

THE REPUBLIC OF UGANDA

IN THE HHIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1319 OF 2022

(Arising out of Civil Appeal No.18 of 2018)

(Arising from the Chief Magistrates Court of Nabweru Civil Suit No.168 of 2007)

BATAMBUZE MOSES:.....APPLICANT

VERSUS

BUKENYA FRED:.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicant brought this application by way of notice of motion under the provisions of **Section 33 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act Cap.71, and Order 52 rules 1 & 2 of the Civil Procedure Rules SI 71-1** seeks orders that the order dismissing **Civil Appeal No.18 of 2018** be set aside, and that **Civil Appeal No.18 of 2018** be reinstated to be heard on its merits. It also seeks that costs of the application abide the outcome of the appeal.

The grounds of the application are contained in the affidavit in support thereof deponed by Counsel Jude Byamukama, the applicant's advocate but briefly they are that **Civil Appeal No.18 of 2018** was dismissed on 9th May 2022 for want of prosecution and that because no hearing notices were served on the applicant, he is dissatisfied with the ruling and orders of this court dismissing **Civil Appeal No.18 of 2018**.

That the applicant who was challenging the orders issued in the lower court had been vigilantly following up on his appeal which was filed without any inordinate delay but the respondent herein filed **Miscellaneous Application No.1352 of 2018** challenging the competency of the appeal and that because the said application was prosecuted for over a year, it affected the continuance of the appeal the determination of which depended on the disposal of the application.

That although the applicant successfully opposed the application, the appeal lost position owing to the transfer of Lady Justice Damalie Lwanga who was handling the matter which led to re-allocation of the appeal.

Additionally, that the applicant through his lawyers on separate occasions wrote letters requesting for hearing dates but did not receive any response and that the institution of



Miscellaneous Application No. 1352 of 2018, and re-allocation of the appeal to several judges frustrated the applicant's efforts to fix the same because his requests received no response.

5 Further, that the dismissal of the applicant's appeal without his knowledge was a violation of his constitutionally guaranteed right to a fair hearing under **Articles 28 (1) & Article 44 (c)** of **the Constitution of the Republic of Uganda** because his lawyers were never served, and yet the appeal raises triable issues which require this court's determination on merit since the applicant is not a trespasser on the respondent's perimeter wall.

10 That this application raises sufficient grounds for failure of the applicant's lawyers to prosecute the matter thus it is in the interest of justice that the orders sought herein are granted.

Respondent's reply.

15 The respondent opposed this application through his affidavit in reply wherein he objected to the applicant's affidavit in support of the application on grounds that counsel Jude Byamukama who is an advocate to the applicant deponed the affidavit in support without any written authority from the applicant thereby rendering the same grossly incompetent, and that because the affidavit in support does not refer to any information from the applicant, there are doubts regarding how he got to know the facts of the suit premises.

20 That the applicant lacked information from the 1st and 3rd defendants who had already partly executed the decree without the applicant's knowledge and that he did not also get the 1st and 3rd defendant's authority to file this application as they are the owners of the suit premises.

25 That while the 1st and 3rd defendants are the owners of the suit land, they opted to settle the matter by mutual agreement rather than file written statements of defence and that the applicant in filing **Civil Appeal No. 18 of 2018** relied on the said mutual agreement despite the fact the he was not a party thereto.

30 That since the 1st and 3rd defendants were presumed to have admitted the claims in the plaint because they did not file their respective written statements of defence thus the applicant, who was the 2nd defendant cannot be heard to have been dissatisfied with the whole decree passed against all 3 defendants and that unknown to the applicant, the mutual agreement between the parties has since been complied with.

35 That while the applicant's grounds of appeal refer to the mutual agreement which has already been complied with by the 1st & 3rd defendants in execution thereof, the remaining part of the decree which has to be executed refers to the 1st & 3rd defendants' perimeter wall which has not yet been demolished from the respondent's wall fence while the 2nd part which is yet to be executed refers to the payment of damages and costs amounting to **Ug. x 21, 625, 000/=**

(**Uganda Shillings twenty-one million six hundred twenty-five thousand only**) thus the applicant's bid to reverse the decree on behalf of all the defendants is not only barred by law, but is also an abuse of court process.

5 That there was dilatory conduct on the part of the applicant thereby causing undue delay in prosecuting the appeal which prompted the trial judge to dismiss the same for want of prosecution and that if the applicant was indeed aggrieved with the ruling of this court, he should have filed an appeal of review.

10 That the applicant cannot be aggrieved by a decree intended to demolish the suit perimeter wall owned by the 1st & 3rd defendants, and that when the appeal was scheduled for hearing on 21st January 2020, the applicant was informed of the same by his lawyer who was in court on that day and that the matter as adjourned to 31st March 2020 but they failed to attend court with no cause.

15 In addition, that when the matter came up for hearing on 31st March 2020, neither the applicant nor his counsel entered appearance and although the matter was put on hold for further directions and that by the time counsel for the applicant filed letters requesting for dates, the matter had already been fixed for hearing on 13th May 2021.

20 That the applicant in *paragraph 8* of his affidavit in support of the application admits that he was informed by his lawyers that the file was re-allocated to **Justice Yasin Nyanzi** and later to **Justice Immaculate Busingye** who fixed the same for hearing on 9th May 2022 and that the respondent being vigilant attended court on that day without waiting to be served hearing notices.

25 Further, that the applicant, and his lawyer's failure to attend court on the fixed dates was not only deliberate, but also inexcusable thus the applicant's lawyer who went to court to check on the appeal on 14th August 2022 after they had been served with the notice to show cause from the Nabweru Court has failed to bring good cause or sufficient reason that prevented them from attending court on 9th May 2022.

That the applicant is on a fishing expedition as **Civil Appeal No.18 of 2018** has no likelihood of success seeing that he is neither aggrieved nor dissatisfied with the decree appealed from.

Applicant's rejoinder.

30 The applicant in his affidavit in rejoinder stated that the applicant admitted that Jude Byamukama has been acting as the applicant's lawyer with instruction to appeal the decision of the Chief Magistrates Court of Nabweru in **Civil Suit No.168 of 2007**, and that the instant application is for the reinstatement of **Civil Appeal No.18 of 2018** in which the 1st & 3rd defendants are not party, and whose written authority the applicant did not require.

That the *paragraphs 8 – 16* of the affidavit in reply are irrelevant as the respondent delves into the merits of the appeal that was dismissed for want of prosecution which dismissal is the basis of this application, and in reply to *paragraphs 16 – 19*, the applicant stated that he has been vigilant in prosecuting the appeal.

- 5 That the applicant is very interested in pursuing his appeal until its final decision and that this application raises sufficient grounds for his failure of his lawyer to prosecute the said appeal thus it is in the interest of justice that the appeal is reinstated

Representation.

- 10 The applicant was represented by ***M/s J Byamukama & Co. Advocates*** while the respondent was represented by ***M/s Katongole & Co. Advocates***. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

Consideration by court.

- 15 I have carefully read the application and evidence as set out in the parties' respective affidavits, the details of which are on court record, and which I have taken into consideration in determining whether or not this application merits the prayers sought.

The main issue for determination is whether the order dismissing ***Civil Appeal No. 18 of 2018*** should be set aside, and the appeal reinstated, and heard on its merits.

- 20 It is not in dispute that ***Civil Appeal No. 18 of 2018*** was dismissed by this Court for want of prosecution. ***Order 43 rule 31 of the CPR*** provides, inter alia, that the court may order the dismissal of the appeal for want of prosecution.

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

- 25 ***"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."***

- 30 It is the opinion of this court that the remedy available to a party whose appeal is dismissed for want of prosecution under ***Order 43 rule 31 of the Civil Procedure Rules***, 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***).



Civil Appeal No.18 of 2018 from which this application arises was initially allocated to **Hon. Justice Yasin Nyanzi**, and was later re-allocated to **Hon. Lady Justice Immaculate Busingye** who by letter dated 4th May 2023 referred this matter to the Head of the Division following numerous complaints by the respondent.

5 The chronology of events leading up to the dismissal of the said appeal is that when the **Civil Appeal No.18 of 2018** came up for hearing on 28th August 2019, none of the parties entered appearance and it was adjourned to 21st January 2020. On that day, counsel Jude Byamukama entered appearance for the appellant, while the respondent was absent.

10 The matter was then adjourned to 31st March 2020, but the record does not indicate whether the matter was heard on that day.

This court is also cognizant of the fact that on the above mentioned date, the country was under the COVID-19 country wide lockdown that halted operation of court business.

15 On 9th May 2022, the appeal came up for hearing, and the same was dismissed for want of prosecution hence this application. The applicant adduced in evidence two letters dated 3rd March 2021, and 8th April 2021 by which they wrote to this court requesting for the matter to be scheduled for mention/hearing.

While the applicant through his lawyers wrote to court requesting dates, no explanation has been offered as to why there was no further follow up on the matter for over a year up to the date it was dismissed on 9th May 2022.

20 The applicant has not demonstrated any circumstances warranting this court to exercise its discretion and inherent power to reinstate **Civil Appeal No.18 of 2018**.

It is therefore the finding of this court that this application is not properly before this court and is therefore dismissed with costs to the respondent.

I so order.


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Alexandra Nkonge Rugadya

Judge

23rd August, 2023

Delivered by email

✓
23/08/2023