IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. APPLICATION NO. 304 OF 2021

(ARISING FROM HIGH COURT CIVIL APPEAL NO.29 OF 2018)

BUSHENYI DISTRICT COUNCIL……APPLICANT

versus

MUSISI FRED…… RESPONDENT

BEFORE: Hon. Justice Ssekaana Musa

RULING

This is an application to set aside the order for dismissal of Civil Appeal No. 29 of 2018, the application is brought under Section 98 Civil Procedure Act Cap 71, Section 33 Judicature Act Cap 13, Order 43 Rule 14 and Order 52 Rule 1and 3 Civil procedure Rules S.I 71-1 seeking the following orders;

1. The court be pleased to set aside the order for dismissal of civil appeal no. 29 of 2018
2. Civil Appeal No. 29 of 2018 be readmitted or re-instated.
3. Costs in the application be provided for in the main cause

The grounds for the application state as follows,

1. The applicant has sufficient cause for non- appearance when the suit was fixed and called on for hearing on the 17 December, 2019.

2. That as the appellant in civil appeal no 29 of 2018, the applicant is still interested in pursuing the claim up to its final determination.
3. That the applicant's case has a high chances of success.
4. That its in the best interest of justice that the matter be re-instated or readmitted.

The applicant was sued by the respondents in civil suit no. 680 of 2014 at the Chief Magistrates Court of Mengo where an exparte judgment and orders were entered against her and the defendant Kalensi Emmanuel.

The applicant the made an application for setting aside exparte judgment against the orders vide Misc. Application no 179 0f 2017 which application was dismissed with taxed costs to the respondents.

Dissatisfied with the orders, the applicant pursued for the record of proceedings from Mengo and instituted Civil Appeal No. 29 0f 2018 against the respondent in this honorable court on the 12th day of April, 2018, however the applicants lawyer the late Mr. Tumwesigye Charlie suffered a cute Hemorrhagic Gastritis that later claimed his life on the 10th day of June 2019, on the 17th day of December, 2019 this court dismissed the said appeal under O. 43 r 14 CPR .

The applicant was represented by *Bwire Ronald* while the respondent was represented by *Pande Norman* holding brief for *Peter Kimanje Nsibambi*

Whether Civil Appeal No. 29 of 2081 can be re- admitted or re-instated?

Counsel for the appellant submitted that the applicant was prevented by sufficient cause to warrant of order sought and he relied on O. 43 R 16 CPR.

'' where an appeal is dismissed under rule 14 or 15 of this order, the appellant may apply to the high court for readmission of the appeal, and, where it is proved that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing a sum required, the court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit.''

In support of his submission, counsel for the applicant cited and relied on the case of **Bishop Jancinto Kibuka v The Uganda Catholic Lawyers Society And Others Misc. App No 696 Of 2018 (unreported)** where court cited the case of **Gideon Mosa Onchwati v Kenya Oil Co. Ltd And Anor [2017] KLR** and defined sufficient cause to mean "a party had not acted in in a negligent manner or there was want of bonafide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been not acting diligently or remaining inactive."

Counsel further submitted that failure on the previous advocate to inform her of the hearing date resulted into the dismissal of the appeal. He cited the case of **Banco Arabe Espanol v Bank Of Uganda SSCA No. 8 Of 1998** where it was held that mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Counsel further submits that such a case should be heard on its merits because it constitutes just cause.

Counsel for the respondent in his written submissions submitted that the firm of advocates that represented the applicant in all court processes in the lower court and the dismissed appeal is Tumwesigye & co. Advocates, the same firm of advocates representing the applicant in the present application therefore

negligence of counsel should is a move to mislead court and cannot amount sufficient cause.

Counsel further submits that the affidavit in support of the application in Annexture "B" which is allegedly a death certificate of Tumwesigye Charlie said to be the former lawyer, shows that the lawyer died on 10th June, 2019, he submits that mistake of counsel does not arise in the particular case that was dismissed on 17th December, 2019 these are more than 6 months since the alleged death of a lawyer and one wonders whether the said lawyer died with instructions to prosecute the appeal.

Counsel for the respondent further submits that death is being used an excuse by the appellant and his alleged present advocate to circumvent justice and abuse of court process, counsel relied on the authority of **External Church Of God v Sunday Kasoke Joseph High Court Of Uganda HCT-CV-MA-0011 Of 2016** where the application was dismissed. The issue of not visiting the negligence of counsel on the litigant in my view is a mere excuse by new advocates to get themselves clients, the litigant just as his advocate needs to know the hearing dates of his case. Equity aids the vigilant as the maxim states. It is only the duty of the advocate to show up in court but the litigant too. Litigants ought to be vigilant and follow upon their cases.

Counsel for the respondent further submitted that the applicant did not take any steps to set aside the dismissal of the appeal until 21st of April,2021 which is along period to set aside the dismissal amounts to inordinate delay. He relied on the authority of **Lucas Marisa v Uganda Breweries Limited (1988-90) HCB 131** where

court dismissed an application within reasonable time and one year and seven months in that case was considered to be inordinate delay.

Counsel further submitted that the application set out grounds in O.43 R.6 CPR supra to entitle him to set aside a dismissal order under the law and the applicants attempting to tell court about the probability of success of the appeal is not a ground for reinstatement of an appeal under the law.

Counsel also submitted that the affidavit in opposition of this application which has not been challenged, the applicant only woke up upon being served with a notice to show cause why execution should not issue and this was more than two years after the alleged death of the lawyer and dismissal of the appeal amounts to guilty of dilatory conduct.

ANALYSIS

I have considered the submissions of counsel for the applicant and it is clear that there has been inordinate delay and dilatory delay in Civil Appeal No. 29 of 2018, the applicants continued absence was always delayed the proceedings of this matter.

Inordinate delay in the case of *Primor Plc v Stokes Kennedy Crowly [1996] IR* court held that having found that inordinate delay existed, the court then considered whether the balance of justice.

There should be an end to litigation, as the Roman maxim sates that ***'interest republic it suit finis litium.'*** That translates as 'it concerns the state that there should be an end to law suits.'

This is appeal arising from the Chief Magistrates Court and was originally filed in 2014 and was heard ex-parte and determined on 3rd/03/2015. The applicant filed an application to set aside the ex-parte judgment and the same was dismissed on 25th/09/2017.

The applicant dissatisfied with the said order of dismissal lodged an appeal on 12th April 2018 by filing a memorandum of appeal. When the same was fixed for hearing on 17th December 2019 none of the parties was present and the court dismissed the same for want of prosecution under O.43 r 14.

The applicant filed this application to set aside the dismissal on 21st April 2021 and claims that the main reason for the delay was that the former counsel Tumwesigye Charles passed on in June 2019. The application to set aside the dismissal is brought almost after 20 months after they had been served with a Notice to show cause.

One of the most vexed and worrying problems in the administration of civil justice is of delay. Delay in disposal of case threatens justice. The lapse of time blurs truth, weakens memory of witnesses and makes presentation of evidence difficult. This leads to loss of public confidence in the judicial process which in itself a threat to rule of law and consequently democracy.

An essential requirement of justice is that it should be dispensed as quickly as possible. It is a well-known adage that “Justice delayed is Justice denied” The delay by litigants should be punished by dismissal of such suit in accordance with the Civil Procedural Rules. This court notes that the application was made 20 months after the dismissal which delay is inordinate and is unexplained and

inexcusable in the circumstances. Not every mistake of counsel should be excused. See ***Lucas Marisa v Uganda Breweries Limited [1988-90] HCB 131***

Secondly, upon perusal of the Memorandum of Appeal filed in this court on 12th April 2018 and yet the application to set aside had been dismissed on 25th September 2017. Therefore the appeal was equally filed out of time prescribed under the rules. Therefore, the said appeal would still have suffered a 'still birth' and on this ground would have been dismissed for being time barred.

This application is dismissed with costs to the respondent.

I so Order

Ssekana Musa
Judge
22nd August 2022