THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 0020 OF 2023

(ARISING FROM MISC. CAUSE NO. 016 OF 2012)

(ARISING FROM KAS – 00 – CV – CA 009 OF 2010)

1. **MUHINDO ANDREA**
2. **KIIZA JACKSON :: APPLICANTS**

VERSUS

KAHINDO ALEX :: RESPONDENT

BEFORE: HON JUSTICE VINCENT WAGONA

RULING

The applicants commenced this application under Rule 2(2) of the Judicature (Court of Appeal) Rules, Section 98 of the Civil Procedure Act and Order 44 rules 2, 3 and 4 of the Civil Procedure Rules for orders:

1. That leave be granted to the applicants to appeal out of time against the ruling and orders of the High Court given by Hon Lady Justice Elizabeth Jane Alividza on 21st October 2020 in Misc. Application No. 0016 of 2012.
2. That the costs of taking out the application be provided for.

The application was supported by the affidavit of Mr. Muhindo Andrea, the 1st applicant who stated:

1. That judgment was entered in Misc. Cause No. 0016 of 2012 in favour of the Respondent on the 21st day of October 2020. That the applicants got to know

that judgment had been delivered in Misc. Cause No. 0016 of 2012 when they were served with a taxation hearing notice on 28th October 2022 before they could seek leave to appeal against the ruling.

2. That the 2nd applicant had instructed Mr. Muhumuza Sam of legal Aid Project of Uganda Law Society to prosecute on their behalf Misc. Cause No. 0016 of 2012 in the High Court and to appeal against the ruling if the result was not in their favour.
3. That the said Mr. Muhumuza informed the applicants that he would inform them when the case was due for ruling. That to their surprise, the applicants came to know of the delivery of the ruling after they were served with taxation hearing notices for the respondent's bill of costs.
4. That after receipt of the taxation notice, the 1st applicant visited the registry of the High Court Fort Portal on 7th November 2022 and found that indeed a ruling had been delivered in the respondent's favour. That the applicants are dissatisfied with the said ruling and intended to appeal against it.
5. That the applicants' acts of the former lawyers not informing them in time about the ruling in Misc. Cause No. 0016 of 2012 is a mistake or negligence on the part of the said lawyer and that the same should not be visited on the applicants.
6. That the intended appeal has a likelihood of success since the applicants intend to challenge the authority of the L.CIII Court in entertaining and hearing a suit over land in its capacity as a court of first instance. That the time within which to seek leave to appeal has since expired necessitating an application for leave to appeal out of time. That it is just and equitable in the circumstances that this application is allowed.

The application was opposed by the Respondent who contended in the affidavit in reply as follows:

1. That the application is incompetent since the notice of motion was not given under the hand of the Assistant Registrar and thus the same is frivolous and vexatious.That there is no automatic right of appeal against a revision order of the High Court and thus the current application is incompetent. That Misc. Cause No. 16 of 2012 had earlier been dismissed on 18th April 2013 and later reinstated. That the Applicants were duly aware of the ruling delivered on 21st October 2020 and the applicants voluntarily vacated the land.
2. That the applicants did not explain why they had to wait till March 2023 when this application was filed. That the Applicants have never instructed Mr. Sam Muhumuza to handle on their behalf Misc. Application No. 016 of 2012. That the intended appeal has no chances of success.

Issues:

I find the following as the issues at the heart of this application:

(1) Whether leave should be granted to the application to appeal against the ruling of this court in Misc. Cause No. 016 of 2012 out of time.

(2) Remedies available.

Representation and Hearing:

Mr. Lubangula Geofrey of M/s Bagyenda & Co. Advocates represented the Applicants while Mr. Sibendire Geofrey of M/s Sibendire, Tayebwa & Co. Advocates represented the Respondent. Both parties filed written submissions which I have considered.

CONSIDERATION OF THE APPLICATION:

Learned counsel for the Respondent raised several objections that I will resolve first.

1. **That the application is not signed and Sealed:**

Learned counsel for the Respondent contended that the notice of motion was not given under the hand and seal of the Assistant Registrar. That it is trite law that every notice of motion must be given/signed and sealed by the responsible judicial officer. It was contended that the one in issue was not signed and sealed by court thus rendering the current application incompetent.

Resolution:

Order 5 rule 1(5) of the Civil Procedure Rules provides thus:

> ***Every such summons shall be signed by the judge or such officer as he or she appoints, and shall be sealed with the seal of the court.***

It is thus a mandatory requirement that all summons issued by a court of law must be signed and sealed and the non-compliance leads to rejection of such summons. The purpose of a signature and a seal is among others to ensure that summons issued by court are authenticated to avoid scenarios of such court documents being issued by persons who are not legally authorized to do so.

In this case, I have reviewed the copy of the motion that is on record and it is dated and signed by the Assistant Registrar in full compliance with order 5 rule 1(2) of the Civil Procedure Rules. I thus find no merit in this point of law and it is accordingly overruled.

2. **That the applicant is seeking an order that cannot be granted by court and he has no right of appeal:**

Learned counsel for the applicant contended that this court has no jurisdiction to grant an order for extension of time within which to appeal. That court only has the power to extend time within which to lodge a notice of appeal and not time within which to appeal.That the application was thus filed wrongly in this court and it should be dismissed.

Learned counsel also contended that the applicant did not have an automatic right of appeal against the decision of court in Misc. Cause No.016 of 2012. Counsel cited Order 44 rule 1 of the Civil Procedure Rules and Section 76 of the Civil Procedure Act. He thus asked court to strike out this application.

Resolution:

Section 76 of the Civil Procedure Act provides for orders which are appealable as of right and these do not include an order of court dismissing an application for revision. Order 44 rule1 of the Civil Procedure Rules also detail orders which are appealableas of right and an order dismissing an application for revision is not one of them.

Therefore, a party who desires to appeal against the orders of court rejecting an application for revision must first seek leave under order 44 rule 2 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act.The application for leave to appeal is in the first instance made to the court making the order sought to be appealed from.

Mr. Sibendire argued that the High Court has no jurisdiction and power to grant leave to appeal; that its powers are limited to extending the time within which to lodge a notice of appeal. I do not agree with this assertion. Rule 1(2) of the Judicature (Court of Appeal Rules) Direction S.13-10, provides that; *"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay*."

It is my understanding that the above rule read together with Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act,enables the High Court to grant orders to promote the ends of justice and to prevent an abuse of court process. Applications for leave to appeal to the Court of Appeal must be heard by the high court first.

I therefore find no merit in the objections raised by Mr. Sibendire and they are hereby overruled. I will proceed to examine the merits of the application.

Issue one:Whether leave should be granted to the application to appeal against the ruling of this court in Misc. Cause No. 016 of 2012 out of time.

Applicant's submissions:

It was contended by Mr. Lubangula for the applicant that the applicants were prevented by sufficient cause from fling the appeal against the ruling of this court in Misc. Cause No. 016 of 2012. It was submitted that the applicants had instructed a lawyer who did not inform them of the date when the case was scheduled for ruling. That such mistake and negligence of their lawyer should not be visited on the applicants being innocent litigants.

Learned counsel also invited court to the decision in **Eriga Jos Perino Vs. Vuzzi Azza & 2 others, Misc. Application No. 009 of 2017** where court observed that the governing principle in extension of time is that the administration of justice requires that all substance of the dispute is heard. He also invited court to the decision in**Banco Arabe Espanol Vs. Bank of Uganda [1999] 2 E.A 22** where the Supreme Court stressed that all the substance of the disputes must be investigated and decided on merits and errors or lapses should not debar a litigant from pursuing his rights unless the lack of adherence to the rules renders the appeal process difficult and inoperative.

Mr. Lubangula submitted that the applicants had demonstrated through the affidavit in support of the application specifically paragraphs 9 and 10, that their former lawyer did not inform them of the date the ruling was to be delivered and such mistake or negligence on the part of the lawyer should not be carried on them being innocent litigants and he cited authorities in support of the said position.

That the intended appeal was to challenge the authority of L.C.III Court in entertaining and hearing a land claim as a court of first instance. Learned counsel

thus contended that the failure by the applicants to take the necessary proceedings in time was caused by a mistake or negligence of their lawyer which should not be atoned to them. He thus prayed that the application is allowed with costs.

Resolution:

Rule 3 of the court of appeal rules provides thus:

Extension of time.

The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to the time as extended.

Rule 1 (1) & 2 provides that:

(1) The practice and procedure of the court in connection with appeals and intended appeals from the High Court to the court and the practice and procedure of the High Court in connection with appeals to the court shall be as set out in these Rules.

(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments

which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.

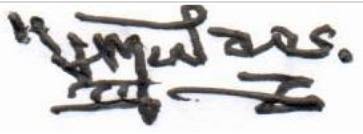
Order 51 rule 6 of the Civil Procedure Rules provides thus:

Power to enlarge time.

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order.

In considering whether to grant leave or not, court is guided by Order 51 rule 6 and rule 3 of the Court of Appeal Rules which is to the effect that enlargement of time within which to do any act under rules can only be granted upon proof of sufficient reason or cause why the act was no done in time.

In **Hadondi Daniel vs Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003**theCourt of Appeal in considering what amounts to sufficient cause held thus: *"it is trite law that time can only be extended if sufficient cause is shown. The sufficient cause must relate to the inability or failure to take necessary step within*



the prescribed time. It does not relate to taking a wrong decision. ***If the applicant is found to be guilty of dilatory conduct, the time will not be extended****".*

In**Mohan Kiwanuka Vs Aisha Chand SCCA no. 14 of 2002,** court held that no prejudice is suffered by a party if it can be compensated by costs.

This Court in **Kabarole District Local Government Vs. Gun Paper Industries Limited, Misc. Application No. 102 of 2022** stated thus: *"It is my understanding that whether a particular cause is sufficient or not is a matter for judicial determination taking into account the facts of the case. Each decision would depend entirely on the particular facts of the case. The events occurring before the expiration of the time provided for under the law may be relevant. Where a party has not been grossly negligent or palpably indifferent in prosecuting the case, the delay may be excused to afford granting an extension. It appears to me that in circumstances where the denial to grant an extension would occasion an injustice or lead to multiplicity of suits, or where in the court's consideration justice can be better served after hearing from both side especially in land matters, an extension should be granted. This is intended to ensure that justice is done to all no matter the faults, mistakes, lapses and minor procedural irregularities that do not go to the roots of the administration of justice."*

The Supreme Court in**Boney M. Katatumba Vs Waheed Karim (Administrator of late Suleiti Haji's Estate SC, xvii application No. 27 of 2007),**while considering an application for extension of time within which to appeal, Justice Mulenga (RIP) observed thus: **". ….. *For example an application that is brought promptly will be***

considered more sympathetically than one that is brought after unexplained inordinate delay. But even where the application is unduly delayed the Court may grant theextension if shutting out the appeal may appear to cause injustice."

It is thus my view, that where there is unreasonable delayin filing the application for leave, court would be reluctant to grant such leave unless the delay is satisfactorily explained by a party desiring such leave. In this case, the applicants'main contention is that they were not aware when the ruling was delivered and that they had instructed a lawyer to prosecuteit, who did not inform them of the date the case was scheduled for ruling.

I have considered the record of proceedings in Misc. Cause No. 016 of 2012 and all the applications which were filed thereunder. The Applicant filed Misc. Application No. 027 of 2013 seeking to reinstate Misc. Cause No. 016 of 2012 which had been dismissed by court for want of prosecution.The ruling of court in the said application was delivered by the Assistant Registrar on 3rd September 2020 in the presence of Counsel Muhumuza Sam for the Applicants and Mr. Kiiza Jackson, the 2nd Applicant. In the ruling of court, the trial judge indicated that she would deliver the rulingin Misc. Cause No. 0016 of 2012 on 21st October 2020.

I therefore believe that the 2nd Applicant was aware of the date when the ruling in Misc. Cause No. 016 of 2012 was scheduled to be delivered.I am not convinced that there was a mistake or negligence on the part of counsel. The Applicants in my view were fully aware of the datewhen the ruling was to be delivered.

Further to the above, since 2020 when the ruling was delivered, the applicants did not appeal against the ruling of court. They only wake up from their slumbers recently in 2023 when the execution process was commenced and filed this application to frustrate execution.

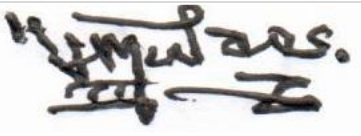
To add to the afore-stated, the applicants were served with taxation hearing notices on 28th October 2022 and they duly acknowledge receipt as per the affidavit of service on record and they admitted this fact under paragraph 3 of the affidavit. Since then, they again went back and waited until March 2023 when a notice to show cause why execution should not issue against them was served upon them. This application was then filed on 29th March 2023.

I find in the circumstances of this case, that there has been inordinate, inexcusable and unexplained delay in filing this application and as such, there is no sufficient cause demonstrated to persuade court to grant this application. I view it as a frantic attempt to frustrate execution.

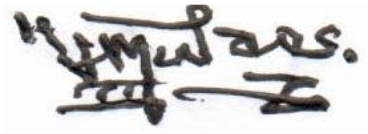
Issue two: Remedies:

I have found no merit in the applicants' application and the same is hereby dismissed with costs awarded to the Respondent.

Since this Application has failed, the subsequent application, that is, Misc. Application No. 021 of 2023 that sought to stay execution of the orders in Misc. Cause No. 016 of 2012 is overtaken by events and it cannot stand on its own to be considered. In the result, Misc. Application No. 021 of 2023 is therefore hereby struck out and the file closed.



It is so ordered



Vincent Wagona

High Court Judge

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18.05.2028.