

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: ***HON.LADY JUSTICE C.K.BYAMUGISHA, JA***
5 **CIVIL APPLICATION NO. 24 OF 2004.**
 [Arising out of Civil Appeal No. 95/2003]

BETWEEN

JULIET KALEMA::: APPLICANT

AND

- 10 1. WILLIAM KALEMA
 2. RHODA KALEMA:::RESPONDENTS

Ruling

The applicant, Juliet Kalema, filed the instant application under the provisions of
15 **Rules 4, 42, and 43 of The Court of Appeal Rules Directions, 1996.** She is seeking
orders for enlargement of time to validate Civil Appeal No. 95/2003 that was filed in
this Court without taking an essential step in time. The applicant is also seeking that
costs of the application abide the outcome of the appeal.

20 The following grounds form the basis of the application namely:

1. The clerk to the applicant's counsel by inadvertence served on the respondents the
notice of appeal outside the prescribed 7 days.
2. The essential step to commence the appeal to wit service of the notice of appeal on
the respondents within 7 days was not complied with.
- 25 3. The applicant is not responsible for the inadvertent mistake of her counsel.
4. The interests of substantive justice require that the appeal be heard on the merits.

The above grounds were supported by the affidavit sworn by Mr Peter Walubiri an
advocate of Courts of Judicature and who had personal conduct of the case in the
High Court. The respondents opposed the application. The second respondent, Rhoda
30 Kalema, deponed an affidavit in which she averred in paragraph 3 thereof that failure
by the applicant's counsel to take the necessary step in time "arose from reckless
and/or negligence on the part of counsel who failed to supervise his clerk". She
further averred that from 12th December 2003 when the mistake was discovered and
the notice was belatedly served the said counsel acted recklessly and was guilty of

inordinate delay, indolence and irresponsibility when he took no steps to validate the belated service until 5th February, 2004.

When the matter came before me for disposal both counsel made brief submissions in support of their case. Mr Bernard Bamwine who represented the applicant relied on the following authorities namely: **Crane Finance Co. Ltd v Makerere Properties Civil Appeal No.11/2001**(SC) (unreported); **Alhaji Yahaya Ziraba Balyejusa v Development Finance Co Ltd Civil Application No.34/2000**(CA) (unreported) and **Capt. Philip Ongom v Catherine Nyero Owota Civil Appeal No.14/2001**(SC) (unreported). Counsel also relied on **Articles 126(2) (e) and 128** of the Constitution.

On his part, Mr Benson Tusasirwe in his submissions cited the following authorities: **Peter Katuramu v Agri Industrial Management Agency Ltd Civil Application No.45/2000**(CA) (unreported); **Attorney General v Oriental Construction Co. Ltd Civil Application No.7/90**(SC) (unreported); **Mugo & Others v Wanjiru & Another [1970]EA 481; Watira v Margaret Elzi Civil Application No.20/94**(SC) (unreported)

Rule 4 under which this application was filed gives this Court wide powers to enlarge time within which to do any act authorised or required by the rules of this Court. In order for an application of this nature to succeed, the party applying has to show that she/he/it was prevented by sufficient cause from taking the right step in time. See **Mugo & Others v Wanjiru & Another**(supra) and **Njagi v Munyiri [1975]EA 179**. In the case of **Utex Industries Ltd v Attorney General** (SCCA No.52/95) the Supreme Court while dealing with an application for enlargement of time had this to say: ***"To avoid delays, rules of Court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily"***.

It has been held in many authorities that mistakes of counsel, faults, lapses or dilatory conduct should not be visited on a litigant except where it is shown that the said litigant was privy to such conduct or the litigant failed to give instructions in time.

The case of **Attorney General V Oriental Construction Co. Ltd** (supra) is authority for the legal proposition that where a period of delay is great, the court must scrutinise

the facts more carefully to be sure that sufficient reason can be given for the extension of time. In order, therefore, for the court to exercise its discretion in favour of the party applying, it must be satisfied that there is adequate excuse for the delay or that the interest of justice is such as to require the indulgence of the court to enlarge time
5 upon such terms as the court may consider just.

In the instant application, the facts are such that the applicant has taken all the essential steps except one to prosecute her appeal. She did not or her counsel did not supervise his clerk adequately to ensure that all the necessary documents are served in
10 time. The respondents were served with the notice of appeal after a period of one month. The issue is whether the delay of one month has been satisfactorily explained or it was negligence and recklessness on the part of counsel as it being alleged by the respondents. There is no evidence and the respondents have not claimed that the applicant knew directly or indirectly that her counsel did not take the essential step
15 after she instructed him to lodge the appeal. She, therefore, cannot be blamed for what happened. The allegations made by the respondents that counsel was reckless in not supervising his clerk, are with respect, quite harsh to say the least. The kind of mistake committed in this case was not a big blunder as the respondents want this court to believe.

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The applicant's appeal is ready and it came up for hearing on the 18th May 2004. It had to be adjourned pending the disposal of the instant application. I think it was also another oversight on the part of this Court not to have enlarged time in favour of the applicant under **Rule 41(2)** of rules of this Court. This rule gives this Court wide
25 under unfettered discretion to grant a consequential extension of time for doing any act as the justice of the case requires in order to safeguard the right of appeal. In my view, since the appeal was ready for disposal on the 18th May 2004, the court had discretion to enlarge time even on its own motion in order to safeguard the applicant's right of appeal.

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Article 126(2) (e) (supra) enjoins Courts in this Country to administer substantive justice without undue regard to technicalities. It is my understanding that the court has a duty to examine all the circumstances of the case before rejecting an application of this nature. I have examined the circumstances of this application, the submissions

made and the authorities cited by counsel on both sides. I am satisfied that the delay in serving the notice of appeal on the respondents has been satisfactorily explained. This court will therefore exercise its discretion by validating the applicant's appeal and the service of the notice of appeal on the respondents out of time. Costs of the application will abide the outcome of the appeal.

Dated at Kampala this.....25thday of.....May.....2004.

C.K.Byamugisha

10 **Justice of Appeal**