

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MASINDI**  
**MISC. APPLICATION NO. 51 OF 2021**  
**(ARISING FROM CIVIL APPEAL NO. 60 OF 2015)**  
**(ARISING OUT OF HOIMA CIVIL SUIT NO. 68 OF 2011)**  
**ERASTO MBURABWIKYO:..... APPLICANT**  
**VERSUS**  
**BALAMU KIIZA:..... RESPONDENT**

**RULING**

***Before: Hon. Justice Byaruhanga Jesse Rugyema***

[1] The applicant brought this application **under Order 43 rule 16 of CPR**, seeking for orders that Masindi High Court **Civil Appeal No. 0060 of 2015** dismissed with costs on the **16<sup>th</sup> May 2017** be readmitted and/or reinstated, that the dismissal order therein be set aside, that all proceedings consequential to the dismissal be stayed and/or set aside and that costs be provided for.

[2] The grounds of the application are set out in the affidavit in support of the application sworn by the Applicant **MWESIGWA DAN** and briefly are;

- a) That the Applicant/Appellant was precluded by sufficient cause from appearing when the appeal was called on for hearing.*
- b) That the Applicant/Appellant is not guilty of inordinate delay in bringing this Application.*
- c) That the Applicant/Appellant is serious about the appeal.*
- d) That should this Application be denied, then the Applicant/Appellant will be condemned unheard.*
- e) That the ends of justice shall be served if the appeal is heard on merit which is not prejudicial to the Respondent.*

*f) It is just, fit and proper for this Application to be expeditiously.*

- [3] The Respondent opposed this application and filed an affidavit in reply stating, briefly that;
1. That it was the duty of the Applicant as the Appellant in **Civil Appeal No. 60 of 2015** to follow up the Appeal, fix it for hearing and serve the Respondent or his lawyer if any, and not vice versa.
  2. That the Applicant's lawyer **Mr. Alibankooha Nobert of Kaggwa-Owoyesigire & Co. Advocates** received a Hearing Notice from this court for hearing of the Appeal on the **16<sup>th</sup> May 2017** and on the due date, neither the Applicant nor his counsel were in court to prosecute the Appeal.
  3. That it is not true the Appellant was not aware of the hearing date when the hearing date was fixed by his lawyers at the time.
  4. That it is wrong and improper for the Applicant to blame the Respondent and his lawyers for the Applicant's negligence and failure to prosecute his appeal.
  5. That the Applicant has not shown any sufficient reason or reasonable cause as to why this application should allowed.

**Representation**

- [4] **Counsel Zemei Susan of Zemei, Aber Law Chamber, Masindi** appeared for the Applicant while **Counsel Baryabanza Aaron of Baryabanza & Co. Advocates, Hoima** appeared for the Respondent. Both counsel filed written submissions which I have had the benefit of reading and considered in the determination of this application.

## Counsel Submissions

- [5] Counsel for the Applicant submitted that the appeal was dismissed for non-appearance without taking into account the circumstances preceding the dismissal of the appeal in the absence of the Appellant. That the Respondent's counsel upon fixing the appeal for hearing, the same was not served on the Applicant and that the matter was adjourned to 16<sup>th</sup> May 2017 in absence of the Respondent and his counsel but they never took any step to inform the Appellant who did not know about the developments in the case.
- [6] That the Respondent and his counsel intentionally and deliberately did not take requisite steps to notify the Applicant of the date fixed for hearing of the appeal and subsequent adjournment so as to frustrate the Appellant's attempt to prosecute the Appeal. There is no affidavit of service on court record to show that indeed the Respondent served the Appellant.
- [7] In reply counsel for the Respondent raised a preliminary objection that the **Erasto Mburabwikyo** filed the application in his individual capacity, that the application does not show that it was filed through the holders of a power of attorney. Counsel submitted that if the application had been filed through a donee of a power of attorney, then it should have been clearly stated on the application. Counsel argued that a power of attorney is not attached on the application which is contrary to the provisions of **Order 7 rule 14(1) CPR**. Counsel also relied on the case of **John Sebataana (suing through his attorney) vs Abanemar Yorokam & Another High Court Civil Appeal No. 99 of 2005**.

**Preliminary Objection**

[8] Counsel for the Respondent having raised a preliminary objection, this court is mandated to first dispose it off.

[9] In this case the Applicant filed this application by himself and not through an attorney but the affidavit in support was sworn by the donee who never attached a copy of the power of attorney. However on perusal of the court record there is a power of attorney although it was not attached on the affidavit in support of the application.

[10] It is my view that courts have inherent powers under **Section 98 of CPA** to ensure justice is rendered and **Article 126 (2) (e) of the constitution of the Republic of Uganda** also empowers court to administer substantive justice without undue regard to technicalities. Therefore although the Applicant did neither attach a copy of the power of attorney to the application nor bring the application through the attorney, since the power of attorney is on record, I consider the omission to attach to the application as a mere technicality and proceed to entertain the application on its merits.

[11] In conclusion, the application for re-admission of **Civil Appeal No. 60 of 2015** will therefore be determined on merit.

**Determination of the Application**

[12] This is an application seeking for orders that Masindi High Court **Civil Appeal No. 0060 of 2015**, dismissed with costs on the **16<sup>th</sup> May 2017** be readmitted and/or reinstated issued on the **16<sup>th</sup> of May 2017**. The appeal record of **16<sup>th</sup> May 2017** is as follows;

**“Hatega:**

*I am Hatega Robert. I appear for the Respondent and the Respondent is in court. The Appellant is absent...this Appeal*

*was coming up for hearing... What is on record is only a notice of Appeal that was filed on 28.9.2015. We have never been served with the memorandum of Appeal or any other document...*

*The Appellant is not present in court nor his counsel. Their conduct shows that they are not interested in pursuing the Appeal. I pray that the Appeal be dismissed with costs to the Respondent*

**Court:** *The Appeal is dismissed with costs”.*

[13] Further perusal of the record show that **Hearing Notice** for hearing of the appeal on the **16/5/2017** was extracted and served accordingly but there is no evidence that the Applicant and or his known advocate was ever served with a copy of the Hearing Notices notifying him of the hearing date of **16/5/2017** when the Appeal was dismissed. There is no affidavit of service on record as required by **O.5 r. 16 CPR** read together with **O.49 r.2 CPR** which require service of court process to be proved by an affidavit of service. However, from the wording of the dismissal order and the entire record of **16/5/2017**, it is clear that the appeal was not dismissed under **O.43 r. 14 CPR** as counsel for the Applicant opined.

[14] The Appeal was dismissed for the Appellant’s failure of service of the memorandum of Appeal. **In Lubega Robert Smith & others vs Walonze Malaki H.C.C.A No. 36 of 2016,**

*It was observed that a Respondent has a right to service of the memorandum of Appeal as much a defendant or Respondent in any other type of civil proceedings has.*

See also **Katsigazi Benson vs Lorna Musanyusa Kamau H.C.M.A No. 21 of 2021 [2022] UGHCLD 40.**

- [15] In the instant case, I note that the lower court judgment and record of proceedings were certified on the **29/9/2015** and **21/10/2015** respectively. The Memorandum of Appeal was filed on the **3/5/2016**, about 7 months from the date when the lower court record was certified and ready for collection. Under **Section 79 (1) (a) CPA**, an appeal ought to be lodged within 30 days of the date of the decree or order. The decree the Appellant/ Applicant intends to appeal against is dated **16/9/2015** signifying that the instant appeal was filed 8 months later by way of the memorandum of appeal filed on **3/5/2016**.
- [16] For any suit or appeal which is or has been dismissed for want of prosecution or failure of service of court process to be reinstated, it must be for sufficient reason. In **Hikima Kyamanywa vs Sajjabi Chris C.A.C.A No. 1 of 2006**, it was held that
- “Sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time”*
- [17] The instant appeal was filed 8 months later after a court order was passed and from the evidence on record leave to file the appeal out of time was not sought by the Applicant/Appellant signifying that the appeal the applicant is seeking to reinstate was filed out of time hence incompetent.
- [18] Secondly, there is no evidence that the Applicant effected service of the memorandum of appeal upon the Respondent within the 21 days stipulated time (**O.49 r.2 and O. 5 r. 16 CPR**), and as a result, the appeal was dismissed with costs.

[19] Therefore, I find that the Appellant/Applicant did not intend to prosecute the appeal. First, he left his appeal to be a responsibility of the court and as fate would have it, on the date it was fixed for hearing it, the appeal suffered dismissal. Secondly I find that, the Applicant's failure to serve a memorandum of appeal was a clear lack of interest in the appeal. Thirdly the said appeal was filed out of time without leave of court. Therefore, since the appeal was dismissed for non-service of the memorandum of appeal, failure to serve the Applicant the hearing notice for the hearing of the appeal on **16/5/2017** when the appeal was dismissed does not amount to sufficient cause or reasons for its reinstatement in the circumstances of this case.

[20] For the reasons above, I decline to grant this application. It is dismissed with costs to the Respondent.

Dated at Masindi this 8<sup>th</sup> day of July, 2022.

.....  
**Justice Byaruhanga Jesse Ruggyema**