

9

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(CORAM: KIREJU J.C.A.)

CIVIL APPLICATION NO. 19 OF 1997

BETWEEN

JULIUS EMOMERI APPLICANT

AND

SHELL (U) LIMITED RESPONDENT

(Appeal from Judgement and Decree of High Court at Kampala dated
17-3-95 before Mr. Justice F.M.S. Egonda Ntende in Civil Suit No.
440 of 1994).

RULING OF KIREJU J.C.A.

This is an application under rule 4 of the Court of Appeal Rules 1996 for extension of time within which to file and serve notice of appeal upon the respondent and also file Memorandum of Appeal and record of appeal and serve them on the respondent.

The grounds of the application are that, first, there was a delay to serve the Notice of Appeal upon the respondent's counsel due to closure of chambers where he was practising by the order of Law Council and delay in reopening them by succeeding advocates, also refusal by the respondent to accept personal service. Secondly, the delay to file the memorandum of appeal and record of appeal was due to constant change of advocates, resulting in the delay to obtain the record of proceedings and to draw and obtain the decree in the original suit and investigate the locus standi of the advocate for the respondent. Lastly that the appeal involves substantial issues of law of

public importance.

The application is supported by two affidavits, one sworn by the applicant Julius Emomeri and the second one by his counsel Mr. George Ogwanga Emesu. According to the affidavits the applicant was the losing party in HCCS No. 440/94 which he brought against the respondent claiming damages for breach of contract of employment. Judgement was delivered on 17-3-1995. The applicant was dissatisfied with the judgement and decree of the trial court and he instructed his lawyers at the time namely M/s Mbogo, Seguya & Co. Advocates to appeal to the Supreme Court (now Court of Appeal) but they declined to take instructions. The applicant instructed M/s. Owori & Co. Advocates to handle his appeal. A Notice of appeal was filed in the High court on 29-3-1995 and also in the Supreme Court. However, the Notice of appeal was not served on the respondent's advocate until 20-6-1995 which put it outside the time prescribed by the rules. The applicant's counsel failed to serve the respondent because, the respondent refused to be served personally. However, when the applicant tried to serve the counsel for the respondent Mr. Turyakira who was representing it in the original trial and practising in the chambers of M/s. Kateeba & Co Advocates, he found that the chambers had been closed by the Law Council Disciplinary Committee. M/s. Turyakira reopened the said chambers and resumed practice in June 1995 under the new names Turyakira & Co. Advocates as per certificate of approved chambers dated 24/4/1995. After instructing his lawyers M/s. Owori & Co. Advocates to apply for enlargement of time for him to prosecute the appeal he went back to his home village in Tororo District

with assurances from the advocates that they were going to carry out his instructions. The advocates were to send message to the applicant in case there was any matter requiring him in connection with the said appeal. After waiting to hear from the advocates in vain, he came back to Kampala on 23-9-1996 and found that they had done nothing beyond serving the notice of appeal on the respondent. The applicant was disappointed and withdrew his instructions from Owori & Co. Advocates and instructed M/s Emesu & Co. Advocates as per Notice of Change of advocates filed in court on 24-9-1996. His new advocate sent him with a clerk to request for record of proceedings from the Registrar High Court Mr. Onega (as he then was) who told them that M/s Owori & Co. Advocates had already taken the proceedings. Attempts to get record of proceedings from M/s. Owori & Co. Advocates failed and they had to get another copy from the Registrar on 4/10/96 although the proceedings had been completed on 18/9/1996 according to the Registrar certificate.

It is further deponed that the delay in filing this application was caused by change of advocates, negligence of former advocates and delay to get record of proceedings from M/s. Owori and the High Court. The delay in filing the application was also due to the delay to draw and file the decree in the original suit and investigations which had to be carried out in the company Registry, Law Council and High Court to find out whether a firm of M/s Kateeba & Turyakira Advocates existed at the time Mr. Turyakira filed an amended defence in the original suit on 16-1-1995, and whether the firm was legally registered. The documents from the Registrar of Companies showed that there was

no such a firm of advocates registered. Which means that the filing of a written statement of defence under a non existence firm was rendered the written statement of defence null and void.

The applicant also believes that matters of law of public importance have been raised in the memorandum of his intended appeal which was attached to the affidavit. First, the rights of the employee under the Employment Decree 1975. Secondly, whether a disqualified advocate who is a sole partner of his firm could have his chambers remain open and used by another practising advocate during the time of his disqualification and whether an advocate lincenced to practice legally could draw and file documents and appear in court in a name of unregistered and unlincenced firm of advocates and the effect of those irregularities on the court proceedings.

The respondent opposed the application on the ground that no sufficient reason had been advanced by the applicant or his counsel. Two affidavits were filed on behalf of the respondent one deponed by Mr. Turyakira former Counsel and Mr. Serwanga Sengendo present Counsel for the respondent. Mr. Turyakira deponed that he had personal conduct of the case in the High Court before it was transferred to M/s Katende, Ssempebwa and Co. Advocates on 20-7-95. He stated that though he practised with Mr. Kateeba the chambers were not closed when Mr. Kateeba was struck off from the role of advocates by the Disciplinary Committee of Law Council. He continued to work normally. He further stated that it is not true that no decree was extracted as alleged by the applicant as there was a decree designed by the

applicant's former Counsel Mr. Mbogo. Counsel further stated that the Law Council proceedings did not affect Mr. Turyakira as counsel as they were against Mr. Kateeba. Mr. Serwanga Sengendo learned counsel for the respondent stated that he was asked to sign another decree by counsel for the applicant not knowing that the applicant's counsel was going to use it to allege that there was no decree when in fact there was one.

From the evidence on record there are two decrees one endorsed by former counsel of the respondent Mr. Mbogo and the second one by the current counsel for the respondent. There was no explanation sought from the High Court Registry why there were two decrees in respect of the same case. I could not therefore say that there was no decree on the file when M/s Emesu & Co. Advocates took over the case. As it is not one of the grounds on which this application is brought, I shall not pursue the matter any further.

Mr. Emesu learned counsel for the applicant submitted that the delay in filing the notice of appeal and memorandum and record of appeal were partly due to lack of diligence on the part of the former advocates for the applicant. The new Counsel for the applicant had to carry out investigations before bringing this application which also caused further delay. Counsel contended that the memorandum of appeal contains good grounds and submitted that the appeal has reasonable chance of success. Counsel referred court to number of authorities in support of his submissions, namely, Mukula International Ltd vs. Cardinal Nsubuga 1982 HCB 11. Mayega vs. Katende and Another {1979} HCB 51 Essaiji & Others vs. Solanki {1968} EA 218 Commissioner for

Transport vs. Attorney General {1959} EA 329. Sepiriya Kyamulesire vs. Justine Bikanhulika Bagambe Civil Appeal No. 20 of 1995 (unreported).

On his part, Mr. Serwanga Sengendo invited court to strike out the affidavits in support of the application on the ground that they were false. He instructed the court to believe the averment of Mr. Turyakira that M/s Kateeba's chambers were not closed after he was struck off from the roll of advocates. Mr. Turyakira continued to work in the same chambers, and therefore the reason advanced by the applicant for having failed to serve the respondent should fail. Counsel argued that no sufficient reason had been advanced why it took 2 years to file this application and why the present lawyer for the applicant took 9 months after he had been instructed to bring this application. He added that the applicant was guilty of dilatory conduct. In support of his submissions, he cited the cases of National Pharmacy vs. KCC {1979} HCB 132 and Immaculate Mubiru vs. J. Ndaula {1979} HCB 130, Busasi & Anor vs. Kareeba and Anor {1979} HCB 129. Counsel further submitted that the grounds intended to be raised on appeal were never considered by the trial court and cannot therefore be raised on appeal. Counsel argued that the cases cited by counsel could be distinguished from the present one, as there was long delay in this case and the other cases were decided on their own facts. He added that whether the negligence of counsel should entitle the litigant to a remedy depends on the surrounding circumstances of each case. Counsel invited court to dismiss this application in order to put an end to this litigation.

This application was brought under rule 4 of Court of Appeal Rules which gives court unfettered discretion for sufficient reason to grant extension of time. The burden is on the applicant to satisfy the court that for sufficient reason it was not possible for the appeal to be lodged in time. (See Busasi vs. Kareeba (supra)). The issue now is whether failure by the applicant's counsel to serve the notice of appeal on the respondent on time was caused by sufficient reason. Sufficient reason depends on the circumstances of each case and must relate to the inability or failure to take a particular step in time although other considerations may be invoked, (See National Pharmacy Ltd. vs. Kampala City Council (supra)).

I do not wish to go into the grounds proposed to be raised on appeal, however it appears that there were some attempts by Mr. Turyakira to operate under a firm called M/s Kateeba & Turyakira Advocates as evidenced by amended written statement of Defence filed in Court on 16-1-1995. Mr. Turyakira did not state anything about this new firm of advocates under which he was operating before judgement was delivered. The respondent also did not respond to the statement by the applicant that he tried to serve them personally but they refused. From what I have referred to above I am more convinced that the applicant failed to serve the respondent because the respondent refused personal service and that his advocates chambers had been closed and did not open until June 1996. This delay is blamed on his advocates. It has now long been held that a mistake or negligence by counsel is not necessarily a bar to an intending appellant obtaining an extension of time. Each case must be considered on its own facts

- see Gatti vs. Shoosmith (1939) 3 All ER 916, Ngoni Matengo Cooperative Union Ltd. vs. A. (Osman) 1959 EA 577, and Essji vs Solamki (supra) and Ben Kiwanuka vs. Haji Nurdin Matovu Civil App. 17/1990.

After the chambers of Turyakira had opened in June 1996 under a new name there was further delay in bringing this application. This further delay was caused by applicant's advocates present and former advocates. The applicant was sure of what he wanted to do after judgement was passed against him and he went ahead and instructed his advocates M/s Owori & Co. Advocates. After M/s. owori & Co. Advocates had failed him he did not tire but went ahead and briefed M/s. Emesu & Co. Advocates. The applicant cannot therefore be blamed for dilatory conduct, (see Shanti vs. Hidocha & others (1973) EA 207. He was vigilant but unfortunately was let down by his advocates. I am of strong considered opinion that a lay person who has entrusted his case with advocates in their professional capacity should not have his efforts in search of justice frustrated by negligence of his advocates. This application is distinguishable from Mubiru vs Ndaula (supra) where the court found that there was unexplained period of 5 months when no action was taken by the applicant after she had obtained letters of administration.

Having carefully considered the whole application and the authorities referred to me by counsel, I find that the applicant has shown that he was delayed from filing his notice of appeal by failure to serve the respondent's counsel whose chambers had been closed for sometime. He was further delayed by his counsel who failed to bring this application as soon as he was in a

position to do so. I found that in the circumstances sufficient reason has been shown for the grant of the application.

I did not find it necessary to go into the issue whether the intended appeal has chances of success, however, on the face of it I found that it is not frivolous.

In the result, the application is allowed. The applicant is granted an extension of 7 days from within which to file notice of appeal and thereafter file the memorandum and record of appeal within 30 days.

Costs will be in the cause.

Dated at Kampala this 16th day of October 1997.


M. Kireju,

J.C.A.

16/10/97.