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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KABALE**

**Miscellaneous APPLICATION No. 0001 of 2023**

**(Arising From Civil Appeal No. 0023 of 2019)**

**1. AYAGASHENYI JOHN**

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**2. MULEKEZI BENON**

**3. NYIRABYIRINGIRO SAMALIE**

**4. NYIRANGOGA NAOME=====APPLICANTS**

**VERSUS**

**1. NKUNZINGOMA CHRISTOPHER**

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**2. MRS NKUNZINGOMA =====RESPONDENT**

**BEFROE HON. JUSTICE SAMUEL EMOKOR**

**RULING**

20 The Applicants bring the instant application by Notice of Motion under **Section 98 of Civil Procedure Act, Section 33 of the Judicature Act, Order 53 Rule 1, 2 and 3 of Civil Procedure Rules** seeking orders that the dismissal Order dated 08/02/2020 in Civil Appeal No. 0023 of 2019 discontinuing proceedings by this honourable Court be set aside and that Civil Appeal No. 0023 of 2019 be reinstated in order to meet the ends of justice and provision be made for costs.

25 The grounds upon which this application is premised are that the Applicants on the 25/06/2019 filed in this honourable Court a Notice of Appeal vide HCCA No. 0023 of 2019 and that the Applicant through Odokel & Co. Advocates on the 17/06/2019 wrote a letter to the lower Court requesting for certified record of proceedings and ruling vide Civil Suit No. 0001 of 2017 and further that on

5 19/09/2022 the 1<sup>st</sup> Applicant through TAK Advocates again requested for the proceeding and ruling in Civil Suit No. 0001 of 2007. That the Applicant was unable to file a memorandum of Appeal within time as he was unable to obtain certified record of the proceedings and ruling of the lower Court and that this Court on the 08/02/2022 discontinued proceedings of HCCA No. 0023 of 2019.  
10 That the Applicant has now obtained a certificate of records of proceeding and ruling from the lower Court and the Applicant has prepared a Memorandum of Appeal and is interested in pursuing the appeal.

That it is in the interest of justice that this application is granted.

The application is supported by the affidavit of the 1<sup>st</sup> Applicant.

15 The 1<sup>st</sup> Respondent filed an affidavit in opposition to the instant application to which the Applicant rejoins.

At the hearing of this application Mr. Tumwebonere Jackson appeared for the Applicant while Mr. Nahabwa Timothy represented the Respondents.

### **Summary of Counsel's submissions.**

20 Mr. Tumwebonere for the Applicant in his submission expounded on the grounds on which the instant application has been brought and prayed that the same is allowed.

Mr. Nahabwa for the Respondent raised a preliminary point of law in objection to the instant application submitting that HCCA No. 0023 of 2019 was dismissed  
25 under **Section 17(2)** of the **Judicature Act** and that the same was a final decree and as such appealable as of right and that the Applicant had only one remedy

5 and that this lay in filing an appeal against the decision of this Court. To buttress his point Counsel relied on the decision in **Richard Lumu Njalebuza versus The Society of Catholic Medical Missionaries Ltd HCMA No. 1944 of 2018** in which the Court held that a suit dismissed under **Section 17 (2)** of the **Judicature Act** constitutes a final decree that is appealable as of right and cannot be reinstated  
10 by the Court that dismissed it.

Counsel for the Respondent therefore contends that the instant application is incompetent and ought to be dismissed with costs.

The above submission notwithstanding Counsel for the Respondent submits that Civil Suit No. 0001 of 2017 was dismissed on the 30/05/2019 and that it is now 4  
15 years since the dismissal and that the Applicant has not taken any step to prosecute his appeal.

Counsel further contends that the Applicant only filed this appeal as a delaying tactic to deny the Respondent the fruits of justice and that a period of 4 years is far too long to obtain a record. Counsel also argues that with the dismissal of the  
20 appeal on the 08/02/2022 it took the Applicant until the 13/01/2023 before he brought the instant action a period that he considers a long delay and prays that the same is dismissed with costs.

The Applicants Counsel in rejoinder submits that **Article 126(2) (e)** enjoins this Court to administer substantive justice without undue regard to technicalities.

25 It is the submission of Counsel for the Applicant that the authorities cited by the Respondent's Counsel oppose the reinstatement in part (b) of the application but

5 that part (a) seeks to set aside the discontinuance and that the authority cited is distinguishable from the present case.

Counsel further argues that the Applicant has since 2019 been following up this matter and in September 2022 the Applicants lawyers wrote requesting for the record and that besides the decree on record that the Respondent is trying to  
10 execute was signed in March 2022 meaning that the Respondents sat on their rights for all this time.

Counsel also refutes the argument that the Applicants are only trying to deploy delaying tactics and prays that the instant application is granted.

**My decision.**

15 The record shows that on the 30/05/2019 the trial Magistrate delivered his ruling and on the 25/06/2019 the Appellants filed their notice of appeal and the same was registered as HCCA No. 0017 of 2019. The Assistant Registrar of this Court on the 27/06/2019 wrote to the trial Court directing that the lower Court file with a certified record be dispatched to the High Court for the hearing of the Appeal.

20 It would appear that no further action was taken in this matter until the 08/02/2022 when this Court discontinued the proceedings under **Section 17(2)** of the **Judicature Act**.

The Applicant now seeks to set aside the dismissal order and reinstate the appeal.

The key consideration here is whether there was a valid appeal in the first place  
25 before consideration is made as to its reinstatement.

5 Appeals before the High Court are governed under **Sections 78 and 79 of Civil Procedure Act and Order 43 of the Civil Procedure Rules.**

**Section 79(1) (a) of Civil Procedure Act** provides that:

*“(1) except as otherwise specifically provided in any other law, every appeal shall be entered-*

10 *(a) within thirty days of the date of the decree or order of the Court...”*

While **Order 43 Rule 1 of Civil Procedure Rules** states:

*“(1)Every appeal to the High Court shall be preferred in the form of a memorandum signed by the Appellant or his or her advocate and presented to the Court or to such officer as it shall appoint for that purpose”.*

15 *(2) The memorandum shall set forth under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative and the grounds shall be numbered consecutively”*

The Court of Appeal under **Rule 76 of the Judicature Act (Court of Appeals) Rules** makes provision for filing of Notice of Appeal for commencement of an  
20 appeal process and the Supreme Court too under **Rule 72 of the Judicature (Supreme Court Rules) Directions** makes provision for the same.

There is however no corresponding provision for filing of Notices of Appeal before the High Court as a mode of commencing appeals.

I am alive to fact that this has become an established practice by lawyers  
25 practicing before the High Court taken of course from the rules of the superior Courts but without an enabling law.

5 I am further alive to decisions by other sister and brother judges taking Judicial Notice of this practice.

The facts of this case however are distinguishable from the others by the fact that at the time that the Appeal was discontinued by this Court on the 08/02/2022 there was no Memorandum of Appeal on the record and the only document on  
10 record was the Notice of Appeal. As already noted a Notice of Appeal is alien before the law in commencement of an appeal process before the High Court. It is my considered view that there was no appeal in the first place and therefore there is nothing to reinstate.

On this ground alone I would reject the prayers sought in this application.

15 The conduct of the Applicants in this matter is also a reflection of how seriously they take their case.

The Applicants were very relaxed in their pursuit of the intended appeal. Having lodged the Notice of Appeal on the 25/06/2019 and the same was discontinued on the 08/02/2022 more than thirty months later, it was not until the 13/01/2023  
20 that the Applicants filed the instant application for reinstatement of the same. This was 11 months after the dismissal and over 3 years since they filed their Notice of Appeal.

The argument advanced by the Applicant's Counsel that they were processing the lower Court record during this period is not backed up by any credible evidence.

25 The suit before the trial Court had been dismissed on a technicality and as such it cannot be by any stretch of imagination possible that there were volumes of the record to prepare.

5 The Court of Appeal in **Kasibante Moses versus Electoral Commission Election Petition Application No. 0007 of 2012** held that:

*“It is now settled law that it is the duty of the intending Appellant to actively take the necessary steps to prosecute his or her intended appeal. It is not the duty of the Court or any other person to carry out this duty for the intending Appellant.*

10 *Once Judgment is delivered the intending Appellant has to take all the necessary steps to ensure the Appeal is filed in time.”*

**See also Utex Industries versus Attorney SCC Application No. 0052 of 1995.**

I am not persuaded that the Applicants took any active steps to prosecute their Appeal. The Applicants merely went back to their ordinary lives and were only  
15 woken up from this slumber when the Respondent threatened to execute against them.

I will now turn to the submissions of Counsel for the Respondent who submits that this Court in discontinuing the Applicant’s Appeal in **HCCA No. 0023 of 2019** proceeded under **Section 17(2)** of the **Judicature Act** and that there was a final  
20 decree and as such appealable as of right and that the Applicants have only one remedy and that is an appeal against the discontinuance.

To this effect Counsel relied on the decision in **Richard Lumu Njalebuza versus The Society of Catholic Medical Missionaries Ltd. [Supra]**. I have perused the decision in the said case that was reached by my learned brother Justice Henry I  
25 Kawesa who in his ruling also cites the decision of **Hon Justice Bashaija in Kibuguma Patrick versus Aisha Mulungi** and **another HCCA No. 445 of 2014**

5 reiterating the same position. I will for ease of reference reproduce the relevant provisions of the decision of Justice Kawesa below:

*“It is indeed true that the main suit was dismissed under Section 17(2) of the Judicature Act and Order 9 Rule 17 of the Civil Procedure Rules. On recent occasions Courts have maintained that suits dismissed under Section 17(2) of the Judicature Act cannot be reinstated since they constitute a final decree, but the Plaintiff may appeal the order.*

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*See Lukwago Erias versus Jennifer Musisi HCTMA No. 626 of 2018 and Kibugumu Patrick versus Aisha Mulungi and another HCMA No. 445 of 2014 by Bashaija J and HCTMA No. 898 of 2019 by this Court. These authorities still represent the correct position of the law and I have no reason to depart from them: since this application seeks reinstatement of a suit dismissed under the fore said law it follows that it is incompetent”*

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I have not found any authorities that would dissuade me that the above authorities are not good law.

20 I will therefore uphold the preliminary objection of Counsel for the Respondent and make a finding that the instant application is incompetent.

For the reasons advanced the instant application is hereby dismissed with costs to the Respondents.

Before me

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**SAMUEL EMOKOR**  
**JUDGE**  
**28/02/2024**