THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.111 OF 2017

(ARISING FROM CIVIL APPEAL NO.80 OF 2017)

1. RUTUKU FRANCIS
2. ISREAL RUTAGIRAKAHU
3. JASTINA TUMUSIME ::::::::::::::::::::::::::::::APPLICANTS
4. NTANGANDA WILSON
5. EDWARD ASIIMWE
6. MUHOOZI ROBERT

VERSUS

ELIPHAS NDAMAGYE ::RESPONDENT

CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA

(SINGLE JUSTICE)

RULING

This is an application brought by Notice of Motion under rules 5 and 43 of the Judicature (Court of Appeal) Rules. It seeks an order of this court to extend the time within which the Applicants ought to have filed Civil Appeal No.80 of 2017 and as a consequence, to validate the said appeal which was already filed.

The application is supported by the affidavits of five of the Applicants namely; Edward Asiimwe, Rutuku Francis, Muhoozi Robert, Ntanganda Wilson and Justine Tumusiime.

The Respondent filed an affidavit in reply disputing the averments of the Applicants and protesting that both the application and its affidavits in support were full of falsehoods and misrepresentations.

The Respondent instituted Civil Suit No.34 of 2011 in trespass against the Applicants before the Chief Magistrates' Court of Mbarara holden at Ntungamo claiming that they were trespassers on the suit land comprised in Rwampara Block 42 plot 13 Folio 19 Lease Register Volume 1373 measuring approximately 70.3 hectares. The suit land is a lease for 49 years valid from 1st October 1984.

The Applicants, in their defence, disputed the fact that they were trespassers and claimed inter alia that the land belonged to Israel Rutagirakahu and it was family land. Apparently, the said Israel Rutagirakahu was the father of both the first Applicant and the Respondent. In addition, he was allegedly the grandfather of the rest of the Applicants.

The Applicants counterclaimed for cancellation of the Respondent's certificate of title on grounds that it had been procured through fraud as the suit land was surveyed secretly.

The trial Magistrate entered judgment in favor of the Applicants. He dismissed the main suit and upheld the counterclaim with costs. He held that the Applicants/Defendants were lawful occupants on the suit land.

The Respondent in this application was dissatisfied with the said judgment and he appealed to the High Court sitting at Mbarara. After hearing the matter, the appellate Judge allowed the appeal on 16th September 2015. He set aside the decision of the Trial Magistrate and ordered for a retrial before a different Magistrate Grade One. He ordered each party to meet their costs on grounds that both parties are close relatives.

The Applicants were dissatisfied with the decision of the High Court. They filed a Notice of Appeal in the High Court on the 13th October 2015. A copy of this Notice of Appeal was transmitted to this Court on 19th November 2015.

The Applicants filed this application for extension of time on 4th May 2017 jointly with the Record of Appeal.

At the hearing of this application, the Applicants were represented by Rev. Ezra Bikangiso whereas Mr. Ngaruye Ruhindi represented the Respondent.

Counsel for the Applicants relied on the affidavits deponed by the Applicants in support of the present application. Counsel submitted that there was sufficient cause for grant of the said application. He added that the application had been filed without inordinate delay and that there was a prima facie case in the intended appeal.

Additionally, Counsel pointed out that the dispute in the appeal relates to land measuring approximately 72 hectares. He pointed out that judgment was read on 15th September 2015 and that though the appeal should have been filed by 30th September 2015, it was filed on 19th October 2015. It was late by 18 days.

He relied on paragraphs 6 and 7 of the affidavits of the 5th Applicant's affidavit. Counsel argued that a mistake of Counsel should not be visited on the client. Counsel conceded though that the 2nd Applicant had died as asserted by the Respondent's affidavit in reply.

Counsel for the Respondent opposed this application. He relied on the Respondent's affidavit in reply and insisted that the present application was frivolous and vexatious. Firstly, he pointed out that the 2nd Applicant was deceased and had died on 29th April 2012.

Secondly, he argued that the averment by the Applicants that the original suit was filed by them was false. He relied on a copy of the amended plaint attached to the Respondent's affidavit to prove that the original suit was filed by the Respondent and not the Applicants.

Counsel pointed out what he called falsehoods in the affidavits of the Applicants. He pointed out that the claims by the Applicants that the delay was occasioned by the failure by one Jonathan Bwagi to take steps to proceed with the retrial was a falsehood. He indicated that in fact, the Applicant's present Counsel had applied for typed proceedings on 28th September 2015.

He maintained that there was no mistake of Counsel in this matter and that once all the outright falsehoods in the affidavits are expunged, the entire affidavits deponed by the Applicants would collapse and leave the application unsupported by any evidence.

Counsel also pointed out numerous defects and irregularities in the affidavits deponed by five of the Applicants ranging from improper spelling of names and

defective jurats inter alia. All in all, Counsel maintained that there was no prima facie case disclosed in the present application.

I have given consideration to the arguments made by both Counsel and the affidavits deponed by the parties themselves. Counsel for the Applicants conceded that the 2nd Applicant was indeed deceased as asserted by the Respondent. A short death certificate was attached indicating that the 2nd applicant died in April 2012.

In respect of the 2nd Applicant who is a deceased individual and without any personal representative acting on his behalf, the application borders on abuse of court process and is hereby struck out. A suit cannot be maintained by a deceased person without his/her personal representative in law.

The key question to be determined is whether, as asserted by the remaining 5 Applicants, one Counsel Jonathan Bwagi of Bwagi & Co. Advocates is to be faulted for his delay in filling the present appeal within time.

Even without the Respondent's reply, the affidavits deponed by the Applicants, on their own, demonstrate that this is an outright falsehood. I will take the liberty to reproduce verbatim paragraphs 4 to 10 of the affidavits deponed by the Applicants. Incidentally the said paragraphs are exactly identical in all the five affidavits deponed by the Applicants.

4. That I and the other Applicants in this application were partially dissatisfied with the decision of Hon. Justice Matovu especially on Grounds 9 and 10 of his judgment, hence we consulted our lawyer Rev. Ezra Bikangiso who advised us to appeal against the judgment.

5. That I and the applicants were not satisfied with his advice based on the fact that Grounds 1 to 8 of the judgment which constituted the major questions of the dispute before the Court were determined in our favor, we opted to consult another lawyer.

6. That I and the other applicants on the 20th September 2015 consulted Counsel Bwagi Jonathan of Bwagi & Co. Advocates who advised us not to appeal, but to go for retrial as per the decision of Hon. Justice Matovu as it would be cost effective and easily determined since the major points of the dispute had been determined.

7. That I and other applicants having been convinced by the advice of Counsel Bwagi Jonathan, immediately instructed him to handle the matter, on the 26th day of September 2015, we visited him at his Chambers in Kabale District only to tell us that he was working on the suit, but to our dismay on asking one of the Clerks at Ntungamo Magistrate's Court, she informed us that no step had been taken.

8. That I and other applicants rushed to our original lawyer Rev. Ezra Bikangiso and informed him of what had transpired regarding the instructions to Counsel Bwagi Jonathan and he insisted that appeal was the right option as there was nothing to be retried though the appeal would be out of time, hence this Application.

9. That I and other applicants were informed by Rev. Ezra Bikangiso that the failure to take the necessary steps to have the retrial carried out, is purely the negligence of our former lawyer and cannot be visited on the clients.

10. That as an ordinary litigant, I was relying on the advice of my former lawyer Counsel Bwogi Jonathan whom I believe misadvised me on the procedure to go for a retrial and as a result, this caused a delayed in filing the appeal.

Clearly, Counsel for the Applicants appears to be filing this appeal against the wishes of his clients if these averments are to be taken as truthful. The Applicants desired to go for the retrial of the suit as ordered by High Court and even proceeded to instruct Counsel Jonathan Bwagi for that purpose.

According to the Applicants, Counsel Jonathan Bwagi appears not to have taken any immediate steps for purposes of the retrial and as a result, they rushed back to Rev. Ezra Bikangiso who instead advised them that he would file an appeal instead of proceeding with the retrial that they were interested in.

On this ground alone, this application cannot be sustained as the Applicants' averments demonstrate that they are more interested in the retrial ordered by High Court. There is nothing on record to suggest that the retrial has been over taken by events and Counsel Jonathan Bwagi does not seem to have been guilty of any delay in preparing for the retrial.

Besides, there is nothing on record to suggest that the failure by Counsel Jonathan Bwagi to take the necessary steps for the retrial could not be corrected by Rev. Ezra Bikangiso. Instead, he proceeded to commence filing of an appeal, against the express wishes of his clients, in a much more problematic manner.

It does not even help matters that the said Rev. Ezra Bikangiso is the one who prosecuted the Applicants' case before the High Court. That much is evident from the Record of Appeal. He is the one who filed the Respondents' submissions

in the High Court. The Applicants' affidavits conveniently omit that material information.

The said affidavits are calculated to mislead court to assume that the Applicants first contacted him after delivery of judgment by the High Court yet it was his duty to receive the said judgment and advise his clients in a timely manner on the procedural steps required if they wished to appeal.

As Counsel for the Respondent pointed out, the application itself and the particular averments reproduced above are, in fact, riddled with numerous falsehoods and deliberately misleading averments. Firstly, I already pointed out that the 2ndApplicant died in 2012 and could not have instructed Rev. Ezra Bikangiso to file this application in 2017.

Secondly, the Applicants' Counsel, Rev. Ezra Bikangiso applied for certified copies of proceedings from the High Court in a letter dated 28th September 2015 but received in the registry of the Court on 30th September 2015. That was well within the timelines for filing and serving the Notice of Appeal as well as the said letter. This was not done.

The said letter requesting for proceedings was clearly filed in Court within the appropriate timelines. Consequently, the Applicants cannot blame anyone except their present Counsel who was also representing them in the lower court. It was entirely the fault of Rev. Ezra Bikangiso that the Notice of Appeal was not filed and served on the opposite party within the fifteen days as required by the

Rules of this Court. The letter requesting for proceedings appears not to have been served on opposite Counsel as well.

I have failed to appreciate why the Applicants labored to blame another advocate for the sloppiness of their own Counsel whom they instructed within time and he opted for a different course of action altogether. The attempt by the Applicants to blame Counsel Jonathan Bwagi for the lapses of Rev. Ezra Bikangiso is yet another falsehood.

Further, the Applicants initially sought the advice of their present Counsel who advised them to appeal. If he did not advise them that appeals have strict timelines to be complied with, it is his fault. Incidentally, the Applicants' intended appeal seems to be, going by their averments, a stop gap measure to cure the delays in proceeding with the retrial ordered by the High Court. I do not appreciate how they intend to achieve that and cannot hesitate to hold that I am not convinced that they have a prima facie case of appeal.

It is trite law that an affidavit riddled with falsehoods cannot validly support an application before a court of law. **See *Eric Tibebaga vs Fr. Narsensio Begumisa & others, Civil Application No.18 of 2002***. I have also taken note of the concern raised, obiter dictum, by Hellen Obura, J as she then was, in ***Sam Aniagyei Obeng & another vs MTL Real Properties Ltd Misc. Application No.198 of 2011.***

In the said application before the High Court, the learned judge noted that though superior courts had adopted a liberal approach in dealing with defective affidavits in line with Article 126 (2) e of the Constitution, her preferred view would be that an affidavit, being sworn evidence, should not at all be admitted once it is proved that some parts contain falsehood.

She proposed that a clear distinction be made by superior courts between affidavits that contain obvious falsehood that goes to the substance of the evidence sought to be adduced and those defective in other aspects. I must state here that I share the same sentiments.

The Supreme Court in ***Col. Besigye Kizza vs Museveni Yoweri & EC, Election Petition No.1 o 2001*** adopted a liberal approach in dealing with affidavits that contain some falsehoods. Odoki C.J. upheld the position that false parts of an affidavit which were irrelevant to the matter at hand could be ignored and the rest of the averments considered.

Since that is the position taken by a superior court, I am bound by the said approach in dealing with the affidavits in this application. I already set out the averments of the Applicants which contain manifest falsehoods and misleading representations to the Court.

Unfortunately for the Applicants in this matter, the misleading and false averments contained in their paragraphs 4 to 10 of their similar affidavits form the crux of their case for extension of time.

I have ignored them and come to the inevitable conclusion that these affidavits are incapable of surviving upon severance of these misleading and false averments. Once the falsehoods and deliberate misrepresentations are disregarded, the Applicants' affidavits are incapable of supporting the present application. The entire application collapses in ruins and it is hereby struck out.

Before I take leave of this matter, I would like to caution Counsel who act for litigants to endeavor to draft affidavits with precision and avoid careless errors, misleading averments and falsehoods such as those that bedeviled the present application.

All jurats for the affidavits contained references to a female deponent yet only one of the five Applicants is female. The name on the jurat, in respect of two deponents, also differed slightly from the name on the rest of the documents. Counsel seemed to have abdicated his duty to act diligently for his clients in this matter.

This duty, in my view, becomes more important where one acts for illiterate litigants that may not be able to notice even the most elementary errors in the pleadings drafted on their behalf and to which they affix their signatures or thumbprints.

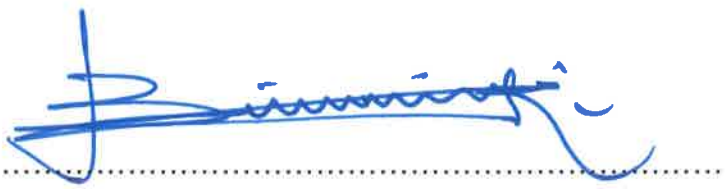
For the reasons already stated above, this application has no merit and is struck out as it is supported by affidavits incapable of presenting any case once the misleading and false averments are expunged.

The file should be remitted back to the Magistrate's Court for re-trial as ordered by the High Court.

In view of the Judgment by the High Court upholding the Magistrate's decision that the applicants are lawful occupants on the suit land, the scope of the re-trial should strictly be limited to determining the questions of the actual acreage held by each party based on the locus visit and occupations on ground. Issues already determined by both the High Court and Magistrate's court need not be re-litigated.

As to costs, I have noted that the parties to this application are close family members and in the interest of fostering the possibility of an amicable resolution of this land dispute, I will order that each party meets their costs of this application.

Dated at Kampala this.....1.....day of.....2017



HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

C/Application No. 111/17
Rutukky Francis & 5 others
Vs
EPIPHAZI NAAMASYE

- Amin - ct clerk
- Rev. Bekanja for the applicants
- Naamanye for the respt
- Parties are absent.
we ready for the Ruling

Ct: Ruling delivered in open court

11/12/17