

- 5 c) Neither the appellant nor his advocates were informed of the date fixed for the hearing of the said appeal as the fixing of cases during the period was affected by the directives given to the courts and general Government directives over the COVID-19 pandemic which were beyond our control.
- 10 d) The application has been presented without delay and the applicant is desirous of prosecuting his appeal.
- e) We have never received the lower Court record for us to prosecute the Appeal which is why the same was fixed for mention and not hearing.
- 15 The application was opposed by Akello Hellen, the respondent in her affidavit in reply, for brevity the respondent opposes this application, that;
- a) My lawyers whose information I believe to be true and correct informed me that there has been inordinate delay and dilatory delay in Civil Appeal No.02 of 2021 arising from the Chief Magistrate's Court originally filed in 2017.
- 20 b) The applicant being dissatisfied with the order of dismissal in the Chief Magistrate's Court lodged an appeal on 9th February 2021 by filing a memorandum of appeal. When the same was fixed for hearing on 1st July 2021, neither the applicant nor his lawyer made appearance and after subsequent hearings with no show of the applicant nor his lawyer, the appeal was dismissed on 20th September 2021.
- 25 c) The application to set aside the dismissal is brought almost 14 months after they had been served with a Notice to show cause.
- 30 d) The applicant has not shown sufficient cause to set aside the appeal and cannot rely on the excuse of the COVID pandemic as by August 2021, the government had lifted the lockdown and by January 2022, the Government ended COVID curfew and reopened the economy

5 wherefore between the months of January 2022 and November
2022, the applicant or his lawyer could have diligently followed up
the appeal in court but did not.

e) Service in the matter was duly effected on all parties as per the
directions of and to the satisfaction of the trial judge.

10 f) Upon the advice of my lawyers, I believe that the applicant has no
interest in pursuing his appeal and only sprang up to action when
served with a Notice to show cause and that the unreasonable delay
caused by the applicant will cause the respondent great injustice.

2. Representation:

15 According to the drawing of the pleadings, M/s Otee Associated Advocates
represent the applicant while M/s Natala and Company Advocates
represent the Respondent.

The parties did not file any submissions.

3. Issues:

20 a) Whether there are any justifiable grounds to merit setting aside the
order dismissing HCCA No. 02 of 2021?

b) What are the remedies available to the parties in the circumstances?

4. Resolution:

25 It is pertinent to first cite the law under which the applicant filed his
application. Thus;

Section 98 of the Civil Procedure Act, Cap 71 states;

**Nothing in this Act shall be deemed to limit or otherwise affect
the inherent power of the court to make such orders as may be
necessary for the ends of justice or to prevent abuse of the
30 process of the court.**

Order 43 Rule 3 of the Civil Procedure Rules, SI 71-1 provides that;

5 **3. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of**
10 **the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.**

Order 43 Rule 16 of the Civil Procedure Rules, SI 71-1 provides
15 **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
20 **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 14 (1) of the Civil Procedure Rules, SI 71-1 states
that;

25 **(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.**

In relations to the instant application, it brought under Order 43 Rule 3 of
30 the Civil Procedure Rules, SI 71-1 though the decision which this application seeks reversal arose from Order 43 Rule 14 of the Civil Procedure Rules, SI 71-1 which is on the dismissal of the appeal for appellant's default,

5 Order 43 Rule 16 of the Civil Procedure Rules, SI 71-1 which is on the readmission of an appeal which is dismissed for default would be the most appropriate rule to proceed under.

Reliance thus is made on the appropriate rule of procedure in handling this I will rely on that in the determination of the application before me.

10 From the record it is clear that whereas the court fixed the instant application for hearing and mention on the dates of 9th January 2023, and 6th March 2023, on both of the dates neither the applicant nor his lawyer entered an appearance with the respondent on each occasion praying for the dismissal of the application owing to the non-appearance of the
15 applicant to prosecute the application. However, the court resolved to determine the same on its own merits.

The background to the impugned appeal that is sought to be reinstated is that on 9th February 2021, the applicant/appellant filed a Memorandum of Appeal in the High Court with the appeal cited as Civil Appeal No. 02
20 of 2021. The same arose from the judgement and orders in Civil Suit No. 038 of 2017 of Soroti Chief Magistrate's Court at Soroti.

On the same day 9th February 2021, the High Court through the Assistant Registrar called for a certified copy of the judgement and record of proceedings.

25 The defendant now applicant/appellant had also earlier written on 5th February 2021 seeking for a certified copy of the proceedings and judgement to enable him institute an appeal.

The appeal then was scheduled for hearing on 28th April 2021 and again on 1st July 2021. On each of these dates both parties as the court reflected
30 show were absent. The matter then lost position and was fixed for another date with the registrar of the court directed to summon parties to be in court on the appointed date.

5 On 17th September 2021, the respondent was represented in court by his counsel whereas the appellant and his legal representative were absent. The matter was adjourned to 20th September 2021 with the registrar of the court still directed to summon parties to be in court on the next appointed date.

10 Still on 20th September 2021 only the respondent was in court. No reason was given for his absence.

The respondent then prayed for dismissal appeal which the court granted the order with a note that the appellant's conspicuous absence indicated that he was no longer interested in the appeal.

15 With this application, the applicant/appellant seeking to readmit the appeal the dismissed appeal.

Under Order 43 Rule 16 of the Civil Procedure Rules, SI 71-1 this court is enjoined to re-admit an appeal dismissed for default. The provision of the rule stipulates the following;

20 **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**
25 **from depositing the sum so required, the court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit.** (underlining for emphasis)

My understanding of the above provision of the law is that an appeal can be re-admitted if the appellant was prevented by any sufficient cause from
30 appearing when the appeal was called on for hearing. This application will The applicant under paragraphs 2, 3,4, 5 and 7 of the affidavit in support of the motion highlights the reasons why he was prevented him from attending court. He states thus;

- 5 a) The applicant filed Civil Appeal No. 02 of 2021 which appeal has a high chance of success. The appeal was filed on 9th February 2021, fixed for hearing on 28th April 2021, thereafter it was fixed upon a summons for directions on 1st July 2021.
- 10 b) Civil Appeal No. 02 of 2021 was dismissed by this court for non-attendance of the appellant and his advocates.
- c) Neither the appellant nor his advocates were informed of the date fixed for the hearing of the said appeal as the fixing of cases during the period was affected by the directives given to the courts and general Government directives over the COVID-19 pandemic which were beyond our control.
- 15 d) We have never received the lower Court record for us to prosecute the Appeal which is why the same was fixed for mention and not hearing.
- 20

In reply the respondent opposed the applicant's application and stated the following;

- a) My lawyers whose information I believe to be true and correct informed me that there has been inordinate delay and dilatory delay in Civil Appeal No.02 of 2021 arising from the Chief Magistrate's Court originally filed in 2017.
- 25 b) The applicant being dissatisfied with the order of dismissal in the Chief Magistrate's Court lodged an appeal on 9th February 2021 by filing a memorandum of appeal. When the same was fixed for hearing on 1st July 2021, neither the applicant nor his lawyer made appearance and after subsequent hearings with no show of the applicant
- 30

5 nor his lawyer, the appeal was dismissed on 20th September 2021.

c) The application to set aside the dismissal is brought almost 14 months after they had been served with a Notice to show cause.

10 d) The applicant has not shown sufficient cause to set aside the appeal and cannot rely on the excuse of the COVID pandemic as by August 2021, the government had lifted the lockdown and by January 2022, the Government ended COVID curfew and reopened the economy
15 wherefore between the months of January 2022 and November 2022, the applicant or his lawyer could have diligently followed up the appeal in court but did not.

For an application of this nature to succeed, sufficient cause must be shown.

20 "**Sufficient cause**" is defined by the **Black's Law Dictionary 6th edition page 1433** to mean;

Such cause as to hold the defendant to answer charges is reasonable or probable cause or that state of facts as would lead a man of ordinary caution to conscientiously
25 entertain a strong suspicion of the defendant's guilt.

In *Abel Belemesa vs Yesero Mugenyi HCMA No. 126 of 2019*, Gadenya Paul Wolimbwa J observed that the following constitutes "**sufficient cause**";

30 "**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**

5 ***been a serious abuse of the process the court should express its disapproval by refusing to prolong the proceedings any further.***

Judicial discretion was defined in the case of ***Attorney General vs Gladys Nakibuule Kisseka Constitutional Appeal No. 2 of 2016***

10 to mean;

“... the power or right given to an individual to make decisions or act according to his/her own judgement. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on his/her opinion – but I hasten to add- but within general legal guidelines. In Black’s Law Dictionary 5th Edition, “judicial and legal discretion” is defined as “discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained.” Judicial discretion does not provide a license for a judge to merely act as he or she chooses.

15
20

In ***Musini vs Wabwiso [1976] HCB 349***, it was pointed out that an appellant with sufficient cause for not appearing should apply to the court to set aside the order of dismissal and re-admit the appeal under his order. In this application, the applicant contends that he was prevented from prosecuting his appeal because neither his lawyer nor himself was informed of the date fixed for hearing of the appeal of 28th April 2021 and 1st July 2021 and that during the said period the country was under COVID-19 restrictions. That was in addition of not having received the lower court record so as to prosecute the appeal.

25
30 The respondent in rebuttal contended that there was an inordinate delay and dilatory conduct on the appellant/applicant in prosecuting the appeal as even confirmed by the fact that even with the instant application, it was brought 14 months after the respondent had served the applicant with a

5 notice to show cause. That the applicant cannot rely on the COVID 19 restrictions as by August 2021, the government had lifted the restrictions and the economy opened.

This case originated in the Chief Magistrate Court of Soroti in 2017, the appeal was filed in February 2021. The COVID-19 restrictions, which are
10 judicially noticed, took effect in March 2021. The restrictions were on an off and of a varied extent. The applicant does not indicate or base his averment the specific documentary evidence on which exact restrictions prevented him from following up on the scheduled dates even if they were just mention dates and not the hearing.

15 From the knowledge of this court, by August 2021 by the Chief Justice's Circular dated 3rd August 2021, the scaling up of operations was enhanced and the use of emails, audio-visual hearings and actual physical presence at courts was possible. This means that by 20th September 2021 when the appeal was dismissed, the applicant should have been present in court in
20 pursuit of his matter even without being summoned for it was his appeal. This is because by his 3rd August 2021 circular, the Honourable Chief Justice directed that ***"the courts should resume the hearing of both civil and criminal cases under strict observance of COVID-19 Standard Operating Procedures."***

25 The circular was to take effect on 3rd August 2021. Clearly, by 20th September 2021, hearings had resumed.

Be that as it may, whereas the respondent was represented in court on 17th September 2021 wherein the matter was adjourned to 20th September 2021, there is no evidence on the court record that indeed the appellant
30 was notified of the next hearing date which was 20th September 2021.

Whereas it is evident upon perusal of the appeal file and the instant application court record that the applicant/appellant has conspicuously absented himself severally together with his counsel, it is also evident that

5 there is no evidence on the record to show that the appellant was notified of the fixed date of 20th September 2021, the date on which the appeal was dismissed.

In *Isadru v Aroma & Ors HCCA No. 0033 of 2014*, Stephen Mubiru J observed that;

10 ***“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***
15 ***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,***
20 ***have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article. The overriding objective under article 28 (1) of The Constitution of the Republic of Uganda, 1995 and The Civil Procedure rules in general is that***
25 ***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.***

30 ***"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 litigation and who have, in consequence, acted, in respect of that***

5 *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"
(see: Solland International Ltd v. Clifford Harris & Co
[2015] EWHC 2018). It was suggested in Phelps v.
10 *Button [2016] EWHC 3185 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;
15 *fourthly, the prejudice caused to the defendant by the*
delay; fifthly, the effect of the delay 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;
20 *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
25 *facts, taking into account 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
30 *continuing the case with the consequence that the actual*
merits of the case are not explored."

This matter has indeed delayed in the court system since 2017. However, the respondent has not shown how she will be prejudiced by any further

5 having the appeal heard if the applicant is given a chance to prosecute the appeal.

Moreover, it is judicially noticed that for the date 1st July 2019, COVID-19 restrictions were at play. But also for the date of 20th September 2021 when the appeal was adjourned from 17th September 2021, there is no
10 evidence on the record to show that the applicant/appellant knew of that date as a date for mention of his appeal.

The applicant also fronts the lack of a record of appeal as a sufficient cause that prevented him from prosecuting the appeal. The respondent did not rebut this averment.

15 In *Ephraim Ongom v Francis Benega SCCA number 10 of 1987 (UR)*, it was held that;

“Where an application for a copy of the proceedings has been made, the period with which an appeal must be instituted does not include the period taken by the registrar in preparing the copy of the proceedings.”
20

In this application, it is argued that the applicant did not receive the record of appeal which prevented him from prosecuting the appeal. The applicant intimated that he filed a letter requesting for the same from the lower court. This assertion is confirmed by the record of the impugned appeal
25 which shows that indeed a letter by the applicant’s lawyer dated 5th February 2021 and even the court’s own letter dated 9th February 2021 requested for the record of the lower court.

The memorandum of appeal dated 8th February 2021, show that this appeal regards land which is a sensitive matter which ought to be handled
30 with great caution. The details of the memorandum of appeal shows the following;

- a) That the learned trial magistrate erred in law and in fact when she held that the suit land belonged to the respondent.

5 b) That the learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence and as a result reached a wrong decision.

c) That the learned trial magistrate erred in law and in fact when he failed to subject the whole of the evidence of the parties to that
10 exhaustive judicial scrutiny and appraisal which the appellant was entitled to expect.

From the foregoing therefore, it is clear to me that since the impugned appeal is in regard to a land matter, this court is enjoined by Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act and Order 43
15 Rule 16 of the Civil Procedure Rules to make such orders as the interest of justice would demand in order to avoid unnecessary litigation.

The shortcomings of the applicant notwithstanding, I would find that this is an application in which the court ought to exercise its discretion in the interest of the justice of the matter so on its merits such that there is a
20 conclusive determination of the questions at hand made by the court.

Accordingly, I am inclined to agree with the observation of Gadenya Paul Wolimbwa J in *Abel Belemesa vs Yesero Mugenyi* (supra) that

***“As a foundational principle of justice every case, regardless of its merit must be determined on merit and
25 courts, as vehicles of justice should be slow to turn away a litigant or case without hear them or it unless of course, there are good reasons to do so.”***

However, it is also trite law that justice delayed is justice denied, and bringing litigation to an end expeditiously are principles that underpin the
30 twin nexus of merit based decisions and the timely delivery of justice among others.

From my observation of the conduct of the applicant, it can be reasonably concluded that the applicant calculatedly delayed prosecuting of his

5 appeal as it can be seen from the slow process he undertook seeing that the decision he appealed against originates from the decision of the Chief Magistrate Court of Soroti of 2017 yet the appeal was filed in February 2021.

The only redeemer which I can see in relations to this application is the
10 issue that COVID-19 restrictions which were imposed over the country from March 2020 to early 2022.

In my considered opinion, those probably caused greter impairment towards the prosecution of matters before courts of law than any other causes. This court being a court of justice thus takes that into account and
15 thus allow the prosecution of the impugned appeal to its logical conclusion given the fact that the appeal was not concluded and or determined on its own merit.

Sufficient cause has thus been shown that prevented the applicant from prosecuting the appeal. Accordingly, this application would be allowed.

20 Before I take leave of the matter; I wish to point out that it goes without saying that it is the duty of the appellant to actively take the necessary steps to prosecute the appeal. It is not the duty of the respondent or the court to do it for him.

It is regrettable that even in the instant application, the applicant seems
25 not to take court process seriously for not only did he absent himself on 9th January 2023 and 6th March 2023 when the matter came up for hearing but even did not file any written arguments in respect of this application as the basis for the readmission of the appeal.

The applicant thus shall pay the costs of this application to the respondent
30 who has shown more active interest in the whole matter and has been attending court regularly as seen from the proceedings in this and the impugned appeal.

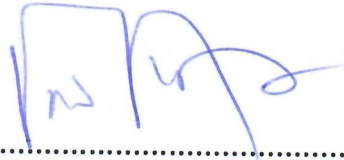
5 5. Orders:

It is hereby ordered that;

- a) The order dismissing H.C.C.A No. 02 of 2021 is set aside.
- b) Civil Appeal No. 02 of 2021 is re-admitted.
- c) The costs of this application is awarded to the respondent.
- 10 d) The applicant is directed to fix the impugned appeal for hearing and determination on own merits within Two (2) months from the date hereof and any failure to do so would render the appeal dismissed with costs to the respondent.

I so order.

15



.....
Hon. Justice Dr Henry Peter Adonyo

Judge

13th April, 2023