

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Owiny-Dollo, CJ, Mwondha, Tibatemwa-Ekirikubinza, Tuhaise, Chibita, JJ.SC

CIVIL APPLICATIONS NO. 12 OF 2021 AND NO. 10 OF 2022

(Arising from Civil Appeal No. 05 of 2016)

BUYUNGO SAMUEL:.....APPLICANT

VERSUS

- | | | |
|---------------------------------------|---|--------------------|
| 1. NYANSIANA TALIDDA SSERWADDA | } | |
| 2. LEONARD KISUULE | | |
| 3. BERNA GUTTABINGI | | |
| 4. JESEPH MAYOBA :..... | | RESPONDENTS |
| 5. SARAH NAMUGAMBWA | | |
| 6. WASSWA PETER | | |
| 7. STEVEN KALEMA | | |

(Arising from the judgment and decision of the Court of Appeal at Kmpala in Civil Appeal No. 05 of 2016 before Egonda-Ntende, Musota, Kasule, JJA dated 10th September, 2020)

RULING OF THE COURT

We have to state on the onset that, the two Applications No. 12 of 2021, Buyungo Samuel V. Nyasiano Talidda Sserwadda and 6 others and Application No. 10 of 2022, Berna Guttabingi and 6 others V. Buyungo Samuel were consolidated under Order XI r (1) (a) of the Civil Procedure Rules, it provides: “where two or more suits are pending in the same Court in which the same or similar questions of law or fact are involved, the Court may either upon the application of one of the parties or of its own motion, at its discretion and upon such terms may order a consolidation of those suits...”

From perusal of the two Applications, Application No. 12 of 2021, Buyungo Samuel was for striking out the appeal and was against the respondents who were the Applicants in Application No. 10 of 2022 seeking for extension of time where Buyungo Samuel was the respondent in the application for extension of time. We shall consider them together but shall dispose of Application No. 12 of 2021 first.

Application NO. 12 of 2021 was brought under rules 78, 79 and 80 of the Judicature (Supreme Court Rules) Directions S.I 13-11 seeking for orders that;

- a) The Notice of Appeal be struck out and the appeal be dismissed for being incompetent.
- b) Costs be provided for.

The application was supported by the grounds in the affidavit deposed by one Daisy Oketcho. Briefly the grounds were as follows:

1. That the applicant was the successful party in the Court of Appeal and High Court in Civil Appeal No.05 of 2016 and Civil Suit No. 01 of 2012 respectively.
2. That the respondents filed a notice of appeal within the prescribed time but have since then not taken any steps to institute the appeal within the required time.
3. That it is in the interest of justice that the application is granted.

The respondents filed an affidavit in reply opposing the application deposed by one Sarah Namugambwa of C/o M/s Kitimbo Associated Advocates, Plot No.35 Kampala Road, Kuteesa Plaza, 1st Floor, P.O Box 72384, Masaka, inter alia as follows:

1. *That the applicant instituted Civil Suit No. 01 of 2012 against the respondents including the deponent, Nyansiana Talidda Sserwadda(deceased), Leonard Kisuule (deceased), Joseph Mayoba, Maria Webuuzawaaki, Wasswa Peter and Steven Kalema in the High Court of Uganda at Masaka, seeking among others, a declaration that he is the owner of land comprised in Buddu Block 369 Plot 494 at Kyabakuza, Masaka District.*
2. *That on the 28th day of November, 2014, the High Court delivered judgment in favor of the plaintiff (applicant herein) but struck out the suit against Nyansiana Talidda Sserwadda and Steven Kalema for not disclosing a cause of action against them.*
3. *That thereafter the respondents aggrieved with the judgment of the High Court preferred an appeal to the Court of Appeal vide Civil Appeal No. 05 of 2016 against the applicant.*
4. *That on the 10th day of September, 2020 the Court of Appeal presided over by Hon. Mr. Justice F. M. S Egonda Ntende, Hon. Mr. Justice Stephen Musota, Hon. Mr. Justice Remmy Kasule, JJA, delivered judgment dismissing the appeal and upholding the orders of the High Court.*
5. *That following the delivery of the judgment by the Court of Appeal, the respondents immediately instructed their former lawyers M/s Nyanzi Kiboneka & Co-Advocates to commence the appeal process to the Supreme Court and the said lawyers filed a Notice of Appeal against the whole decision and orders of the Court, and duly served the same on the applicant.*

6. That the former lawyers of the respondents M/s Nyanzi Kiboneka & Co. Advocates duly requested in writing for a record of proceedings to enable them formulate the grounds of appeal and a copy of the letter was served upon the applicant's.
7. That on the 15th and 22nd October, 2020, the deponent (5th respondent) in company of the 4th respondent proceeded to the Court of Appeal registry to follow up on the file and find out the progress of the preparation of the record of proceedings requested for by their lawyers but were advised by the court staff in the registry that court would inform their lawyers M/s Nyanzi Kiboneka & Co. Advocates when the record is ready.
8. That after some time the deponent (5th respondent), the 3rd and 4th respondents again went back to the Court of Appeal registry on the 17th November 2020 to find out the progress of the preparation of the record of proceedings requested for by their lawyers but were again advised by the court staff in the registry that court would inform their lawyers M/s Nyanzi Kiboneka & Co. Advocates when the record is ready.
9. That the deponent (5th respondent), the 3rd and 4th respondents continued to follow up with Ms. Patricia Nyangoma, counsel with personal conduct of the matter in the law firm of M/s Nyanzi Kiboneka & Co. Advocates via telephone communications to establish whether or not the record of proceedings had been availed to her in order to pursue the appeal and but advised us that as soon as the record is ready, she would inform them so that she files the appeal to the Supreme Court.
10. That, unknown to the respondents, it was discovered on the 14th day of March 2022 that the record of proceedings was typed and availed to the law firm of M/s Nyanzi Kiboneka & Co. Advocates but to their surprise their lawyers did not notify them that the record was availed to them on the 27th of January 2021.
11. That following the breakdown of communication with the respondents' former lawyers the respondents decided to engage new lawyers M/s Kitimbo Associated Advocates on the 11th day of March 2022 in order to follow up on their case at the Supreme Court and advise them on the way forward.
12. That the information in paragraph 10 above was revealed to them by their newly instructed lawyers who visited the registry at Court of Appeal and Supreme Court on the 15th and 16th March 2022 respectively and informed them that the record of proceedings had been typed and availed to their former lawyers.

13. That their new lawyers further informed them that despite receiving the record of proceedings their former lawyers had not filed the memorandum and record of appeal to the Supreme Court within the time stipulated by law.
14. That their omission to file the memorandum of appeal and the record of appeal within the prescribed time was due to the negligence or omission to comply with the requirements of the law by their former lawyers and the same should not be visited on them.
15. That their newly instructed lawyers having discovered that their former lawyers had not filed the appeal within the required time filed Civil Application No. 17 of 2022 seeking extension of time within which to file the appeal and the same was fixed for hearing on the 19th day of April 2022.
16. That the respondents are seriously dissatisfied with the judgment of the Court of Appeal and decision and intend to appeal against the whole of the said decision in the Supreme Court.
17. That the respondents have been advised by lawyers M/s Kitimbo Associates Advocates and their advise they verily believe to be true that the intended appeal to the Supreme Court raises a number of issues that this Court will have to address and pronounce itself upon. They are:
 - a) Whether the Court of Appeal was correct in ignoring the finding of the Magistrate's Court in Administration Cause No. 83 of 1991, to the effect that the late Charles Sserufusa through whom the respondent claims the suit land had surrendered the suit land to the administrators of the estate of the late Sereste Lwanga Mumaaanya.
 - b) Whether or not the late Charles Sserufusa obtained the same by purchase from the then owner Sereste Lwanga Mumaaanya or by deed of donation
 - c) Whether or not the suit land forms part and parcel of the estate of the late Charles Sserufusa or Sereste Lwanga Mumaaanya.
18. That the respondents are very much interested in appealing against the decision of the Court of Appeal and have done everything within their power to follow up on the same but were let down by their former lawyers who did not file the appeal within the required time.
19. That the suit land comprised in Buddu Block 369 Plot 494 forms part of the respondents' family burial sites and raises desirous issues which requires to be investigated and decided on their merits.
20. That it is just and fair that this court exercises its discretion to dismiss this application seeking to strike out the respondents notice of appeal in this court.

21. *That whatever was stated herein is true and correct to be best of the 5th respondent's (deponent) knowledge and belief save for information whose source have been disclosed".*

The applicant filed an affidavit in rejoinder opposing the averments in the respondents' affidavit in reply to this application.


Background.

The background of this application is that the applicant sued the respondents and a one Maria Webuuzawaaki in the High Court at Masaka seeking a declaration that he is the rightful owner of the Certificate of Title and the land comprised in Buddu, Block 369, Plot 494, an order directing the Commissioner, Land Registration to register the suit property in his names and an order for costs.

At the conclusion of the trial, the learned trial Judge entered judgment in favour of the applicant. Dissatisfied with the decision of the trial Judge, the respondents appealed to the Court of Appeal against the whole decision. The Court of Appeal dismissed the appeal and upheld the lower court's judgment, decision and orders.

The respondents were dissatisfied with the judgment and decision of the Court of Appeal and filed a Notice of Appeal on 24th September, 2020 and served it on the applicant on the same date but did not file their appeal within the prescribed time of 60 days. The respondents filed an Application for Extension of time within which to appeal on 23rd March 2022.

Representation.

At the hearing, Mr. Urban Tibamanya represented the Applicant while Mr. Kalani Sekyewa represented the Respondents. 

Submissions of the Applicant.

Counsel relied on rule 78 of the rules of the Judicature (Supreme Court Rules) Directions S I 13-11 and submitted that the respondents failed to take the essential steps to file their appeal within the stipulated time. Counsel argued that rule 79 provides that the intended appellant should lodge their appeal within 60 days after the date of filing a notice of appeal which the respondents did not do for over 1½ years.

Counsel pointed out that the applicant served copies of the proceedings and judgment to the respondents' lawyers by the letter dated 27th January 2021 and that by the time this application was filed, the Respondents had not taken any steps to file their appeal thus fell short of the mandatory requirement under rule 79 of the rules of this Court. Counsel argued

that the respondents' inordinate delay is inexcusable considering the fact that the respondents have been in possession of the land the subject matter of this case.

Counsel cited rule 80 of the rules of this Court and asked court to strike out the Notice of Appeal with costs.

Submissions of the Respondents.

Counsel submitted that by the time this application was called for hearing, the respondents had filed an Application for extension of time within which to file the appeal.

Counsel submitted that it is in the interest of justice that this court determines the application for extension of time first before the applicant's application for striking out the Notice of Appeal. Counsel submitted that this application should not bar the respondents' application for extension of time and it does not divest the court of its jurisdiction to extend time. For this argument, Counsel cited the case of **Godfrey Magezi & Another Vs. Sudhir Ruparelia, SCMA No. 6 of 2003**, for the proposition that the Rules of this Court grant it jurisdiction to hear and determine applications for extension of time.

Counsel cited rule 5 of the rules of this court and submitted that this court is empowered to extend time prescribed by the rules on finding that there was sufficient reason why the applicant did not take steps to file their appeal in time.

In addition, counsel argued that the respondents' former lawyers neglected their case and failed to file the appeal in time. He relied on **Molly Kyalikunda Turinawe & 4 Others Vs. Engineer Ephraim Turinawe & Another, Civil Application No. 27 of 2010** for the proposition that the mistake of counsel should not be vested on the applicant as has been held by this court in other similar applications.

Counsel further, contended that the respondents got to know that their appeal had not been filed by their former lawyers on the 14th March 2022, having been informed by their new lawyers. That therefore the respondents are not guilty of dilatory conduct because they at all times been desirous of appealing against the decision of the lower courts and that the applicant shall not be prejudiced if the respondents are granted time within which to file their appeal.

Counsel argued that the intended appeal raises a number of triable issues which ought to be dealt with in a full hearing between the parties. Counsel submitted that the suit land forms part of the respondents' family burial sites and it would be unjust to dismiss their application without consideration of the issues on merit.

Lastly, Counsel submitted that the respondents would suffer injustice and great loss if their rights in the subject matter is lost without their appeal being heard and decided on its merits by this Court. Counsel prayed that the Court denies the applicant's prayer to strike out the Notice of Appeal and prayed that it extends time within which to lodge the respondents' appeal.

Submissions of the applicant in rejoinder.

Counsel reiterated his earlier submissions and added that ^{it is} ~~it's~~ not true that the respondents lost contact with their former lawyers because they still use the same lawyers in the same subject matter as shown by annexure A1 on record. He pointed out that the respondents have a tendency of delaying court proceedings to defeat the applicants' rights since they are the ones in possession of the suit land, and have since then sold parts of it and as such the applicant will be prejudiced if this application is not granted.

Counsel submitted that the case of **Godfrey Magezi & Another Vs. Sudhir Ruparelia, (supra)** is distinguishable from the instant case because in that case the appeal had been filed and the issue was whether a single Judge can hear an application for extension of time where there is a pending application to strike out the appeal.

Further, counsel distinguished the case of **Molly K. Turinawe, supra** and contended that the respondents in that case had been displaced from Kampala to up-country and they never heard from their lawyers until they were informed that an application to strike out the appeal had been filed.

Consideration of the application.

This is an application brought under Rules 78, 79 and 80 of the Judicature (Supreme Court Rules) Directions S I 13-11, seeking to strike out the Notice of Appeal of the respondents for failure to take necessary steps to file the appeal. The respondents filed an application No. 17 of 2022 seeking for extension of time within which to file the appeal. The two applications were consolidated.

The rules relied on by the applicant expressly provide as follows:

78. Application to strike out notice of appeal or appeal.

"A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time"

79. Institution of appeals.

“(1) Subject to rule 109 of these Rules and subrule (4) of this rule, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged—


- (a) a memorandum of appeal;*
- (b) the record of appeal*
- (c) the prescribed fee; and*
- (d) security for the costs of the appeal”.*

80. Effect of default in instituting appeal.

“If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed 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 the notice of any persons on whom the notice of appeal was served”*

It is trite law that “Rules are made to be observed, and when there has apparently been excessive delay the court requires to be satisfied that there is an adequate excuse for the delay or that the interest of justice is such as to require the indulgence of the court upon such terms as the court considers just”. See: **Shah Bharmal Vs Santosh Kumari (1961) EA 679** and **Attorney General Vs Oriental Construction Co. Ltd, SCCA No. 7 of 1990.**

The Court of Appeal case of **Kitariko Vs Twino Katama [1982] HCB 97** states that *“rules of Court must Prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”* 

A reading of rules 79 and 80, indicates that they are coached in mandatory terms, but rule 5 gives Court the parameters in which to apply them. It is evident that the respondents did not take steps to institute the appeal in time. However, rule 5 of this Court's Rules provides for extension of time if there is sufficient reason for not taking the necessary steps. There are various

decisions on this point. In **Kaderbhai & N.H Valiji Vs. Shamasherali M. Zaver Virji & 2 Others, Supreme Court Civil Application No. 20 of 2008**, the applicants had instructed their lawyer to prefer an appeal against the judgment of the Court of Appeal. The Notice of Appeal was filed but the applicants' lawyers inadvertently failed to serve the opposite party within the required time and neither did the lawyers file an appeal within time. Okello, JSC (as he then was) found that "it would, in my view, be a grave injustice to deny an applicant such as this one, to pursue his rights of appeal simply because of the negligence of his lawyers when it is fairly well settled now, that an error of counsel should not necessarily be visited on his client".

The question is whether the averments in paragraphs 10, 11, 12 and 13 as reproduced in the ruling raise sufficient reason.

In **F.L. Kaderbhai & Anor Vs. Shamsherali M. Zaver Virji & 2 Others, Supra**, Okello, JSC (as he then was) cited with approval **Boney M. Katatumba Vs. Waheed Karim, Supreme Court Civil Application No. 27 of 2007**, who observed as follows with regard to the meaning of 'sufficient reason' under Rule 5.

"Under Rule 5 of the Supreme Court Rules, the Court may, for sufficient reason, extend the time prescribed by the Rules. What constitutes 'sufficient reason' is left to the Court's unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. But even where the application is unduly delayed, the Court may grant the extension if shutting out the appeal may appear to cause injustice."

As the above authorities indicate, sufficient reason amounts to the justification for the delay or inability to comply with the time limits prescribed by law.

The question is whether by the averments, in paragraphs 10, 11, 12 and 13 of the affidavit of the respondents, proved sufficient reasons.

The applicant's counsel submitted that the respondents have had a tendency of delaying this matter and that it is not true that they lost contact with their former lawyers because

the applicants still use the same lawyers in the same subject matter as per the notice of motion on record marked as annexure A1. We have considered that submission but according to the evidence as per the affidavit in reply, the respondents averred that there was a break in communication with their former lawyers which is not the same thing as loss of contact as the applicant stated. Break down is wider than loss of contact.

There are various decisions of this Court which provide that a mistake or omission of counsel should not be visited on his/her client and that counsel's negligence, omission or mistake can constitute sufficient reason under Rule 5 of this Court rules. See: **F.L. Kaderbhai & Anor Vs. Shamsherali M. Zaver Virji & Anor, (Supra)** and **Molly Kyalukinda Turinawe & 4 others Vs. Eng. Ephraim Turinawe & Another, (Supra)**.

In **Capt. Philip Ongom Vs. Catherine Nyero Owota, Supreme Court Civil Appeal No. 14 of 2001, Mulenga, JSC** held as follows:

"A litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the advocate due instructions."



In **Sepiriya Kyamulesire Vs. Justine Bikanchurika Bagambe, Supreme Court Civil Appeal No. 20 of 1995 Karokora, JSC** also held as follows:

"In my considered opinion, considering the decided cases of this Court and other Courts on this point, it is now settled that errors of omission by counsel (are) no longer considered to be fatal 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."

In **Mulindwa George William Vs. Kisubika, SCCA NO. 12 of 2014**, this Court stated that the applicant seeking for extension of time has the burden of proving to Court's satisfaction that for sufficient reason it was not possible to lodge the appeal in the prescribed time.

Upon careful perusal of the record and careful consideration of the submissions of both counsel and the authorities relied on, it was due to the lawyers' negligence that the respondents failed to file their appeal in time. we are therefore satisfied that the respondents have proved sufficient reason for the extension of time within which to file the appeal and

therefore it follows that the application for striking out the Notice of Appeal is denied to facilitate the resolving of the issues surrounding the subject matter, which is land, on merit as the justice of the case demands.

In the result, we allow the application for extension of time and the respondents are ordered to file the record of Appeal within 7 days from the date of delivery of this ruling without fail. Each party shall bear its own costs.

Dated at Kampala this 5th day of October 2023.



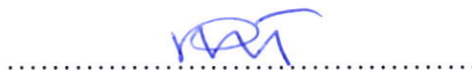
Owiny-Dollo
CHIEF JUSTICE



Mwendha
JUSTICE OF THE SUPREME COURT



Prof. Tibatemwa-Ekirikubinza
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Tuhaise
JUSTICE OF THE SUPREME COURT



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