

THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 16 OF 2016.

*(ARISING FROM CIVIL APPEAL NO. 130 OF 2015)*

**PATRICK KAUMBA WILTSHIRE.....APPLICANT**

**VERSUS**

**ISMAIL DABULE.....RESPONDENT**

**CORAM: HON. JUSTICE S.B.K.KAVUMA, DCJ**

**RULING OF THE COURT**

**Introduction**

This is an application for orders that the applicant be granted an extension of time to serve a Notice of Appeal on the respondent, institute an appeal, validate Civil Appeal No. 130 of 2015, and for the costs herein to abide the outcome of the Appeal. It is brought by way of Notice of Motion under Rules 5, 43 and 44 of the Judicature (Court of Appeal Rules) Directions S.I.13-10. It is supported by the affidavits of Patrick Kaumba Wiltshire and Esther Barungi, both dated the 19<sup>th</sup> January 2016. An affidavit in reply affirmed by one, Ismail Dabule, was filed on 22<sup>nd</sup> January 2016 and was read relied upon by counsel for the respondent at the hearing application.

## **Background**

The background to the application, as can be discerned from the affidavits in its support, is that the applicant was the unsuccessful party in HCCS No. 155 of 2010 wherein he was represented by M/S Kimanje, Nsibambi Advocates. Dissatisfied with the court decision delivered on June 12, 2014, the applicant, through the same advocates, filed a Notice of Appeal and requested for a typed Record of Proceedings in order to institute an appeal.

The applicant later instructed M/S Muwema & Co. Advocates to take over the conduct of his case from M/S Kimanje, Nsibambi Advocates, which was done. M/S Muwema & Co. Advocates wrote another letter to the Registrar of the High Court, Land Division, reiterating the request for the typed Record of Proceedings to enable them institute an appeal but to no avail.

On July 2, 2015, Balondemu, Candia & Wandera Advocates took over the applicant's case from M/S Muwema & Co. Advocates and by a letter dated July, 16, 2015, the Registrar notified the firm that the typed Record of Proceedings was ready for collection.

Consequently, the new firm filed Civil Appeal No. 130 of 2015 in this Court on July 22, 2015, and duly served the respondent's lawyers, Ms. Omongole & Co. Advocates on July 24, 2015.

served record included the Memorandum of Appeal, the Appeal and the request for the typed Record of

On August 4, 2015, the respondent's advocates aforesaid were also served with conferencing schedules, the appellant's conferencing notes and written arguments.

On October 7, 2015, Civil Appeal No. 130 of 2015 was duly conferenced before the Registrar of this Court and is ready for hearing.

When the respondent's advocates were served with the Record of Proceedings, one of the deponents to the affidavits in support of the application, Esther Barungi, noticed that it was stamped with an endorsement stating, "Received under protest as appeal filed out of time". Barungi then perused all the documents availed to the advocates and the High Court file to establish why the Appeal was stated to have been filed out of time. She discovered that the Notice of Appeal did not have a 'received' stamp or the signature of the respondent or his counsel. She also discovered that the request for the typed Record of Proceedings was not filed in time and did not bear any stamp or signature of the respondent or his counsel aforesaid.

The applicant, who ordinarily works in London, at all times relied on the competence and ability of his then counsel to prosecute his case diligently and with professional skill.

Barungi also averred that the above failures were attribute to the errors, mistakes, negligence and or inadvertence applicant's former counsel which should not be visited on the

applicant. She added that the justice of this case, which involves family land, demanded that it is heard by this Court on its merits.

### **Grounds of the application**

The background to the above Application substantially reflects the grounds upon which it is premised. In addition, however, the applicant averred in his affidavit, *among other things*, that:

- He is a son and beneficiary of the late Jane Kogere Wiltshire who was the registered proprietor of commercial property at plot 21, Kampala Road,

The respondent is his stepfather and registered on the title of the property in his capacity as Administrator of the estate of his late mother, He lodged a caveat on the title and the respondent filed HCCS No. 155 of 2010 for the removal of the caveat, which order was

granted by the High Court on 12<sup>th</sup> June 2014, He is now advised by his current counsel, Messrs Balondemu Candia & Wandera Advocates that his former lawyers failed to file and serve the Notice of Appeal and request for proceedings in time, The above omissions should not be visited on him since he is a lay person and being ordinary resident of united kingdom

it was not possible for him to constantly visit the lawyers' chambers to check on the progress of the case or get copies of the documents,

- If his appeal is not validated he will be disabled from exercising the right to appeal and pursue his claim on the suit,property as beneficiary, (sic)

### **Reply to the application**

In his affidavit in reply to the application, the respondent averred, *among other things*, that he filed a civil suit against the defendant (now applicant) for orders of vacating and or removing a caveat which the applicant lodged on his property vide LRV 194 Folio 13 Plot 21 Kampala road also known as "Slow Boat", wherein he succeeded. The applicant was ordered to pay costs and his lawyers M/S Omongole & Co. Advocates filed a bill of over Ug. Shs. 100,000, 000/-. The applicant rushed to Court and obtained an interim order maintaining the status quo pending the hearing of the application for stay of execution. The applicant also filed Misc. Application No. 673 of 2014 for a stay of execution and 674 of 2014 for interim stay.

On 28/ 08/ 2014 when the interim stay was called for hearing, the applicant consented to depositing security for due performance of decree and costs, but has not deposited any money to date, On 22<sup>nd</sup> July 2015, the applicant filed C.A. No. 130/ 2015 filed conferencing notes on August 2015 at the Court of Appeal on 22<sup>nd</sup> September at 2:30 pm, the matter was fixed for hearing at Court of Appeal and scheduling done,

The applicant has not given security for due performance of the decree amounting to 100, 000, 000/- or security worth the same for the due performance of the decree/ security for costs, and that the intended appeal has no likelihood of success.

### **Representation**

At the hearing of the application, the applicant was represented by Mr. Nelson Nerima, Mr. Alex Chandia and Mr. David OundoWandera, (counsel for the applicant). The respondent was represented by Mr. Omongole, (counsel for the respondent).

### **The case for the applicant**

Counsel for the applicant submitted that Civil Appeal No. 130 of 2015 was already filed here and it had been conferenced and was therefore ready for hearing. He noted however, that the Notice of

Appeal was never served on the respondent's counsel within 7 days as required by Rule 78 of the Court of Appeal Rules. No letter applying for proceedings was served under Rule 83 (2) of the same Rules. He relied on the affidavits in support of the application to seek an extension of time contending that the failure to serve was due to the omission of his previous counsel.

Submitting that no injustice will be caused if the Appeal is to allow the dispute to be heard on merit, counsel cited **Magezi & Anor v Sudhir Ruparelia S.C. Misc. Application No. 5 of 2003** which states the principles for allowing an already filed

appeal to be validated and prayed that this Court be pleased to grant the application.

Counsel added that the affidavit in reply to the application had neither opposed the averments of the applicant nor indicated that he was guilty of dilatory conduct to disentitle him the order of extension of time.

### **The case for the respondent**

Counsel for the respondent relied heavily on the affidavit affirmed by the respondent to oppose the application. He submitted that the failure to serve the Notice of Appeal and the letter applying for the Record of Proceedings violated the cardinal Rules 78 and 81- 83 of the Court of Appeal rules. He stated that these were mandatory and there was no sufficient reason advanced by the applicant, unlike in the cases cited. He stated that the failure to comply with the rules was action by counsel and not by a lay person. Counsel further submitted that those mistakes were for the applicant's current counsel and not the previous one. He argued that **Magezi** (supra) does not give an automatic right to validate invalid appeals or extension of time but rather extension of time calls for sufficient reasons, which are absent in the instant Application. He prayed that the Application be dismissed for lack of sufficient cause. He referred to the authority in *Tight Security Ltd v Chartis Uganda Insurance Co. Ltd & Anor HC Misc. Application No. 8 of 2014m* where Court considered the decision in **Magezi** (supra) to decline validation and struck out the appeal but allowed the filing of a fresh appeal. He prayed that this Court finds that the appeal is invalid and cannot be validated.

On the question of no injustice being caused to the applicant, counsel for the respondent contended that the failure to fix the respondent's application filed in August 2015 and the fixing of the **10** applicant's application filed in January 2016 showed that there would be no injustice if this application was dismissed. He prayed that Court fixes Application No. 222 of 2015.

On costs, counsel pointed out that the applicant was a British Citizen who had failed to pay for the decree and had also not paid 15 security for costs. He prayed that this application be dismissed with costs so that a proper appeal is filed.

### **Reply**

In reply, counsel for the applicant submitted that security for costs under Rule 105 of the Court of Appeal Rules was not a matter for consideration in an application for extension of time. He further submitted that the consent orders referred to by the respondent were not before this but the High Court and any application concerning them should be made at that Court but not here. He

reiterated that the Notice of Appeal and the letter applying for the court record were filed out of time and extension of time is what was needed to cure the mistake. He submitted that **Tiger Security Ltd** (supra) was distinguishable from the instant application since in that case, the Appeal had already been struck out by the time the application for extension of time was made.

### **Court's consideration of the application**

This application is for extension of time to enable the applicant to comply with Rules 78, 82 and 83 of the Judicature (Court of Appeal Rules) Directions S.I.13-10. This Court derives its jurisdiction in this matter from Rule 5 (2) of the same Rules which provides:

**“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 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 as extended.”**

The basis for the grant or denial of such applications considered in the Supreme Court in **Mulwooza & Bro ltd Vs. N. Shah and co ltd** SCCA no.20 of 2010 where it held that the applicant seeking an extension of time must satisfactorily explain the reason for the delay and should satisfy court as to whether or not there will be a denial of justice by the refusal or the granting of the application.



This, in my view, is reflected in the need for the applicant to prove 'sufficient cause' for the failure to take the necessary steps in time.

In the instant application, the applicant argues that the failure to serve the Notice of Appeal and the letter applying for the typed Proceedings in time was due to the inadvertence of his former counsel who he trusted to do their professional work. He pleads that being away in the United Kingdom, he could not constantly check on his said counsel whom he trusted would handle his case with diligence and professional skill.

Counsel for the respondent, however, contended that the mistakes allegedly made were by the current counsel and not the applicants' former one as claimed by the applicant. Further, to him, the applicant being an educated man, was not a lay person and, as such, he could not claim ignorance of the law to sustain his inability to comply with court requirements.

A perusal of the Notice of Appeal in issue shows that it was filed in this Court by M/S Kimanje, Nsibambi Advocates on 12<sup>th</sup> June 2014. A further perusal of the other annexures to the application shows that the applicant received the copy of the typed proceedings from the High Court on July 16, 2015 after M/S Muwema & co. Advocates & Solicitors had re-applied for the same on the 21<sup>st</sup> May 2015. The Notice of Motion shows that the applicant is currently

being represented by M/s Balondemu, Candia & Wandera Advocates. Clearly these were not the applicant's counsel at the material time for this application. In any case the legal principle of non-visitation of counsel's mistake/ inadvertency to his/her client, as developed in the jurisprudence in this area, does not, to my mind, differentiate between the former and the current counsel for an aggrieved party. What is trite is that mistakes inadvertencies of counsel should not be visited on his/her client. See **Captain Philip Ongom v Catherine Nyero Owota SCCA No. 14 of 2001**.

The respondent, in his affidavit in reply to the application affirmed that the applicant is not resident in Uganda confirming the applicant's explanation that being away in the UK, he relied entirely on the professional skill of his counsel.

Further, I find the authority of **Tight Security Limited** (supra) is relied on by counsel for the respondent for the assertion that the intended appeal in the instant application cannot be validated distinguishable from the situation before me. In that case, the appeal having been struck out already, the court could not grant an extension of time to validate it. There was nothing to validate. In the instant case, there is an Appeal filed in this Court whose scheduling has already been done. Further, the irregularities complained of by the respondent in this are not fatal as the rationale for court's discretion to well expressed by the Supreme Court in **Godfrey magezi & Another**, (supra), where court held:

**“We think that it is obvious that the contended effect is to bring an act within the time as so extended. There would have been no reason to include that scenario in the rule if an act done out of time was an incurable nullity...”**

Counsel for the respondent contends that they filed their application to strike out the Appeal before the instant one and therefore Court should reject this one. That application is not before court and I deliberately refrain from saying more than that on it.

I am not persuaded by counsel from the respondent’s submission that the appellant, being an educated person is not a lay man who should not benefit from the principle of his counsel’s mistake not being visited upon him. I am fortified in this view by the accepted definition of a lay person or lay man or lay woman in the English Queens language from which this jurisdiction has a lot to share.

The Oxford Dictionary of English defines a lay person as

*“..... A person without professional or specialized*

*Knowledge in a particular subject* Coming nearer to the home of

legal fraternity, Black’s Law Dictionary, the 9<sup>th</sup> Edition defines a

*layman as “.....A person who is not a member of a*

*profession or an expert on a particular subject”.*

Clearly, no evidence has been adduced in the instant application to remove the Applicant from the confines of either of the two definitions which have very close, if not complete similarity?

By reason of this fact the applicant cannot be denied the benefit of the said well developed and accepted principle stated above.

I

It is clear to me, from the evidence on record and the full circumstances of this application that the applicant came to court seeking substantive justice to have his appeal heard on merit. Appeals are a fundamental aspect of our justice system. It is part of the right to a fair hearing well entrenched in this Country's Constitution See **Articles 28 and 44 (C) of the Constitution**. See also **Article 45** of the Constitution. Further, The African Commission on Human and Peoples' Rights provides for principles and guidelines on the right to a fair hearing which include *inter alia* an entitlement to an appeal to a higher judicial body.

It is also trite that fair hearing encompasses both substantive and procedural guarantees. See the Lawyers' Committee for Human Rights, in its Basic Guide to Legal Standards and Practice, March 2000, a document of significant persuasive authority, where it observes:

**“The right to a fair hearing as provided for in Article 14(1) of the 1CCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15 however, it is wider in scope as can be seen from the wording of Article 14(3) which refers to the concrete rights enumerated as minimum guarantees.**

**Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2 to 7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1).”(Underlining mine)**

A litigant who comes to court should not be driven from the seat of justice as long as he/she satisfies court that he/she has shown good cause to persuade it to exercise its discretion in his/her favour. Having carefully considered the parties’ pleadings, the submissions by counsel for both parties and the affidavit evidence on record, I am satisfied that this is a case where the provisions of **Article 126** clause 2 **(e)** of the Constitution, which requires courts of this Country to administer substantive justice without undue regard to technicalities should be invoked and I hereby do so. Further, the applicant should not be denied the right to a fair hearing and the now well settled principles and guidelines stipulated herein above.

I, therefore, find that the applicant has shown sufficient cause for the grant to him of an extension of time to allow him serve the respondent within seven(7) days from the date thereof with a notice of appeal and the letter applying for the record of proceedings and a validation of civil appeal no.130 of 2015, as i indeed hereby do.

The costs of this application shall abide the outcome of the Appeal.

**I so order.**

**Dated at Kampala this 14<sup>th</sup> day of April 2016.**

**S.B.K.KAVUMA**

**DEPUTY CHIEF JUSTICE**