

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
MISC. APPLICATION NO. 24 OF 2021
(ARISING FROM HCT-12-CV-CA-NO.50 OF 2014)
(ARISING FROM CIVIL SUIT NO. 061 OF 2017)

ABI T.K HAIRORA:..... APPLICANT

VERSUS

ROBERT ALINDA:..... RESPONDENT

RULING

Before: Hon. Justice Byaruhanga Jesse Rugyema

[1] The applicant brought this application **under Order 9 rr 23 & 27, Order 22 r. 23, Order 52 rr 1, 2 & 3 of CPR and Section 98 of the CPA CAP 71**, seeking for orders that the order and decree dismissing **civil appeal No. 50 of 2014** issued on the **17th day of May 2017** be set aside and **civil appeal No. 50 of 2014** be reinstated and be set down for hearing on merits inter-parties. That all execution proceedings against the Applicant in **Civil Appeal No. 50 of 2014** before this honorable court be stayed till the disposal of the main suit inter-parties and costs of this application be provided for.

[2] The grounds of the application have been set out in the affidavit in support of the application sworn by the Applicant **Abi T.K Hairora** and briefly are;

- a) That the Applicant/Appellant filed an appeal against the Respondent in the honorable court vide **Civil Appeal No. 50 of 2014**.*
- b) That the Applicant has been critically ill and could not appear in court when the matter came up for mention and hearing.*

- c) *The Applicant his health having deteriorated, was taken to Kampala for better treatment.*
- d) *That the Applicant instructed **M/s Mwebaza & Co. Advocates** to pursue the appeal on his behalf and believed at all times that they were prosecuting the appeal accordingly whereas not.*
- e) *That the negligence of counsel cannot be visited on the innocent party.*
- f) *Neither of the parties nor their counsel appeared in court on the date when the matter came up.*
- g) *There is sufficient cause for reinstatement of the main suit and setting aside dismissal order as the Applicant and his counsel were unable to attend.*
- h) *It is a matter which ought to be heard and determined on merits.*
- i) *The Applicant is and has always been interested in pursuing this case to its logical conclusion.*
- j) *It is just and equitable that the order dismissing **Civil Appeal No. 50 of 2014**, be set aside and the same be reinstated and heard on merits.*

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

- 1) That the applicant's appeal was rightly dismissed for want of prosecution after the applicant failed to attend court on the 17th day of May 2017 despite being aware of the hearing date.
- 2) The Applicant has not furnished any sufficient reason for not attending court on the date the appeal was dismissed.
- 3) The Applicant's application has no merit.
- 4) The applicant's application and affidavit in support contain falsehood, is suspect and incurably defective.
- 5) The Applicant has not shown any sufficient cause or special circumstances for the grant of the orders herein sought.
- 6) The Applicant is guilty of dilatory conduct.

Representation

- [4] **Counsel Irumba Robert of Tumusiime, Irumba & Co. Advocates, Kampala** appeared for the Applicant while **Counsel Simon Kasangaki of Kasangaki & Co. Advocates, Masindi** 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.

Determination of the Application

- [5] This is an application for setting aside the orders and decree dismissing **Civil Appeal No. 50 of 2014** issued on the **17th of May 2017**. The appeal record of **17th May 2017** is as follows

Court:

This matter was last in court on 27/9/2016 and it was given this date as the last adjournment. When the matter came up this morning for hearing, the Appellant was absent. Counsel for the Appellant who is reported to be aware of this hearing date is absent. In the premises therefore the appeal is dismissed for want of prosecution with costs to the Respondent.

- [6] The appeal record of **27th/9/2016** when this file was allegedly given the last adjournment as per the above is as follows.

Court:

It appears from the record that the appellant has never been given an indication that this matter is in court. I will therefore give him the benefit of the doubt and direct that his counsel on record be served with hearing notice. If he does not appear we shall move on from that point. The matter will come up on 17/5/2017 for hearing.

- [7] It was on the **17/5/2017** that the appeal was dismissed for want of prosecution. I have however perused and combed

the entire record, there is no evidence that any **Hearing Notice** for hearing of the suit on the **17/5/2017** was either extracted and or served upon the Appellant to notify him of the hearing date as directed by court on the **27/9/2016**. It follows therefore the Appellant/Applicant's appeal was dismissed for want of prosecution on a fixed date for hearing of which he was not aware of.

[8] From the wording of the dismissal order, it is clear that the appeal was dismissed under **O.43 r. 14 CPR** which provides thus

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

An appeal dismissed under **O.43 r.14 CPR** above is re-admissible under **O.43 r.16 CPR** which provides thus

Where an appeal is dismissed under rule 14 or 15 of this order, the appellant may apply to the High court for 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 for hearing or from depositing the sum so required, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

[9] It is clear from the above provisions of the law that an appeal dismissed for want of prosecution under **O. 43 r.14 CPR** can be re-instated under **O. 43 r. 16 CPR**. It follows therefore that **O.9 rr.23 &27** and **O.22 r.23 CPR** cited by the applicant and his counsel as the provisions under which this application has been brought are not applicable to this application.

Inordinate delay in filing this application.

- [10] The appeal in question was dismissed for want of prosecution on the **17th of May 2017**. The present application for re-admission of the appeal was filed on **17th March 2021** after almost 4 years.
- [11] In his affidavit in support, the applicant deponed in **paragraphs 5-6** that he instructed **M/S Mwebaza & Co. Advocates** to pursue the appeal on his behalf and believed at all times that they were prosecuting the appeal accordingly whereas not, that the said counsel did not inform him of any hearing dates that his case was coming up and that it was not until he visited the court registry that he established that his appeal had been dismissed for want of prosecution. He in the premises, attributed his failure to pursue his appeal to the negligence of his counsel.
- [12] However as can clearly be seen from the applicant's affidavit in support, he does not disclose when he established that his appeal had been dismissed for want of prosecution so as to enable this court to ascertain whether he filed this application without any reasonable delay.
- [13] Secondly, on record there are copies of **Hearing Notices** lying on the appeal record dated **4th/5/2015** and **2nd/5/2016**. There is no explanation from the applicant why these **Hearing Notices** were never served upon the Respondent and why from **17th/7/2014** when the Applicant filed this appeal, he has never at any one day appeared in court to take any necessary step with the view to proceed with his appeal.
- [14] In **Hikima Kyamanywa vs Sajjabi Chris C.A.C.A No. 1 of 2006** it was held that
“Sufficient reason or cause depends the circumstances of each case and must relate to inability or failure to take a particular step in time”

[15] In the instant case, I find that the claim by the Applicant that he was prevented from appearing in court and pursue his appeal by illness was insufficient cause in view of the fact that the appeal was filed on 17th/7/2014 and the medical chits he filed as proof of his illness are dated 8th/5/2020, 13th/5/2019 and 11/9/2019 respectively yet the appeal was dismissed on 17/5/2017. There is nothing to explain the Applicant's failure, his inability and or failure to take a particular step within the time to pursue and or proceed with his appeal from 17/7/2014 when he filed the appeal to 17/5/2017 when it was eventually dismissed for want of prosecution. Then lastly, he has not shown any reason why he delayed to file the present application to set aside the dismissal order and have it re-admitted, the appeal having been dismissed on 17/5/2017 and the application was filed on 17/3/2021 after a span of 4 years!

[16] The foregoing clearly shows that the Appellant/Applicant has never honestly intended to prosecute the appeal. The Appellant/Applicant left his appeal to be a responsibility of the court, the Respondent and his counsel who as fate would have it, left the appeal to suffer dismissal.

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

Dated at Masindi this 22nd day of April 2022.

Justice Byaruhanga Jesse Ruyema