THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS CIVIL APPLICATION 43/97

RWENZORI INVESTMENT LTD. ..... APPLICANT

- VERSUS -

N.P.A.R.T. ..... RESPONDENT

(Judgment and decree of the Non-Performing Assets Recovery Trust dated 15th April 1997 (Hon. Justice Tsekooko, Mr. G. Lule & Mr. Obbok) in (Tribunal Case No.36/1996)

BEFORE THE HONOURABLE MR. JUSTICE A. TWINOMUJUNI, J.A.

RULING

This is an application by Rwenzori Investments Ltd. (herein after referred to as the applicant) for leave to file and serve a notice of Appeal, to institute the appeal by lodging a memorandum and Record of Appeal and to serve them all outside the time prescribed by the Court of Appeal Rules, 1996. The application is made under Rules 4, 42(1) and (2), 43(1) and (3) 45(1), 48, 49, 52(1), 53(1), 76 and 87 of the Court of Appeal Rules.

The grounds on which the application is based are:-

(a) That the applicant through its Managing Director filed a Notice of Appeal within prescribed time but due to his ignorance of legal technicalities, he omitted to serve a copy on the respondent as required by the Rules.

(b) That when he later instructed advocates to follow the necessary steps in the appeal, they did nothing.

(c) That when he eventually hired the present firm of advocates, it took them a long time to obtain records of the proceedings of the tribunal.

(d) That the applicants intended appeal is good on merits and has a strong likelihood of success.

(e) That the applicant will suffer injustice and substantial irreparable damage and loss if the intended appeal is not allowed.

The application is supported by a 29 paragraph affidavit of the Managing Director of the applicant Mr. Besiima Kabonesa dated the 30th October 1997.

The background facts behind this application as can be ascertained from the affidavit of Mr. Besiima Kabonesa are as follows:-

In 1988 the applicant applied for and was granted U.Shs.5,067,000/= by the Uganda Commercial Bank as a loan on a USAID line of credit. For various reasons not relevant to this application, the applicant failed to pay back the money. By 30th September 1996, the respondent claimed U.Shs.49,968,435/= from the applicant. When the respondent made public threats to take legal action against the applicant, the applicant filed in the Non-Performing Assets Recovery Tribunal, tribunal Case No.36 of 1996 seeking inter alia for a declaration that the computation of the loan amount was wrong and excessive. He however admitted that according to them, they owed U.Shs.30,978,625/= to the respondent. When the case came up for hearing before the tribunal on 7/1/97 the ~~court~~ tribunal and all the parties agreed that the only issue was on the computation of the figures and the case was adjourned to 7/4/97 to a single member of the Tribunal Mr. Obbok to handle that issue. On that date the respondent had revised his claim from U.Shs.49,968,435/= to U.Shs.30,803,533/=. The

applicant maintained that he owed U.Shs.30,978,625/=. The single member of the tribunal adopted the respondent figure of U.Shs.30,803,533/= which he reported to the full tribunal on 9/4/97. On that day it was also reported to the tribunal and accepted by both parties that the applicant had previously made a part payment of U.Shs.2,000,000/= which was then deducted from the agreed outstanding figure of U.Shs.30,803,533/=, which now reduced the outstanding loan to U.Shs.28,803,533/-.

The final judgment of the tribunal was delivered on 15th April 1997 in favour of the respondent for U.Shs.30,978,625/=. In the final judgment, the tribunal appears to have ignored or overlooked what had been agreed before it on the 7th and 9th april 1997. The applicants were not happy with the final judgment and instructed this Managing Director Mr. Basiima Kabonesa to appeal to this court.

On 23/4/97 Mr. Kabonesa filed a notice of Appeal at the Registry of the Non-Performing Assets Recovery Trust. He did not serve a copy of this notice of appeal to the respondent. He also took no further steps towards the prosecution of the intended appeal for the next 56 days until on 18/06/97 when he instructed M/s Kanyunyuzi & Co. Advocates to handle the case for him. It is not clear what instructions Mr. Kabonesa gave to these advocates. At the time after the judgment of the Tribunal, the applicant had two options both available under S.17 of the non-Performing Assets Recovery Trust statute No.11 of 1994. One was to apply for a review of its judgment under S.17(1) and the other was to prefer an appeal to this court S.17(3) of the statute. It is not clear which of these two options the advocates were instructed to pursue but on 2/7/97 the lawyers wrote to NPART Tribunal requesting for a review of their decision under S.17(1) of the statute. Up to this date the response of the tribunal to the letter is not known and it was intimated by counsel for the

applicant that this was because the advocates did not follow the proper procedure to move the tribunal to act under S.17(1) of the statute.

After instructing the advocates, Mr. Kabonesa, the Managing Director of the applicant went to his employers farm in Kabarole district and did not (according to him) return to Kampala until 23rd September 1997 when he discovered that his lawyers had done nothing by way of prosecuting the appeal on his behalf. He promptly withdrew instructions and engaged M/s Emesu & Co. Advocates to pursue the matter. Mr. Emesu promptly requested in writing for the records of the tribunal which he did not obtain in full till 15th October 1997. He then filed this motion on 31st October 1997.

The respondents oppose this application. The grounds for the opposition are contained in an affidavit in reply of Herbert Kwizera who is a legal officer of the respondent deponed to on 9th December 1997.

In his arguments before me, Mr. Emesu, learned counsel for the applicants heaped all the blame for the delays on M/s Kanyunyuzi and Company Advocates whom he accused of negligence and ineptitude in handling the instructions given to them by the applicant. He submitted that the advocates were wrong to have applied for a review of the Tribunal's decision by a mere letter which was not the procedure prescribed by law. Mr. Emesu claimed that the advocates had been expressly instructed to appeal but they negligently failed to do so and instead took irrelevant steps like the application for review and the application for a temporary injunction under rule 37(1) of the Civil Procedure Rules instead of filing an application for stay of execution pending appeal, both actions being done without the instruction from or notice to the applicant. That as soon as the applicant discovered this, he promptly took measures to put matters right.

Mr. Emesu did not see anything to blame the applicant for despite the fact that for 56 days after the filing of the notice of appeal, he failed to take any other steps in prosecuting the intended appeal. He simply blamed this on the fact that the applicant did not know the legal procedures that he had to follow in prosecuting the intended appeal, and that the registrar at the tribunal had told him that the tribunal would serve the notice of appeal. Mr. Emesu then submitted that he himself had acted diligently on handling his clients instructions in that he promptly requested for and obtained the records of the proceedings of the Tribunal and filed these applications. He then concluded that it was M/s Kanyunyuzi & Co. Advocates to blame for the whole delay and that a client should not be made to suffer for the negligence or ineptitude of his lawyers. He cited the cases of: Esagi & Others v Solanki [1968] EA 218 and Sipiriya Kyamulesire v Justine Bakanchurika Bagambe Supreme Court Civil Appeal No.20 of 19995 (unreported) in support of that submission.

On grounds (d) and (e) of the application, Mr. Emesu submitted that a perusal of the record of the Tribunal would clearly reveal that the tribunal had made serious mistakes which are apparent on the face of the record and for which the applicant deserved re-address by way of an appeal. He particularly cited the failure of the tribunals judgment of 15th April 1997 to reflect what had been agreed upon in the tribunal on 7th and 9th April 1997 and the award of costs against the applicant though he was substantially the successful party. On these grounds, Mr. Emesu submitted that the intended appeal was good on merits and had a very good chance of success and that a denial of the opportunity to appeal would cause substantial loss to the applicant. His prayer was that the court grants the application as prayed for.

Mr. Paul Byaruhanga learned counsel for the respondent strongly opposed the application on a number of grounds. First he argued that the application was incompetent in three ways:-

(a) That it was made under the wrong rules. That a lot of irrelevant rules like rules 73,76 and 87 were cited which rendered the whole application incompetent. He contended that of all the rules cited ~~why~~ only rules 4 and 42 were relevant and would have been sufficient. The inclusion of irrelevant rules made it uncertain for the court to know what it should deal with and rendered the application incompetent.

(b) That the applicant had no locus standi to make this application because there was already a subsisting notice of appeal duly filed in time, the only problem with it being that it was not served on the respondent. That in these circumstances it is not available to the applicant to file a fresh notice of appeal but could only apply for extension of time to serve the respondent.

(c) That the application is incompetent because the applicant has no right of appeal in the matter he is seeking to appeal from because of the provisions of S.17(4) of the NPART statute. He argued that the relevant Rules i.e. S.69(2) of the Civil Procedure Rules prohibits appeals from decrees passed by courts with the consent of parties. He argued that the order of the Tribunal from which the intended appeal is sought was made with the consent of both parties. Mr. Byaruhanga also submitted that it followed from this last submission that the

intended appeal had no likelihood of success.

Mr. Byaruhanga made two further submissions on this matter. One was that the affidavit sworn by Mr. Basiima Kabonesa should not be relied upon as it contained a falsehood which made the whole affidavit not reliable. He said that when Mr. Basiima swore that after instructing M/s Kanyunyuzi & Co. Advocates on 18/6/97 he went to Kabarole and never returned to Kampala till 23rd September 1997, he was telling lies because there was on record an affidavit of the same Basiima Kabonesa dated 9th July 1997 sworn here in Kampala in support of an application for an order of injunction made by the same M/s Kanyunyuzi & Co. Advocates to the NPART tribunal. This falsehood according to Mr. Byaruhanga affected the entire affidavit and therefore the entire application. He submitted that the whole application should collapse on this ground too.

Mr. Byaruhanga's other argument was that even if the court was to find this application competent, yet the application was really unnecessary because the errors in the judgment of the Tribunal were merely arithmetical and could be corrected in a review under S.17(1) of the NPART statute. He submitted further that in fact M/s Kanyunyuzi & Co. Advocates had already made the necessary application and it was possible that the tribunal was already in the process of reviewing its judgment as requested.

Finally Mr. Byaruhanga submitted that it was the duty of the applicant to show reasonable cause why they were unable to take the necessary steps to prosecute the intended appeal. He submitted they had failed to do this and he submitted a list of eight authorities in support of his submissions. His final prayer was that this application should be dismissed with costs to the respondent.

Mr. Emesu in reply submitted that:-

(a) The submission that the rules under which the application was brought were wrong should be dismissed because the court can simply ignore irrelevant rules as long as the correct rules have been stated.

(b) That the notice of appeal already on record is still valid in misleading. Rule 83(a) of this Courts Rules provides that a notice of appeal which is not followed by the institution of the appeal is deemed to be withdrawn and cannot remain valid thereafter.

(c) That a perusal of the record of the proceedings of the tribunal clearly shows that its judgment was not the result of consent of parties and in fact what had been agreed upon on 7th and 9th April 1997 was actually ignored or deliberately left out in the judgment of the tribunal of 15th April 1997.

(d) On the issue that the matter could be reviewed under S.17(1) of NPART statute, he argued there were cases which are both reviewable and appealable and this was one such a case - S.83 of the ~~Court~~ Civil Procedure Act.

(e) On the allegation that there was falsehood in the affidavit of the applicant, he submitted that his instructions were that though the applicant was always in telephone contact with M/s Kanyunyuzi & Co. Advocates, he did not come to Kampala in July 1997 but he signed the affidavit dated 9/7/97 much earlier before he left for Fort Portal and the date was inserted later at the time of filing the notice of motion. He claimed that this was a well known practice among the Commissioners of Oaths in Uganda who sometimes sign affidavits without seeing the deponent.

I have carefully studied and considered all the arguments raised by counsel in their submissions. In my judgment I consider that the following issues should be resolved to dispose of this matter:-

(a) Did the applicant have a right of appeal following the decision of NPART tribunal of 15th April 1997?

(b) Is this application competent and properly before this court?

(c) Has the applicant shown "sufficient reason" why up to 31/10/97 when this application was filed, he had failed to institute the appeal?

(d) If the answer to (c) above is negative, does the intended appeal have a good likelihood of success and does that affect the result where "sufficient reasons" have not been shown?

The first issue is whether the applicant had a right of appeal following the decision of NPART tribunal of 15th April 1997. The relevant law is Section 17 of the NPART statute of 1994. S.17(3) provides that any party aggrieved by a decision or order of the NPART Tribunal may within thirty days after the decision or order appeal to the Court of Appeal against the decision or order. It is true that S.17(1) of the statute provides that the Tribunal shall have the power to review its own judgments and orders but in my judgment this does not take away the right of appeal provided for in S.17(3) of the statute. It was however submitted by learned counsel for the respondent that S.69(i) of the Civil Procedure Act prohibited appeals from decrees passed by courts with the consent of both parties. I do not agree that this provision is applicable to this case. The record of the proceedings of the Tribunal, especially the proceedings of 7th and 9th April 1997 which contain what the parties had agreed upon before the tribunal is not reflected in the final judgment of the tribunal dated

15th April 1997. In these circumstances, an appeal lay of right from the decision of the Tribunal provided it was filed within the prescribed time, which in this case was thirty days from the date of the judgment. The answer to the first issue is therefore in the affirmative.

The second issue is whether this application is competent. Mr. Byaruhanga's first submission on this matter was that the application was based on wrong rules of procedure. I do agree with him that the applicant cited a lot of irrelevant rules of procedure, but then the correct rules namely rules 4 and 42 of the Court of Appeal rules were also cited and Mr. Byaruhanga conceded that those would have been sufficient. In my judgment, the inclusion of superfluous rules did not in this case prejudice the respondents case in any way and the superfluous ones can be disregarded without harm to the applicants case. On that point I rule that this application is not rendered incompetent by that reason.

Mr. Byaruhanga also submitted that this application was incompetent by reason that there was already a valid and subsisting notice of appeal, the only problem with it being that it was never served on the respondent and that to apply to be allowed to file and serve another notice was incompetent. I find myself unable to accept this argument in light of rule 83(a) of this Courts rules which provides:-

> "If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time -
>
> (a) he or she shall be taken to have withdrawn his or her notice of appeal and shall unless the court otherwise orders, be liable to pay the costs arising from it of any persons on whom the notice was served."

In my judgment it seems to be very clear beyond any doubt that if an appellant fails to institute an appeal within the prescribed time after lodging a notice of appeal, the notice of appeal is deemed to be withdrawn and ceases to be valid as such. I find no merit in this submission as well.

The third point raised by Mr. Byaruhanga on the point of alleged incompetence of this application was that by virtue of the provisions of S.17(4) of NPART statute and S.69(2) of the Civil Procedure Act, this appeal did not arise. I have already dealt with this point in the earlier part of this ruling and I re-state again here that the applicant had a right of appeal and therefore this application is competent and properly before this court. The answer to the second issue is therefore affirmative.

Now I turn to the third and main issue in this application, whether the applicant has shown "sufficient reason" as required under rule 4 of this Courts Rules as to why since 15th April 1997, he failed to institute the intended appeal. Mr. Emesu counsel for the applicant argued that the applicant had filed a notice of appeal in the prescribed time but due to his ignorance of legal technicalities, he failed to serve it on the respondents as required. After 56 days after the filing, he briefed M/s Kanyunyuzi & Company Advocates who negligently failed to do anything till his own firm was briefed which acted promptly to put the matter on cause. On the other hand Mr. Byaruhanga for the respondents attacks this line of arguments on the grounds that:-

(a) The applicant was guilty of dilatory conduct in briefing M/s Kanyunyuzi & Co. Advocates almost two months late.

(b) In light of the fact that the advocates had two options to appeal or apply for review, it was not clear what instructions the applicant had

given them. In absence of an affidavit from the advocates, it appears as if they were instructed to apply for a review which contributed to this delay.

(c) That Mr. Emesu himself did greatly contribute to the delay because on receiving instructions, he should have realised quickly that the problem was on the notice of appeal and should have acted promptly to put right the situation instead of first applying and waiting for records of the tribunal which were not a pre-requisite to the regularisation of the notice of appeal.

(d) That the whole attempt to show "sufficient reason" must fail because the affidavit on which the whole effort is based contains falsehoods which render it null and void.

In brief, Mr. Emesu's argument on this point is that the applicant was not responsible for the delays and it was his advocate M/s Kanyunyuzi who must take the whole blame and the applicant should not be made to suffer because of the negligence of his counsel whose actions were not under his control. He cited a number of authorities in support of that proposition. Mr. Byaruhanga's argument in reply is that the applicant and his advocates equally contributed to the delay and that in any case he deserves no remedy from this court when the application is relying on a false affidavit.

The rules of this court require that an intended appellant must before or within seven days after lodging notice of appeal serve copies thereof on all persons directly affected by the appeal. The appeal must then be instituted within sixty days from the date of filing the notice of appeal.

In this case the notice of appeal has never been served on the respondent and indeed, the appeal itself has never been instituted. The law governing the instant situation has been laid down in many cases decided by the former East African Court of Appeal and the Supreme Court of Uganda. They include Shanti v Handocha [1973] EA 207, Essayi v Solanki [1968] EA 218, Mugo v ~~Wanjiru~~ Wanjiru [1970] EA 481, Florence Nabatanzi v Naume Binsobedde S.C. Civil Application No.6/1987 and Sipiriya Kyarulesire v Justin Bakanchulike Bagambe Civil Appeal No.20/1995.

The principles laid down in these cases can be summarised as follows:-

(a) The administration of Justice normally requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights - Essayi v Solanki (supra) at page 224.

(b) Under rule 4 of the Courts rules, the Court has wide powers to extend a period fixed by the rules provided sufficient reason is shown.

(c) Normally "sufficient reason" depends on the circumstances of each case and the sufficient reason must relate to the inability or failure to take the particular step in time - Mugo v Wanjiru & Another (supra).

(d) A party is at liberty to choose an advocate of his choice but this should not delay the process of an appeal.

(e) Errors of omission by counsel are not necessarily fetal to an application under rule 4 of the rules of this court unless there is evidence that the applicant was guilty of dilatory conduct in the instruction of his lawyer.

(f) Where an applicant has instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyers negligence when he fails

to take essential steps necessary under the law to lodge an appeal. A vigilant applicant should not be penalised by refusing him to appeal because of the negligence of counsel over whose actions he has no control.

Bearing these principles in mind I now turn to the facts of the instant case. I have already noted that for almost two months after the NPART tribunal delivered its judgment and after the filing of the notice of appeal, the applicant took no single step whatsoever to institute the appeal. Other than the weak excuse that he did not know the legal requirements and that the Registrar at NPART Tribunal promised to serve the notice of appeal, there is no other plausible explanation as to why he conducted himself in this manner. Mr. Emesu did not cite to me any authority to support the proposition that ignorance of the law or procedure was sufficient reason in these circumstances and I am not aware of any such authority. I do not accept the alleged promises of the NPART Tribunal registrar when the registrar has no affidavit to that effect on record. There is no evidence to support that claim.

Then there followed the events following the instructions to M/s Kanyunyuzi & Co advocates on 18/6/97 up to 23/9/97. Shortly after they were instructed they wrote a letter to NPART tribunal requesting for a review. They had an option to continue pursuing the appeal but they chose to apply for a review. We have no evidence as to what instructions they received on this matter but in absence of such evidence we cannot rule out that they were instructed to apply for a review. This further delayed the process of appeal which delay cannot be solely blamed on the advocates. The applicant must share the consequences as the advocates were probably carrying out his instructions. We are not told of the fate of the application but there is no doubt that whether the applicant was in Fort Portal on not, he was always in contact with his advocates on phone or otherwise as is shown by the affidavit he

swore in Kampala on 9/7/97 in support of an application on motion for an order of injunction and the admission by Mr. Emesu from the bar that there was always telephone contact. I do not accept Mr. Emesu's statement from the bar that the applicant signed blank documents before going to Fort Portal because affidavits are not sworn that way. I refuse to accept that such an alleged practice widely exists as that would be taking judicial notice of an illegal practice. In my considered opinion, at all material times between June and September 1997 the applicant never lost contact with his lawyers and if he had wanted them to pursue the appeal, he would have instructed them to do so. I cannot lay blame for the delay of these three months on the applicants lawyers alone. The applicant was partly to blame. Even after he instructed M/s Emesu & Co. Advocates, they also unnecessarily added another 5 weeks of delay trying to obtain documents that were not pre-requisite to diligent and speedy action that was necessary to prosecute the intended appeal.

The applicant was guilty of dilatory conduct when he instructed advocates long after the time for taking essential steps in the appeal had elapsed. His conduct between June and September 1997 show that he did not exercise any vigilance or diligence in pursuit of his intended appeal. In these circumstances none of the five principles laid down above can come to his aid. The answer to the third issue posed in this ruling is negative that the applicant did not show sufficient reason for the excessive delays.

The final issue for determination was whether the intended appeal had any good chance of success and whether that would alter the result in view of my finding that the applicant has shown no sufficient reasons to justify his delay in filing the appeal. I propose to cite two authorities on this matter which I hope will dispose of the issue. In the case of Florence Nabatanzi v Naume Binsobedde (supra) it was held that it was settled law that the

fact that the appeal appears likely to succeed cannot of itself amount to sufficient reason. There is a similar holding in the cases of Mugo v Wanjiru and Shanti v Hindocho and others (supra). In later case the Court of Appeal for East Africa stated:

> "The position of an applicant for leave to extend 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 Bhats case, 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 matters 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 (that is to show sufficient reason) he does so at his peril."

In the case of Abdul Aziz Ngema v Mungai Mathayo & Another Civil Appeal No.55 of 1975 cited in Supreme Court Civil application No.5/88 Attorney General v Madotali Hudo & Others.

The Court of Appeal said -

> "I would like to state once again that this courts discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and prospects or otherwise of success in the appeal can be considered."

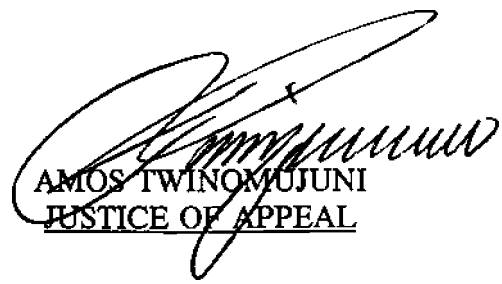
In my considered judgment, it does not, in this case, make any difference whether this

intended appeal had good prospects of success or not in light of my holding that the applicant has failed to establish or show 'sufficient reason' as required by rule 4 of the Rules of this Court.

Finally before I leave this case I wish to elude to a submission by Mr. Byaruhanga for the respondent that this application was based on an affidavit that contained a falsehood namely that the applicant was never in Kampala between 18/6/97 and 23rd September 1997 whereas there is on record an affidavit dated 9th July 1997 signed by him in Kampala. Mr. Byaruhanga did not raise this as a preliminary objection nor did he advance it as one of the reasons he felt the application was not competent. He raised it to support his submission that the applicant should not be believed and his reasons should be rejected. Though I was quite inclined to accept Mr. Byaruhanga's submission, I was reluctant to pronounce on the falsehood or otherwise of the affidavit when the applicant never had opportunity to explain how he came to sign the affidavit on 9th July 1997 in Kampala.

In the result, I find no merit in this application which is dismissed with costs to the respondent.

Dated at Kampala this 20th day of January 1998.



AMOS TWINOMUJUNI
JUSTICE OF APPEAL