THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0035 OF 2017

(Arising from Gulu Chief Magistrate's Court Civil Appeal No. 050 of 2006)

P'ODUR MILLS …… APPLICANT

VERSUS

WATMON BERRY ….…….…….…….…….…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

During July, 2006 the respondent sued the appellant before the L.C.II Court of Pawat-Omero Parish seeking a declaration that the land in dispute situated near Owiyo Trading Centre, belonged to him. The respondent's claim was that the land in dispute had been allocated to him during the year 1978 by some officers from the Gulu Urban Office, in the presence of the then sub-county Chief Peer Otto. He immediately constructed a six roomed building on the land but in 1987, residents of the trading centre were re-located to Karuma during the L.R.A. insurgency. The house collapsed during the period of insurgency. He re-established a semi-permanent house in 1995 thereon but the appellant occupied it on the pretext that he was a caretaker. He deposited bricks on the land in preparation of construction of a permanent house but the respondent's brother Kumakech sold them off at the time the respondent attempted to sell the plot to a one Ojera. On 20th June 20016 the respondent gave the appellant notice to vacate the building but the appellant refused to, hence the suit. At the trial he presented a general receipt for rates paid to Gulu District Administration in December, 1999 in respect of the land in dispute.

The appellant's defence was that around 1984-1985, the land was unlawfully allocated to the respondent by the self-styled local leadership of Olwiyo Trading Centre in the absence of his father, Abuneri Odur. Because of the existing political environment that existed at the time and

being fearful of the UNLA, his father and him did not take any action against the forceful allocation but in 1995 they had stopped the respondent from digging a foundation on the land. Ten years later the respondent re-invigorated his claim to the land, hence the suit. The L.C.II Court decided in favour of the respondent on 28th July, 2006.

Being dissatisfied with the decision, the appellant appealed to the L.C.III Court at Purongo sub-county. He argued that the L.C.II Court had misconstrued and also disregarded most of the evidence he adduced during the trial. This evidence included graves of his deceased relatives, a Cwa tree and oral testimony of witness who stated that the appellant's relatives had been growing crops on this land before. The L.C.II Court had instead upheld the respondent's defence that the land was vacant at the time it was allocated to him during the year 1978. He argued further that the L.C.II Court had failed to examine the question as to whether the persons who purported to allocate the land to the respondent had the legal authority to do so. The L.C.III Court heard the case *de novo* and also visited the *locus in quo* where it found broken bricks, remnants of the respondent's building that had collapsed during the insurgency. It dismissed the appeal on 27th July, 2007.

The appellant appealed further to the Chief Magistrate's Court of Gulu on 19th December, 2006 but on 11th February, 2010 the appeal was dismissed with costs to the respondent under Order 9 rule 22 of *The Civil Procedure Rules* on grounds that the appellant was not in court when the appeal was called for hearing. The court had directed that the appellant was to file his submissions by 5th February, 2009 and the respondent his by 26th March, 2009. The appellant failed to submit as directed and the matter was thereafter adjourned consecutively on 8th June, 2009; 10th September, 2009; 30th November, 2009; and finally to 11th February, 2010 when it was dismissed for failure to file submissions and for the unexplained absence of the appellant and his from counsel on that day.

On 18th February, 2010, the appellant filed his submissions in respect of the then dismissed appeal and an application seeking re-instatement of the appeal on ground that he and his counsel were not served with a hearing notice for 11th February, 2010 when the appeal had come up for hearing and dismissed for their failure to attend court that day. The appellant was in court on 30th

November, 2009 but had erroneously heard that the matter had been adjourned to 18th February, 2010 only to discover when he turned up that day that the appeal had been dismissed on 11th February, 2010. The appellant opposed the application contending that the appellant was present in court on 1st December, 2009 when the appeal was adjourned to 11th February, 2010. The appellant filed the appeal in 2006, he was instructed to file his submissions as way back as the year 2008 but by the time the appeal was dismissed he had not. He opined that the proceedings were only meant to delay justice.

In his ruling, the leaned Chief Magistrate decided that the appeal from the decision of the L.C.III had remained unprosecuted for over one year since it was filed on 19th December, 2006. It was dismissed on 22nd January, 2008 for want of prosecution. It was on application of the appellant reinstated on 18th August, 2010 on condition that the appellant filed his submissions by 9th September, 2010. The appellant did not file his written submissions. It was dismissed once again for want of prosecution on 12th March, 2012. The respondent had filed his submissions on 25th October, 2010 while the appellant filed his on 18th October, 2010. The appellant sought leave to appeal the dismissal yet the appeal had not been decided on merit. The appellant should have sought leave to set aside the order dismissing the appeal rather than seek to appeal that order. For that reason the application was dismissed with costs.

Being dissatisfied with the decision, the appellant appealed to this court on the following grounds;

1. The learned Chief Magistrate erred in law and fact when he held that the application was without merit and dismissed it with costs.
2. The learned Chief Magistrate erred in law and fact when he engaged in conjecture and thereby reached the wrong conclusion.
3. The Chief Magistrate erred in law and fact when he condemned the applicant in costs.

Counsel for the appellant argued that the court below erred in dismissing the appeal for want of persecution when failure to file written submissions as directed by the court was that of counsel and not the appellant. The submissions, although belated, ought to have been considered since they were filed before the judgment dismissing the appeal for want of prosecution was delivered.

When he applied for leave to appeal that decision, the same court erroneously rejected the application without taking into consideration the factors that guide the determination of such applications. The respondents, appearing in person unrepresented, never filed any submissions in reply.

It is the duty of this court to re-hear the case by subjecting the evidence presented to the court below to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). It must weigh the conflicting evidence and draw its own inference and conclusions.

Having re-examined the record of proceedings and the decision of the court below, I find that in dismissing the appeal for want of prosecution, just because counsel for the appellant filed his submissions late, the court below practically penalised the appellant for the failure of his counsel yet mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and where there are serious issues to be tried, the court ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank [1971] EA 17* and *G M Combined (U) Limited v. A. K. Detergents (U) Limited S.C Civil Appeal No. 34 of 1995*).

On the other hand, Order 44 rule 1 (3) of *The Civil Procedure Rules* provides that an application for leave to appeal shall in the first place be made to the court making the order sought to be appealed from. Section 220 (4) of *The Magistrates Courts Act* provides that an application for leave to appeal shall in the first instance be made to the Chief Magistrate within the period of thirty days from the date of the decision sought to be appealed from, and an application to the High Court for that leave shall be made within a period of fourteen days from the date on which the application is refused by the Chief Magistrate. The import of section 220 (4) is that an application for leave to appeal can only be made to the High Court upon refusal by the Chief Magistrate to grant the same.

Leave will normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial consideration (see *Sango Bay Estates Limited and others v. Dresdner Bank [1992] E. A. 17; G.M. Combined (U) Ltd v. A.K. Detergents (U) Ltd, S. C. Civil*

Appeal No. 23 of 1994; Degeya Trading Stores (U) Ltd. v. Uganda Revenue Authority, C. A. Civil Application No 16 of 1996; and *Kayaga v. Waligo C. A Misc. App. 80 of 2012*). An applicant seeking leave to appeal must show either that his or her intended appeal has a reasonable chance of success or that he or she has arguable grounds of appeal and has not been guilty of dilatory conduct. All that the court to which such application is made is required to do is determine whether or not *prima facie* there are grounds of appeal that merit serious consideration. In the instant case, the court below instead considered that because the appellant should have sought leave to set aside the order dismissing the appeal rather than seek to appeal that order, the application should be rejected.

In the instant case, the application for leave to appeal was dismissed on 28th August, 2014. The court below misdirected itself when in dismissing that application, it failed to consider whether or not the applicant seeking leave to appeal had showed either that his intended appeal had reasonable chances of success or that he had arguable grounds of appeal and was not been guilty of dilatory conduct. Instead of making a similar appeal to this court in accordance with Order 44 rule 1 (3) of *The Civil Procedure Rules,* the appellant chose instead to appeal the decision on 4th September, 2014 yet under Order 44 of *The Civil Procedure Rules* such an order is not appealable as of right. To demand compliance with the procedural requirements in the circumstances of the unfortunate prolonged litigation history of this dispute would not serve the justice of the case. Being a dispute over land, it is better that it is determined on the merits of each party's case rather than on technicalities.

For that reason, by virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995,* and in order to bring the proceedings to a more expeditious conclusion, I have opted to administer substantive justice without undue regard to technicalities by setting aside both decisions of the Chief magistrate; dismissing the appeal for want of prosecution and the one rejecting the application for leave to appeal, and instead order that Civil Appeal No. 50 of 2006 between the same parties be reinstated by the Chief Magistrate's Court at Gulu and be decided on merits, since both parties filed their submissions which are already on record. The costs of this appeal shall abide the results of the re-instated appeal

Dated at Gulu this 4th day of October, 2018

Stephen Mubiru

Judge,