

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO.122 OF 2018

(Arising from High Court of Uganda at Jinja Civil Appeal No.71 of
2014 itself arising out of Chief Magistrate's Court of Mukono at
Mukono Civil Suit No.71 of 1994)

HOSEA SONKO AND 12 OTHERS:.....:APPLICANTS

VERSUS

DICK K.BANOBA:.....:RESPONDENT

CORAM: HON. MR. JUSTICE, F.M.S EGONDA NTENDE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE HELLEN OBURA, JA

RULING OF HON. LADY JUSTICE ELIZABETH MUSOKE, JA

Background:

This is an application for extension of time within which to file a memorandum of appeal. It is brought under **Section 98** of the Civil Procedure Act, **Rules 5** and **43** of the Judicature (Court of Appeal Rules) Directions S.I 13-10.

Grounds for the application:

The grounds upon which this application is premised as set out in the Notice of Motion are briefly as follows:-

- 1) That the High Court at Jinja refused to release the record of Court proceedings when it failed to establish the date of the judgment of the above Civil Appeal.
- 2) That the applicants exercised their constitutional right and lodged a complaint to the Hon. Principal Judge in the interest of seeking justice.
- 3) That the failure in filing the notice of appeal was caused by Jinja High Court when copies of the proceedings were not released as expected.
- 4) That the applicants then instructed their lawyer to file an application seeking leave to file the Appeal out of time but the same was dismissed for want of prosecution.
- 5) That the Appeal has high chances of success.
- 6) That it's just and equitable that the orders sought be granted.

The application was supported by an affidavit deponed by the 1st applicant dated 11/4/2018, and it was opposed by the respondent through his affidavit in reply dated 10/12/2018 in which he averred, inter alia, that:-

- a) Not all applicants were affected by the judgment in HCCA No.71 of 2014 at Jinja.
- b) The 2nd, 4th, 8th and 13th applicants were all deceased and no action could be commenced in their names.

- c) The 6th applicant had already settled his dispute with the respondent and willingly accepted to vacate the respondent's land and therefore did not qualify as a party to the said application.
- d) Judgment in the above mentioned appeal was pronounced on 6th February, 2015 in the presence of the 12th applicant and with full knowledge of counsel for the applicants.
- e) There had been an inordinate delay in filing this application since the application was not filed until a period of over 4 years had passed.
- f) There was no notice of appeal filed since the applicants had served none upon the respondent or his lawyers.
- g) The application does not disclose any arguable grounds to warrant extension of time for appeal by this Court.

Representation:

When this matter came up for hearing on 13/12/2018, Mr. Kikomeko Saul and Mr. Ogwado Francis Xavier appeared for the applicants while Ms. Namutebi Aliziik appeared for the respondent. The 1st applicant and the respondent were in court.

Applicants' Submissions:

When the hearing commenced, Mr. Kikomeko, applied for leave to have the 2nd, 4th, 6th, 7th, 8th, 11th and 13th removed as applicants in *Miscellaneous Application No.122/2018* because they were deceased and their legal representatives had failed to provide Letters of Administration.

The Court granted the application with costs to be paid by Counsel Kikomeko personally.

In addition, court on its own motion made an order that all other applicants, save for the 1st applicant, be struck off because their applications were filed without instructions.

On the main application, Mr. Kikomeko submitted that the applicant had made a request to Jinja High Court to release the record of proceedings and the judgment in issue so that he could file a notice of appeal, but the court failed to release the same to the applicant. He submitted further that the applicant was forced to lodge a complaint with the Hon. the Principal Judge about the issue.

Counsel further pointed out that the applicant had earlier instructed his former firms of advocates, M/s Mungoma, Mabonga Wakaka & Co. Advocates, and M/s Patrick Furah & Co. Advocates, to file an application for extension of time to file a memorandum of appeal, which both firms respectively did but they never informed the applicant of the dates fixed for hearing the respective applications. The two applications were consequently dismissed for non-appearance of parties. Counsel submitted that the mistakes of the applicant's former advocates should not be visited on the applicant who was still interested in prosecuting his intended appeal which in his view had a likelihood of success. He, therefore, prayed that the application be allowed.

Respondent's Submissions:

Ms. Namutebi, for the respondent, was of a different view. She pointed out that an applicant seeking for extension of time to file an appeal had to show sufficient cause as to why he/she did not take the right step at the right time. On the applicant's reliance on indolence of counsel, as sufficient cause, counsel submitted that the applicant had not shown exactly when the instructions were given to counsel so as to determine who was to blame for the late filing; and there was no affidavit to support the allegation that indeed counsel did not file his appeal in time. Neither had the applicant indicated when he had actually received the record for this court to be appraised on the extent of delay subsequent to receipt of the record. Counsel prayed that this application be dismissed with costs to the respondent.

Resolution:

I have had the opportunity to peruse and consider the pleadings, the affidavits for and against, and the submissions of counsel on either side.

Rule 5 of the Judicature (Court of Appeal Rules) Directions S.I 13-10 states;
"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 authorized 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."

The power granted to this court under this rule is discretionary but can only be exercised upon the applicant satisfying court that there is sufficient cause for the extension of time. In *Mugo vs. Wanjiri [1970] EA 481* and *Pinnacle Projects Limited vs. Business in Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010*, court held that the sufficient reason must relate to the inability or failure to take a particular step in time; and in *Nicholas Roussos vs. Ghulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993* it was held that a mistake by an advocate, though negligent, may be accepted as sufficient cause; ignorance of procedure by an unrepresented defendant may amount to sufficient cause; illness by a party may also constitute sufficient cause; but failure to instruct an advocate is not sufficient cause.

In the present case, counsel for the applicant submitted that the delay was attributed to two major factors. First, that there was a delay in filing the notice of appeal by the applicant when the Jinja High Court failed to release the record of proceedings and judgment; and secondly, when the applicant's former advocates filed applications for extension of time to file a memorandum of appeal, but never informed the applicant of the hearing dates, resulting in their dismissal.

Rule 76 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, stipulates that a person who desires to appeal to this court should give a notice of appeal which is lodged in duplicate with the Registrar of High Court within fourteen days after the date of the decision against which it is desired to appeal. There is no evidence before us that a notice of appeal was ever lodged. **Rule 83** presupposes that an appeal is lodged after the Notice of Appeal has been lodged and is in existence. In the absence of such a notice of appeal, the appeal cannot be deemed to have been lodged.

Rule 78 requires the intended appellant to serve the notice of appeal on the person directly affected. There is also no evidence of service of the notice of appeal on the respondent.

The discretion granted this court under Rule 5 to extend time to file memorandum of appeal may not be exercised unless it is established that a notice of appeal was lodged as required by the law. We also note from paragraph 5 of the affidavit in reply, which was not controverted by the appellant, that judgment was delivered on 5th February 2015 in the presence of the 12th applicant and with the full knowledge of counsel for the appellants. The respondent further averred that there was no Notice of Appeal in existence and indeed none was served on them (see paragraph 8 of the affidavit in reply). The appellant did not controvert this averment by way of an affidavit in rejoinder.

I note that Miscellaneous Application No. 113 of 2017 which was an application for extension of time to file a memorandum of appeal, was dismissed on 21st March, 2018 by the Deputy Registrar of this Court for lack of prosecution. (See Annexure L to the affidavit in reply). In this respect, the option available to the appellant was to apply to set aside the dismissal if he had sufficient reasons for doing so. Instead, the applicant filed this application for extension of time which was wrong. I find that this application is, therefore, misconceived on the above ground.

I further note that the appeal which the appellant intends to lodge is a second appeal. *Section 72 of the Civil Procedure Act, Cap.71* provides as follows on second appeals to the Court of Appeal:

"Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—

- (a) the decision is contrary to law or to some usage having the force of law;***
- (b) the decision has failed to determine some material issue of law or usage having the force of law;***
- (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits."***

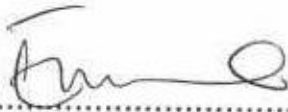
In *Kifamunte Henry vs. Uganda, Criminal Appeal No. 10 of 1991 [1998]* the Supreme Court had this to say:-

"On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law"

The appellant has not pointed out any points of law deriving from the judgment, that the intended appeal seeks to address. Neither are there any triable issues out of the Judgment intended to be appealed which are stated to deserve the attention of this court. Indeed the appellant neither attached the Judgment he intends to appeal from nor the intended draft memorandum of appeal, to assist this court to determine whether there are any triable issues of law. Failure to attach the judgment, or draft memorandum of appeal, to point out the triable issues of law which ought to be considered is a grave omission which may not be cured by Article 126 (2) (e) of the Constitution.

In the result, I find that the applicant has not availed this court sufficient reason to grant the extension of time, and I would therefore dismiss this application with costs to the respondent.

Dated at Kampala this 17th day of Sept 2019.



.....
Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Musoke & Obura, JJA*]

Miscellaneous Application No. 122 of 2018

(Arising from High Court Civil Appeal No. 71 of 2014 at Jinja)

BETWEEN

Hosea Sonko and 12 Others=====Appellants

AND

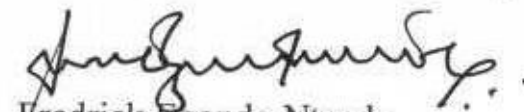
Dick K. Banoba=====Respondent

RULING OF FREDRICK EGONDA-NTENDE, JA

Introduction

- [1] I have had the opportunity to read the ruling in draft of the Musoke, JA. I agree that this application should be dismissed with costs for lack of merit.
- [2] As Obura, JA, agrees this application is dismissed with costs.

Dated, signed and delivered at Kampala this 11th day of Sept. 2019


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL MISCELLANEOUS APPLICATION NO. 122 OF 2018

(Arising from High Court of Uganda at Jinja Civil No. 71 of 2014 which arose out of Chief Magistrate's Court Civil Suit No. 71 of 1994)

HOSEA SONKO AND 12 OTHERS:.....APPELLANTS

VERSUS

DICK K. BANOBA:.....RESPONDENT

RULING OF HELLEN OBURA, JA

I have read in draft the ruling prepared by my sister, Elizabeth Musoke, JA and I concur with her findings and conclusion that the application be dismissed with costs to the respondent.

Dated at Kampala this ^{11th} day of Sept 2019.

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Hellen Obura

JUSTICE OF APPEAL