

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

MISCELLANEOUS APPLICATION NO.044 OF 2022

ARISING FROM CIVIL APPEAL NO. 133 OF 2014

MAKOLO MAX ::: APPLICANT

VERSUS

NYACHWO BEATRICE OMALLA (Administrator of

the estate of the late Omalla Opowo Donato) ::::::::::::::::::::::::::::::: RESPONDENT

RULING

BEFORE HON. DR. JUSTICE HENRY I. KAWESA

This application was brought by notice of motion under **Section 98 of the Civil Procedure Act Cap.71; O.52 Rules 1 & 3 of the Civil Procedure Rules SI 71-1.**

The application seeks orders that:

1. The dismissal of High Court Civil Appeal No.133 of 2015 be set aside, and the appeal be reinstated.
2. Costs be provided for.

The grounds of the application are supported by the applicant's affidavit; and opposed by the affidavit of the respondent.

The grounds are:

1. That the late Omalla Opowo Donato was the respondent in Civil Appeal No.133 of 2015.

2. That owing to the death of the late Omalla Opowo Donato, the High Court dismissed the said appeal in error for non-prosecution without knowing of the late's death.
3. That the dismissal was an oversight of court since it was notified of the respondent's death.
4. That the applicant could not proceed without the Administrators of the late Omalla Opowo Donata being brought on board and he kept waiting.
5. That the applicant was only shocked to receive a Taxation hearing notice and a bill of costs for the respondent on the 15th of March 2021 prompting him to contact his former lawyers of Wegoye Samuel Advocates.
6. That since Counsel Wegoye Samuel has become sickly, the applicant decided to engage new lawyers of Luchivya & Co. Advocates.
7. That when the matter came up on 9th of April 2021 before the learned Deputy Registrar, the applicant's lawyers brought the fact of death of the respondent and Counsel for the respondent also told court that he was not sure that his client had died and the matter was adjourned for proper guidance on the file.

Representation

The applicant is represented by **M/S LUCHIVYA & CO. ADVOCATES**; and the respondent is represented by **M/S OWORI & CO. ADVOCATES**.

The court directed Counsel for the parties to file written submissions and they complied. The court has appreciated the said submissions and decides as follows.

Court Decision

The appeal sought to be reinstated was dismissed by this court on the 28th day of February 2017, in the absence of any parties. At the time, I was the Resident Judge

at the High Court of Uganda at Mbale. This application was filed in the said court on the 04th of July 2022, after about five years from the dismissal of the appeal.

The record indicates that prior the dismissal, on the 7th of April, 2016, and in the presence of the appellant and his Counsel, I gave the applicant 14 days from thereof to reappear and show cause why his appeal should not be struck off for non-prosecution. The matter was then adjourned for mention on 26th of April, 2016. The record shows that only Counsel for the respondent appeared on the latter day, and that the matter was again adjourned to the 21st of June, 2016. It is on the latter day that Counsel for the respondent informed court that his client, Omalla Opowo Donato (respondent in the appeal) passed on and sought for time to process letters of administration.

Thus, between the 21st of June, 2016, and the time when I ordered the applicant to show cause, about 07 months had lapsed, without any action on the file. That notwithstanding, the court had prior that ordered the appellant/applicant to appear and show cause why the appeal should not be struck out. It is plain that the appellant/applicant did not show any such cause, having not appeared on the scheduled day. The order was made after court observing delays on the appellant/applicant's part.

In this application, the applicant asserts that he could not proceed with his appeal owing to the death of the respondent; and that he had to wait until the appointment of the respondent's legal representative. However, even before the death of the said respondent, there was an unexplained delay in the prosecution of the appeal by the applicant/appellant, as the record shows.

It suffices to add that the record of Misc. Application No.199 of 2021, which the respondent filed, shows that she was appointed the legal representative of Omalla

Opowo Donato on the 10th of October 2016. This was way before the dismissal of the appeal. The applicant could legally proceed with the appeal, therefore. No reason has been given for the failure to cause the substitution of the respondent herein for the deceased party prior the dismissal of the appeal, or at least seek leave of court to appoint some administrator ad litem as the respondent's Counsel submitted. In this circumstances, the court considers the applicant's assertion that he could not proceed with the appeal owing to the respondent's death as a lame excuse.

It suffices to state that between the time when the appeal was dismissed and the 15th of March 2021 when the applicant was allegedly served with a taxation hearing notice and bill of costs by the respondent, he knew nothing about the appeal. The impression therefore is that had he not been served with the said documents; he would not know anything about his appeal by now!

In principle, a reinstatement of a dismissed matter is done upon proof of sufficient cause, which cause must relate to the inability or failure to take the particular step in time (**Rosette Kizito vs. Administrator General & others Supreme Court Civil Appeal No. 9 of 1996**). It is also in principle that if the applicant is found to be guilty of dilatory conduct, an application of this nature should not be granted (**Hadondi Daniel vs. Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003**).

In this case, no sufficient case has been demonstrated by the applicant as to why he failed to show up when required to show cause why his appeal should not be struck out. His allegation that the appeal was dismissed without issuing a notice of listing as envisaged under **O.43 R.31 of the Civil Procedure Rules SI 71-1**, are technicalities which do not justify his prior failures, especially of showing cause why the appeal should not be struck out. The record clearly indicates dilatory conduct on his part, and this is exacerbated by the lame excuses he gives now.

In conclusion, the court is satisfied with the respondent's averments, and her Counsel's submissions that this application should fail. Consequently, the same is dismissed with costs.

It is so ordered.

Delivered at Tororo this18th..... Day of10..... 2023

HENRY I KAWESA

JUDGE

Right of Appeal explained.

In the presence of:

- 1...Ochen Francis Xavier
- 2...Willing Matumanya
- 3...Nyachwo Beatrice Omalla
- 4...Orillo Pascal Ben