

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(CORAM: BUTEERA, DCJ; BAMUGEMEREIRE &
GASHIRABAKE, JJA)

5 **CIVIL APPLICATION NOS. 100 & 103 OF 2020**

(ARISING OUT OF CIVIL SUIT NO. 046 OF 2015)

PROFESSOR SAM TULYA-MUHIKA :::::::::::::::::::: APPLICANT

VERSUS

1. **APOLLO BRIGHT BWEYAKYE**

10 2. **CHRISTOPHER NGABIRANO**

3. **FRED ZIRYABAREEBA :::::::::::::::::::: RESPONDENTS**

4. **STANLEY OMWEHANGIRE**

RULING OF THE COURT

15 The applicant brought Application No. 100 of 2020 by Notice of Motion under rules 2 (2), 5, 43 (1) & 2 and 44 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, seeking leave to file and serve his Record of Appeal out of time.

20 Pursuant to that Application, he also filed Application No. 103 of 2020 seeking an order of stay of execution of the decree in Kabale Civil Suit No. 046 of 2015 until the final hearing and determination of his intended Appeal in this Court.

We shall now proceed to handle Application No. 100 of 2020.

Background

Briefly, the background to this application is that the applicant on the 25th of October 2015 instituted Civil Suit No. 46 of 2015 against the respondents for recovery of land in the High Court of Uganda at Kabale. The respondents raised a preliminary objection to the effect that the suit was barred by limitation and the trial Court entered judgment with costs against the applicant basing on the preliminary objection. The applicant being aggrieved with the decision of the trial court, instructed his then lawyers, M/S Kangaho & Co. Advocates to institute an appeal which they did but it was unfortunately out of time; hence this application.

Grounds of the application

The application is supported by the affidavit of Alex Baguma briefly stating that; the applicant having been aggrieved with the decision of the trial court, he instructed his former lawyers, M/S Kangaho & Co. Advocates to immediately institute an appeal. The lawyers filed the Notice of Appeal on 26th February 2019 and wrote a letter requesting for the record of proceedings which were certified in May 2019. The applicant learnt that his lawyers did not take the necessary steps to file the Record of Appeal upon his return from Somalia by which time to do so had elapsed. He prayed that the mistake of the former lawyers should not be attributed to the applicant.

In reply, the respondents through Apollo Bright Bweyake the 1st respondent herein, swore an affidavit stating that Civil Suit No. 46 of 2015 was dismissed on 21st January 2019 in the presence of the applicant with his advocates and the applicant was aware of the time
5 in which to file an appeal and that he could not put the blame on his lawyers. Further that the application is brought in bad faith with inordinate delay and that the applicant has not shown sufficient reasons to warrant the grant of the application hence it should be dismissed. The 1st respondent also deponed that the applicant is guilty
10 of dilatory conduct having filed this application after one year and one month, which is an abuse of court process.

Representation

At the hearing, the applicant was represented by Mr. Andrew
15 Bwengye while Mr. Asasira Bosco Kiyonga represented the respondent.

Applicant's Submissions

Counsel for the applicant relied on **rule 83 (1) of the Judicature (Court
20 of Appeal Rules) Directions S.I 13-10** which provides that an appeal shall be lodged in the registry within 60 days after the date when the Notice of Appeal was lodged. It was counsel's submission that the certified copies of the Judgment and Record of proceedings were availed on 2nd May 2019 and as such the 60 days run out in August
25 2019 before the Record of Appeal was filed.

Counsel submitted that the law provides for extension of time where sufficient reason is shown by the applicant as stipulated in **rule 5 of the rules of this court.**

5 It was counsel's submission that the expression sufficient reason has been explained in various judicial decisions and must relate to failure to act within the stipulated time as was held in **Njagi v Munyiri, [1975] EA 197** quoted in **St. Kizito Youth Farm Ltd v Attorney General, Civil Application No. 58 of 1995.** Counsel cited various authorities in support of his argument on sufficient reason.

10 Counsel submitted that the considerations which guide courts in arriving at the appropriate decision on extension of time were outlined in **Tiberio Okeny & Anor v Attorney General & 2 Ors, Civil Appeal No. 51 of 2001.**

15 Counsel cited **Eng. Ephraim Turinawe & Anor v Molly Turinawe & 4 Ors, SCC Civil Application No. 36 of 2017** for the proposition that mistake of counsel should not be visited on the litigant. Further, counsel relied on **Rosette Kizito v Administrator General, [1993] 5 KLR 4** for the assertion that the application will not be granted if there
20 was inordinate delay in filing it.

Counsel contended that the applicant in this case exercised his right of appeal with due diligence by instructing his former lawyers to appeal whereby the Notice of Appeal and letter requesting for the record of proceedings were filed on 26th February 2019. Counsel submitted that
25 the applicant's former lawyers did not take the necessary steps of filing

the Record of Appeal in time and the applicant only discovered this upon his return from Somalia and upon discovering the unexplained delay, the applicant immediately instructed his new lawyers to proceed with the appeal hence this application filed on 15th January
5 2020.

It was counsel's submission that the applicant is not guilty of unexplained or inordinate delay and has presented a reasonable explanation of his failure to file the appeal in time.

It was counsel's further argument that the intended appeal is meritorious
10 and has high chances of success because of the nature of the subject matter of the dispute, which involves land, which is a source of livelihood and security.

Counsel submitted that the respondents have not presented sufficient grounds to show that the extension will be prejudicial to them thus it
15 is only fair and just that the applicant be accorded an opportunity to ventilate his grievances on appeal.

The Respondents' Submissions

In reply, counsel for the respondents submitted that Judgment in Civil Suit No. 46 of 2015 was delivered on 21st January 2019 in the presence
20 of both parties. The applicant filed his Notice of Appeal on 25th February 2019 which was 35 days after delivery of the judgment against which he intends to appeal.

Counsel contended that the applicant never sought leave of court to do so and there is no application filed to validate the said notice of

Appeal. He submitted that the Notice of Appeal is illegal, incompetent and not properly before this court for reasons that it offends **rule 76 (1) and (2) of the Judicature (Court of Appeal Rules) Directions**, having been filed out of time thus it should be struck off.

5 Counsel cited **Herbert Semakula Musoke & Anor v Lawrence Nabamba & 2 Ors, SCCA No. 22 of 2019** where court held;

“Having found that the Notice of Appeal is incompetent for being filed out of time, we do not find it gainful to go into the merits of submissions...”

10 Counsel for the respondent contended that the principles governing extension of time under **rule 5 of the rules of this court** were well established that time should be extended only for sufficient cause and the reasons for extension of time must relate to the inability or failure to take a required step in time and the time cannot be extended if the
15 applicant is guilty of dilatory conduct or inordinate delay.

Counsel submitted that the affidavit in support of this application deponed by Alex Baguma in paragraphs 6,7,11,9 and 4 does not raise sufficient grounds to warrant the extension of time and the said paragraphs are based on lies and hearsay evidence meant to mislead
20 court and are an abuse of court process.

It was counsel’s submission that Civil Suit No. 46 of 2015 was determined interparty basing on matters of law and the whole plaint filed by the applicant was rejected under **order 7 rule 11 (d) of the**

Civil Procedure Rules. Counsel contended that the applicant filed the suit after a period of 27 years contrary to the provisions of the Limitation Act.

It was counsel's argument that the applicant, instead of pursuing his appeal at that time when he instructed his former lawyers to pursue it, instead decided to file a fresh suit with similar facts against the respondents seeking the same remedies which suit was also dismissed and that was when he decided to pursue the current appeal. Counsel contended that the applicant is fond of taking advantage of court process by filing various applications against the respondents, which he has failed to prosecute which amounts to abuse of court process.

Counsel submitted that the reasons advanced by the applicant are not sufficient to warrant the extension of time and the applicant is guilty of dilatory conduct. Counsel added that even if the time were to be extended, the appeal would fail basing on the **Limitation Act and order 7 r 11 (d) of the Civil Procedure Rules**, since the suit was brought after 27 years. Reference was made to **Uganda v Ntambi Vincent, Criminal Application No. 8 of 2019 (SC)**, **Hadondi Daniel v Yolamu Egondi, CACA No. 67 of 2003** and **Kananura Andrew Kansiime v Richard Henry Kaijuka, SC Civil Reference No. 15 of 2016** for the propositions that for extension of time, the applicant should not be guilty of dilatory conduct and sufficient reason has to be shown to warrant the extension.

Counsel submitted that the only remedy for this court is to dismiss this application with costs.

Decision of Court

We have perused the applicant's grounds in support of the application, the affidavit and submissions thereto as well as the respondents' reply and submissions.

The Judgment from which the appeal emanates was entered by the trial court on **21st January 2019**. The Notice of Appeal was filed on 26th February 2019 and the Record of proceedings was availed to the applicant on 2nd May 2019.

Rule 76 (2) of the Judicature (Court of Appeal Rules) Directions provides that the notice of appeal should be lodged within fourteen days after the date of the decision against which it is desired to appeal. It is evident that the notice of appeal in this case was lodged after 35 days, outside the stipulated time by the rules.

We shall look at the grounds for the applicant's application and determine whether or not they justify a grant of the same.

Rule 5 of the Judicature (Court of Appeal Rules) Directions gives this court the discretion, for sufficient reason, to extend the time limited by the rules.

This rule provides a discretionary remedy that ordinarily would only be availed to litigants upon the demonstration of sufficient reason for recourse thereto. In the absence of a definitive definition of what

would amount to '*sufficient reason*', it has been proposed that this would be determined on a case-by-case basis with appropriate regard to the circumstances of each case. (See **St. Kizito Youth Farm Ltd v The Attorney General, CA Civil Application No, 58/1997**).

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In **Boney M. Katatumba v Waheed Karim, Civil Application No. 27 of 2007**, Mulenga, JSC noted that;

“What constitutes '*sufficient reason*' is left to the court's unfettered discretion. In this context, the court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. 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 the extension if shutting out the appeal may appear to cause injustice.”

In **Florence Nabatanzi v Naome Binsobodde, SC Civil Application No. 6 of 1987**, court noted that;

“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. Where an applicant instructed a lawyer in time, his rights

should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law."

In **Tropical Africa Bank Ltd v Grace Were Muhwana, SC Civil Application No. 3 of 2012 Katureebe, JSC** (as he then was) relied on an earlier case of **Godfrey Magezi and Brian Mbazira v Sudhir Rupaleria, SC Misc. Application No. 6 of 2003** where Karokora, JSC (as he then was) noted that;

"It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on to the litigant, leading to the striking out of his appeal thereby denying him justice. There are many decisions from this court and other jurisdictions in which it has been held that an application for extension of time, such as this one, where mistake or error or misunderstanding of the applicants' legal advisor, even though negligent have been accepted as a proper ground for granting relief..."

Further, in **Kasaala Growers Cooperative Society v Kakooza Jonathan & Anor, Civil Application No. 24 of 2010 (SC)** Tsekooko, JSC observed thus;

"I think that in land cases it is proper to allow parties to exhaust their proper legal rights of appeal. Naturally no court should condone lack of diligence by a party seeking a remedy from court."

The applicant avers in Paragraph 7 of his affidavit in support of the Application, that immediately after the Judgment he went to Somalia where he is employed. It is when he returned that he discovered that his former lawyers never took an essential step to file the Record of Appeal within the required time and as a result, the time within which to appeal had already lapsed.

He further averred under paragraph 11 of the affidavit that in the period of March when the new lawyers got instructions and restrictions had been imposed by the Ugandan government because of COVID-19. A lock- down to prevent the spread of COVID- 19 had been imposed. This prevented his new lawyers from filing an application for extension of time.

The above averments were not controverted by the respondents.

In the circumstances described above, we find that the applicant instructed his previous Advocates to file an appeal. He was deployed to Somalia a war torn country. The Lawyer did not file the appeal as instructed. The applicant did not know of the failure to file in time until his return from Somalia. He instructed his new lawyers but that was at the time of COVID-19 and there were government COVID -19 restrictions that prevent the new Advocates to act in time.

We find that the failure to file in time was caused by his previous Advocates who were instructed but failed to file in time.

We find this a proper case where the omission or inadvertence of Counsel should not be visited on the litigant.

We are persuaded that the applicant's application has merit. Noting that the applicant has already paid the costs in the lower court to the respondents and for the interest of justice, this being a land matter, we are inclined to grant this application so that the appeal can be heard on its own merits.

In the result we order as follows: -

1. The applicant is granted leave to file and serve his record of Appeal out of time.

2. Costs in Applications No. 100 of 2020 and No. 103 of 2020 arising from High Court Civil Suit No. 046 of 2015 shall both - abide the outcome of the main cause.

We so order

Dated at Kampala this 29th day of May 2023.



Richard Buteera
Deputy Chief Justice



Catherine Bamugemereire
Justice of Appeal



Christopher Gashirabake
Justice of Appeal