

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE C.N.B. KITUMBA, JA

CIVIL MISCELLANEOUS APPLICATION NO.62 OF 1998

BETWEEN

BOUTIQUE SHAZIM LTD..... APPLICANT

AND

NIPUN BHATIA RESPONDENT

(Arising from the ruling of the High Court {Mukanza J} dated 14-4-98 in H.C.C.S. No.910/95)

RULING OF C.N.B. KITUMBA, JA

This is an application under Rule 4 of the Court of Appeal Rules 1996 for an extension of time within which to file an appeal against the ruling of the High Court which was delivered on 14-4-1998.

The application is by notice of motion filed in this Court on 21/12/1998. It is supported by two affidavits deposed to by Azim Kassam, a director of the applicant company. The first affidavit was deposed to on 18th December 1998 . The supplementary affidavit was deposed to on 24th February 1999, and filed in court on the same day after an application had been made by Mr.Mwesigwa- Rukutana,learned counsel for the applicant, under R.43{2) of the Court of Appeal Rules, Directions 1996. As Mr. Albert Byenkya,learned counsel for the respondent, did not oppose the application, I granted it and the supplementary affidavit was put on the court record.

The brief background to this application as can be discerned from the notice of motion and the affidavits of Azim Kassam are as follows:

The applicant company was the unsuccessful plaintiff in High Court Civil Suit No. 910 of 1995 in which a ruling was given on 14 -4-1998. Immediately after the ruling, the applicant company instructed its counsel, M/s Bitangaro and Company Advocates, to appeal against the High Court ruling. M/s Bitangaro and Company Advocates filed a notice of appeal within the prescribed time but did not write to court to apply for the record of proceedings.

On 15th December 1998, the applicant instructed M/s Mwesigwa- Rukutana and Company Advocates to pursue the intended appeal. The new lawyers informed the appellant that the sixty days within which the

appeal should have been filed had already elapsed. On 21/12/1998 M/s Mwesigwa Rukutana and Company Advocates filed an application in this Court applying for extension of time within which to file an appeal.

Mr. Mwesigwa-Rukutana, learned counsel for the applicant, based his submissions mainly on what was contained in the affidavits of Azim Kassam. Counsel contended that the former counsel of the applicant were negligent as they did not pursue the appeal after filing the notice of appeal. The former counsel did not write to court to apply for the court record and the applicant could not therefore, avail itself of the provisions of R.82(2) of the Court of Appeal Rules. However, the lawyers kept on assuring the applicant that they were handling the appeal and the applicant would be informed of the hearing date. In December 1998 the applicant consulted their present counsel, who informed them that the appeal was out of time and that it was necessary to make the present application for extension of time within which to file the appeal. Counsel submitted that the duty was upon the applicant to satisfy court that there is sufficient reason for its inability to take a particular step in time. In the present case the applicant instructed its lawyers to appeal immediately, the ruling was made against it. When the applicant found out that its previous counsel had been negligent in handling the appeal, it instructed its present counsel to file this application. Mr. Mwesigwa-Rukutana argued further that the applicant was a vigilant client, who inspite of the assurance from his lawyers, took advice from another lawyer when it was noted that the appeal was taking a long period. In support of his arguments he relied on the following authorities: Haji Nurdin Matovu v Ben Kiwanuka S.C. Civil Application No.21/91(unreported) ; Mary Kyamulabi v Ahmad Zirondomu 1980 HCB 11.

Mr. Mwesigwa-Rukutana attacked para 5 of the affidavit in reply which was deponed to by Nupun Bhatia in opposition to the application. In para 5 of the affidavit of Nupun Bhatia it was stated that the affidavit of the applicant does not show that the new advocates had applied for a record of the proceedings and his counsel had never received a copy of such a request. Counsel argued that he could not have requested court for a copy of the proceedings because time had run out and the notice of appeal filed by the previous counsel, is deemed to have been withdrawn. Mr. Mwesigwa-Rukutana argued that by this application, it was obvious that the applicant still wishes to peruse the appeal.

On his part, Mr. Byenkya, learned counsel for the respondent, opposed the application on the ground that no sufficient reason had been shown by the applicant as required under Rule 4 of the Court of Appeal Rules, Directions 1996. Mr. Byenkya relied on the affidavit in reply of Nupun Bhatia, the respondent, deponed to on 23rd February 1999 in opposition to the application. Counsel argued that according to Rule 83 (a) of the Rules of this Court when one files a notice of appeal and fails to institute the appeal within the prescribed time, he/she shall be taken to have withdrawn his/her notice of appeal.

Counsel argued that the applicant's affidavits should not be believed as they do not indicate the exact steps the applicant took to ascertain that its former counsel was pursuing the appeal. For example: the affidavits do not indicate the serial number of the

appeal given to its case in the civil registry. Counsel contended that the application was frivolous and mere abuse of the legal process.

Mr. Byenkya submitted that the applicant is not interested in the appeal as it had already instituted a new suit against the right party instead of the respondent. He contended that allowing this application would lead to a multiplicity of suits as the applicant had already filed a similar suit. Learned Counsel contended that even the new Counsel who is handling the present application is guilty of dilatory conduct as he has not taken any steps to get the court record since his instructions in December 1998. He submitted that mistake/negligence by counsel is not always sufficient reason for extension of time. In support of his submissions he relied on the authorities of Clouds 10 Ltd v. Standard Chartered Bank S.C. Civil Appeal No.35 of 1992 (unreported): Sezi Busasi & Another v. Enoka S. Kareba & Another C.A. Civil App No. 6/7 8 (unreported) . He submitted that negligence of counsel which causes inordinate delay may be visited on his client.

In reply, Mr. Mwesigwa-Rukutana submitted that the present application was not frivolous and an abuse of process, because if the court finds that the learned trial judge was wrong in dismissing the application, his client would not be condemned to costs. He argued that R.83(a) should not be used as the applicant is not a lawyer and never intended to withdraw the notice of appeal, as should be inferred from the applicant's conduct especially, its instructions to counsel to make the present application. As counsel for the respondent had not used R.81 of the Rules of this Court to have the notice of appeal struck out, he contended that the notice of appeal was still valid. He distinguished the authorities quoted by Mr. Byenkya as follows: Clouds 10 Ltd v Standard Chartered Bank (U) Ltd.(supra) there was inordinate delay by the two lawyers who handled the case.

Sezi Busasi & Another v Enoka Kabera (supra) was a case of inordinate delay and the Counsel for the appellant in the case was asking the Court of Appeal to condone his own negligence which the court refused to do.

Rule 4 of the Rules of this Court under which this application is brought provides as follows:

"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 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 so extended."

The governing phrase in the above section is "for sufficient reason". Sufficient reason must relate to the inability or failure to take a particular step in time. See Mugo v. Wanjiru [1970] E.A.

481. The applicant has to show that the delay was not caused to by contributed by dilatory conduct on the part of the applicant. See Bhatt v Tijirant Singh (1962) E.A. 497, and Shanti Hundocha & Others f197 31 E.A. 207.

In the instant application the counsel for the applicant contends that it was the applicant's first counsel who was negligent in pursuing the appeal and not the applicant. Counsel relied on the case of Mary Kvamulabi v Ahamad Zirondomu S.C. Civil Appeal No. 41 of 1979, 1980 HCB 11, and Haji Nurdin Matovu v. Ben Kiwanuka S.C. Civil App No.12/91 (unreported) for the following holdings; that a mistake by counsel may not be visited on the client to deny extension of time; that administration of justice normally requires that all disputes are investigated and decided according to their merits; and that errors or lapses on part of counsel over whom the litigant has no control should not deter a vigilant litigant from pursuing his appeal .

the same is deemed to have been withdrawn. Mr. Mwesigwa-Rukutana too conceded that in view of Rule 83(a) , the notice had been withdrawn, he could not request for the court record from the Registrar before making this application "to file an appeal out of time". However, Mr. Mwesigwa Rukutana argued that the notice of appeal was still valid as Counsel for the respondent had not applied to court to have the notice of appeal struck out. I find this argument untenable as Rule 83(a) clearly states:

**"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 it of any persons on whom the notice of appeal was served;"**

According to the notice of motion, counsel for the applicant has applied for the extension of time to file the appeal out of time. However, from his arguments he only wishes to obtain extension of time to file the memorandum of appeal the record of appeal and not the notice appeal. It would serve no purpose to allow the applicant extension of time within which to file an appeal when there is no valid notice of appeal.

The issue of whether the appeal has chances of success is not for this Court to determine at the moment, and I will not deal with it.

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

Dated at Kampala this 8th day of April 1999

C.N.B Kitumba

JUSTICE OF APPEAL

I agree with the statement of the law as stated in the above cases. However, I find that in the above authorities there were appeals on

