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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO.31/1997

SIRAZALI GULAMURALI MERALI HUDANI :::::::::::::::::::::::::::::::::::APPLICANT

AND

JIMMY TEJANI :::::::::::::::::::::::::::::::::::RESPONDENT

(Arising out of High Court Civil Suit No. 712 of 1995)

RULING OF KIREJU, J.C.A.

This is an application for leave to file a notice of appeal out of time and also to serve a copy of the application of the proceedings in the High Court on the Respondent. The application is by Notice of Motion filed in this court on 29-8-1997. It is supported by an affidavit deponed by Innocent Ngobi Ndiko an Advocate, dated 29-8-1997. There was no affidavit in reply filed by the Respondent. The application was brought under Rule 1 (3) and 4 of the Court of Appeal Rules Directions 1996.

The brief background to this application as stated in the affidavit is that the applicant Sirazali Galamali Merali Hudani filed a suit HCCS No. 712 of 1995 against the respondent Jimmy Tejani which was dismissed with costs by Ntabgoba P.J on 6/12/1996. On 19-12-1996 a Notice of Appeal was filed in High Court and also served on Counsel for the respondent M/s. Mulenga, Kalemera & Co. Advocates as per Annexure "A" to the affidavit.

On 13-1-1997 Counsel for the applicant at the time namely

M/s. Kasirye, Byaruhanga Co. Advocates applied to the High Court for the record of proceedings (Annexure "A") followed by a reminder dated 28-2-1997 (Annexure "B"). However, inadvertently according to the affidavit, these two letters were not served on the respondent, within the time prescribed by law. The record of proceedings of the High Court are still being prepared, yet the (60) days with which the appeal should have been instituted have already expired. As a result of not serving the respondent with the application for a copy of proceedings, the applicant cannot take the benefit of the period of grace provided under rule 82 (2) and (3) of the Court of Appeal Rules Directions in computation of time hence this application.

At the hearing of this application the applicant was represented by learned Counsel Mr. Twesigire of M/s Muhumuza-Laki Twesigire & Co. Advocates and was assisted by learned Counsel Mr. Makeera of Makeera & Co. Advocates. A notice of change of Advocates was filed in this court on 19/9/97.

Mr. Twesigire in his submissions which were based mainly on what was contained in the affidavit argued that the inadvertent omission by the former Counsel to serve the respondent with a copy of the application for High Court proceedings should not be visited on the applicant. Counsel further argued that the delay of the appeal was also caused by the delay in providing proceedings to the applicant rather than failure to serve the respondent with the copy of the letter applying for proceedings. Counsel cited the case of Delia Almeida vs. Dr. Carmo Rui Almeida Civil Application No. 15/1990 Supreme Court which he said was on all fours with the present application, and that court in that

case granted the application for extension of time after finding that the delay was caused by delay of issuing the proceedings by court. Counsel prayed that the application be granted and costs abide the results of the appeal.

On his part Mr. Nkurunziza learned counsel for the respondent opposed the application on the ground that no sufficient cause had been shown by the applicant as required under Rule 4 of the Court of Appeal Rules Directions. Counsel argued that failure to serve the copies of the letters Annexure "B" and "C" to the respondent by the applicant was not inadvertent but ignorance of the rule. Counsel further argued that the applicant did not show in the affidavit on which facts the inadvertence was based. Counsel contended that from the case of Delia Almeida (supra) the Supreme Court held that mistakes or errors of judgement of Counsel may in certain circumstances amount to sufficient reason, and that this was however not automatic, the applicant has to show that the inadvertence alleged amounted to sufficient cause. Counsel also referred to Annexure "B" where the Deputy Registrar endorsed on the letter of 6-1-1997 that the applicant be given the proceedings on payment of due fees. Counsel argued that the applicant had not proved that the fees were paid and therefore he could not blame the court for not giving him the court proceedings. The blame should be on the applicant for failing to pay fees as ordered by the Registrar. Counsel further submitted that the applicant has not been diligent and vigilant as this application was filed almost 9 months after judgement intended to be appealed from was delivered. Counsel argued that the applicant has not shown in

the affidavit his chances of success in the intended appeal to enable court exercise its discretion. Counsel further argued that the interest of justice and equity also require that the successful litigant should be entitled to the fruits of his judgement and this should not be delayed by laxity or carelessness of the applicant, he cited the case of Utex Industrial Vs. Attorney General Civil Application No. 52/95 S.C. in support of his contention. Failure to serve the respondent with a copy of the application should not be enough to constitute sufficient reason for extension of time, there should be other circumstances when which do not exist in this case Counsel argued. Counsel prayed for the dismissal of this application with costs.

The rule 4 under which this application is brought provides:

"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 so extended".

From the above provisions the court is given wide powers to extend the period provided sufficient reason is shown. This in effect means that before court can exercise its discretion the applicant must satisfy this court that he was prevented by sufficient reason from adhering to the time limit provided by the Rules. The sufficient reason must relate to his inability to take a particular step in the first instance, see Mugo Vs. Wanjiru & Another {1970} EA 481. The applicant can do so by showing that the delay had not been caused by his dilatory conduct. It is

also the law that the fact that an appeal appears likely to succeed cannot of itself amount to sufficient reason. In the case of Shanti V. Hindocha and others {1973} EA 207 . The Court of Appeal for East Africa had this to say:

"The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the most persuasive reason that he can show, as in Bhatt's (91962 EA 497) is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matter of degree. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case but his application is likely to be viewed more sympathetically if he can do so and if he fails to comply with the requirement set out above he does so at his peril".

There are also authorities to the effect that a mistake or negligence by counsel is not necessarily a bar to his obtaining an extension of time see Gatti vs. Shoosmith (1939) 3 All ER 916, Ngoni - Matengo Cooperative Marketing Union Ltd Vs. A. Osman {1959} EA 577 Zamu Nalumansi & Anor and Sulaiman Lule Civil Appl.No. 2/92 .

In the present case the applicant filed the notice of appeal on 12-12-1996 which was within the prescribed period. However the letter applying for record of proceedings filed on 13-1-1997 was not served on the respondent which denied the applicant the benefit of the provisions of Rule 82 (2) & 3. Subrule 3 is as follows:

"An appellant shall not be entitled to rely on the subrule (2), unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant retained proof of that service."

I agree with the submission by Mr. Nkurunziza that not all cases where an advocate makes an error will result in an

automatic extension of time. Each case must be considered on its own circumstances. Advocates should not be given an impression that whenever they make mistakes in performance of their professional duty they must be excused. However with respect I do not agree with Mr. Nkurunziza that failure to copy the applications to the respondent by the applicant's previous counsel was ignorance of the rule rather than inadvertence as there is no evidence to support this contention. Ignorance of the law on part of a lawyer should not arise.

Counsel for the respondent also submitted that the Applicant should not blame the court for failure to furnish him with the proceedings because he had also failed to comply with the Registrar's order for payment of fees for the said proceedings. The Registrar's instructions after receiving the application by the applicant, were as follows:-

"HC Civil
Cause the proceedings to be prepared and given to Counsel on payment of due fees.

(Signature of Registrar)

14-1-1997."

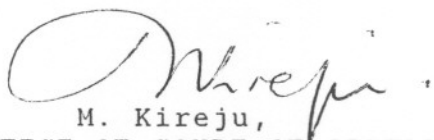
Although S. 103 (2) of the Rules provides that the Registrar may require the payment in advance of the fee for any service or a deposit where the fee cannot be ascertained. I do not think that the Registrar's instructions above were directing the applicant to pay fees before proceedings were delivered as suggested by Counsel for the respondent. If the Registrar had wanted money deposited before proceedings were typed he would have said so in no uncertain words.

... absolutely necessary in a case for extension of time to the notice of appeal. In this case the situation is made worse by the absence of the proceedings which were applied for almost 9 months ago and are still not ready. The court has no proceedings to consider. I absolutely agree with submission by Counsel that when looking at justice and equity on the side of the applicant, the Court should also consider that of the respondent. The respondent however, cannot be allowed to enjoy the fruits of judgement in the lower court until the applicant has exhausted his venues for justice availed of by the law.

After addressing myself to the submissions by both Counsel and considering the authorities referred to me, I find that former Counsel for the applicant's omission to copy the application for proceedings to the respondent was an oversight or human error and that mistake should not be attributed to the applicant nor penalised for it. Counsel for applicant could not be seriously accused of lack of diligence as he had filed the notice of appeal in time. For the above reasons I am satisfied that the applicant has shown sufficient reason for this court to exercise its discretion in extending the time in which to file the notice of appeal. The application is allowed. The applicant is to lodge his notice of appeal and also serve the respondent

with a copy of the proceedings in the High Court within seven days from the date of this ruling. The costs of the application shall follow the results of the appeal.

Delivered at Kampala this 23rd day of September 1997.


M. Kireju,
JUSTICE OF COURT OF APPEAL
23/9/97