

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 061 OF 2023

(ARISING FROM HCT – 01 – LD – CA – 18 OF 2021)

5 **(ARISING FROM KJJO – CV – SC – LD – NO. 20 OF 2018)**

KACHOPE RWAKIJUMA PATRICK :::::::::::::::::::::::::::::: APPLICANT

VERSUS

NYAKWERA BAGUMA :::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

10 **RULING**

This ruling arises from an application under Section 98 of the Civil Procedure Act, Cap. 71 and 52 rule 1 and 2 of the Civil Procedure Rules seeking orders that:

1. **The orders of this honorable court dismissing HCT – 01 – LD – CA – 18 OF 2021 be set aside.**
- 15 2. **That HCT – 01 – LD – CA – 18 OF 2021 be reinstated so that it can be heard on merits.**
3. **That the costs of the application be provided for.**

The application is supported by the affidavit of the applicant who averred as follows:

1. That being dissatisfied with the decision of HW Robert Mukanza in Civil Suit
20 No. 20 of 2018, he lodged Civil Appeal No. 18 of 2021 against the said decision in this court, that later on 3rd March 2023 dismissed the appeal for want of prosecution.

2. That the appeal was fixed for hearing without notice and when the applicant checked on the file, he found the appeal had been dismissed. That the applicant was sick when the appeal was called for hearing and as such he was prevented by sufficient cause from attending court.
- 5 3. That he desires that the appeal is heard since it concerns land which is fraudulently claimed by the Respondent. That it is fair, just and equitable that the appeal is allowed and the orders sought therein.

The application was opposed by the Respondent who contended as follows;

- 10 1. That the affidavit in support of the application contains material falsehoods and as such it should be struck out. That without prejudice, the applicant filed Civil Appeal No.18 of 2021 against the decision of the trial court and never served him or his lawyer. That he got knowledge of the appeal when he attempted to execute the orders of the trial court.
- 15 2. That the applicant has been redundant in pursuing his appeal. That the Respondent's counsel upon knowledge of the appeal extracted hearing notices and served the applicant. That it is not true that the case was dismissed on 3/3/2023 as averred by the applicant but it was on 7/11/2022.
- 20 3. That it is not true that the applicant was absent when the case was dismissed. That he was present and when asked by court to explain the whereabouts of his lawyer, he never gave a convincing explanation as such the case was dismissed for want of prosecution.
- 25 4. That the applicant has no plausible appeal since he merely outlined the grounds of appeal. That on more than three occasions, the applicant avoided prosecution of his appeal and as such there is no justification for a reinstatement. That it is just and equitable that the application is denied with costs.

Representation and hearing:

Mr. Muhumuza Samuel represented the applicant while ***Mr. Balinda Daudi*** appeared for the Respondent. Both parties addressed me on the merits of the application by way of written submissions which I have considered herein.

5 ***Legal Arguments:***

Mr. Muhumuza submitted that Section 33 of the Judicature Act Cap. 13 and 98 of the Civil Procedure Act gives this court inherent powers to make such orders as may be necessary for ends of justice and to ensure that the matters and controversies between the parties are determined to avoid multiplicity of proceedings. He
10 contended that Civil Appeal No. 18 of 2021 was dismissed for want of prosecution under Order 43 rule 31 of the Civil Procedure Rules and that in **Abel Balesesa V YesroMugenyi, HCMA No. 126 of 2019**, Gadenya J guided thus:

15 ***“In deserving circumstances, the court may acting under article 126 (2) (e) of the constitution, section 98 of the Civil Procedure Act and 33 of the Judicature Act, re-admit an appeal that has been dismissed for want of prosecution under Order 43 rules 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.”***

20 Learned counsel submitted that the applicant demonstrated through the affidavit in support of the motion that he had no knowledge that the appeal had been fixed for hearing. That he only discovered the dismissal when he was following upon on the appeal. Further that the applicant was sick and under-going treatment and as such he was unable to enter appearance on the date the case was dismissed. Lastly that the subject matter in issue is land at Musindika, Kyenjojo Town counsel which the
25 applicant claims he inherited from his father. That as such it would be fair and just

that the dismissal is set aside on the basis of the fore-going account and have the appeal heard on merits.

In response Mr. Balinda contended that there was no sufficient cause disclosed by the applicant to warrant setting aside the dismissal order. That whereas sickness constitutes sufficient cause of nonattendance by the dictum in *Wakabala & Co. Advocates V. Banyenzaki, HCMA No. 802 of 2019*, the same does not arise in this matter. It was pointed out that the applicant was present when the case was called for hearing and as such he was never sick as contended by Mr. Muhumuza.

It was further the assertion of Mr. Balinda that the affidavit in support of the application contains material falsehoods rendering the same defective liable to be struck out, and consequently the application. He invited court to the case of *Bety City (U) Ltd, MA No. 1177 OF 2022* where Wejuli J rejected a similar application on the basis that the affidavit in support of the application contained material falsehoods with the effect of leaving the application unsupported. Counsel further argued that Wejuli J referred to the case of *Bitaitana v Kananura (1972) HCB 26 OF 2006* where court held that falsehoods in affidavits renders the entire affidavit to be disregarded.

Counsel thus argued that the affidavit in support of the motion contains material falsehoods to wit; that the applicant was sick and thus absent when the case was called for hearing yet he was present. It was contended that this is a material falsehood with the consequential effect of causing the supporting affidavit to be struck out. He thus asked court to be pleased to strike out the affidavit in support of the application and consequently dismiss the application with costs.

Learned counsel also contended that there must be an end to litigation. That the suit from where the appeal arose, started in 2008 and later an appeal was filed by the

Respondent. it was contended that the Respondent merely wants the dispute to keep in court. That in *Brown v Dean (1910) AC 373*, it was observed thus; “...*in the interest of society as a whole, litigation must come to an end and when a litigant has obtained a judgment in a court of justice..... he is by law entitled not to be* 5 *deprived of that judgment without very solid grounds.*” Counsel thus asked court to put rest to the dispute between the parties by rejecting this application with costs.

Issues:

1. **Whether the affidavit in support of the application is defective.**
2. **Whether there is sufficient cause for reinstatement of Civil Suit No. 072** 10 **of 2022.**
3. **Remedies available to the parties.**

Consideration by Court:

Issue No. 1: Whether the affidavit in support of the application is defective.

Order 19 rule 3(1) of the Civil Procedure Rules provides that:

15 *“Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.”*

Therefore, an affidavit should contain evidence as known to the deponent and where 20 such evidence is derived from another source, it must be disclosed in the affidavit. Additionally, as stated in the persuasive dicta by the Supreme Court of India in *Re Suo Moto Proceedings (2005) 5 SCC 289*: “ *...sanctity of affidavits has to be preserved and protected by discouraging of irresponsible statements without regard to accuracy..*”

Therefore, an affidavit should contain accurate facts. In the **Besigye Kiiza v Museveni Yoweri Kaguta and Another (Election Petition No.1 of 2001) [2001] UGSC 3 (21 April 2001)**, in the lead judgment by Odoki JSC, he guided that where an affidavit contains falsehoods, it does not invalidate the same but the offending parts can be severed and the rest of the content can be relied upon. In **Yona Kanyomozi v Motor Mart (U) Ltd. Supreme Court Civil Application No. 6 of 1999**, Mulenga, JSC held that some parts of counsel's affidavits were false and that those parts were irrelevant to the application and could be ignored.

In **Rutuku Francis & 5 others v Eliphas Ndamagye, Court of Appeal Civil Appeal No. 111 of 2017**, Barishaki Cheborion JCA observed that whereas the position in **Besigye Kiiza v Museveni (supra)** was to the effect that you can sever the offending parts, where the said contents are severed and the remaining parts are incapable of supporting the application, the affidavit collapses.

In the current application, the applicant indicated under paragraphs 5,6,7 and 8 that on the date Civil Appeal No. 18 of 2021 was dismissed he was not present and sick and he had no knowledge that the same had been fixed. This is not true. Per the record of court, when the matter came up for hearing on 7th November 2022, the applicant was present and when asked about the whereabouts of his lawyer he was not clear in court's view. The court thus directed that the appeal is dismissed for want of prosecution. It is therefore not true that the applicant had no knowledge of the date the case was scheduled for hearing and that he was not present. I therefore sever paragraphs 5, 6,7 and 8 from the affidavit in support of the motion and I ignore that evidence.

Issue No. 2: Whether there is sufficient cause for reinstatement of Civil Suit No. 072 of 2022.

Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act gives me the discretion to re-instate the appeal that had been dismissed for want of prosecution. Courts have guided on the considerations for exercising the court's discretion. *Twinomujuni JA (RIP) in Tiberio Okeny& Anor V The Attorney General and 2 ors CA 51 of 2001* stated thus:

5 “(a) *First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.*

10 (b) *The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.*

15 (c) *Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.*

20 (d) *Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.*

25 (e) *Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's*

negligence or omission to comply with the requirements of the law ...”

The **Hon. Justice Twinomujuni** further held that

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“it is only after “sufficient reason” has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ...”.

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In the present application, the applicant contents that it is in the interest of justice that the appeal is heard on merits the subject matter being land. At the time of dismissal of the appeal, the applicant was present but failed to satisfy court about the whereabouts of the lawyer which led to the dismissal of the appeal. He later filed this application on 20th June 2023 after 7 months from the date the case was dismissed. I find that the delay by 7 months is an unreasonable long delay. I however take into account that the dispute is over land where the interests of substantive justice would require that the matter is concluded on the merits.

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I therefore allow the application and issue the following orders:

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1. The dismissal order dated 7th November 2022 dismissing Civil Appeal No. 18 of 2021 is hereby set aside and the appeal shall be heard on merits.

2. That the applicant shall file and serve his submissions in support of the appeal within two weeks from the date of this ruling failure whereof the appeal shall stand dismissed with costs without notice.

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3. That after service, the respondent shall file and serve her submissions within two weeks after service.

4. The applicant shall pay the costs of this application to the Respondent.

I so order.

A handwritten signature in black ink, appearing to read "Vincent Wagona". The signature is written in a cursive style with some loops and flourishes.

5 Vincent Wagona
High Court Judge
FORT-PORTAL

DATE: 25/09/2023

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