

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA SITTING AT ARUA  
MISCELLANEOUS APPLICATION No. 0047 OF 2017  
AND**

5 **MISCELLANEOUS APPLICATION No. 0048 OF 2017  
(Arising from Arua Chief Magistrate's Civil Suit No. 050 of 2009)**

1. ALTAFF HUSSEIN }  
2. JHAN MOHAMMED ENTERPRISES } ..... APPLICANTS  
10 3. JHAN MOHAMMED ENTERPRISES LIMITED }

**VERSUS**

**EGUMA BLASIO T/A ZEBRA HOTEL ARUA ..... RESPONDENT**

15

**Before: Hon Justice Stephen Mubiru.**

**RULING**

20 These are two applications consolidated under the provisions of Order 11 rule 1 of *The Civil  
Procedure Rules*. Upon perusal of the two applications, I found that they were based on the same  
facts, founded on more or less similar grounds and seek similar or related relief from the court.  
Therefore, the two applications, though filed separately, would raise questions of law and fact  
that were common to all. Order 11 rule 1 specifically provides for the consolidation of suits,  
25 either upon the application of one of the parties or at the court's own motion and at its discretion,  
where two or more of them are pending in the same court in which the same or similar questions  
of law or fact are involved.

In Miscellaneous Application No. 047 of 2017, the applicants seek an order of revision setting  
30 aside the judgment and decree of the Chief Magistrate delivered on 9<sup>th</sup> January, 2017 in Civil  
Suit No. 50 of 2009, on grounds that in exercise of his jurisdiction, the trial magistrate acted with

material irregularity and injustice when he ordered the applicants to close their defence without being given opportunity to adduce evidence, thereby denying them their right to be heard. On the other hand, in Miscellaneous Application No. 048 of 2017, the applicants seek an order of stay of execution of the decree pending the final determination of Miscellaneous Application No. 047 of 5 2017, on ground that the applicants are likely to suffer substantial / irreparable damage or loss, if execution is not stayed considering that the main application has high chances of success yet it will be rendered nugatory if execution ensues before it is heard.

The background to these applications is that the respondent is the proprietor of commercial 10 premises situated at plot 4 Gulam Close, Old Bus Park, Bazaar Ward in Arua Municipality. By an agreement dated 1<sup>st</sup> May 2008, the respondent let out to first applicant a room to serve as a store, and the agreement was executed in the name and on behalf of the third applicant, but named the second applicant as the tenant. It was agreed that the rent payable would be shs. 300,000/= (three hundred thousand shillings) per month. Rent for the first six months, with effect 15 from 1<sup>st</sup> May 2008, was paid in advance in a lump sum of shs. 1,800,000/=. Difference having developed thereafter between the respondent and the first applicant, the respondent on 29<sup>th</sup> September, 2009 filed a suit against the first applicant for recovery of rent arrears accruing beginning from the month of August 2009, until the time of filing the suit.

20 In his defence, the first applicant contended that he was not the right party to be sued. In the alternative, he argued that having been unlawfully evicted by the respondent from the premises in the month of July, 2009, he did not owe the respondent any rent because at that time he had paid rent covering the period up to 31<sup>st</sup> December, 2009. He instead counterclaimed a sum of shs. 9,800,000/=: comprising shs. 1,800,000/= as advance payment of rent for the period running 25 from 1<sup>st</sup> July, 2009 to 31<sup>st</sup> December, 2009 and shs. 8,000,000/= as lost profits for the period of four weeks during which the respondent had forcefully locked the premises denying the first applicant access to the premises.

Seven months after the suit was filed, when it came up for a scheduling conference on 15<sup>th</sup> April, 30 2010, both parties and their counsel were not in court. It was adjourned to 26<sup>th</sup> June, 2010. On that day, still the parties and their counsel were not in court and it was adjourned *sine die*. The

next time the suit came up was on 24<sup>th</sup> May, 2011 but the trial magistrate was indisposed and the suit was adjourned to 6<sup>th</sup> June, 2011 on which date the trial magistrate was still indisposed and the suit was adjourned further to 11<sup>th</sup> November, 2011. On that date, both counsel were in court together with the plaintiff and one other witness who were ready to testify. The defendant was  
5 not in court. Counsel for the plaintiff complained about belated service of a defence to his amended plaint and the suit was adjourned to 12<sup>th</sup> January, 2012 for scheduling. Thereafter, the suit came up only on two occasions during that year and was adjourned on both occasions because the trial magistrate was indisposed.

10 The next time the suit came up was on 14<sup>th</sup> February, 2013. The parties were absent but both counsel were in court. It was adjourned to 10<sup>th</sup> April, 2013 on which day counsel holding brief for the defence sought an adjournment to 6<sup>th</sup> June, 2013 which was granted. The next time it came up was on 11<sup>th</sup> July, 2013 and it was adjourned to 12<sup>th</sup> September, 2013 at the instance of counsel holding brief for the plaintiff's counsel. Defence counsel and both parties were not in  
15 court. On 12<sup>th</sup> September, 2013, the trial magistrate was indisposed and the suit was adjourned to 3<sup>rd</sup> September, 2013 on which day defence counsel raised a preliminary objection. The ruling was reserved for 13<sup>th</sup> November, 2013 on which day all the parties were absent and the same was adjourned to 11<sup>th</sup> December, 2013 but there is no record as to what transpired on that day. It is on 20<sup>th</sup> February, 2014 that the objection was overruled and the plaintiff was allowed to add the  
20 third defendant.

The next time the suit came up was on 18<sup>th</sup> September, 2014, the plaintiff and his counsel were in court but the defendants and their counsel were absent. It was for that reason adjourned to 14<sup>th</sup> October, 2014. On that date the plaintiff and his counsel were in court and so was counsel for the  
25 defendants who sought the matter to be adjourned further for the parties to explore a possible out-of-court settlement. It was adjourned to 21<sup>st</sup> November, 2014. The next time it came up was on 22<sup>nd</sup> April, 2015 on which day the plaintiff was present in court but his counsel and defence counsel were not. Counsel holding brief for defence counsel sought an adjournment and the suit was adjourned to 30<sup>th</sup> June, 2015. On that day the plaintiff was in court by his lawyer, defence  
30 counsel and the defendants were not. It was adjourned to 20<sup>th</sup> August, 2015 and a similar occurrence caused a further adjournment to 15<sup>th</sup> October, 2015. On that day the plaintiff and one

other witness testified following which the suit was adjourned to 14<sup>th</sup> December, 2015 for further hearing. On that day the trial magistrate was indisposed and the suit underwent two other consecutive adjournments; on 25<sup>th</sup> January, 2016 and 3<sup>rd</sup> February, 2016 for the same reason.

Trial continued on 23<sup>rd</sup> March, 2016 with the testimony of the third witness and the plaintiff closed his case. The suit was adjourned to 7<sup>th</sup> June, 2016 for the defendants to open their defence.

There is no record as to what transpired on that day but the next time the suit came up was 23<sup>rd</sup> August, 2016 where counsel for the defendants reported the first defendant was out of the country. It was adjourned to 18<sup>th</sup> October, 2016 on which day counsel for the plaintiff was absent and the suit was adjourned to 15<sup>th</sup> December, 2016. On that day, both counsel were in court but the first defendant was not. Only his shop attendant was. In light of the three previous occasions when the defence ought to have opened and on application of counsel for the plaintiff, the trial magistrate ordered closure of the defence case under the provisions of Order 17 rule 4 of *The Civil Procedure Rules*. The court directed a schedule for the filing of final submissions and adjourned the suit for judgment on 24<sup>th</sup> January, 2017. Below is a tabulated summary of those occurrences;

		Date	Attendance	At instance of court	At instance of the plaintiff	At instance of the defence
1.	P	15 <sup>th</sup> April, 2010	- Plaintiff's Counsel present - Both parties absent			✓
2.	L	26 <sup>th</sup> June, 2010	- None		✓	✓
3.	A I	24 <sup>th</sup> May, 2011	- Both Counsel present - Plaintiff present - both parties absent	✓		
4.	N	6 <sup>th</sup> June, 2011	- Both Counsel present - Both parties absent	✓		
5.		11 <sup>th</sup> Nov,	- Both Counsel present			✓

	T I	2011	- Plaintiff present - One witness present - Defendant absent			
6.		12 <sup>th</sup> Jan, 2012	- No record			
7.	F S	19 <sup>th</sup> April, 2012	- Both Counsel present - Both parties absent	✓		
8.		11 <sup>th</sup> July, 2012	- Plaintiff Counsel present - Defence Counsel absent - Both parties absent	✓		
9.	C A	11 <sup>th</sup> Nov, 2012	- No record			
10.		14 <sup>th</sup> Feb, 2013	- Both Counsel present - Both parties absent		✓	
11.	S E	10 <sup>th</sup> April, 2013	- Plaintiff Counsel absent - Defence Counsel absent - Parties absent		✓	
12.		6 <sup>th</sup> June, 2013	- No record			
13.	C A	11 <sup>th</sup> July, 2013	- Plaintiff Counsel present - Defence Counsel absent - Parties absent		✓	
14.		12 <sup>th</sup> Sept, 2013	- Both Counsel present - Both parties absent	✓		
15.	S E	3 <sup>rd</sup> Oct, 2013	- Both Counsel present - Both parties absent	P.O raised		
16.		13 <sup>th</sup> Nov, 2013	- Both Counsel present - Both parties absent	✓		
17.	C A	11 <sup>th</sup> Dec, 2013	- No record			
18.		20 <sup>th</sup> Feb, 2014	- Plaintiff 's Counsel present - Plaintiff absent	Ruling read		

			- Defendants & Counsel absent			
19.		18 <sup>th</sup> Sept, 2014	- Plaintiff & Counsel present - Defendants & Counsel absent			✓
20.		14 <sup>th</sup> Oct, 2014	- Plaintiff & Counsel present - Defence Counsel present - Defendants absent	for settlement		✓
21.		22 <sup>nd</sup> April, 2015	- Plaintiff present - His counsel is absent - Defendants & Counsel absent			✓
22.		30 <sup>th</sup> June, 2015	- Plaintiff present - His counsel is absent - Defendants & Counsel absent			✓
23.		20 <sup>th</sup> Aug, 2015	- Plaintiff present - His counsel is absent - Defendants & Counsel absent			✓
24.		15 <sup>th</sup> Oct, 2015	- Both Counsel present - Plaintiff present - One witness present - Defendant absent	P.W.1 & P.W.2 testified		
25.		14 <sup>th</sup> Dec, 2015	- Both Counsel present - Plaintiff present - Defendants represented	✓		
26.		25 <sup>th</sup> Jan, 2016	- Plaintiff & Counsel present	✓		

			- Defence Counsel absent - Defendants represented			
27.		3 <sup>rd</sup> Feb, 2016	- Plaintiff & Counsel present - Defendants & Counsel absent	✓		
28.		22 <sup>nd</sup> March, 2016	- Plaintiff & Counsel present - Defence Counsel present - Defendants absent	✓		
29.	D	7 <sup>th</sup> June, 2016	- No record	✓		
30.	E F E N	23 <sup>rd</sup> Aug, 2016	- Plaintiff & Counsel present - Defence Counsel present - Defendants absent			✓
31.	C E C	18 <sup>th</sup> Oct, 2016	- Plaintiff's Counsel absent - Defence Counsel present - Defendants absent		✓	✓
32.	A S E	15 <sup>th</sup> Dec, 2016	- Plaintiff & Counsel present - Defence Counsel present - Defendants absent			✓

The progress of this suit unfortunately is typical of our current justice system, a stark demonstration of the inefficiency that has crept into and almost overwhelmed contemporary civil trials, which is without doubt one of the major challenges of our national justice system today. It is evident from the above table that hearing of the entire suit took twenty seven (27) court sittings that spanned over a period of approximately six years and eight months. During that period, the file lost position on five occasions, both parties were not ready to proceed on one (1) occasion, the suit was adjourned nine (9) times at the instance of court due to transfer of the first trial magistrate, five (5) times at the instance of the plaintiff and twelve (12) times at the instance

of the defendants. The first, and consequently the second defendant (the correctness of whose joinder is doubtful the same being only a business name), did not attend any of the sittings while the third defendant was represented by a one Bruhan Sebi, its sales representative, on only three occasions. It took five years and six months before the first witness could testify.

5

Having failed to persuade the trial court to grant a further adjournment for presentation of the defence evidence, counsel for the defendants filed Arua Chief Magistrates Court Miscellaneous application No. 62 of 2016 on 20<sup>th</sup> December, 2016 by which the applicants sought leave to open the defence and be allowed to present evidence in defence of the suit. Counsel claimed he was  
10 indisposed on the day the suit had come up for defence since he was suffering from chronic diarrhoea, contending that he was represented in court on that material day by another advocate holding his brief to seek an adjournment. There however was no explanation advanced for the defendants' absence from court on the material date. The trial magistrate heard the application on 9<sup>th</sup> January, 2016 and dismissed it on that day with costs. He immediately proceeded to deliver  
15 the judgment in the main suit on that very day. Counsel for the defendants then filed Arua Chief Magistrates Court Miscellaneous application No. 05 of 2017 on 31<sup>st</sup> January, 2017 by which the applicants sought leave to appeal the aforementioned decision. The trial magistrate heard the this application too and dismissed it with costs on 15<sup>th</sup> June, 2017, hence the two consolidated applications now before this court.

20

It is argued by counsel for the applicants / defendants Mr. Henry Odama, that the applicants have been denied their right to be heard and put evidence on the record so as to enable court determine the matter interparty. On 22<sup>nd</sup> March 2016, the plaintiff had closed their case and thereafter the applicants were directed to open their defence on 7<sup>th</sup> June 2016. On that date, the trial magistrate  
25 was indisposed upon which the matter was given another date 23<sup>rd</sup> August, 2016. On that day the first applicant who was the defendant was out of the country attending to his ailing mother and that communicated to the court by a representative of the company Mr. Bruhan Sebi. Following that the matter was adjourned to 18<sup>th</sup> October, 2016. On that day Counsel Louis Odongo for the plaintiff was not in attendance but sent a one Counsel Komakech Denis to hold his brief. This  
30 was when the first applicant, the defendant in the head suit, was still out of the country and the same explanation was offered. Mr. Bruhan Sebi was in attendance. The matter was fixed to 15<sup>th</sup>



December, 2016. On that day unfortunately counsel in personal conduct was very sick and requested Counsel Onyafia Ezadri Michael to hold his brief seeking for another date. Counsel had informed the client, the first applicant that he would not be able to lead him on that day because of sickness. Mr. Bruhan Sebi was in attendance to offer that explanation. That was when  
5 the trial magistrate directed the defence case to be closed. On the day judgment was delivered, the application for leave to present the applicants' defence was heard and dismissed despite the fact that the applicants were ready to give their defence. The application was dismissed and shortly thereafter, the judgment was delivered. Counsel sought leave of court to appeal and it was rejected. He submitted that a material error occurred when the applicants were denied  
10 opportunity to explain their absence.

In rebuttal, counsel for the respondent Mr. Louis Odong argued that there is no merit in both applications. The trial magistrate judiciously exercised his discretion. Mr. Sebi Bruhan, the third applicant's sales representative, was in court on 23<sup>rd</sup> August, 2016 but chose not to give evidence.  
15 The same thing occurred on 18<sup>th</sup> October 2016. On 15<sup>th</sup> December, 2016 there was no witness and the trial magistrate closed the case. Most of the previous incidents of adjournment were at the instance of the defence. After the preliminaries were done with, the plaintiff did not waste time. He closed his case at two sittings. He observed that the applications have been brought in bad faith. There was a counterclaim that has not been raised in any of these applications. He  
20 prayed that the applications be dismissed with costs.

Section 83 of the *Civil Procedure Act, Cap 71* empowers this court to revise decisions of magistrates' courts where the magistrate's court appears to have; (a) exercised a jurisdiction not vested in it in law; (b) failed to exercise a jurisdiction so vested; or (c) acted in the exercise of its  
25 jurisdiction illegally or with material irregularity or injustice. It entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court, after satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a magistrate's court. It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case  
30 or involving a miscarriage of justice occurred, but after the parties have first been given the opportunity of being heard and only if from lapse of time or other cause, the exercise of that

power would not involve serious hardship to any person. The central point raised as the main ground for the applications is denial of the right to a fair trial. It is contended that by directing the applicants to close their case before they had adduced any evidence, the trial magistrate acted in the exercise of his jurisdiction with material irregularity or injustice.

5

The right to a fair trial in civil matters is guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995*. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Entailed in that right to a "speedy hearing" is the right to a trial within a reasonable time, often termed the right to be tried without undue delay or the right to a speedy trial. For the realisation of this right, all parties, including the courts, have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article.

Guarantee of this right is intended to prevent oppressive litigation, minimise the cost (in terms of temporal, monetary and other resources), anxiety and stigma associated with court proceedings, and promote meaningful enjoyment of the right to a fair trial by ensuring that the proceedings occur while evidence is fresh and available and remedies are granted when they are most effective. On the other hand, the public has interest in speedy trials in civil justice since lengthy delays mean enhancement of opportunities for manipulation of the judicial system, loss of the benefits of human and other resources tied up in the court system, loss of confidence in the judicial system especially by victims and key witnesses, it breeds cynicism, and tends to bring the administration of justice into disrepute, and delay further increases costs and places additional pressure upon scarce private and public resources. Observance of the right to a trial within a reasonable time ensures parties will not unduly wait for a resolution to their cases. It is intended to avoid the unnecessary prolonging of the amount of emotional and often financial stress on the parties as a result of avoidable delay. Public interest emphasises efficiency and economy in the conduct of litigation, in that the courts' resources should be used in such a manner that any given case is allocated its fair share of resources, the most important of which in civil litigation is time. Each case whose trial is unduly prolonged deprives other worthy litigants of timely access to the courts.

Expeditious trials require reasonable availability and reasonable cooperation of the court, the parties and their counsel. Although it does not necessarily require any of the said stakeholders to hold themselves in a state of perpetual availability, the expectation is that the only acceptable justification for unavailability of any of them should only be caused by exceptional events or circumstances that are not reasonably foreseeable or are glaringly unavoidable such as illness, bereavement or other unexpected events at trial, which cannot be reasonably mitigated. Courts must ensure that each suit is dealt with expeditiously and fairly, allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. This role emphasised in *Grovit v. Doctor* [1997] 1 WLR, 640 specifically in the judgment of Lord Woolf at page 647G to 648 as follows;

The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James* [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.

That notwithstanding, delays by either the parties or the courts are common within our judicial system. Many times the parties are prepared and ready to go to trial, but the courts are unable to accommodate them for a number of reasons. These reasons might include a backlog of court cases, or judicial officers just not being available. What therefore constitutes reasonable time is case specific and is left to the Courts to decide in the circumstances of the individual cases. Under the practice in place hitherto, a claim could normally only be dismissed for want of

prosecution where the plaintiff's default or delay had been intentional and contumacious, or where he or she had been guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or to serious prejudice to the defendant (see *Birkett v. James* [1978] AC 297; *Kampala International University Ltd v. Tororo Cement, and two others*,  
5 *H.C. Civil Application No.433 of 2006*; *Rosette Kizito v. Administrator General* [1993]5 KALR 4 and *Allen v. Sir Alfred McAlpine & Sons* [1968] 1 All ER 543).

The delay clock will not stop as soon as a single available date offered by court goes by unutilised. Under Order 17 rule 1 (1) of *The Civil Procedure Rules*, the court may at any stage of  
10 the suit grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit if sufficient cause is shown. Where the plaintiff and Court are ready to proceed but the defence is not the resultant delay is attributable to the defence. Any frivolous application causing delay will be attributable to the defence as well. Even where adjournments are merited, the court and the parties ought to be careful not to have too many of them to an  
15 extent that compromises the right to a trial within a reasonable time. When a suit drags on due to adjournments granted at the instance of a party, that may constitute a violation of the right to trial within a reasonable time and may form a ground for dismissing it for want of prosecution (see *Ayub Sulaiman v. Salim Kabambalo S.C. Civil Appeal No.32 of 1995*). The overriding objective under article 28 (1) of *The Constitution of the Republic of Uganda, 1995* and *The Civil*  
20 *Procedure rules* in general is that courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party. The factors to consider in deciding whether the delay constitutes a violation of the right to trial within a reasonable time are therefore;- the length of the delay, the reasons for the delay, failure to assert  
25 the right to trial within a reasonable time and prejudice to the parties. Case complexity will not on its own automatically result in the delay being found reasonable.

Judicial policy in Uganda has set up a presumptive ceiling of two years, even for complex cases, beyond which a case is considered as backlog. It may be argued that even the stipulated two  
30 years is a long time to wait for justice, but this presumptive ceiling reflects the realities we currently face. This presumptive ceiling is probably inspired or informed by Order 17 rule 6 of

*The Civil procedure Rules* which empowers courts to disencumber themselves of suits in which the parties appear to have lost interest, evinced by being inactive for over two years. The rationale is that inordinate delay is likely to obstruct the just disposal suits. The court will need to examine the reasons for the delay, and the effect it has had on the parties before it makes a decision whether or not to dismiss or stay the suit. A stay is typically ordered if the rights of one of the parties were violated in a way that is serious enough to deny them a fair trial.

If the delay does not exceed the presumptive ceiling the burden is on the party alleging so to prove that the delay has been unreasonable but where it does, and the case has taken markedly longer than it reasonably should have, the presumption is that the delay is unreasonable and the burden rests on the party seeking to continue with the trial to justify the continuation. To do so, the party must establish that it took meaningful steps that demonstrate a sustained effort to expedite the proceedings for example by raising the issue of delay, taking active steps to move the matter forwards expeditiously by inquiring on early trial dates, or by counsel soliciting meetings with opposite counsel in advance of hearings to streamline the process, and so on. This burden will be heightened the more, like in the instant case, where the party seeks post-judgment or interlocutory relief, long after the presumptive ceiling has been surpassed.

In Canada where the presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry), the Supreme Court of Canada has in the case of *R. v. Jordan*, 2016 SCC 27 where there was a delay of 35.5 months of which Williamson only caused 1.5 months of the delay, found that this was a case where the presumptive ceiling had been breached, while in that of *R v. Williamson* 2016 SCC 28, where the delay was 49.5 months and Jordan was only responsible for 5.5 months, a delay of 44 months was found to be clearly unreasonable. In both cases the court found that the accused were proactive in moving the matter along, whereas the Crown did little to nothing in doing the same. The court opined that “to be tried within a reasonable time” does not admit of gradients of reasonableness where the charges are serious. For example, it does not guarantee the right to be tried within “somewhat longer” than a reasonable time, or within a time that is “excessive but not so long as to be clearly unreasonable” when the charges are serious.

Indeed, the Court went further to note that “These are precisely the cases that should be heard promptly, on the strongest possible evidence.”

Where there is a breach of the right to a trial within a reasonable time, the available remedy to a court is a stay of proceedings. For example under section 17 (2) of *The Judicature Act*, with regard to its own procedures and those of the magistrates courts, the High Court has the power to exercise its inherent jurisdiction in order to prevent abuse of the process of the court by curtailing delays. The focus of this provision is more on maintaining confidence in the integrity of the judicial system than on protecting individual rights. It has its overriding objective as that of enabling the court to deal with cases justly, where dealing with a case justly includes, so far as is practicable, by; - a) ensuring that the parties are on an equal footing; b) saving expense; and c) dealing with the case in ways which are proportionate in terms of the amount of money involved relative to the importance of the case, the complexity of the issues and the financial position of each party; d) ensuring that cases are dealt with expeditiously and fairly; and e) allotting to each case an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. The ultimate objective is to ensure that there should be a fair trial according to law, which involves fairness to both parties and that court process is not misused or misapplied or an end other than that which it was designed to accomplish.

The courts' inherent jurisdiction confers upon them the power and the duty to protect the law by protecting their own purpose and functions, striving to strike the balance between public interest and private right. It is an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people (see *Hunter v. Chief Constable of the West Midlands Police*, [1982] AC 529, [1981] 3 WLR 906, [1981] 3 All ER 727). Inordinate delay or unfair manipulation of court procedures is likely to have such effect. The standard of proof required to invoke this jurisdiction is the more onerous “clearest of cases” standard.

30

The circumstances in which abuse of process can arise are very varied, there cannot be limited or fixed categories of the kinds of circumstances in which the court has a duty to exercise this salutary power since the category of cases in which the abuse of process principles can be applied is not closed (see *Regina v. Latif; Regina v. Shahzad*, [1996] 1 WLR 104, [1996] 2 Cr App R 92, [1996] 1 All ER 353, [1996] Crim LR 92). Proceedings which have come before court and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law have been stayed. Such acts as unlawful extradition by providing a morally unacceptable foundation for the exercise of jurisdiction over a suspect have been found to taint the proposed trial and, if tolerated, would mean that the court's process has been abused (see for example *Regina v. Horseferry Road Magistrates' Court, ex Parte Bennett (No 1)*, [1993] 3 WLR 90, [1994] 1 AC 42, (1993) 3 All ER 138, (1994) 98 Cr App R 114).

The criminal courts have refused to countenance behaviour that threatens either basic human rights or the rule of law, for example in *Dr. Kizza Besigye and ten others v. The Attorney General, Constitutional Petition No. 07 of 2007*, a criminal trial was stayed on account of the fact that the accused could no longer receive a fair trial in light of what security and other State agencies had done at the premises of and Headquarters of the third organ of State (the Judiciary) which included "the shedding of blood in the premises of the High Court, brutal assaults on prisoners who had been released on bail, violent arrest and manhandling prisoners as they were thrown on lorries as if they were sacks of potatoes, unlawful confinement of the Deputy Chief Justice, the Principal Judge and other frightened Judges and Registrars who were confined and besieged for over six hours in the High Court buildings and the unrepentant attitude of the Executive Arm of this Republic." The Constitutional Court found that this conduct constituted an outrageous affront to the Constitution, constitutionalism and the Rule of Law in Uganda. It stated; "This court cannot sanction any continued prosecution of the petitioners where during the proceedings, the human rights of the petitioners has been violated to the extent described above. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process."

The above are examples to show that in criminal trials, despite the fact that the charges may be grave, the merits of the case and that a fair trial may still be possible, proceedings have been

stayed on broader considerations of the integrity of the criminal justice system. It is recognised that a person charged with having committed a criminal offence should receive a fair trial and that, if he or she cannot be tried fairly for that offence, he or she should not be tried for it at all. Proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place (see *Regina v. Horseferry Road Magistrates' Court, ex Parte Bennett (No 1)*, [1993] 3 WLR 90, [1994] 1 AC 42, (1993) 3 All ER 138, (1994) 98 Cr App R 114). The question there is whether the behaviour is "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed," (see *Regina v. Latif; Regina v. Shahzad*, [1996] 1 WLR 104, [1996] 2 Cr App R 92, [1996] 1 All ER 353, [1996] Crim LR 92). The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed. In *Uganda v. Shabahuria Matia, H. C. Criminal Revisional Cause No. Msk-00-CR-0005 of 1999 (unreported)* for example, a stay was ordered on account of the fact that the period of three and half years without committing an accused for trial, without an explanation for the delay by the state, was found to be oppressive, amounting to an abuse of the process of the court warranting the extreme remedy of ordering a stay of prosecution. In criminal trials, proceedings may be stayed in the exercise of the judicial officer's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that trial should take place.

Whereas the concept of abuse of process emerged and developed within the context of criminal trials, there is no doubt that it extends to civil litigation as well. For example in *Arbuthnot Latham Bank v. Trafalgar Holdings* [1988] 1 WLR 1426 at page 1437, Lord Woolf stated as follows:

Whereas hitherto it may have been arguable that for a party on its own initiative to in effect 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts



becoming involved in order to find out why the action is not being progressed. If the Claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes.

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It is clear from that case, and from earlier authorities such as *Grovit v. Doctor* [1997] 1 WLR 640, that the concept of abuse of process in civil litigation is not engaged merely because there is a delay in the prosecution of the litigation; there must be something more such that a "fair trial" is no longer possible or at least that there is a substantial risk that it is no longer possible. For example, if a party embarks on litigation intending never to conclude it or something of that kind. It may also arise if there is significant prejudice to the other side, where the delay is likely to obstruct the just disposal of the proceedings. Just like in criminal trials, in the field of civil litigation it is the duty of a civil court to ensure that parties exercise their right to a fair trial responsibly and as intended by the constitution. Where there has been a serious abuse of the process the court should, in my view, express its disapproval by refusing to act upon it. The court should refuse to allow parties to take advantage of abuse of their rights by regarding their behaviour as an abuse of process and thus preventing a litigation from continuing.

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There appear to be two categories of abuse of process (a) conduct affecting the fairness of the trial; and (b) conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. Conducting proceedings in a manner manifesting an intention not to bring the proceedings to an expeditious conclusion is a subversion of the process of the court and will constitute an abuse. It is conduct that either compromises the other party's fair trial interests or the integrity of the justice system. It may be evinced by misconduct, improper motive or bad faith in the approach adopted by the party, going beyond mere legitimate tactics before the court, or evidence of irremediable impairment to the fair trial interests or that the

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conduct has prejudiced the other party's ability to have a trial within a reasonable time. In some cases though, if a fair trial is still possible, in the sense of there being no trial prejudice proven, the court could be persuaded to provide other remedies, such as ordering expedited proceedings.

5 An action is an abuse of process only if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process: (i) the achievement of a collateral advantage beyond the proper scope of the action, or (ii) the conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to  
10 cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation (see *Broxton v. McClelland and Another*, [1995] EMLR 485). For that reason, commencing or continuing proceedings which a party has no intention to bring to a conclusion may constitute an abuse of process.

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For example in *Phelps v. Button* [2016] EWHC 3185, the suit related to breach of contract that occurred in 2003. Most of the claimant's claims were filed at trial in February 2006, however he succeeded on a claim for wasted expenditure and, in 2007, the court gave directions for determination of the issue of quantum. That order was not complied with. The court made further  
20 orders (in similar terms) in September 2010, which provided for disclosure and the exchange of witness statements. Again that was not complied with. The claimant made an application that the action be set down for a "quantum hearing". The defendant made an application that the claim be struck out, on the grounds of failure to comply with two orders of the court, and because of delay generally. In its judgment the court held that a defendant cannot let time go by without taking  
25 action so where delay does cause prejudice to him he cannot say that it is entirely the fault of the claimant. Citing *Grovit v. Doctor* [1997] 1 WLR 640, it further held that to commence or to continue proceedings which you have no intention to bring to a conclusion may constitute an abuse of process.

30 Similarly in *Solland International Ltd v. Clifford Harris & Co* [2015] EWHC 2018, the claimants brought an action against their former solicitors alleging negligence in the conduct of

litigation in that there was a failure on their part; to take early witness statements, to consider a witness statement of a witness which had been taken by the claimants themselves. That statement was exchanged and the differences in accounts had a major impact on credibility, and a failure to take statements early. The claimants were due to file certain pleadings in April 2012. The court  
5 failed to notice this failure and the matter was left in abeyance until the 13<sup>th</sup> August 2014 when the defendants applied to strike out. It was held that the only sensible inference from the Claimants' failures was that they had no settled intention to pursue the claim. In conducting themselves in that way they were abusing the process of the court, having no intention to pursue the matter to trial. "In taking no active steps between April 2012 and, eventually, November  
10 2014 to pursue their Claim, the Claimants acted in knowing and total disregard of the rules and of the requirements of modern litigation." The court found that a failure to progress the action for 31 months amounted, on the facts of the case, to an abuse of process and specifically stated that;

Litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that  
15 litigation and who have, in consequence, acted, in respect of that litigation, in knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner. It is equally fair that the opposing party, faced with litigation carried on in this fashion, should not be expected to have to continue to meet such litigation.

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It was suggested in *Phelps v. Button* that in situations of delay, the court ought to consider the following factors. First, the length of the delay; secondly, any excuses put forward for the delay; thirdly, the degree to which the claimant has failed to observe the rules of court or any court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay  
25 on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case. It requires examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account  
30 the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the

process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored.

In the instant case, the respondent / plaintiff's claim is for recovery of rental arrears accruing beginning from the month of August 2009, until the time of filing the suit. In the judgment delivered on 9<sup>th</sup> January, 2017 the trial magistrate awarded shs. 5,000,000/= as the rent due for the seventeen months, shs. 3,000,000/= in general damages and costs. The applicant's counterclaim is for shs. 9,800,000/=. Giving each party the benefit of doubt by assuming that each would be capable of proving their respective monetary claims, the resultant offset would mean that the real value of the suit is in the region of 1,800,000/= exclusive of costs. Considering that the only matters in controversy were the duration of the tenancy and as to which of the parties was in breach considering the circumstances of its termination, it is not surprising that the respondent / plaintiff called only three witnesses, himself included, in proof of his case. I do not envisage the applicants / defendants calling any greater number of witnesses themselves.

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In the circumstances, this is a suit in which the evidence of both parties could, and should have been closed in a maximum of two sittings after the scheduling conference. It is a suit where, had each of the parties been diligent, in which judgment could and should have been delivered not later than a month after the first sitting following conclusion of the scheduling conference. The case is of no general importance. The legal or factual questions in controversy are not convoluted or technically, administratively or otherwise involved as to require intensive or otherwise time consuming investigation. They are very mundane and do not involve any complexity. The length of the interlocutory proceedings and the trial were wholly disproportionate to the importance of the case. The level of complexity is insufficient to justify the duration of this trial. The suit did not require this inordinate amount of time of trial or preparation. That it has taken nearly seven years to be concluded is utterly shocking, to say the least. It is an indictment of the trial court's case management skills. The trial court was too generous with its adjournments until 15<sup>th</sup> December, 2016 when it put its foot down in the following terms;

The defendants are not bothered to attend the court and give their testimonies. The defendants were given 4 occasions to make their defence but all in vain. The legal maxim states that justice delayed is justice denied. The counsel for the defendants

even failed to appear in court knowingly (sic) that his clients would never appear in court and make their defence. In the interest of justice and fairness and under Order 17 rule 4 CPR the hearing of the instant (sic) be and is hereby closed. Both parties to file in court their written submissions not later than 22/12/2016. Judgment is fixed for 24/01/2017.

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I have considered the reasons given by the trial magistrate in directing the closure of the defence case against the backdrop of the nature of the claim and the conduct of the parties prior to that decision. I find that the magistrate properly directed himself on the law and the facts in the decision he took. I have not found any material irregularity or injustice such as the one contended by counsel for the applicants. I find this to have been a proper exercise of judicial discretion in the circumstances, that does not call for a revision. This is a suit where the quantum of both special and general damages would most likely be very modest, perhaps nominal. I must therefore have regard to the possible benefits that might accrue to the parties as rendering such a significant delay of nearly seven years' expenditure potentially worthwhile.

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The applicants and their counsel engaged in a course of conduct indicating that their purpose in bringing the defence and counterclaim was not vindication of the applicants' claim. It is clear that the proceedings in court, even when they involved a counterclaim, have not been their main priority for the last nearly seven years. I struggle to see how what has happened in relation to the present proceedings does not amount to a type of warehousing. In the circumstances, the inference that their inactivity is only consistent with a decision not to pursue the proceedings expeditiously, is inevitable. The purpose of a suit for special damages is for recovery of a liquidated sum. In an suit in which a party wishes to achieve this end, he or she will also wish the action to be heard as soon as possible. If the party delays in prosecuting such a suit, and gives no valid explanation for his or her delay, the court is entitled to infer that his or her motive for the delay is not a proper one. I am quite satisfied, on the evidence, that until the order directing them to close their case, the applicants had literally no interest in pursuing this litigation. The applicants / defendants by deliberately litigating in an oppressive fashion, are deemed to have had a dominant intention to cause expense and harassment to the respondent / plaintiff. It is

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conduct more consistent with a calculated decision to obstruct the just disposal of the suit or pursuit of a vendetta, than pursuing a vindication of their contractual rights.

Litigants and their counsel should realise that the Court ethos has changed enormously in these modern times of increased litigation. There is a significantly reduced margin of tolerance of litigants who delay and dilly-dally because of the noticeable slack that has hitherto existed in the system. All of that has now gone. There is greater emphasis on measures to prevent the litigation system being overwhelmed. There are now fewer resources available. We no longer have the luxury of being able to schedule repeat performance of hearings because the parties are not ready. It is a much harder game to play.

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Having taken into account the contribution attributable to institutional delay, by occasioning adjournments flowing from a lack of diligence, I still find that there was considerable inaction on the part of the defendants / applicants that solely or directly caused a substantial delay resulting in failure to use court time efficiently. I have found nothing to suggest that the delays occasioned by the defendants / applicants were reasonably unforeseen or reasonably unavoidable. A party who occasions an adjournment has an obligation to ensure that henceforth the case is tried without causing any more delay. The party must demonstrate that he or she thereafter took steps to avoid and address the problem that caused the adjournment, in order to avoid further delay. Instead, the applicants have wastefully occupied the time and resources of the court in a claim that could and should have been decided within a month of conclusion of the scheduling conference.

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It is my considered view that our civil litigation system should cease to be used as a warehouse or repository for storage of moribund disputes that clog and suffocate it to the detriment of those with genuine controversies that require expeditious resolution. Being too liberal with adjournments is what has largely landed us in this situation. The culture of delay and complacency during litigation must not be encouraged. Courts should instead encourage participants in the justice system to take preventive measures to address inefficient practices and resource problems. Courts are now prepared to dismiss a claim for delay even if neither of Lord Diplock's two requirements as laid down in *Birkett v. James* [1978] AC 297 is satisfied (see *Biguzzi v. Rank Leisure plc* [1997] 1 WLR 1926 at 1932 G). The duty of a claimant to pursue an

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action expeditiously and in accordance with the rules is all the more important now. There is greater emphasis therefore, and rightly so, on expeditious trials to prevent the litigation system from being overwhelmed. In *Ayub Sulaiman v. Salim Kabambalo S.C. Civil Appeal No.32 of 1995*, despite the argument that the principle requiring courts to administer substantive justice  
5 demands that litigation should be resolved on merit, especially in land matters, the Supreme Court upheld a decision that dismissed a suit which for 8 years had been dragging on due to adjournments granted at the instance of the appellant. The court found that clearly the appellant had lost interest in the case.

10 In considering an application of this nature, the court will take into account all the circumstances of the case including the need for litigation to be conducted efficiently and at proportionate cost and enforcement of compliance with Rules, Practice Directions and Orders. In my judgment, whatever the position might have been in the last few decades, it is currently wholly unacceptable to seek to continue with a trial of this nature, nearly seven years after the event, the  
15 applicants having failed miserably to comply with an order to open their defence after two prior adjournments granted for a similar purpose. Even if there is no evidence of dimming of memories (the inability to recall entirely accurately what happened a long time ago), in a suit like the one at hand, absence of actual prejudice or the argument that the unfairness caused could be cured, cannot convert an unreasonable delay into a reasonable one. Once the presumptive ceiling  
20 is breached, prejudice does not have to be shown, it can be inferred since keeping a suit in court indefinitely with no intention of bringing it to a conclusion, is an abuse of process which should be stopped regardless of whether a fair trial of the action remains possible (see *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd [1998] 1 WLR 1426 at 1436; Summers v. Fairclough Homes Ltd, [2012] 1 WLR 2004, para 35; and Michelle Hepburn v. Royal  
25 Alexandria Hospital NHS and Glasgow Infirmary, 2011 SC 20, Para 47; 2010 SLT 1071; [2010] CSIH 71*). In the instant case, I think it will be a scandal to the administration of justice if more court resources are devoted to aid litigants who by their conduct over the years have demonstrated utter disinterest in the litigation. Seven years is clearly a long time to wait for justice in a suit of this nature. It simply will not be the same quality of trial that the parties would  
30 have had and are entitled to, if it had been concluded in a timely manner.

Courts will adjudicate upon the issues between the parties as long as the litigants' conduct has not rendered it impossible to hold a fair trial. It is an abuse of process if a party has manipulated or misused the process of the court so as to deprive the other of a protection provided by the law or in order to take unfair advantage of a technicality. The applicants' conduct in the instant case  
5 manifests lack of a sense of awareness of purpose of the proceedings, tending towards utilisation of the proceedings for purposes for which they are not designed, resulting in loss of their legitimate function as a reasonably justifiable litigation process. A litigant who resorts to delaying tactics in order to prevent the court from trying the case within a reasonable time or proceeds with such a carefree attitude towards an expeditious conclusion of the suit or engages in  
10 conduct which otherwise compromises the integrity of the court's procedures, *ipso facto* forfeits his or her right to have the court hear his or her case. Such a litigant cannot be heard to complain when the doors of justice are finally closed to him or her for what is clearly a subversion of the judicial process. Courts have an inherent jurisdiction and indeed a duty to take effective action to vindicate their authority and preserve the due and impartial administration of justice. The  
15 interests of justice require that suits should be brought to a timely end.

Unlike the "all or nothing" extremes of either dismissing the case for delay or permitting it to continue practiced in criminal trials, in civil litigation these are merely the two ends of a spectrum. The court has other sanctions at its disposal which it can and, in appropriate cases,  
20 should impose, rather than adopting one of the two extreme positions. The sanction, if any, to be invoked by the court to deal with a particular case of delay should be proportionate. To dismiss a claim, especially in cases where the claimant appears to stand a reasonable chance of success and of recovering substantial damages, is a strong thing to do. It seems to me however in this case, without going into the merits of the applicant's defence and counterclaim, that an order for costs  
25 cannot compensate for a trial process whose continuation will be unfair because the suit cannot be tried as fairly now as it could have been tried within a reasonable time after it was filed. This court ought to protect the integrity of its process by preventing one party from putting the other at an unfair disadvantage and compromising the just and proper conduct of the proceedings.

30 The old adage speaks of "justice delayed is justice denied" and that "the delay of justice is a denial of justice," (see *Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1 ALL ER 543 at pp 546*



and 547). Efficiency of justice is a major component of a fair trial and of the grant of effective remedies. The courts should take a proactive approach that prevents unnecessary delay by targeting its root causes. In order to eliminate the culture of complacency, Judicial officers have the duty of changing courtroom culture by being active and encouraging parties to improve efficiencies by denying adjournments for circumstances that could be foreseen or that were otherwise foreseeable, even where it may be defence-attributed. The nature of a violation of the right to trial within a reasonable time is such that any further litigation in the matter would only exacerbate the violation as it would amount to trial outside a reasonable time. In this case where it is no longer possible to deal with the case justly without the investment of disproportionate resources, any order other than the dismissal of these applications would, in all the circumstances, be contrary to the due administration of civil justice. Both applications are accordingly dismissed with costs to the respondent.

Dated at Arua this 27<sup>th</sup> day of November, 2017. ....

Stephen Mubiru

15 Judge

27<sup>th</sup> November, 2017.