

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0033 OF 2014
(Arising from Moyo Chief Magistrate’s Court Civil Suit No. 0008 of 2011)

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ISADRU VICKY **APPELLANT**

VERSUS

10 **1. PERINA AROMA** }
2. SANTINA AKUTI BAYOA }
3. KAMUCE BEN }
4. SANTINA DIPIO OKUMU } **RESPONDENTS**
5. AZAA }
15 **6. BALI CHRISTOPHER** }
7. AMADRIO ESTHER }

Before: Hon Justice Stephen Mubiru.

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JUDGMENT

In the court below, appellant sued the defendants jointly and severally for recovery of land measuring approximately three hectares situated at Elenderea village, Elenderea Parish, Moyo sub-county in Moyo District, a declaration that she is the lawful customary owner of the land in
25 dispute, an order of vacant possession, a permanent injunction, general damages for trespass to land and the costs of the suit. She claimed to have inherited the land in dispute from her late father and permitted temporary use of a part thereof by a Pastor of a Pentecostal Church during the year 1990. It is upon departure of that pastor from the land that the defendants forcefully entered into occupation without her consent and have since refused to vacate the land.

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In their respective written statements of defence, the defendants refuted the plaintiff's claim. They contended that the land in dispute belonged to Moyo Town Council and the first person to occupy it during the 1970s was a one Opiku and upon his death in 1988, it was allocated to a one Achile Manua. When he subsequently migrated to Yumbe, the land was taken over by Andruwa
35 John who continued paying ground rent in Achile Manua's name until 1993 when it was

transferred into his name. Andruwa John too subsequently vacated the land and the first defendant then took it over, paying ground rent in Achile Manua's name but later began paying in her own name. The defendants therefore contended that they are the lawful owners by virtue of their recognition by the local government authorities at different levels. They thereafter
5 commenced the process of applying for a lease title over the land and were granted a lease offer on 3rd July, 2000. They averred that the land in dispute is not owned customarily and that therefore the plaintiff's suit is misconceived.

It would appear that thereafter the plaintiff did not take active steps to proceed with the hearing
10 of the suit. However, there is a hearing notice dated 23rd June, 2011 fixing the suit for hearing on 12th July, 2011. All three copies are still on the court file which is an indication that probably no attempt was made to retrieve and serve those hearing notices. Although the file cover indicates that it ought to have come up before the trial magistrate on 31st August, 2011 and 15th September, 2011 respectively, there is no corresponding record by the trial magistrate as to what transpired
15 on any of those dates. Similarly, there are no copies of hearing notices on the file indicating how any of those dates was reserved. The next time the suit came up before the trial magistrate was on 28th September, 2011 whereupon the trial magistrate made the following order;

This matter was filed in this honourable court on 15.4.2011 but the parties have since
20 failed to take steps to have it heard. The Court at its own instance fixed and cause-listed this case for hearing today but the parties have failed to attend and no sufficient cause has been shown for their absence. In light of this, I find no reason as to why the case should not be dismissed and it is hereby dismissed under O.9 rule 17 of The Civil Procedure Rules.

25 The record reveals that the plaintiff thereafter on 28th March, 2012 filed an application for reinstatement of the suit, which was fixed for hearing on 26th April, 2012. The record does not indicate what transpired in court on that day. The next time the application came up for hearing was on 10th May, 2012 when it was called before the trial magistrate for hearing in the presence of all the defendants and their counsel but in the absence of the plaintiff and her counsel.
30 Counsel for the defendants applied for the application to be dismissed under the provisions of Order 9 rule 22 of *The Civil Procedure Rules*. The trial magistrate commented that he had received a letter from the plaintiff's newly instructed counsel indicating that they had just received instructions yet they had prior engagements on that day in the High Court at Masindi and their

client, the applicant, was sick. The trial magistrate reluctantly adjourned hearing of the application to 8th June, 2012.

On 8th June, 2012 when the application came up for hearing, all the defendants and their counsel
5 were present but the plaintiff and her counsel were absent. Counsel for the defendants applied
once more for the application to be dismissed. In his ruling, the trial magistrate commented;

Unfortunately today, the plaintiff again is absent without any cause shown and it is
intimated that the lawyers were informed by their client on phone and the clerk has
since sworn an affidavit to that effect. That the lawyer having been informed never
10 showed any interest in the matter. Further, the plaintiff should have taken interest in
getting to know the next fixture since this is her case. All this appears to show that
the plaintiff is not so keen or interested in the matter at the moment. I am therefore
constrained to dismiss the application for want of prosecution. If the plaintiff is
ready, she may re-apply. Dismissed with costs.

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On divers day thereafter from around 20th November, 2012 until 25th September, 2013 the parties
became embroiled in matters concerning the taxation and award of costs arising from the two
applications that had been dismissed. It is on 30th October, 2013 that the court finally came round
to hearing an application for the setting aside the ex-parte order of dismissal of the application
20 for re-instatement of the suit which had been made on 8th June, 2012 (more than one and a half
years before). Again on that day counsel for the defendants was in court yet the plaintiff and her
counsel were absent. Counsel for the plaintiff had written a letter seeking adjournment of the
application. It was adjourned to 20th November, 2013 on which date all parties and their counsel
were absent. It was adjourned to 15th January, 2014 on which date the plaintiff was present and
25 all the defendants save the second and fifth defendants. The trial magistrate and Counsel for both
parties were absent whereupon hearing of the application was adjourned to 19th February, 2014
on which date the plaintiff was absent but his advocate was present. Counsel for the defendants
and the defendants too were absent. It was adjourned to 28th March, 2014 on which date all
parties were in court but their advocates were not. It was adjourned to 17th April, 2014 on which
30 date counsel for the plaintiff and all parties were in court, but defence counsel was not. It was
adjourned to 5th June, 2014. The record does not indicate what transpired on that day.

The next time the application came up for hearing was on 26th June, 2014. On that date counsel for the defendants and the defendants were in court. The plaintiff and her counsel were absent. The plaintiff's son, Anyama Oziti was in court and informed the trial magistrate that the plaintiff was sick and admitted at Mulago Hospital and the plaintiff's lawyer was appearing before the High Court in Arua. Counsel for the defendants applied for dismissal. In his ruling, the trial magistrate stated that;

Not only has the plaintiff failed to prove the alleged sickness for her absence in court but also her lawyer (Bundu Richard) has not proved before this court (by way of either a cause list or any other document that he is appearing in the High Court or any other court in Arua. A perusal of the entire court record (as per the submission by Counsel Olweny Willy) indeed shows lack of seriousness by the plaintiff to prosecute the case. In line with Order 9 rule 22 of *The Civil Procedure Rules* and section 98 of *The Civil procedure Act*, this matter is dismissed for want of prosecution and this matter is barred from being re-instated in this court (unless on appeal to the High Court) because it has been dismissed and re-instated into this court more than three times. It is dismissed with costs.

Being dissatisfied with the decision, the appellant appealed on the following ground;

1. The learned trial Chief Magistrate erred in law and fact when he dismissed with costs the appellant's Land Civil Suit No. 009 of 2011 for want of prosecution and barred the appellants from reinstating the case.

When the appeal came up for hearing, none of the respondents nor their counsel was in court. The court having satisfied itself by way of an affidavit of service filed in court on 21st December, 2017 certifying that counsel for the respondents was served with a hearing notice on 13th December, 2017 at 10.am and there not being any reason furnished for their absence, leave was granted under the provisions of Order 43 rule 14 (2) of *The Civil Procedure Rules* for counsel for the appellant to proceed ex-parte.

In his submissions, Counsel for appellant, Mr. Samuel Ondoma argued that the dismissal of the suit and refusal to reinstate it was wrong. On 26th June 2014, the court dismissed the suit under Order 9 r 22 and section 98 of *The Civil procedure rules* for non-appearance. In her ruling, it was stated that it was dismissed for want of prosecution. That provision does not cater for such

dismissal. It is Order 17 r 1 that provides for it. The remedy is Order 9 rule 23. The plaintiff filed an application of re-instatement. For as long as there is sufficient cause, the suit will be reinstated. The magistrate barred her from filing an application for re-instatement. She was denied her right under that order. The case was ongoing and for several occasions the plaintiff was in court together with her lawyer or the lawyer would be present. It is counsel for the respondent who was always absent. He appeared on 26th June and he prayed for dismissal. How the date was fixed is not clear. The last record is that the matter came on 5th June 2015 and the date of 26th June was dismissed in an unclear manner. Counsel himself stated at page 15 that the trial magistrate was not in court and that he communicated to his client. There is no evidence that the plaintiff's counsel was served with a notice of the date. The appellant somehow got to know of the date and sent her son called Charles Anyama to go to court and inform it that he was sick, admitted at Mulago. He accordingly informed court to that effect. That appears on the record of 26th June 2015, but the lawyer dismissed it as a mere excuse. That would be a sufficient cause for her lawyer's non-appearance. This is a land matter that touched on customary land and it would be improper for it to have been dismissed on technicality. He prayed that the appeal be allowed and the costs be granted to the appellant.

It is evident from the procedural history of these proceedings as summarised above, that there has been an incredible delay in the trial and disposal of the underlying suit. Nearly seven years following the filing of the suit on 15th April, 2011, not a single witness has testified. 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 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, 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 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.

Public interest emphasises efficiency and economy in the conduct of litigation, in that the courts' resources should be used in such a manner that any given case is allocated its fair share of resources, the most important of which in civil litigation is time. Each case whose trial is unduly prolonged deprives other worthy litigants of timely access to the courts. Courts must ensure that each suit is dealt with expeditiously and fairly, allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. Where the reason for delay involves abusing the process of the court, such as that which may be evident in maintaining proceedings when there is no intention of carrying the case to trial, or delay that is intentional and contumacious, or where a party is guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or to serious prejudice to the other party, the court is entitled to dismiss the proceedings (see *Birkett v. James* [1978] AC 297; *Kampala International University Ltd v. Tororo Cement, and two others*, H.C. Civil Application No.433 of 2006; *Rosette Kizito v. Administrator General* [1993] 5 KALR 4 and *Allen v. Sir Alfred McAlpine & Sons* [1968] 1 All ER 543). Conducting proceedings in a manner manifesting an intention not to bring them to an expeditious conclusion is a subversion of the process of the court and will constitute an abuse justifying a stay or dismissal.

Proceedings may also be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the justice system that a trial should take place (see *Regina v. Horseferry Road Magistrates' Court, ex Parte Bennett (No 1)*, [1993] 3 WLR 90, [1994] 1 AC 42, (1993) 3 All ER 138, (1994) 98 Cr App R 114). Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion 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 disapproval by refusing to prolong the proceedings any further.

"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 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. 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; 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; 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 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 continuing the case with the consequence that the actual merits of the case are not explored.

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The history of the delay in the instant case commenced with the plaintiff's failure to take out and serve the hearing notice dated 23rd June, 2011 that fixed the suit for hearing on 12th July, 2011. This hearing notice was signed and sealed by court nearly two months after the suit was filed (the suit having been filed on 15th April, 2011), but before most of the written statements of defence were filed (the sixth defendant filed his on 24th April, 2011; the second defendant filed his on 9th May, 2011; the fourth defendant too filed his on 9th May, 2011; the first defendant filed hers on 13th May, 2011; the third defendant filed his on 12th August, 2011). According to Order 9 rule 11 (1) of *The Civil Procedure Rules*, a suit is supposed to be set down for hearing, after the last of the defences has been filed. Under Order 17 rule 5 of *The Civil Procedure Rules*, where the plaintiff does not within eight weeks from the delivery of the last defence, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution.

There being no copy on the court record, of a hearing notice indicating how or when the court fixed the next date, 28th September, 2011, the only observation that can be made is that this date as fixed for the hearing of the suit, was well within the stipulated eight weeks' period following

the filing of the last of the written statements of defence (that period was due to elapse on 13th October, 2011). When the trial magistrate dismissed the suit on 28th September, 2011 under Order 9 rule 17 of *The Civil Procedure Rules*, the decision was erroneous on two grounds;- the court having taken the initiative to fix the case for hearing, it ought to have ensured that the parties are notified but there was nothing to show that any of the parties had been served, and most especially that the plaintiff was aware of that date; the provision that was invoked in dismissing the suit applies only in situations where neither party appears when the suit is called on for hearing, and was thus inapplicable to the facts before the trial magistrate. An order made ex-parte in those circumstances, and more especially when there is no proof before court, of effective service on the party adversely affected by the order, ought to be set aside.

Although close analysis of the events after the suit was dismissed reveals a lack of sustained effort by the appellant to expedite the proceedings by taking active steps to move the matter forwards expeditiously, nevertheless it is clear that the expeditious disposal of the suit was fundamentally derailed and hampered by the erroneous decision of court made on 28th September, 2011 to the extent that the appellant's shortcomings thereafter pale in comparison and become inconsequential. The attempts at having the suit re-instated were half-hearted at most and most probably this explains the trial magistrate's frustration in directing, albeit erroneously, that the application was never to be revived in her court. Nevertheless, I have found nothing in the plaintiff and his counsel's conduct manifesting a clear intention not to bring the proceedings to an expeditious conclusion. I have neither found circumstances to suggest that a fair trial is no longer possible despite the prolonged delay nor anything to suggest that it would be contrary to the public interest in the integrity of the justice system that a trial should take place.

In the circumstances, I find merit in the appeal. The result is that the all orders of the court below arising from the suit are hereby set aside. The suit is hereby re-instated and the appellant is directed to fix it for hearing within a period of thirty days of this decision. The costs of the appeal will abide the outcome of the re-trial.

Dated at Arua this 11th day of January, 2018

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Stephen Mubiru
Judge,
11th January, 2018.