IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 041 of 2017

In the matter between

ACAYE ALEX **APPELLANT**

And

1. ONYANGO BENJAMIN
2. OBOL SEVERINO
3. OMONA VENTORINO
4. OTTO PATRICK
5. NYERO RICHARD **RESPONDENTS**

Heard: 2 September, 2019.
Delivered: 26 November, 2019.

Civil Procedure *— Re-instatement of suits — whether there were sufficient reasons to justify re-instatement of the suit — The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and errors, lapses should not necessarily debar a litigant from the pursuit of his rights.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for a declaration that he is the rightful customary owner of approximately 600 x 200 metres of land forming part of approximately 800 - 1,000 acres of land located at Akworo Te-Cwaa village and Manwoko North village, Akworo Parish, Labongo Amida sub-

county in Kitgum District, an order of vacant possession, general damages for trespass to land, *mesne* profits, a permanent injunction and the costs of the suit.

[2] His claim was that the land in dispute originally belonged to his late grandfather Aodoch Achori who acquired it in 1930. When he died it was inherited by the appellant's father Okema George. The respondents were during 1995 permitted by Okema George to temporarily grow crops on approximately ten acres of that land. However, upon his death on 30th November 2006, the respondents unlawfully and without authority extended their occupancy to approximately forty (40) acres. They have since July, 2013 claimed to be the owners of the land. They have gone ahead to let out parts of the land to divers persons without the appellant's consent, hence the suit.

[3] In their joint written statement of defence, the respondents denied the appellant's claim. The 1st respondent averred that the land he is occupying measures approximately ten acres which belonged to his late father William Okana. He was born and raised on that land and has lived thereon since 1962. The 2nd respondent averred that the land he is occupying measures approximately three acres which he inherited from his late father Ogena Martino in the year 2002. The 3rd respondent averred that the land he is occupying measures approximately one acre which he inherited from his late father Oryema Serafino. The 4th respondent averred that he inherited the land he is occupying from his late father Marko Obiya in 1958. All the respondents claimed to have trees, crops, homesteads and graves of their deceased relatives on the land. They prayed that the suit be dismissed with costs.

[4] Following an amendment of the plaint, the parties and their respective counsel appeared in court on 9th February, 2017. They were directed to file a joint memorandum of scheduling and the suit was adjourned to 7th March, 2017. On that day the trial Magistrate was indisposed. Both counsel did not turn up in court but the parties were present. The suit was adjourned by another Magistrate to

29th March, 2017. On that day the respondents and their counsel appeared in court but the appellant and his counsel did not. The suit was dismissed as provided under Order 9 rule 22 of *The Civil Procedure Rules*. The appellant on 19th April, 2017 filed an application for that order to be set aside and for re-instatement of the suit. His argument was that he had an earlier fixture for 29th March, 2017 in a different court and he had instructed his client to seek an adjournment to 3rd April, 2017. Both him and his client were under the impression that the Magistrate had adjourned the suit to that date and indeed turned up in court on 3rd April, 2017 only to be surprised that the suit had been dismissed six days before, on 29th March, 2017.

Ruling of the court below

[5] In his ruling, the trial Magistrate found that "no advocate appeared on the 7th. They only sent in their clients. It is therefore not a surprise that there was a miscommunication." He however went ahead to find that there was no evidence on record to support counsel for the appellant's argument that the suit had been adjourned to 3rd April, 2017. Counsel for the appellant too did not explain why he was not in court on 7th March, 2017. Had he been in court on that day, he would have ensured that the suit was fixed for 3rd April, 2017, the date that was convenient to him. The application was on 2nd October, 2017 accordingly dismissed with costs, on ground that the appellant and his counsel had not furnished sufficient cause for their non-appearance on 29th March, 2017, hence this appeal.

The grounds of appeal:

[6] The appellant was dissatisfied with the decision and appealed to this court on one ground as follows;

1. The learned trial Magistrate erred in law and fact when he ruled that the appellant did not present sufficient reasons to justify a re-instatement of the suit.

Arguments of Counsel for the appellant:

[7] In his submissions, counsel for the appellant argued that the court had to determine whether the appellant and his counsel had an honest intention to attend the hearing and did their best to do so. Counsel for the appellant's explanation that he had a prior engagement fixed for 29th March, 2017 and his belief that the suit had been adjourned to 3rd April, 2017 constituted sufficient cause since the non-appearance of the appellant and his counsel on 29th March, 2017 was out of inadvertence. An error regarding the date fixed for haring constitutes sufficient court and the trial court misdirected itself when it found otherwise. He prayed that the appeal be dismissed.

Arguments of Counsel for the respondents:

[8] In response, counsel for the respondents, submitted that the appellant never made a prayer for the suit to be adjourned to 3rd April, 2017. The court unequivocally adjourned it to 29th March, 2017 in the presence of the appellant. The appellant did not furnish a reasonable explanation for his absence from court on that day and the trial court came to the right conclusion when it dismissed the application for re-instatement. the court properly exercised its discretion not to reinstate the suit since rules are not made in vain. Re-instatement would be contributing to the problem of backlog and it is important that litigation comes to an end. He prayed that the appeal be dismissed with costs.

[9] The only question for determination in applications of the nature presented to the trial Magistrate is whether there was sufficient cause for the nonappearance of the plaintiff and his Counsel on the day the suit was dismissed. All the appellant

needs to do is to satisfy Court that he and his counsel had an honest intention to attend the hearing, they did their best to do so but for a countervailing event, and that they were diligent in applying for re-instatement of the suit. The law does not offer a definition of what amounts to "sufficient cause" but several countervailing events have been found sufficient by courts, such as; a mistake by the plaintiff's counsel although negligent (see *Shabir Din. v. Ram I'arkash Anand (1955) 22 E.A.C.A. 48*); sickness of counsel (see *Nuru Nakiridde v. Hotel International [1987] HCB 85*). Although the rules do not provide for a time limit, the application to set aside an order of dismissal must be brought within a reasonable time (see *Marisa Lucas v. Uganda Breweries Ltd [1988- 90] HCB 131*).

[10] Furthermore, the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and errors, lapses should not necessarily debar a litigant from the pursuit of his rights. Unless the other party will be greatly prejudiced, and cannot be taken care of by an order of costs, hearing and determination of disputes should be fostered rather than hindered (see *Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998*).

[11] I have found nothing in the appellant 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. Had the trial court properly directed itself, it would have come to a different conclusion.

Order:

[12] In the final result, I find merit in the appeal. 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 and of reinstatement are to the respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Ogik and Co. Advocates.

For the respondent : M/s Odongo and Co. Advocates.