THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 234 of 2017
(Arising out of Mbale High court Civil Suit No. HCT-04-CV –CS-0026-2012)

UGANDA REVENUE AUTHORITY ═══ APPLICANT

VERSUS

1. M/S URGENT CARGO HANDLING LIMITED
2. GERRY ANDREW MSAFIRI ═══ RESPONDENTS

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ.
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA.
HON. JUSTICE CHRISTOPHER GASHIRABAKE, JA)

RULING OF COURT

1. Background.

This Application was lodged in this Honourable Court under rules 5, 42 (2), and 76 of the Judicature (Court of Appeal rules) Directions SI 13-10 and Section 98 of the Civil Procedure Act, Cap 71, on 9th August 2017 seeking orders that;

a) Leave is granted to appeal out of time;
b) Costs of the Application be provided for.

The Grounds upon which the application is based, as listed in the Notice of Motion, are:

a) The Applicant was only made aware of the judgment in Civil Suit No. 26 of 2012 on 2nd August 2017 following a search on the court record after being served with a Bill of costs on 26th July 2017.
b) The Applicant has filed this application in reasonable time after learning of the Judgment in Civil Suit No. 26 of 2012.

c) That it is in the interest of justice that the Applicant be allowed an extension of time to Appeal.

The Application is supported by the Affidavit of Mr. Haluna Mbeeta, a supervisor in the legal Services and Board Affairs Division of the Applicant. He states that:

a) In 2012, High Court Civil Suit No. 0026 of 2012 to wit; Urgent Cargo Handling Ltd & Gerry Andrew Msafiri v Uganda Revenue Authority was lodged, and it first came up for hearing on 25th June 2013.

b) The matter progressed and was being heard interparty at all material times until 2nd December 2015, when the matter was adjourned to 24th February 2016 when the Defendant (URA) was supposed to produce its witness.

c) On 13th December 2016, unknown to the Defendant (URA), the matter came up for hearing in the absence of the defendant at which hearing the Plaintiff sought leave to have the Defendant's case closed for non-appearance and sought to file written submissions and the matter be fixed for judgment.

d) The order to close the Defendant's case was granted by court on the basis of Affidavit evidence being the affidavit of service of one Erap Roberts to the effect that he found an unnamed male receptionist whom he served the hearing notice whereas the legal department has no reception nor male receptionist.

e) On 19th January 2017, unknown to the Applicant, and without serving the defendant, the Respondent filed its submission in the High Court civil suit No, 26 of 2012.

f) On 25th April 2017, in the absence of the Applicant/ Defendant and without their knowledge, judgment was entered against the Applicant/ Defendant.

g) In the judgment, the Plaintiff was awarded reliefs that are astronomical such as USD 33,600 each month from 2012 to date as lost earnings from a vehicle whose value the judgment places at USD 46,000 which decree could not have gone unchallenged were the Defendant aware.

h) On 26th July 2017, the Respondent served on the Applicant/ Defendant a taxation hearing notice for a bill of costs to be taxed on 16th August 2017.

i) This application has been brought without delay and in reasonable time following the Applicant learning of the Judgment in Civil Suit no. 26 of 2012.

j) It is just and proper that this Application be granted to afford the issues raised in the intended appeal to be determined.

2. <u>Reply by the Respondents.</u>

The Respondents lodged an Affidavit in reply deposed by Hosbome Ongoli Arungah, a Kenyan citizen employed by M/S Urgent Cargo Handling Ltd on 15th December 2017. In the Affidavit, it is contended that:

a) At all material times, Gerry Andrew Msafiri was one of the company drivers.

b) It was his evidence at the trial that the company truck was totally vandalized and the learned trial judge found so in his judgment and consequently awarded the necessary relief in monetary terms. There cannot therefore be any prayer anymore for unconditional release of the truck as alleged in the Notice of Motion.

c) The Applicant participated in the trial by filling their pleadings and cross examined the Respondent/ Plaintiffs in Court until the close of our case. A date was fixed in open court in the presence of the Applicant to begin their defence but they also did not appear. The suit was therefore heard and concluded ex-parte and the only course available for the applicant is

to apply to the trial court to set aside its proceedings and Judgment and enable them present their case but not to appeal to this Honourable Court.

d) Judgment was delivered in open court on the 25th April 2017 and certified proceedings were available on the 1st June 2017 but the Applicant's counsel never bothered to collect them from the Registrar, High Court Mbale.

e) The Applicant's letter requesting for certified proceedings on 17th November 2017 is merely a cover up and was out of time.

f) There was no need to appeal in this matter as this matter proceeded interparties on 21st April 2015, 23rd July 2015, 3rd March 2015, 18th June 2015, 2nd December 2015, 13th December 2016 and 18th April 2017.

g) On 13th December 2016, the Applicant's counsel was supposed to come to Court and conduct their defence and there was a Return of service in form of an Affidavit of Service and URA duly acknowledged service by the Assistant Commissioner Litigation stamping and signing the Hearing Notice on 30th September 2016 but counsel did not appear in Court for further hearing.

h) The Garnishee Order Nisi was granted, served and executed as per Annexture "BA" and the Garnishee Order has already been issued by the Assistant Registrar Mary Ikit in Miscellaneous Application No. 234 of 2017 (Arising out of Mbale High Court Suit No. HCT-04-CV-CS-0026-2012)

i) There is no application for leave to Appeal first lodged in the High Court of Uganda Mbale before it was filed in the Court of Appeal at Kampala.

j) It is not true that the Respondents were awarded an astronomical award of USD 33,600 each month from 2012 to date.

k) The taxation proceedings have already been conducted and there was no appeal preferred in the High Court of Mbale against the taxation proceedings.

l) The Applicant has not filed a proper Notice of Appeal and a letter requesting for proceedings duly served on the Respondent's lawyer as their notice of Appeal was filed 206 days late after the High Court Judgment was delivered.

4. Representation.

When this Application was called for hearing on 24th November 2022, Mr. Ronald Baluku, acting Manager appeared for the Appellant. The 1st and 2nd Respondents were represented by Mr. James Okuku and Mr. Justine Semuyaba. At the hearing, leave was granted by the Court to the parties to proceed by way of written submissions. We have considered the submissions of the parties duly lodged in the Court and the authorities thereunder in the preparation of this ruling.

5. Submissions by the Applicant

The Applicant lodged written submissions in this court on 9th November 2022. In the submissions, the Applicant averred that it has an automatic right of appeal in a matter of this nature. Counsel for the applicant relied on the decision in **Salem Ahmed Hassan Zaidi v Faud Humeidan , Civil Appeal No. 51 of 1959** wherein it was held that judgment pronounced against a party must be deemed to be a decision on the merits and has the same effect as a dismissal upon evidence and the matters in issue must be deemed to have been heard and determined and as such ,an aggrieved party has the right of appeal.

The Applicant submitted that this Court, on its own motion under rule 42, can grant leave as was considered in the decision of **Kasimbazi James v Tumwebaze Olivia, CACA No. 265 of 2016.**

The Applicant relied on this Court's powers in rule 5 of the Judicature (Court of Appeal rules) Directions which gives this Court powers to extend time within which to appeal whether before or after the act is done. The Applicant submitted that it has sufficient reasons to satisfy the conditions for grant of extension of time. Sufficient cause has been defined in the case of **Attorney General v**

Oriental Construction Company Ltd, Application No. 7/90. In this case, the court acknowledged that mistake of counsel may sometimes amount to sufficient cause but only if they amount to an error of judgment.

In the instant case, the Applicant relies on negligence of counsel considering that the counsel (Mr. Kitaka) who was in personal conduct of the matter , left the Applicant's employment without informing them of the conclusion of the case. The Applicant filed its witness statements in time but was unavailable at the hearing of the case hence forcing the court to proceed under Order 17, rule 4 of the Civil Procedure rules.

The Applicant relied on the decision in **Al Hajji Ziraba Balyejusa versus Development Finance Company, CACA No. 24 of 2000** to pray that the prayer of extension of time is granted and the Applicant's appeal validated. In addition, Article 126(2)(e) of the Constitution enjoins Courts to administer substantive justice without undue regard to technicalities. Further, rule 2(2) of the Court of Appeal rules gives the court powers to extend time accordingly.

Finally, counsel for the Applicant submitted that the grant of extension of time to lodge an appeal would not require the Applicant to file any additional documents, but would validate those already on court record, pursuant to the decision in **The Executrix of the Estate of the Late Christine Mary N Tebajjukira and another v Noel Grace Shalita, SCCA No. 8 of 1988.**

6. <u>Submissions by the Respondents</u>

On the other hand, counsel for the Respondent submitted that the record of proceedings at the High Court (on Pg. 15) shows clearly that the Respondents closed their case on 2/12/2015 in the presence and participation of the Applicant. The suit was adjourned to 13/12/2016 in open court and on which date neither counsel nor the Applicant appeared. The trial Judge further directed that the Applicant be served with a hearing notice, which was done. However, on the second occasion, the Applicant still did not appear and the court fixed the Judgment for 25/4/2017 on which date the same was delivered.

The Respondents relied on the Supreme Court decisions of **SCCA No. 7 of 2010; Dr. Ahmed Kisuule v Greenland Bank (in liquidation), SCCA No. 23 of 1994, GM Combined (U) Ltd v AK Detergents (U) Ltd** at Pages 4-7 to aver that the Application is without merit.

In addition, Counsel for the Respondent relied on **Rule 42 (2) of the Judicature (Court of Appeal rules) Directions** and **Rule 6(2) (b)** of the same. Counsel further submitted that the hearing notice for 13/12/2016 was duly served and clearly endorsed by the Applicant. Any averment otherwise was a falsehood.

Counsel for the Respondent prayed that the application be dismissed with costs and prayed for a certificate of 2 counsel to that effect.

7. <u>Resolution of the Application.</u>

This Court has discretion, for sufficient cause, to enlarge the time in which an appeal may be lodged in this court under **rule 5 of the Judicature (Court of Appeal rules) Directions SI 13-10.** The rule provides that:

> *"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 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"*

In the case of **Molly Kyalikunda & Others v Engineer Ephraim Turinawe & Another , Supreme Court Civil Application No. 27 of 2010;** the Court stated that three questions need to be determined before disposing of an application for enlargement of time. These are;

1) *whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the Appeal.*
2) *Whether the applicant is guilty of dilatory conduct.*
3) *Whether any injustice will be caused if the application is not granted."*

See also: **Njagi v Munyiri [1975] EA 179 and Utex Industries Ltd v Attorney General ,SCCA No. 52 of 1995.**

We shall evaluate the application before us on the above parameters.

whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the Appeal

Enlargement of time is an exercise of discretion by this Court which ought to be exercised judiciously on proper analysis of the facts and application of the law to the facts. Discretionary orders are normally issued on a case-by-case basis, and not as a matter of right. Therefore, the Applicant ought to persuade this court through some evidence, upon whose assessment such discretion may be exercised. Generally, applications for enlargement of time within which to appeal may not be granted if the delay is inexcusably long or where there is no reasonable justification for such delay.

Section 66 of the Civil Procedure Act Cap 71, Laws of Uganda confers a right of appeal from decrees of the High Court to the Court of Appeal. Furthermore, **Section 79 (1) (a) of the Civil Procedure Act** provides that every appeal shall be entered within 30 days from the date of decree or the order of the Court, except where it is otherwise specifically provided in any other law.

Rule 76 (2) of the Judicature (Court of Appeal rules) Directions SI 71-10 requires lodgement of a Notice of Appeal within 14 days after the date of the decision against which it is desired to appeal to the Court of Appeal.

What constitutes sufficient reason depends on the circumstances of each case and has been defined to mean "*Special circumstances*". In the decision of **Shanti v Hindocha and Others [1973] EA 207,** the court held that:

> "*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 (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on*

his own part but there are other reasons and these are all matters of degree"(sic)

In **Kananura Kansiime Andrew v Richard Henry Kaijuka , SCC Reference No. 15 of 2006,** Justice Opio Aweri (JSC) held that:

> *"what constitutes sufficient reason is left to the Courts unfettered discretion. In this context, the court will accept either a reason that prevented the applicant from taking the essential step in time, or other reasons why the intended appeal be allowed to proceed though out of time. For example, an application brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay"*

Our perception is that the Applicant has a right to apply for enlargement of time to lodge an appeal and such order should be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of the failure to file the notice of appeal within the time prescribed by the rules, and the extension will not be prejudicial to the Respondent. We acknowledge that it is fairly well settled that "*sufficient cause*" should be given a liberal construction so as to advance substantive justice when there is no inaction, no negligence nor want of *bonafide* reason imputable to the Applicant. Sufficient cause will vary from case to case.

In this case, the Applicant's sole reason for the delay in instituting the appeal is a mistake of counsel. The applicant alleges that Mr. Kitaka, who was an employee in their legal department, and counsel in personal conduct of this matter did not inform his employers that the court had passed judgment in the matter, nor did he inform them of the hearing date when the matter was to proceed. It is alleged that the Applicant only found out about the judgment when they were served with a taxation application arising from the civil suit. In

addition, the Applicant claims that they were never served with written submissions by the Applicant prior to the decision. The Applicant further alleges that service was not proper and the averments in the affidavit of service which the court relied on to proceed to determine the matter without their input were false.

The response by the Respondents was to the effect that the Application for leave ought to have been lodged in the High Court before the Court of Appeal, that the case proceeded inter-parties and therefore there is no need to appeal the same, and that an appeal is not an appropriate avenue in this matter, but rather an application to set aside the judgment of the High Court. They however did not address specifically the mistake of counsel, although it was contended that service for the hearing date of 2/12/2015 was duly done.

Mistake of counsel as sufficient cause for enlargement of time has been discussed severally by the Courts. In **Ggolooba Godrey v Harriet Kizito, SCCA No. 7 of 2006,** the Supreme Court held generally that mistake of counsel should not be visited on a party. There was, in our assessment, an error of counsel Kitaka who abandoned the case and never informed his employers. We find this reason sufficient to account for the delay in lodging the Appeal. In addition, we find that the Applicant was not guilty of dilatory conduct. There is no evidence that the error of counsel can be visited on the litigant, due to a failure to instruct or observe provisions of the law. See **Tiberio Okeny and another v The Attorney General and 2 others, Court of Appeal Civil Appeal No. 51 of 2001.**

The delay in the present case was for a period of four months. It is further clear to us , from the record and evidence available, that it is true that the Applicant did not participate in the hearing of the case and did not lodge written submissions on account of the actions of Mr. Kitaka. However, the Applicant acted immediately to lodge the Notice of Appeal which they seek to validate,

the memorandum of Appeal, albeit out of time, and this application from the date they were served with the taxation notice on 26th July 2017.

In **Andrew Bamanya v Shamsherali Zaver, Supreme Court Civil Application No. 70 of 2001;** the Supreme Court held that mistakes, faults/ lapses or dilatory conduct of counsel should not be visited on the litigant. The Court further held that the other principle governing applications for extension of time is that the administration of justice requires that disputes should be heard and determined on merit. In the *Andrew Bamanya* case, the delay constituted two and a half years in filing an application for leave to appeal out of time. The delay was caused by the Applicant's lawyers. In that case, Court found that it would be a denial of justice considering the case, to shut the Applicant out of exercising their rights. Court also found that it has inherent powers under its own rules to administer substantive justice.

Furthermore, in **Sabiiti Kachope & 3 others v Margaret Kamujje, Supreme Court Civil Application No. 31 of 1997,** the Court held that an application for leave to extend time within which to appeal which was filed after two years and five months from the date judgment was passed was, for sufficient cause, extended on account of mistake of counsel.

From the two authorities cited above, enlargement of time was granted by the Courts despite the relatively longer delay in comparison to the present application. It is our view that a liberal approach ought to be considered in this matter to ensure that the substantive rights of the parties are not defeated only on the ground of delay. The rules of the court are not meant to destroy the rights of the parties. The object of providing a legal remedy is to repair any damage caused by a legal injury so suffered. Therefore, the delay in preferring an appeal by the Applicant is condoned on account of absence of evidence of gross negligence, or deliberate inaction once the Applicant found out about the court decision.

Whether any injustice will be caused if the application is not granted

It is our view, which has been applied by the courts in previous decisions, that the interest of justice is best served if disputes are heard on the merits and a conclusive decision weighing the rights of the parties is given. In **National Enterprises Corporation v Mukisa Foods, Court of Appeal Civil Appeal No. 42 of 1997,** this Court held that denying a party a hearing should be the last resort of the Court. We agree with this position.

In **Nanjibhai Prabhudas and Company Ltd v Standard Bank Ltd [1968] EACA 5,** it was held that:

> *"The Court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature"*

In ***Tiberio Okeny & Others v The Attorney General & 2 others (Supra)*** it was held that the court is enjoined to consider that the administration of justice normally requires that the substance of all disputes should be investigated and decided on the merits, and errors and lapses should not necessarily debar a litigant from the pursuit of his rights.

The Supreme Court of Uganda in **Re Christine Namatovu Tebajjukira [1992-93] HCB 85** stated that:

> *"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and errors and lapses should not necessarily debar a litigant from the pursuit of his rights"*

We are further persuaded by the Kenyan Court of Appeal's reasoning in **Phillip Kiepto Cemwolo & Another v Augustine Kubende [1986] KLR 495,** wherein the Court held that:

> *"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits"*

In this case, the Applicant delayed to lodge the Notice of Appeal and has advanced the reason discussed above. We are persuaded in the circumstances of this case that the interest of justice would best be served by granting the application. The Respondent, in our view is not prejudiced by the appeal, although lodged out of time, being heard on the merits.

Whether the applicant is guilty of dilatory conduct

We have not observed any evidence in the affidavit in reply lodged by the Respondents which suggests that the Applicant is guilty of dilatory conduct, either through failing to instruct or through inordinate delay.. In addition, at the date of hearing this application, the intended Appeal (Civil Appeal No. 20 of 2018) was duly lodged and was called for hearing.

Therefore, having found that this court has discretion to enlarge time in order to safeguard the Applicant's right of appeal, it would be in the interest of justice to allow the application. This court therefore grants the orders sought and validates the Applicant's appeal.

The costs of this Application shall abide the outcome of the appeal.

Dated at Kampala this ....3rd..... day of ....April..... 2024

RICHARD BUTEERA, DCJ

CATHERINE BAMUGEMEREIRE, JA

CHRISTOPHER GASHIRABAKE JA