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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application 38 of 2023

*(Arising from Miscellaneous Application No. 182 of 2020)**(All arising from Civil Suit No. 25 of 2014)*

10

1. Oboi Vigilio ..... Applicants

2. Apio Jane

Versus

Egwangu Marshall ..... Respondent

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Before: Hon. Justice Dr Henry Peter AdonyoRuling1. Introduction:

20 The applicants filed this application by way of a Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, and Section 33 of the Judicature Act, Cap 13 for orders that;

- a) An order dismissing Miscellaneous Application No. 182 of 2020 be set aside.
- b) Miscellaneous Application No. 182 of 2020 be reinstated and heard on its merits.
- 25 c) Costs of this application be provided for.



5      2. Grounds of the application:

The grounds of this application, as set out in the application and further stated in the affidavits in support sworn by each of the applicants, are that;

- 10      a. On 11<sup>th</sup> December 2020, the applicants filed Misc. Application No. 182 of 2020 in the registry of this honourable court for leave to file an appeal out of time against the decision of the Grade One Magistrate of Amuria dated 20 November 2019.
- 15      b. On 15<sup>th</sup> September 2021, the applicants' lawyers, Ms. Legal Aid Project of the Uganda Law Society, appeared before the then Assistant Registrar of this court for the mention of Miscellaneous Application No. 182 of 2020 and, accordingly, directions for submissions to be filed in the court registry were given.
- 20      c. The applicants were directed to file their submissions by 29<sup>th</sup> September 2021 and the respondent by 13<sup>th</sup> October 2021. The applicants' submissions were duly filed at the court registry on 29<sup>th</sup> September 2021 and served on counsel for the respondent on 30<sup>th</sup> September 2021, who made a reply by 13 October 2021. **(A copy of the applicants' submissions annexed as "B")**
- 25      d. Upon complying with the directions given, the applicants waited for the court ruling in vain, which prompted the applicants to seek the intervention of their lawyers, who wrote to the court on 25<sup>th</sup> May 2022 requesting for a ruling and they were informed that the application was dismissed for want of prosecution for not filing submissions as directed. **(Attached is a photostat copy of the letter and order marked "C" and "D")**



5 e. Upon perusal of the court file, the application was dismissed for want of prosecution for not filing submissions, which position is not correct since the applicants were able to comply with the court directive, and it is unfair that the applicants' application was dismissed for want of prosecution without determining its merits.

10 f. The applicants are still interested in pursuing the claim, which has a high chance of success, and they depone this affidavit in support of an application for reinstatement of Misc. Application No. 182 of 2020.

g. It is fair, just, and equitable that this application be allowed under all the terms prayed for.

15 3. Affidavit in reply:

Egwangu Marshal opposed the application and deponed an affidavit in reply. He stated that;

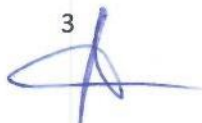
a. Upon dismissal of the application, the applicants were summoned to Amuria court upon being given 90 days' notice.

20 b. The applicants are merely frustrating the execution process by filing this application, given the respondent's age of 92 years.

c. This court was mandated to terminate the application as it had no merit.

d. The respondent's lawyers informed him that there must be an end to litigation.

25 e. The applicants are in occupation and use of the land and merely filing the instant application to delay justice.





- 5 f. The applicants filed a notice of appeal after being served with the bill of costs  
of the lower court and are still acting in the same manner by filing this  
application. To restrain such conduct, the respondent has been advised that  
the applicants be ordered to deposit security for costs before the grant of the  
application, and in default thereof, this application be dismissed with costs to  
10 the respondent.

4. Representation:

The applicants were represented by M/s Legal Aid Project of the Uganda Law Society  
and M/s Erabu and Co. Advocates represented the respondent.

15 This matter proceeded through written submissions to support each party's  
respective cases. I have perused the same and I do take note of them in determining  
this application

5. Issues:

The applicants' counsel, in his submissions, formulated two issues, which I find to  
suffice in resolving this instant application. They are;

- 20 a) Whether there is sufficient ground to set aside the order of dismissal of  
Miscellaneous Application No. 182 of 2020?  
b) What remedies are available to the parties?

6. Court's Determination:

25 This application was brought under Section 98 of the Civil Procedure Act (CPA),  
which grants this Honourable Court the inherent powers to make such orders as  
may be necessary for the ends of justice or to prevent abuse of the process of the  
court.



5 This application also arises from a civil matter thus it is the of proof lie on the applicants because they are the ones who seek to get a decision from this court in their favour (See: Sections 101 and 102 of the Evidence Act, Cap 6).

(a) Whether there is sufficient ground to set aside the order of dismissal of Miscellaneous Application No. 182 of 2020?

10 From the affidavits in support of this application, the applicants aver that on 11 December 2020 they filed Misc. Application No. 182 of 2020 in this Court for leave to file an appeal out of time against the decision of the Magistrate Grade 1 of Amuria dated 20<sup>th</sup> November 2019.

The applicants state that they were directed by this Honourable Court to file their  
15 submissions in prosecuting this application by 29<sup>th</sup> September 2021 with the respondent given up to 13<sup>th</sup> October 2021 to make any reply thereto.

That they complied with the court's direction by filing their submissions at the court registry on the dot on 29<sup>th</sup> September 2021 and served the same on counsel for the respondent on 30<sup>th</sup> September 2021.

20 That similarly counsel for the respondent made a corresponding reply promptly on the 13<sup>th</sup> October 2021. **(A copy of the applicants' submissions annexed as "B").**

The applicants aver that after complying with the directions they waited in vain for the court ruling and were prompted them to seek the intervention of their lawyers who wrote to the court on 25<sup>th</sup> May 2022 requesting for the ruling only to informed  
25 that their application had been dismissed for want of prosecution for not filing submissions as directed. **(Attached is a photostat copy of the letter and order marked "C" and "D").**



5 The applicants aver that it was unfair for their application to be dismissed for want of prosecution yet they had complied with the court's directions and promptly filed the requisite submissions as directed by court.

The applicants further stated that the dismissal of their application was in error as it was done without taking into account their compliance with court's orders as well  
10 as it being dismissed without its merits being determined.

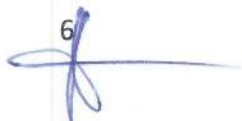
They aver further that they were still interested in pursuing the claim which has a high chance of success and thus prayed that this instant application be granted with order dismissing Misc. Application No. 182 of 2020 be set aside and Misc. Application No. 182 reinstated and heard on its merits with the costs of this  
15 application provided for.

In his affidavit in reply, the respondent contends that the applicants are merely frustrating the execution process by filing the instant application, given the respondent's age of 92 years.

The respondent contends that this court terminated Misc. Application No. 182 of  
20 2020 as it had no merit and that the applicants were in occupation and use of the suit land and were merely filing the instant application to delay justice as the applicants filed a notice of appeal only after being served with the bill of costs of the lower court and are still acting in the same manner by filing this application.

The respondent further contends that his lawyers informed him that there must be  
25 an end to litigation.

Counsel for the respondent submitted that the instant application seeks to reinstate Miscellaneous Application No. 182 of 2020, which was dismissed by this honourable



5 court but the grounds in both applications are similar. Counsel submitted that the respondent filed Civil Suit No. 25 of 2014 against the applicants in Amuria Magistrate's court on 20<sup>th</sup> November 2019 and that the trial magistrate decided in favour of the respondent with the outcome that the applicants were ordered to vacate the suit land among other orders. Counsel for the respondents submitted  
10 that the 2<sup>nd</sup> applicant did not file an affidavit in support of the application, which they seek to reinstate, and there is no evidence to prove to this court that she gave authority to the 1<sup>st</sup> applicant in that application and it is erroneous that the 2<sup>nd</sup> applicant swore an affidavit in this application.

15 Counsel for the respondent submitted that the applicants brought this application to delay justice to the respondent and that the applicants who are in possession and use of the suit land in disregard of the orders of the Court have brought this application to frustrate ongoing execution in the lower court as stated in the respondent's affidavit in reply.

20 Counsel for the respondent submitted that justice delayed is justice denied, and there must be an end to litigation. However, the applicants are taking advantage of the respondent's age, who is over 90, by filing this application, yet they are in occupation and use of the land. To that end, counsel for the respondent contends that to demonstrate seriousness, the applicants be ordered to deposit security of costs the sum of **Ugshs: 15,000,000/=(fifteen million Uganda shillings)** and counsel  
25 referred this court to the case of **Anthony Namboro and Anor** versus **Henry Kaala [1975] HCB 315** where Sekandi AJ held " that the main consideration to be taken into account in an application for security for costs are; whether the





5 applicant is being put to an expense defending a frivolous and vexatious suit and yet he has a good defence that he is likely to succeed in his defence”.

To that end, the respondent avers that were this Hon Court to be inclined to grant this application, then in order to restrain the ever changing conduct of the applicants, they must be ordered to deposit security for costs before the grant of  
10 this application and if they default thereof, then this application be dismissed with costs to the respondent.

7. Resolution:

Section 98 of the Civil Procedure Act (CPA) grants this Honourable Court the inherent power to make such orders as may be necessary for the ends of justice or  
15 to prevent abuse of the process of the court.

That being the case, this court may exercise its discretion in line with the said provision of the law as may be necessary.

In *Calderon v Calderon* [1992] 43 WIR 159, Floissac C J observed that;

20 *“Therefore, in order to succeed in his application for the restoration of his appeal, an appellant must establish*

*(1) that there is good and sufficient cause for the restoration and;*

*(2) that there are preponderant circumstances which should incline the court in the interest of justice to exercise its discretion in favour of the restoration”.*





5 Although the above cited case was addressing the reinstatement of an appeal, in my  
 view, the principles of reinstatement thereunder are also relevant to this present  
 application.

In this case the applicant must demonstrate good cause for the restoration and that  
 there are preponderant circumstances which would make the court to exercise its  
 10 discretion in favour of the restoration of their application in the interest of justice.

In the case of *Florence Nabatanzi v. Naome Binsobodde*, *Supreme Court Civil Application No. 6 of 1987*, the Supreme Court of Uganda was of the firm view that;

15 *"The administration of justice normally requires that substance of all  
 disputes should be investigated and decided on their merits and that  
 errors and lapses should not necessarily debar a litigant from pursuit of  
 his rights."*

I concede to that holding and would proceed further to state that it is not in the  
 interest of justice that a party who has a good cause to be locked out of court  
 proceedings as that I not the purpose for which the courts were set. This is because  
 20 according to Black's Law Dictionary (9<sup>th</sup> ed.) on page 251 good cause is defined as

A legally sufficient reason. ... good cause is often the burden placed on a litigant  
 (usually by court rule or order) to show why a request should be granted or an action  
 should be excused. -Also termed good cause shown; just cause; lawful cause;  
 sufficient cause.

25 Relating the above rationale to the instant application and upon carefully perusing  
 the records, I note that Miscellaneous Application No. 182 of 2020 was dismissed on

5 22<sup>nd</sup> October 2021 for want of prosecution on the basis of a ruling, which I quote thus;

10 *"... the applicant was given two weeks from 15/09/2021 to file written submissions, but to date, none is on record. Only that of the respondent filed on 13/10/2021 is on record. The applicant, thus, has failed to prosecute his application, which is dismissed for want of prosecution given that the respondent is not required to make submissions before the applicants make their case. "*

The dismissal order was based on the non-prosecution of Miscellaneous Application No. 182 of 2020 by the applicants on the basis that they failed to comply with the  
15 court directives given on 15/09/2021 to file their written submissions in two weeks from 15/09/2021.

However, the applicants in this instant application contend in their affidavits in support that they duly filed their submissions at the court registry on 29<sup>th</sup> September 2021 and even served on counsel for the respondent on 30<sup>th</sup> September 2021, who  
20 made a reply by 13th October 2021.

The applicants have annexed **"Annexure B"** as the evidence of their filing their submissions in compliance with the court's directives. This is against the respondent's contention in his affidavit in reply that this court was mandated to terminate the application as it had no merit and that the applicants are merely  
25 frustrating the execution process by filing this application, given the respondent's age of 92 years.

I have carefully perused **"Annexure B"** which is a copy of the applicants' submissions and I note that it clearly bears a received court stamp of the date of 29<sup>th</sup> September



5 2021 which is exactly two weeks which the court directed that the applicants file their written submissions.

Apparently the same mysteriously went missing from the court file which in my considered view smacks of unfair play by whosoever did so for on "Annexure "B" itself there is an acknowledgement of receipt of the said submissions by M/s Erabu  
10 and Co Advocates on behalf of the respondent on 30/09/2021.

There is no opposing evidence from the respondent that the said M/s Erabu and Co Advocates was not acting on behalf of the respondent and as such I would take it that the respondent did receive the applicant's submissions.

This even so for there is on record the respondent's reply dated 13<sup>th</sup> October, 2021  
15 to the said submissions which upon perusal clearly show that it was responding to the applicants' submission of 29<sup>th</sup> September, 2021.

Clearly, it was true that the applicants filed their submissions which mysteriously went missing from the court record and which by error and mistake made the court to dismiss Miscellaneous Application No. 182 of 2020 which ought not to have been  
20 the case.

It is thus my finding that the applicants complied with court's orders and filed their submissions in Miscellaneous Application No. 182 of 2020 meaning that they did actually prosecute their application and so the order of dismissal of the same was in error.

25 That being the case, I do find that this instant application has merits and would accordingly allow this application by setting aside the dismissal order of Miscellaneous Application No. 182 of 2020 and reinstate it.





5 b) What remedies are available to the parties?

The applicant sought three orders; thus, an order dismissing Miscellaneous Application No. 182 of 2020 be set aside, Miscellaneous Application No. 182 of 2020 be reinstated and heard on its merits and the costs of this application be provided for.

10 I have already indicated that the applicants' submissions were on file as per the directives of the court, the consequence of which the order dismissing Miscellaneous Application No. 182 of 2020 is hereby set aside.

The applicants prayed that Miscellaneous Application No. 182 of 2020 be reinstated and heard on its merits.

15 The applicant averred that the applicants are still interested in pursuing the claim, which has a high chance of success.

On the other hand, the respondent contends that the applicants be ordered to deposit security for costs before the grant of the application, and in default thereof, this application be dismissed with costs to the respondent.

20 I am not convinced on the respondent's contention that the applicants be required to pay security for costs before the grant of this application as the averment and submission are not grounded in law for applications of this nature.

Also I note that the dismissal order of Miscellaneous Application No. 182 of 2020 appears to have arisen as a result of the court's own mistake and as such the  
25 applicants' cannot be condemned for the inaction of the court as doing so would not be justice.



- 5 The above being so, I find that this application is meritorious and is allowed accordingly with Miscellaneous Application No. 182 of 2020 reinstated as having been dismissed irregularly.

8. Orders:

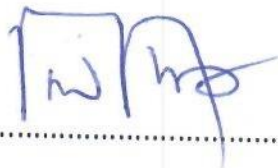
- 10 The records do show that the submissions in Miscellaneous Application No. 182 of 2020 are missing from the court file despite its having apparently been filed.

In the interest of the justice of this matter, I would order the applicants to file afresh their submissions by 19<sup>th</sup> April, 2024 with the respondent filing by 26<sup>th</sup> April 2024 and any rejoinder filed by 1<sup>st</sup> May, 2024.

Ruling in Miscellaneous Application No. 182 of 2020 for 8<sup>th</sup> May, 2024 at 2.00 pm.

- 15 No order is made as to the costs in this application.

I so order.



Hon. Justice Dr Henry Peter Adonyo

Judge

12<sup>th</sup> April 2024