

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.782 OF 2023

(Arising from Civil Suit No.913 of 2021)

1. WILSON MILTON WERE

**2. ROBINAH NAJJEMBA *(Suing through
their lawful Attorney GODFREY***

***KATWERE)*.....APPLICANTS**

VERSUS

1. LAWRENCE KAKANDE

2. ZIMBE KASIM WALUGEMBE

3. NAKITO SARAH

4. TEOPISTA NAKAWUNGU

5. WAMBUGA DAVID).....RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicants brought this application by way of notice of motion under the provisions of **Article 126 (2) (e) of the Constitution, Section 33 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act cap.71 and Order 26 rule 2 and Order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1** seeking orders that the order of this court dismissing **Civil Suit No.913 of 2021** on 14th February 2023 be set aside, and the matter be reinstated and heard on its merits. It also seeks that costs of the application be provided for.



Grounds of the application.

The grounds upon which this application is premised are contained in the affidavit in support deposed by Mr. Godfrey Katwere, the applicants' lawful attorney.

- 5 He stated that the applicants are the registered proprietors land comprised in **Block 90 plot 32 land at Katalemwa** which is the subject matter in **Civil Suit No.913 of 2021**.

10 That the applicants filed the said suit seeking a declaration that they are the lawful owners of the suit property, and that the respondents have no interest therein.

That the respondents filed a written statement of defence contesting the claim as well as a counter claim seeking cancellation of the applicants' title and that the applicants went ahead to apply for summons for directions for which a date for hearing was fixed.

- 15 That before the case could proceed to trial, the 1st and 2nd respondents filed **Miscellaneous Application No.2219 of 2021** seeking orders that the applicants herein deposit security for costs before the suit could be heard.

20 The said application was heard by His Worship Kintu Simon Zirintusa who ordered that the applicants deposit **Ug. x 50,000,000/= (Uganda shillings fifty million only)**, within a period of three months.

25 That the effect of the said order to pay security for costs was that for all purposes and intent the applicants could not proceed with the suit until they deposited the sum of **Ug.x 50,000,000/= (Uganda Shillings fifty million only)** in court. That the applicants were dissatisfied with the decision, and filed an appeal vide: **Miscellaneous Appeal No.004 of 2022**.

However, that before the same was heard, and before the lapse of time within which to deposit the security for costs, the applicants applied for, and were granted an *ex-parte* order staying the execution of the order to pay security for costs pending the hearing and determination of the appeal.

Chabw 8th

That the appeal was heard and dismissed on 11th November 2022 by Hon. Justice Bernard Namanya who ordered that the order to pay security for costs stays in place.

5 That being dissatisfied with the orders of court, the applicants filed an application for leave to appeal al to the Court of Appeal on ECCMIS vide **DRFT-LD-MA-2603-2022** which is not only pending admission on ECCMIS but is also yet to be heard and determined.

10 In addition, that the applicants without prejudice to their right to pursue an appeal, mobilized funds and paid the said security for costs and also notified court of the same before dismissal of the suit.

15 That the applicants were not only prevented but were also unable to furnish the security for costs and proceed with the directives of this court on joint scheduling and witness statements on account of the order to pay security for costs, the pending appeal challenging the same as well as the *ex-parte* order staying the said order, before the hearing and determination of the appeal challenging the order.

That on 16th March 2023, the applicants through their lawyers established that **Civil Suit No.913 of 2021** was dismissed for want of prosecution, and failure to furnish security for costs on 14th February 2023.

20 Based on the advice from their lawyers, it is the applicant's belief that the existence of the order to pay security for costs that was not complied with, the appeal challenging the said order, as well as the *ex-parte* order issued by court staying the enforcement of the said order amount to sufficient cause to justify the applicant's failure to furnish security for costs within the three (3) months
25 period as ordered.

It was the reason why the applicants could not proceed with the hearing of the suit, or file the joint scheduling memorandum and the witness statements.

30 That the applicants who are the registered proprietors of the suit property are interested in pursuing the suit on its merits and demonstrated the same by



paying the security for costs before dismissal of the suit, and have acted without undue delay by expeditiously filing this application to set aside the dismissal, and reinstate the suit.

5 Further, that the respondent will not in any way be prejudiced by the reinstatement of the suit since the security for costs that was granted by court was deposited in court and that it is interest of justice and fairness that the order of this court dated 14th February dismissing **Civil Suit No.913 of 2021** be set aside and the suit be reinstated to be heard on its merits.

1st & 2nd Respondents' reply.

10 The 1st and 2nd respondents filed an affidavit in reply deponed by Mr. Zimbe Kasim Walugembe, the 2nd respondent herein, and the 1st respondent's lawful attorney opposing the application.

15 He admitted that the applicants are the registered proprietors of the suit property but alleged that the said registration was not only illegal, but also fraudulent as the respondents still have the original certificate of title for the suit land in the names of Yowan Kabalu, the 1st respondent's father, and are still in full possession and occupation of the suit land.

20 That the respondents were not aware of any order of interim stay acquired by the applicants as they were not parties thereto, and in reply to *paragraph 11* of the affidavit in support of the application, the 2nd respondent deponed that the contents thereto were true only to the extent that **Miscellaneous Appeal No.006 of 2022** was heard and dismissed on 11th November 2022.

25 That no application was ever served on the respondents or their lawyers and that while the applicants had no right to pay the moneys out of time without leave of court, the receipt of payment attached is a forgery, and that all the applications were filed by the applicants who frustrated the hearing of the main suit and also disobeyed directives of court, all in total abuse of court process.

30 Additionally, that while all applications were closed by 11th November 2022, the applicants have never filed their trial bundles or witness statements as

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directed by this court thus they have no interest in prosecuting their case which was dismissed for want of prosecution and failure to furnish security for costs of **Ug. x 50,000,000/= (Uganda Shillings fifty million only)**.

5 Further, that the period within which the applicants ought to have furnished security for costs lapsed on 16th May 2022 and that it has been more than a year since the order was made without the applicants responding to the same.

10 That on 14th July, 2022, the directives of court were given in the presence of counsel Ojambo Robert, the applicant's lawyer who was ordered to file witness statements, and trial bundle by 30th August 2022, but the same have never been filed to date thus court was right to dismiss the suit for want of prosecution.

15 That the applicants are not interested in pursuing in the main suit and they merely filed this suit to frustrate the respondents' interest in the suit land and that because the applicants could not pay any money in court after the expiration of the 3 months' period ordered by court, without leave of court and any payments made by the applicants made after the period that was ordered is overtaken by events

20 That the respondents will be prejudiced if this application is granted since they have already filed their trial bundles, as well as their witness statements, and are already pursuing their counter claim thus the grant of this application would take them backwards as the applicants have nothing on court record since directives were given in August 2020.

25 That the applicants have not demonstrated any valid grounds warranting the setting aside of the dismissal order and that since the applicants failed to pay the security for costs by 16th May 2022, they have no valid claim to reinstate the main suit.

30 That since the applicants have nothing on court record, it is clear that they not willing to prosecute the suit and are merely wasting court's time, therefore it is in the interest of justice and fairness that this application is dismissed with costs to the respondents.


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From the record, the 3rd, 4th, & 5th respondents were never served and as such they did not file their affidavits in reply opposing the application. In the absence of evidence that summons to file a defence was served on the defendant within the prescribed time, it is tempting to believe the assertion
5 that they were never served with the court process.

Accordingly, the applicants' claim against the 3rd, 4th and 5th respondents herein is hereby dismissed for want of service under **Order 5 rule 3 (b) of the Civil Procedure Rules SI 71-1.**

This court noted that the applicants did not file affidavit in rejoinder to the
10 averments set out in the 1st and 2nd respondents' affidavit in reply.

Representation.

The applicants were represented by **M/s Ojambo & Ojambo Advocates** while the 1st & 2nd respondents were represented by **M/s Wakabala & Co. Advocates.** Both counsel filed written submissions in support of their
15 respective clients' cases as directed by this court.

Consideration by court.

I have carefully read and considered the evidence, and submissions of counsel, the details of which are on court record.

This application was brought under the provisions of **Article 126 (2) (e) of the Constitution, Section 33 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act cap.71 and Order 26 rule 2 and Order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1**
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The Court of Appeal in the case of **Agnes Nanfuka Kalyango & others vs Attorney General & Another CACA No.64 of 200** set down the instances in
25 which court would invoke its inherent powers to dismiss a suit for want of prosecution too wit; where there was inordinate delay, the delay was inexcusable even if a credible excuse was made out. The defendant is likely to be seriously prejudiced by the delay, and that the balance of justice demands it.


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In the present case, **Civil Suit No.913 of 2021** was dismissed for want of prosecution under **section 17 (2) (a) of the Judicature Act**, and for failure to furnish security for failure to furnish security for costs as ordered under **Order 26 rule 2 (1)**.

5 In dismissing the main suit, this court took careful note of the fact that on 14th July, 2022, this court had issued orders directing the parties to file a joint scheduling memorandum by 16th August 2022, and the applicants had on 30th August, 2022 been directed to file their witness statements by 14th September, 2022 but the same were never complied with.

10 The applicants in their affidavit in support of the application state that they were unable to comply with the directives of this court on account of the subsisting order for security for costs, the *ex-parte* interim staying implementation of the same, and the appeal challenging the said order.

It is noteworthy that while it is true that the applicants challenged the order
15 for security for costs in **Miscellaneous Appeal No.4 of 2022**, the said appeal was dismissed by Hon. Justice Bernard Namanya who upheld the earlier orders of court in his ruling delivered on 11th November 2022.

The applicants on the other hand opted to file an application seeking leave to appeal against the orders of this court, and later on opted to pay the said
20 security for costs on 25th January 2023, over 2 months after the ruling of this court had passed.

The applicants in May, 2022 also filed **Miscellaneous Application No. 682 of 2022** for stay of execution of the orders of security for costs as well as **Miscellaneous Application No.683 of 2022** seeking an *ex-parte* interim stay
25 of execution pending the determination of the appeal.

From the record however, no such interim order staying the orders of this court was ever issued as alleged by the applicants. **Miscellaneous Application No.682 of 2022** was in fact dismissed on grounds that the same had since been overtaken by events.



In his ruling dismissing the application, His Worship Kintu Simon Zirintusa noted that the time within which to pay the security for costs had lapsed on 15th May 2022.

It follows therefore that the applicants had not complied with the orders of this court on and paid the amount ordered by court over 8 months after the period of paying the same had lapsed.

Decision of court:

The suit was dismissed by court for want of prosecution, and non-compliance with the directives of court under **Section 17 (2) (a) of the Judicature Act**, with the objective in mind to curtail further delay and abuse of process.

In the case of **Gold Beverages (U) Ltd v. Muhangura Kenneth and Anor, M.A No 674 of 2019**, it was held that:

“The dismissal for want of prosecution seals the matter for the plaintiff in the same court which issued the dismissal order, and recourse can only be had by the plaintiff to an appeal or commencement of a fresh action subject to the limitation period imposed by law.”

It is the opinion of this court that the remedy available to a party whose case is dismissed for want of prosecution is to appeal against the order, and not to apply for its readmission unless there are exceptional circumstances compelling this court to exercise its inherent powers under **Section 98 of the Civil Procedure Act** to reinstate the appeal. (See: **Miscellaneous Application No. 805 of 2021 Moses Makubuya versus Namuddu Beatrice; Miscellaneous Application No.1516 of 2022 Kigozi Andrew vs Mukasa Ronald**).

Furthermore, **Order 26 rule 2 (1) of the Civil Procedure Rules** stipulates that where security for costs is not paid court shall dismiss the suit. **Order 26 rule 2 (2)** under which this application was filed stipulates that where a suit is dismissed under the preceding rule, court may, upon proof of sufficient cause set aside the dismissal.



I am inclined to agree with the 1st and 2nd respondents that the applicants ought to have sought leave of court to pay the security for costs out of time rather than pay the same without court's leave.

Administration of justice however requires, as far as practicable to have each
5 case heard on its merits, especially where security for costs has been paid, albeit belatedly as in this case. The respondents' claim that the receipt for such payment was forged was not substantiated.

The parties in their pleadings as noted by court raise triable issues, a number of these alluding to fraud where evidence of ownership must be heard and its
10 authenticity duly tested by way of a formal trial.

Indeed, where as in the present case the applicants claim as the registered owners on the one hand and the respondents claim to have in their possession the original title on the other hand, these are matters to be considered pointing towards an illegality that a court would not ignore, as it overrides all
15 manner of pleadings. (***Makula Internanational Ltd vs H.E Cardinal Nsubuga & Anor Civil Appeal No. 4 of 1981***). Relevant orders must therefore be issued made to determine ownership of the suit property which may require court to revoke or rectify one of the titles upon the full hearing of the merits of the case.

20 To this court, the above findings as highlighted constitute sufficient cause for reinstatement of the suit ***Civil Suit No.913 of 2021***. I therefore fail to see how setting aside the dismissal order would in those circumstances prejudice the respondents/defendants who in any case still have their counterclaim unresolved.

25 I accordingly allow the application to reinstate the suit.

Costs shall abide the outcome of the suit.

I so order.



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Alexandra Nkonge Rugadya

Judge

4th August, 2023.

Delivered by mail



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4/8/2023