The Republic of Uganda

High Court of Uganda Holden at Soroti

High Court Miscellaneous Application No. 041 of 2021

[Arising out of Taxation Reference No. 024 of 2021]

[Arising from Miscellaneous Cause No. 010 of 2011]

Isiagino John Robert :: Applicant

VS

Otinga Geoffrey and 2 Others :: Respondents

Before: Hon Justice Dr Henry Peter Adonyo

Ruling

1. Background:

This is an application by Notice of Motion brought under Order 9 rules 22 and 23 (1) and Order 52 Rule 1 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for orders that:

a. The dismissal of Civil Appeal No. 0033 of 2020 be set aside.
b. That the costs of this application be provided for.

2. Grounds of Application:

The grounds of this application as contained in the application and supporting affidavit of the applicant are;

That the absence of the applicant in court on 16th September, 2021 when the appeal was called was not deliberate but for sufficient cause.

That the dismissed appeal has overwhelming chances of success as among other grounds the trial magistrate erred in law in ignoring material departure from pleadings.

That the application has been made without undue delay upon discovery of the dismissal.

That it is just and fair and equitable to grant this application.

The respondents in reply stated that the application is a non-starter as the applicant is guilty of inordinate delay.

That when this court fixed the Applicant's appeal for hearing the applicant together with his lawyer were duly notified of the hearing date.

That it was the appellant's duty to follow up his appeal and have the same fixed for hearing but he has not demonstrated that he did so.

That the applicant is simply frustrating the respondents' from enjoying the fruits of judgement in the lower court.

That the instant application is irrelevant, incompetent, time wasting and should therefore be dismissed with costs.

In rejoinder, the applicant stated that the averment of inordinate delay is not correct as he only became aware of the dismissal through the notice of taxation slated for 4th March 2022 and he immediately instructed his lawyers to file this application which was done on 28th March 2022.

That constructive service is imputed by the notice on the court premises but the notice escaped his attention and that of his lawyers.

Submissions.

The applicant submitted that for a dismissal to be set aside it must be proved that the applicant was prevented from prosecuting his case by sufficient cause. Counsel relied on a Kenyan case ***Gideon Mosa Onchwatu*** to define sufficient cause. He then submitted that the Applicant has given an elaborate sequence of events which resulted into him and his lawyers not attending court on the day notified.

Counsel for the respondent submitted in reply that the applicant is guilty of inordinate delay seeing as Civil Appeal No. 33 of 2020 which he seeks to reinstate was dismissed on 16th September 2021 and the applicant only sought to reinstate it in March 2022 over six months later.

That if the applicant was interested in prosecuting his appeal this application should have been brought earlier. Counsel further stated that the applicant has not given any plausible reason for delay in filing this application.

Counsel further submitted that mistake of counsel as relied upon by the applicant is not tenable as the applicant maintained the same counsel in the lower court and the appeal.

In making this assertion, Counsel relied ***Court of Appeal Consolidated Election Petition Applications No. 5 of 2021 and No. 36 of 2022 Electoral Commission Vs Abala David, Abala David Vs Achayo Juliet Lodou and Electoral Commission and Achayo Juliet Lodou Vs Abala David.***

Counsel further submitted that there is no solid reason for granting the current application and if it is granted then this court would be encouraging the applicants to mire court with endless litigation. That should this court be inclined to grant this application the applicant should

be made to deposit security of costs pursuant to the provisions of Order 26 rule 1 or pay costs of the instant application as a condition for reinstatement of the appeal.

In rejoinder, the applicant submitted that the period relied upon by the respondents to constitute inordinate delay is inaccurate. That the applicant clearly stated that he only became aware of the dismissal when he was served with a taxation notice which is dated 18th February 2022 and the application was filed on 20th March 2022 just about a month later.

On mistake of counsel, counsel submitted that the reason given is being unaware of fixture of the appeal.

That this was not a mistake as they were both not served.

With regard to the prayer for security of costs counsel submitted that its inapplicable as this is not a suit for recovery of a debt or damages as envisaged under Order 26 rule 1 CPR. Counsel further prayed that costs abide the outcome of the appeal.

Court's findings and decision.:

The record of proceedings in Civil Appeal No. 33 of 2020 indicates that on the 16th of September 2021 the appellant and his counsel were not present in court.

Counsel for the respondent sought dismissal of the matter under Order 9 rule 22 of the Civil Procedure Rules and this court found that despite being given sufficient notice the appellant had not appeared and no reason was given for their absence. The appeal was accordingly dismissed.

The applicant stated that he was not aware of the hearing date and only found out about the dismissal when he was served with a taxation notice. He further alleged that he was never served with a hearing notice and

upon inquiry it was discovered that the notice was on the notice board and none of them saw it.

The respondent on the other hand contended that the applicant and his counsel were duly notified of the hearing date.

The applicant does not deny the fact that he and counsel did not see the hearing notice on the notice board. The file also only has a hearing notice for 24th day June and both parties were absent so the matter was adjourned to 16.09.2021 when only the respondent appeared and the matter was dismissed.

Under the rules of procedure, a party who has a matter in court enjoined with the duty to ensure that he or she is not indolent for equity aids the vigorous.

From the time the appeal was filed, there is no evidence that the appellant had sought to have his appeal heard. His making this application was a result of the appeal being dismissed for which his only time to realise that the same was no longer on court record was when he apparently was served with taxation notice. This fact in my considered view indicates the inactiveness of the appellant in pursuing his matter for it is apparent that he rested on his laurel once he had filed the appeal and was only awaken when faced by a taxation notice.

Such kind of behaviour cannot be tolerated. A party who takes a matter to court is enjoined to ensure that it moves forward and not be a clog to the court system by nonstarter matters.

Given the clear averment by the respondent that the applicant and his counsel were duly notified of the hearing date and yet they chose not to come to court, I am thus convinced that this application is brought as an afterthought as no evidence of any previous real seriousness by the

applicant and counsel has been shown that active pursuance of this appeal on their behalf had previously been made.

The applicant himself through his affidavit evidence does not even deny the fact that he and counsel did not see the hearing notice which was even placed on the court notice board.

Consequently, I would find that this application has no merits as I am not convinced that the applicant has proven any sufficient cause for non prosecution of his appeal coupled with his non-appearance on the date the appeal came up for hearing yet evidence show that he had the opportunity in pursuing his appeal before its dismissal but acted to the contrary.

Sufficient can only be shown where a party could not the applicant after filing the appeal acted with negligence with no bona fides reason.

Equality cannot be claimed in an illegality and cannot be enforced in a negative manner - If wrongs or illegality or irregularity had been committed in earlier proceedings, then similarly situated persons cannot invoke jurisdiction of courts for repeating or multiplying such illegality.

If courts start substituting negligence of a party in pursuing their matter with allowing indolence, then then it would amount to allowing parties to use the court system as they wish and that would not only amount to negation of justice but is impermissible. Where a party acts with proven negligence as in this case then such lack of bona fides or inaction then there cannot be any way taken as a justifying ground for grant of a prayer for that would be condoning delays. If courts start condoning delay where no sufficient cause was made out by imposing conditions, then that would amount to violation of the principles of equity and showing utter disregard to court system itself.

I would thus find that in this application for reinstatement of the appeal no sufficient cause for non-appearance of the applicant on the date on which the absence was made a ground for appeal to be dismissed has been shown as I am not convinced that the circumstances anterior to the non-appearance or the non prosecution of the appeal before it was dismissed was none other than the applicant being indolent.

I would thus find that this application has the one and only intention of denying the respondent the fruit of his judgment in the lower court.

Accordingly, this application is found to lack merits. It is dismissed with costs to the respondent.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

31st August 2022