether the Assistant Registrar acted legally when he dismissed the appeal. Accordingly to the record, the Assistant Registrar dismissed the appeal for want of prosecution, after Mr. Kasangaki wrote a letter to the Court complaining about the delay in prosecuting the appeal. The Assistant Registrar, having established that no action had been taken by the Appellants to prosecute the appeal for more than 2 years, dismissed the appeal under Order 17 r. 6 of the Civil Procedure Rules. Order 17 r. 6 (1) of the Civil Procedure Rules provides that:-

In any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the Court may order the suit to be dismissed.

This rule, from my reading, deal with suits and other matters that are not specifically provided for in the Rules. Section 2 (x) of the Civil Procedure Act defines a suit, to mean, "all Civil

Proceedings commenced in any manner prescribed.” This section does not cover appeals because appeals by their nature do not commence actions but are rather a continuation of proceedings already commenced by suits. In G4S Security Solutions (U) Ltd versus 201 former Employees of G4S Security, Industrial Court, Miscellaneous Application No. 031 of 2017, the Industrial Court held that Order 17 r. 6 (1) of the Civil Procedure Rules deals with suit and not appeals.

As was rightly observed by the Applicants, appeals can only be dismissed for want of prosecution under Order 43 rule 31 of the Civil Procedure Rules. This order provides that:-

“(1). Where there has been undue delay in the hearing of an appeal, the Registrar may obtain the directions of a Judge for the listing of the appeal at the next session of the High Court.

(2). 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 orders as may seem just.”

Rule 31 provides an elaborate procedure under which appeals may be dismissed for want of prosecution.

First of all, the Applicant has to prove that there has been undue delay in prosecuting the appeal. While the rule is silent about who should be blamed for undue delay, it is only logical to assume that the Appellant who brought the appeal, are the ones targetted by the rule.

Secondly, the Registrar has to obtain guidance or directions from the Judge in dealing with any applications under the rule.

Thirdly, the Registrar must notify the parties of the Court’s intention to dismiss the appeal for want of prosecution. The Registrar cannot, therefore dismiss appeals exparte.

Fourthly the Court must hear the parties before the appeal is dismissed for want of prosecution. The guidelines provided under Order 43 r. 31 are very different from the procedure under Order 17 rule 6 of the Civil Procedure Rules, where the Court is given power to dismiss suits where no action has been taken for more than two years without notifying or summoning the parties.

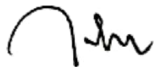
Turning to the instant application, I cannot but agree with the Applicant that their appeal was irregularly dismissed by the Assistant Registrar under Order 17 rule 6 of the Civil Procedure Rules. Since the dismissal was irregular, this Court hereby sets aside the dismissal order and directs that the appeal be heard on its merits.

The Chief Magistrate, Masindi is directed to prepare and submit the lower court record to the Assistant Registrar by 31st of July 2020, to enable the Applicants to pursue their appeal.

As regards costs, each party will meet their own costs since the error was made by the Court for which I cannot blame the Respondents.

Decision:

In the result I allow the application and set aside the order of the Assistant Registrar dismissing Civil Appeal No. 59 of 2014. The Chief Magistrate Masindi is directed to prepare and deliver a certified copy of the record in Civil Suit No. MSD-OC-CV-0069 of 2011 to the Assistant Registrar by 31st July 2020. Each party will meet their own costs.



Gadenya Paul Wolimbwa

JUDGE

17th July 2020

This decision is read in open court in the presence of Robert Kamuhanda Court Clerk and in the absence of the parties. The Registrar shall email the decision to the parties.



Gadenya Paul Wolimbwa

JUDGE

17th July 2020