THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS APPLICATION NO. 126 OF 2019

(ARISING FROM MISCELLANEOUS APPLICATION NO. 86 OF 2011)

(ARISING FROM CIVIL APPEAL NO. 86 OF 2014)

(ALL ARISING FROM HOIMA CHIEF MAGISTRATES COURT AT HOIMA CIVIL SUIT NO. 14 OF 2007)

ABEL BELEMESA :: APPLICANT

VERSUS

YESERO MUGENYI:: RESPONDENT

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

The applicant brought this application under Section 98 of the CPA CAP 71. Section 33 of the Judicature Act Cap 13 and Order 43 Rules 14, 16 and 31 and Order 52 rule 1 of the CPR SI 71-1 seeking for orders that the order dismissing civil appeal No. 86 of 2014 to be set aside and civil appeal No. 86 of 2014 be reinstated for hearing inter parties on merits and that provision be made for the costs of this application.

The grounds of the application have been set out briefly in the application and the affidavit in support of the application attached to the application and sworn by Abel Belemesa and briefly are;

a) That the applicant is dissatisfied with the ruling and order of this court dismissing Civil Appeal No. 86 of 2014 on 15/6/2017,
b) That civil Appeal 86 of 2014 was fixed for hearing and dismissed without the notice of the appellant.

c) That civil Appeal No. 86 of 2014 was fixed by court for hearing in Hoima on 7/11/2014 but it did not proceed with hearing of the appeal on account of objection by the respondent who had filed a notice of appeal.
d) That the applicant was informally notified by the presiding judge His Lordship Byamukama Simon Mugenyi that Civil Appeal No. 86 of 2014 would be fixed for hearing after disposal of the respondent's appeal in the Court of Appeal.
e) That he went to check on the status of Civil Appeal No. 86 of 2014 and the respondent's appeal at Masindi High Court whereupon he discovered that his appeal had been dismissed on 15/6/2017 without being notified.
f) That the court entered the dismissal order in civil appeal No. 86 of 2014 on 15/6/2017 in the absence of the parties and without service of the same on him.
g) That the applicant did not attend court on 15/6/2017 because he was not aware of the hearing date for his appeal and that he was never served with court process for 15/6/2017 in Civil Appeal No. 86 of 2014.
h) That he is desirous of being heard in Civil Appeal No. 86 of 2014 since it touches on his registered interest in land comprised in LRV 2833 Folio 3 Kyakaliba Bugahya Block 19 plot 35 measuring approximately 20 hectares which is fraudulently claimed by the respondent.
i) That the appellant was prevented from appearing in court on 15/6/2017 by sufficient cause when Civil Appeal No. 86 of 2014 was called for hearing and dismissed for want of prosecution.
j) That the ruling of court was delivered in the absence of the applicant who discovered the dismissal order after he checked with court on 30/10/2019 and the status of the respondent's appeal in Miscellaneous Application No. 107 of 2013 in the Court of Appeal.
k) That it is just and equitable that the applicant be granted the orders herein sought.
l) That it is fair, just and equitable that this application be allowed in all the terms prayed for.

The respondent opposed this application and filed an affidavit in reply stating that;

1. That he was present in court on 7/11/2014 and the judge did not talk or advise about fixing the applicant's appeal No. 086 of 2014 for hearing. That the words attributed to His Lordship Mr. Justice Byamukama Simon Mugenyi by the applicant were never uttered and that they are false.
2. That the applicant was served with the Notice of Appeal but the same counsel declined to acknowledge receipt of the same and neither did he file the address of service of further process in the matter.
3. That service in the matter was duly effected on all parties as per directions of and to the satisfaction of the trial judge.
4. That the application is misconceived in as much as there is no particular provision in the laws of Uganda under which a *dismissal for want of prosecution* by court can be set aside.
5. That it is unequitable and not in the interests of justice to grant the application because *justice delayed is justice denied.*
6. That he has been advised by his lawyers that the applicant has no interest in pursuing his appeal and sprang to action when faced by the court bailiff with a warrant to execute against him and that the unreasonable delay caused by the applicant will cause him great injustice.

Representation

Counsel Simon Kasangaki of Kasangaki & Co. Advocates appeared for the applicants while the respondent was represented by Mwebaze & Co. Advocates.

At the hearing of this application the parties were advised to file written submissions which I have had the benefit of reading and have considered in the determination of this application.

Submissions by the respondent on preliminaries.

Before delving into the merits of the application, counsel for the respondent raised a pertinent issue stating that this application to set aside the dismissal of Civil Appeal No. 86 of 2014 is misconceived and the applicant should have appealed against the dismissal by the judge on the 15/6/2017 instead of

applying to set it aside. He based on this stating that the matter before court was dismissed for want of prosecution and not for nonappearance.

Counsel for the respondent argued that it is clear that appeal was dismissed for want of prosecution under Order 43 Rule 31 of the Civil Procedure Rules and not rule 14. That this means that the remedy sought and claimed by the applicant under Order 43 rule 16 as per his submissions is only available if the dismissal was made under rule 14 or 15 of Order 43 of the Civil Procedure Rules, i.e for nonappearance or (2) nonpayment of deposits costs.

Counsel further submitted that a dismissal for want of prosecution under Order 43 rule 31 is not included under Order 43 rule 16 and it cannot be imported into that provision of law only to give advantage to a party in that matter. That if the legislature had wanted rule 31 to be included under Order 43 rule 16, it should have expressly done so together with rules 14 and 15 which are clearly stated to be the rules included or affected.

He further stated that the applicant's only recourse was to appeal against the decision and not set aside the dismissal. In differentiating a matter dismissed for nonappearance and a matter dismissed for want of prosecution, counsel for the respondent submitted that a matter is dismissed for nonappearance when a party or its counsel has not appeared in court and that a matter is dismissed for want of prosecution when a party fails to take the necessary steps to prosecute its appeal. He argued that in the present case, the appeal was dismissed by court because the party failed to take any steps to prosecute its appeal.

Counsel for the respondent further submitted that the court in dismissing the appeal under Order 43 rule 31 for want of prosecution, was exercising similar and identical powers as it does when dismissing a suit for want of prosecution under Order 17 rules 5 and 6 of the Civil Procedure Rule. He further added that it is now established law that a decision of dismissal under Order 17 rule 5 amounts to a decree and not an order, and that such a decree is only appealable as of a right and cannot be set aside as a mere order, since it is adjudged to have been given on merit. That the purpose of this is to enable courts deal with backlog of cases.

In support of his submission, counsel for the respondent cited the case of **Fredrick Sekyaya Sebugulu vs Daniel Katunda (1979) HCB 48** where court held that *"The order of dismissal was regular as passed under Order 15 r 4 of CPR and could not be set aside by the court order setting it aside under O.9 r 20 and could only be set aside by the court of Appeal. Accordingly the learned judge's order setting it aside under O.9 r. 20 was without authority."*

Counsel for the respondent further stated that the main concern for the judge in dismissing the appeal was not of non-appearance but one of want of prosecution. That this meant that the issue of whether the applicant was served or not was not relevant because the court did not dismiss the matter for nonappearance. He further stated that there could have been an affidavit of service on court record but the judge did not consider it when dismissing the matter for want of prosecution. The court took into consideration the fact that the appeal had been filed for a long time without the necessary steps being taken to further its progress.

Resolution

It should be noted at the onset that the applicant did not respond to the respondent's preliminary objection to this application and as such I will address the issue based on the respondent's arguments and the law.

Under the Evidence Act, a party who alleges a fact must prove it and in this case , it is the Respondent who has to prove that the Applicant's appeal was dismissed under Order 43 rule 31 of the Civil Procedure Rules for want of prosecution. From the record there is no doubt that the appeal was dismissed by the judge under Order 43 rule 31 of the Civil Procedure Rules for want of prosecution.

Order 43 Rule 31 provides for dismissal for want of prosecution and states that:-

(1) "**Where there has been undue delay in the hearing of an appeal, the registrar may obtain the directions of a judge for the listing of the appeal at the next ensuing sessions of the High Court**."

(2) "**Notice of the listing shall be served in such manner as the judge may think fit upon the appellant and respondent or their advocates, and upon the hearing thereof the court may order the dismissal of the appeal for want of prosecution or may make such other order as may seem just."**

Under Order 43 rule 31 of the Civil Procedure Rules , a judge who is faced with an appeal that has remained unprosecuted for a long time, may either dismiss the appeal for want of prosecution or make any other order as he or she thinks just provided that the parties have been notified in accordance with Order 43 Rule 31 (2) of the Civil Procedure Rules . In this case, while the record does not show how the parties were served before the appeal was dismissed, I suppose that the Judge directed the Registrar to notify the parties of the hearing either through the court's notice board or local media in the area before the appeal was dismissed. Service rendered in such circumstances is not the best form of service as in most cases than not parties never get to know that they are required by the court except if they access the court or are lucky to listen to the media. It is therefore , clear that on the day the appeal was called, the appellant was not in court and hence the court dismissed his appeal under Order 43 rule 31 of the Civil Procedure Rules.

It was contended for the applicant, at least as drawn from his pleadings, that the dismissed appeal can be reinstated under Order 43 rule 16 of the Civil Procedure Rules. And for the Respondent , it was contended that the correct remedy is to appeal against the dismissal of the appeal in the Court of Appeal since the dismissal was on merit and final. There is no doubt that Order 43 rule 31 of the Civil Procedure Rules, among other things, grants the court power to dismiss appeals that have without good cause remained unprosecuted for a long time. Unlike appeals dismissed under Order 43 rule 15 of the Civil Procedure Rules, the rules are silent on how such appeals can be reinstated. It was argued for the Respondent that such appeals should be treated like cases dismissed under Order 17 rule 5 of the Civil Procedure Rules, where the court has held that such dismissals are final. I beg to differ because Order 17 rule 6 of the Civil Procedure Rules in very unequivocal terms provides that a party can subject to the law of limitation reinstate the

dismissed suit unlike Order 43 rule 31 of the Civil Procedure Rules which, is silent about reinstatement of dismissed appeals for want of prosecution. To this extent, therefore, the Respondent is right when he says that it is improper for the Applicant to bring an application for reinstatement of the appeal under Order 43 rule 16 of the Civil Procedure Rules. Order 43 rule 16 of the Civil Procedure Rules deals with appeals that are dismissed under rule 14 and 15 and not rule 31 of the Civil Procedure Rules. Does this therefore mean that there is no remedy for a party , who through no misfortune of their own has had their appeal dismissed for want of prosecution ? As a foundational principle of justice every case , regardless of its merit must be determined on merit and courts, as vehicles of justice should be slow to turn away a litigant or case without hear them or it unless of course, there is good reasons to do so.

It is for this reason that the courts have been empowered under article 126(2)(e) of the Constitution to administer substantive justice over undue regard to technicalities. Equally, the courts are given inherent powers under section 98 of the Civil Procedure Act to ensure that justice is rendered in instances where the law may be silent on a particular point. The High Court is also grated powers under section 33 of the Judicature Act to grant such remedies as may be just in the circumstances of the cases. Therefore , reading all these provisions together, it is the finding of this court that whereas Order 43 of the Civil Procedure Rules is silent on how to reinstate a dismissed appeal under Order 43 rule 31 of the Civil Procedure Rules, an affected party can rely on article 126 (2)(e) of the Constitution and section 98 of the Civil Procedure Act to request the court to reinstate a dismissed appeal if they have good reasons why the appeal should be reinstated. I should however, caution that the inherent powers of the court should only be invoked in very compelling circumstances and in a limited manner.

In conclusion , the application for reinstatement of the appeal before me is not misconceived and will therefore, be determined on merit.

Submissions of the applicant in regards to the application.

Counsel for the applicant submitted that there is sufficient cause to warrant the reinstatement of Civil Appeal No. 86 of 2014 and that the application should be granted.

Counsel for the applicant submitted that he filed miscellaneous application No. 107 of 2013 which was allowed by the court on 14/10/2014 upon which he filed a Memorandum of Appeal in Civil Appeal No. 86 of 2014 which was fixed by the court for hearing on 7/11/2014. That on the 7.11.2014 court did not proceed with the hearing of the appeal on account of objection by the respondent who had filed a notice of appeal to the Court of Appeal. That however, the applicant was informally notified by the presiding judge Justice Byamukama Simon Mugenyi, that Civil Appeal No. 86 of 2014 would be fixed for hearing after the disposal of the respondent's appeal in the Court of Appeal.

Counsel for the applicant further stated that on 30/10/2019, the applicant together with his lawyer Mr. Simon Kasangaki went to court to check on the status of Civil Appeal No. 86 of 2014 and the respondent's appeal at Masindi High Court whereupon the applicant discovered that his appeal was dismissed on the 15/6/2017 without his notice. He further submitted that the applicant was not served with any hearing notice of Civil Appeal No. 86 of 2017 and was not aware that it would come up on the 15/6/2017 the date it was dismissed.

Counsel further submitted that he discovered that the respondent withdrew the notice of appeal in Miscellaneous application No. 107 of 2013 by a letter dated 13/05/ 2016, and never served him with a copy thereof.

Counsel further stated that the applicant is desirous of being heard in Civil Appeal No. 86 of 2014 since it touches on his registered interest in land comprised I LRV 2833 Folio 3 Kyakaliba Bugahya Block 19 Plot 35 measuring approximately 20 hectares which is fraudulently claimed by the respondent. He added that the delay to prosecute Civil Appeal No. 86 of 2014 by the applicant was due to factors beyond his control as he was notified that Civil Appeal No. 86 of2014 would be fixed upon the disposal of the respondent's appeal in Miscellaneous application No. 107 of 2013 in the Court of Appeal.

That however, the respondent withdrew the Notice of Appeal to the Court of Appeal by letter dated 13/05/2016 and the same letter was never served onto the applicant.

In conclusion, counsel submitted that it is just and equitable that the order dismissing Civil Appeal No. 86 of 2014 be set aside and the appeal be reinstated, heard and disposed of on its merits.

Arguments for the respondent in opposition to the application.

In opposition to the application, Counsel for the respondent submitted that the applicant failed to take action on his appeal as a result of which it was dismissed for want of prosecution. He further stated that the applicant had 3 years from the date of filing the appeal on 24/10/2014 to 15/06/2017 when it was dismissed and that he never bothered to check on the file and take steps to dispose of the appeal. He added that the undue delay to prosecute the appeal is forbidden by law and action had to be taken under Order 43 Rule 31 to enforce complicity or suffer the consequences.

On the issue of the information allegedly passed on by the judge in regards to fixing the matter, counsel for the respondent submitted that there is no evidence anywhere that the said judge gave any advice or said a word on any of the appeal of the two parties and as to how they would be handled. He added that the judge never gave any advice or said a word about this matter to any party and if such advice or word had been given it should have been recorded. He added that the applicant is just avoiding to take responsibility as the whole allegation is a pack of lies.

Counsel for the respondent further submitted that it is trite law that the notice of appeal does not serve as a stay of another appeal by any party in the case and there was no legal basis on how the progress of the applicant's appeal could be affected or even stopped by the actions of the respondent, when an appeal had not even yet been filed. That further to that no notice of address of service was given or served on the respondent or his counsel and that there was no acknowledgement of receipt of the notice of appeal by the counsel for the applicant to the respondent or his counsel.

He further submitted that the applicant cannot pray in the aid and invoke the doctrines of equity because his conduct in this suit has breached all the tenets/maxims of these doctrines at many points. That he who comes to equity must come with clean hands that however, the applicant has not come with clean hands for he has been frustrating the execution process. That he has interfered with the police and security agencies of government who have declined to assist in providing security for vacant possession. That this shows that he does not obey the law himself and instead he subverts it so as to cause miscarriage of justice and that the application is filed in bad faith.

He further submitted that equity does not help the indolent and sleepy but the vigilant who observe and keep timelines and that the applicant sat on his rights at the expense of the respondent. In support of the submission, he stated that the Supreme court of Kenya in **Abdall Mohamed vs Mbaraka Shokain Civil Appeal No. 163 of 1989** in an application to set aside an exparte decree, the court held that an application for setting aside an exparte judgment/decree coming after 4 years should be dismissed on the ground that allowing it would lead to hardships to that other side and other members of the public.

Counsel for the applicant further stated that courts exercise maximum reluctance to open up litigation under Order 17 rule 5 of the Civil Procedure Rules. He further stated that the applicant cannot invoke section 98 of the CPA whose principles are steeped in the tenets/maxims of the doctrines of equity. He further submitted that this suit was filed 13 years ago and is yet to get off the ground if it is sent back for retrial. He further stated that if the witnesses are dead or have grown senile, as the case is, justice cannot be done to the respondent despite his many years of struggle to get it.

Counsel further argued that there are two universal doctrines of jurisprudence underlying the delivery of justice, which are that;

a) Justice delayed is justice denied, and
b) Litigation must be brought to an end expeditiously.

In relation to the above, that the second doctrine (b) above is derived from the Roman jurisprudence where it is stated that "interest republic it suit finis litium" and translates as "it concerns the state that there should be an end

to law suits." That it is therefore submitted that the application be dismissed with costs as it fails to satisfy the regal and factual prerequisites necessary for the court to exercise its discretion in favour of the applicant and it further falls into the category of the very cases envisaged by the above doctrines of jurisprudence and principles of equity.

Resolution

It is evident from the proceedings and as submitted by counsel for the respondent, there has been incredible delay in the trial and disposal of the underlying suit which is Civil Suit No. 14 of 2007. It was filed on 24/4/2007 by the respondent and it has been nearly 14 years and upon perusing the record, it has always been the applicant that has always delayed the proceeding of this matter.

Article 28 (1) of the Constitution of the Republic of Uganda guarantees the right to a fair trial in civil matters. That 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 speed hearing is the right to a fair trial within a reasonable time, often termed the right to a speedy trial. For the realization of this right, all parties, including courts have the responsibility to ensure that proceedings are carried out expeditiously in a manner consistent with this Article.

In the instant case, the applicant seeks for orders that the order dismissing civil appeal No. 86 of 2014 be set aside and Civil Appeal No. 86 of 2014 be reinstated for hearing inter parties on merits. Upon perusing the record, it is evident that the respondent sued the applicant for trespass to land comprised in LRV 2833 Folio 3 being land at Kyakaliba Block 19 Plot 35 measuring approximately 20 hectares under Civil Suit No. 14 of 2007. The suit was heard and decided exparte upon the applicant not filing his statement of defence in time. It was on that basis that the applicant herein applied vide Miscellaneous Application No. 86 of 2011 to set aside the

exparte judgment and decree which was dismissed on 28/05/2013 in the absence of the applicant by the trial magistrate. The applicant upon seeking time to file his appeal out of time, appealed against the dismissal order in Miscellaneous Application No. 86 of 2011 vide Civil Appeal No. 86 of 2014 which appeal was dismissed on 15/06/2017.

The applicant brings this application under Section 33 of the Judicature Act which provides general provisions as to remedies and states that;

"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

The applicant also relied on Order 43 Rules 14, 16 and 31 of the Civil Procedure Rules. I will lay them down for reference.

Order 43 Rule 14 of the Civil Procedure Rules provides for dismissal of appeal for appellant's default and states that;

(1) **"Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed."**

Order 43 Rule 16 provides for readmission of appeal dismissed for default and states that;

"Where an appeal is dismissed under rule 14 or 15 of this Order, the appellant may apply to the High Court for the readmission of the appeal; and, where it is proved that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit."

Order 43 Rule 31 provides for dismissal for want of prosecution and states that;

(1) "**Where there has been undue delay in the hearing of an appeal, the registrar may obtain the directions of a judge for the listing of the appeal at the next ensuing sessions of the High Court**."

(2) "**Notice of the listing shall be served in such manner as the judge may think fit upon the appellant and respondent or their advocates, and upon the hearing thereof the court may order the dismissal of the appeal for want of prosecution or may make such other order as may seem just."**

The applicant also cited and relied on **Section 98 of the Civil Procedure Act** which gives inherent power to the court to make such orders as may be necessary for the ends of justice.

The applicant submitted that the matter was fixed for hearing on 7/11/2014 and that on that day, the applicant was informally notified by the presiding judge his Lordship Mr. Byabakama Simon Mugenyi that Civil Appeal No. 86 of 2014 would be fixed for hearing after the disposal of the respondent's appeal in the Court of Appeal. However, the respondent denies these assertions by the applicant stating that the words attributed to His Lordship are false as they were never uttered by him. He further stated that it is trite law that the notice of appeal does not serve as a stay of another appeal by any party in the case and there was no legal basis on how the progress of the applicant's appeal could be affected or even stopped by the actions of the respondent, when an appeal had not even yet been filed.

No sufficient evidence has been adduced by the applicant to prove that indeed the court was to fix the matter for hearing. Notwithstanding that, it is evident that the applicant followed up on the matter after nearly 5 years as demonstrated in the submissions of the applicant having checked the status of the appeal on 30/10/2019.

Counsel for the applicant further argued that the applicant was not served with any hearing notice of Civil Appeal No. 86 of 2014 and was not aware that it would come up on 15/6/2017 the date it was dismissed. That indeed

it was dismissed in his absence without any notice being given to him. However, the respondent contends that the applicant never availed his address of service and hence could not be served with any documents.

There is nothing on the court record showing that the applicant was effected with service by court or the respondent on 15/6/2017 and indeed the appeal was dismissed without the applicant being notified of the case. However this notwithstanding, the applicant seems to have left the appeal for the responsibility of the court and the respondent. The appeal was filed by the applicant in 2014 and he only checked on its progress after 5 years which, clearly portrays inordinate delay on the part of the applicant. Inordinate delay has been defined to mean unusually or disproportionately large or excessive. It may well be that Justice Byabakama, may have told the parties that the appeal under consideration would be heard after the court of appeal had dealt with the respondent's appeal but that is not good enough reason for the applicant to have abandoned his appeal . Any reasonable litigant would have at least checked on the progress of the Appeal in the Court of Appeal and also the appeal in the High Court. The Applicant instead went to sleep and only woke up after a whole five years, when he discovered that his appeal had been dismissed for want of prosecution. There is virtually nothing which is near to justification for the applicant failing to take the necessary step to follow up on the appeal other than stating that the court was to fix it for him moreover no sufficient evidence has been adduced in that regard.

In deserving circumstances, the court may acting under article 126(2)(e) of the Constitution, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act, re admit an appeal that has been dismissed for want of prosecution under Order 43 rule 31 of the Civil Procedure Rules. That, however, will be dependent on the applicant demonstrating sufficient cause why they should be heard. What constitutes sufficient cause is left to the court's discretion. While exercising this discretion, the judge has to decide whether there has been an abuse of process, which amounts to an affront to the public conscience that requires the proceedings to be stayed. Where there has been a serious abuse of the process the court should express its disproval by refusing to prolong the proceedings any further. In **Ivita vs.**

Kyumbu (1984)KLR 441 Justice Chesoni, as he then was, when dealing with the effect of delay on litigation had this to say:

The test is whether the delay is prolonged and , if it is , can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and ,or witnesses may be be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.the defendant must however satisfy court that he will be prejudiced by the delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if the delay is prolonged , if the court is satisfied with the plaintiff's excuse for the delay , the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.

Delay perse is therefore, not the overriding factor when considering whether to terminate a matter for want of prosecution. The court has to look at the justice of the case as well. In **Pan African Paper Mills Limited versus Silvester Nyarango Obwocha Civil Appeal no. 118 of 2002** Achode J observed that :

Courts should strive to sustain rather than dismiss suit especially where justice would still be done and a fair trial had, despite the delay.

In this case, Counsel for the respondent has demonstrated the delay in the instant case chronologically from when it was filed in 2007 and it is 13 years now without anything substantial being done by the applicant other than always applying for extension of time since no time limits have ever been honoured by him. The rules of equity as stated by the respondent cannot be used in favour of the applicant who has not acted justly in regards to ensuring that the matter comes to an end. Litigation must come to an end and as stated in the Constitution, every person is entitled to a fair, speedy

and public hearing which also entails a fair trial within a reasonable time which is not being demonstrated here.

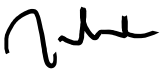
The Applicant on his part has demonstrated that he relied on the court for guidance on when the appeal would be heard. He also says that he was not served when the appeal was dismissed which has not been rebutted by the respondent apart from saying that the Applicant did not have an address of service in his notice appeal , being an Un represented litigant. The Respondent, could have effected service on the Applicant either using personal service or substituted service as service is mandatory for dismissal of appeals under Order 43 rule 31 of the Civil Procedure Rules.

What I take from the facts of this case is that this is a matter that has never been determined on its merits as the suit proceeded exparte when it was first heard in court. Efforts to get the applicant heard in the matter have been rendered difficult as all the applications filed by the Applicant for the case to be heard on merit were dismissed for none appearance of the Applicant in the court. I would have left this matter to remain in its state of rest had it not been that the matter at stake is land and the fact that the respondent will not be prejudiced by delay. Starting with land , land in this country is a valuable asset that often is the most important source of livelihood for most persons in this country. Besides, land is property , which is protected by the Constitution and if it must be taken away it must be done so after due process, which in this case has been most difficult due to the misfortunes of the applicant. I do appreciate the anxieties the Respondent has gone through regarding the unending litigation to keep the land in question but the ends of justice require that the case be determined on merit so that the rightful owner of the land is determined in a fair trial where each party is given an opportunity to present their case. The Respondent, may be inconvenienced by the delay but he will not be prejudiced by the late hearing of this case as I have not been told of witnesses who have either passed or or are of failing memory to assist the court to reach a just decision in the matter. For this reason and for the greater good of justice , I will reinstate the appeal so that it is heard on merit. I will however, award the costs of this application to the Respondent,

which must be paid within sixty days from the date of this ruling or else the application for reinstatement will stand dismissed.

Decision

In conclusion , I conditionally reinstate Civil Appeal Number ….. on condition that the Applicant pays the Respondent the costs of this Application within sixty days from the date of this ruling. In case the Applicant fails to pay the costs in the prescribed time, the application for reinstatement will stand dismissed.



Gadenya Paul Wolimbwa

Judge

16th April 2021

I direct the Registrar of the Court to read the Ruling to the parties on the 22nd April 2021 after serving them.

Gadenya Paul Wolimbwa

Judge

16th April 2021.