

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

CIVIL APPLICATION NO. 299 OF 2014

BENEDICT BINUGE MUGISA:..... APPLICANT

VERSUS

1. FRANCIS KARUBANGA

2. CHARLES SAFARI

3. PATRICK NYAKANA

4. SELEVESTER BAGUMA

5. SELEVESTER NKوبا:..... RESPONDENTS

(Arising from the decision of the High Court of Uganda at Fort Portal before His Lordship Hon. Justice Simon Byabakama dated 13.12. 2012)

BEFORE: HON. LADY JUSTICE HELLEN OBURA, JA, sitting as single justice.

RULING OF THE COURT

Introduction

This is an application brought by notice of motion under rules 5, 2(2) of the Judicature (Court of Appeal) Rules SI 13-10 and Section 98 of the Civil Procedure Act, Cap 71 seeking for orders that:-

- (a) The period be extended to file notice of appeal and to serve it upon the respondents. The applicant be granted leave of Court to lodge record of appeal out of time.
- (b) Costs of this application be provided for.

Background to the Application

The background to this application is that the applicant filed an action for recovery of land against the respondents in the District Land Tribunal. Following the dissolution of land tribunals the case was transferred to the Magistrates Court, Fort Portal and was handled by Her Worship Ms. Sarah Langa, Magistrate Grade 1. The parties entered a 10 consent agreement and a consent order was issued. The impugned consent order was to the effect that the claim as against the 3rd respondent was withdrawn, the applicant recognized the 3rd respondent as the rightful owner of the suit property, no further action was to be brought against the 3rd respondent or any other person and each party was to bear his own cost.

On the 14th of October, 2008 the appellant applied before the Chief Magistrates Court for an order of review and vacation of the consent order. It was heard and dismissed by His Worship Kawesa Godfrey. Being dissatisfied with that decision, the applicant appealed to the High Court of Uganda at Fort Portal before Hon. Justice Simon Byabakama. The appeal was heard and dismissed on the ground that the applicant had not shown that the consent order was obtained through fraud, collusion or agreement contrary the Court policy, nor was it proved that the consent order was given without sufficient facts, or in misapprehension of material facts. Dissatisfied with the decision of the High Court, the applicant filed a notice of a second appeal in this Court on 13/12/2012.

The grounds upon which this application is based are contained in the notice of motion and in the affidavit in support thereof sworn by Benedict Binuge Mugisa, the applicant. The gist of the grounds is that:-

1. The applicant appealed to the High Court against decision of Magistrate Grade I whereby the applicant's application for review of consent order was dismissed. Applicant further appealed to the High Court which also dismissed his appeal.

2. The applicant who is semi-illiterate was not represented by an advocate to draw proper notice of appeal so the notice of appeal he drew named Patrick Nyakana as the only defendant but did not include four other defendants namely: - Francis Karubanga, Charles Safari, Selevester Baguma and Selevester Nkoba who also appear as defendants on the consent order which is subject matter of the appeal.
3. The subject matter of the appeal is land (property). The judgment of the Hon. Justice Simon Byabakama Mugenyi on appeal is in favor of Patrick Nyakana, one defendant which is an error of law.
4. The consent order was drawn by an undisclosed author and the name of the advocate who signed as counsel for the defendant is not disclosed to enable the applicant to investigate whether he is a licensed practicing advocate.
5. The consent order was subtly (secretly planned) to deprive applicant entirely of the land that is subject matter of the applicant's claim.
6. The intended appeal raises serious and novel points of law for the determination of the Court of Appeal and has higher chances of success.
7. The orders of the High Court confirming decision of Magistrate Grade 1 Court are illegal in so far as there was no formal plaint filed in the Magistrates Court to which the trial Magistrate would base to make decision against the applicant.
8. The applicant was advised by his counsel, M/S Rukundo Seth & Co. Advocates, who was instructed to represent him under probono scheme, that the applicant should have served a copy of the notice of appeal upon the respondent and filed a copy of the same in the Court of Appeal. Furthermore, that it was an essential step to file a letter requesting for proceedings and judgment in the lower court and serve a copy of the same upon counsel for the respondent which essential step the applicant is going to fulfill upon grant of this application.

The applicant prayed that the period be extended for him to file the notice of appeal and to file the letter requesting for proceedings and judgment from the lower court.

Mr. Patrick Nyakana, the 3rd respondent swore an affidavit in opposition to this application and the grounds are contained in paragraphs 5-10 as follows;

5. *“That the applicant's claim that he is an indigent client is a total lie given that he has not*

attached any proof in that regard, and yet as an immediate neighbor to his home, I know him to be a wealthy man who promptly paid my costs of over Ugx. 7,000,000/= once they were taxed and the applicant was represented by various advocates in the lower courts including; Counsel Peter Nyamutale, John Musana and Victor Busingye and now Rukundo Seth.

6. *That I know as a fact that the case against me i.e. M.A No. 029 of 2008 seeking review of the consent order and the resulting appeal vide H.C.C.A No. 061 of 2009 were determined separately from the one against my co-respondents and as such it is untenable for the applicant to wish to have different matters joined in one appeal without following the proper procedure.*
7. *That I also know as an advocate that illiteracy or even ignorance of the law has never constituted an excuse for flouting rules of procedure of court and besides the applicant is guilty of inordinate delay in so far as he has not in any way explained why he filed the instant application almost two years after the judgment intended to be appealed from.*
8. *That further, there is nothing on record to show that the applicant is illiterate as claimed given that he has never in all his pleadings, including the affidavit in support of the instant application, inserted a jurat to that effect and yet the same is signed by him.*
9. *That the applicant's prayer for extension of the time within which to appeal is in vain since he lodged his appeal in time, while his prayer for extension of time to request for the judgment and proceedings lacks merit because it failed to state the dates certified by the High Court as the due dates of completion thereof*
10. *That there is no serious or novel point of law raised by the applicant's intended appeal as claimed, given that the applicant is relying on his own default(s) when he alleges that there was no formal plaint filed by him before the Magistrate and he failed to raise the alleged illegalities at the trial or even during his 1st appeal. ”*

Representation

At the hearing of this application, Mr. Rukundo M. Henry appeared for the applicant while Mr.

Wetaka Andrew appeared for the 3rd respondent. The rest of the respondents did not participate in the proceedings because they appear not to have been served.

Applicant's Case

Mr. Rukundo submitted that at all material times the applicant was desirous of appealing against the decision of the High Court and he demonstrated this by filing a notice of appeal on 12/12/ 2012 against the decision made on 7/12/2012. The applicant did not write a letter requesting for the proceedings because he did not know the legal steps required for lodging the appeal. The applicant has shown sufficient cause that he is an illiterate person who does not know the requirements of the law. Having filed a notice of appeal, there is no letter annexed to the affidavit in reply from the Registrar High Court Fort Portal showing that the records were ready and needed to be picked since notice of appeal had been filed.

Counsel further submitted that on a possibility of success, the consent order was signed by an advocate who did not indicate his name so that the applicant could investigate whether or not he is qualified. The applicant did not indicate whether he signed the 30 consent order or not and neither did all the parties to the suit mentioned in the consent order sign it. He contended that this was an illegality that escaped the eyes of the lower court. Counsel cited the case of **Uganda Railways Corporation vs Ekwaru CACA No. 185 of 2007** where it was held that the higher court should not allow an illegality that escaped the eyes of a lower court. It was counsel's submission that there was a miscarriage of justice in that the consent order recognized the 3rd respondent as the owner 10 of the suit land and that no action will be taken as regards the property and yet these other respondents did not sign it. This occasioned a miscarriage of justice as this was an illegality. He cited the case of **Crane Insurance Company vs Shelter (U) Ltd CACA No. of 1998** for the definition of miscarriage of justice. Counsel argued that this was a misdirection as the consent order appeared to be admitting evidence that was not led. He 15 contended that the learned trial Judge did not evaluate that aspect of the case in his judgment. Counsel finally submitted that what are stated in the notice of motion are grounds of the application and what is stated in the affidavit is evidence supporting the grounds
He prayed that the orders sought be granted

Respondent's Case

Mr. Wetaka opposed the application and submitted that this Court has unfettered discretion to grant this application. However, the applicant must demonstrate that there was sufficient cause as to why the applicant did not commence the appeal in time. Counsel cited the case of **Molly Kyalukinda Fur inawe and ors vs Engineer Ephraim Turinawe and anor; SCCA No. 27 of 2010** where the Supreme Court stated conditions to be satisfied in order for leave to appeal out of time to be granted. These are:- (1) the applicant should show that he/ she has an arguable intended appeal, (2) he or she should have the desire to prosecute the intended appeal, (3) the application has not been brought with undue delay, and (4) in case the application is denied, the applicant is likely to suffer injustice.

I must point out at this juncture that this Court thoroughly perused a copy of the judgment in **Molly Kyalukinda Tur inawe and ors vs Engineer Ephraim Turin awe and anor (supra)** provided by counsel for the respondent but could not see the four conditions counsel said are listed in that case. He seemed to have drawn his own erroneous conclusion that the judgment listed those four conditions.

Be that as it may, counsel for the respondent submitted that the applicant has not demonstrated any of those four conditions because the grounds of the application are different from what is set out in the affidavit in support. He also argued that there is no ground showing the reason as to why the applicant did not file his intended appeal in time. According to counsel, the matter that the applicant had filed touched land and if he agreed to surrender the same to the 3rd respondent, then there is no illegality.

Counsel further submitted that the applicant applied for a review of the consent order and the application was dismissed. He appealed against the dismissal and the appeal was also dismissed. It was his contention that all the issues raised by the applicant here were covered by the judgment of the High Court and if the applicant has to appeal against that 20 decision he has to show what the judge did not do.

Counsel also submitted that the alleged miscarriage of justice by the failure of the other parties to the suit to sign the consent order is untenable because those parties were not affected by the consent and so their signatures were not necessary as stated by the trial Judge.

As regards the applicant's illiteracy, counsel submitted that this issue was canvassed before the

High Court Judge who determined it by noting that there was no jurat indicating that the appellant is illiterate. The Judge also looked at the other documents signed by the applicant. Counsel drew this Court's attention to the fact that this application does not indicate that an illiterate person signed it.

Counsel further submitted that the reason given by counsel for failing to request for proceedings are unsatisfactory. He conceded that it was the applicant himself who filed the notice of appeal but argued that the applicant has not shown any reason why there was delay between filing the notice and the filing of this appeal. It shows the applicant was not desirous to prosecute the appeal since he filed it with undue delay.

In conclusion, counsel prayed that the applicant should not be granted the orders sought in light of the admission made by him that he defaulted in taking the essential steps to file the appeal and in light of the contradictions in the grounds of the application as contained in the notice of motion and the evidence in the affidavit. He prayed that Court should note that the delay is for over 2 years.

Court's Findings

I have carefully studied the notice of motion, the affidavits and considered the submissions of both counsel and the issues they raised. I am also alive to the fact that this Court has the discretion to extend time pursuant to rule 5 of the Judicature (Court of Appeal) Rules SI 13-10.

Rule 5 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 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 phrase “*sufficient cause*” has been explained in a number of authorities. In the case of **Rosette Kizito vs Administrator General and Others; Supreme Court Civil Application No. 9/86**, it was held that “sufficient reason” must relate to the inability or failure to take the particular step in time.

The Supreme Court in the case of **Nicholas Roussos vs. Gulam hussein Habib Virani and anor SCCA No. 9 of 1993** laid down grounds or circumstances which may amount to sufficient cause and

these include:- a mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness by a party.

The question to be determined in this application, therefore, is whether the applicant has proved to the satisfaction of this Court that he was prevented by sufficient cause from taking the essential steps for instituting his appeal in time. It was submitted for the applicant that at all material times the applicant was desirous of appealing against the decision of the High Court and he demonstrated this by filing a notice of appeal on 12/12/ 2012 against the decision made on 7/12/2012. Further, that the notice of appeal was filed by the applicant who is an illiterate person with no knowledge of the law and the legal steps for lodging an appeal. Consequently, the applicant did not write a letter requesting for the proceedings and serve a copy of the same on counsel for the intended respondent.

On the other hand, counsel for the respondent argued that there is no indication that this application was signed by an illiterate person as there is no jurat to that effect. Furthermore, that the applicant did not show any reason why there was delay between filing the notice of appeal and the filing of this application. Counsel contended that this showed the applicant was not desirous to prosecute the appeal since he filed it with undue delay.

It is not disputed that the notice of appeal on record was drawn and filed by the applicant. It follows therefore that the applicant was unrepresented at the time of filing the notice of appeal. As an unrepresented litigant, the applicant filed the notice of appeal but failed to 30 take the other essential steps listed under rule 83 of the Judicature (Court of Appeal) Rules SI 13-10 for the proper institution of the appeal. He was ignorant of the procedure and according to the authority of **Nicholas Roussos vs Gulam hussein Habib Virani and anor (supra)**, ignorance of procedure by an unrepresented party amounts to sufficient cause upon which court may grant an application for enlargement of time.

In my view, first of all, all the applicant needs to show for him to benefit from this ground is that he is a lay person in legal matters and that he was unrepresented at the time he filed the notice of appeal. Whether or not he is illiterate or literate is immaterial for purposes of this application.

Secondly, this Court does not necessarily have to go into the merits of the intended appeal to determine its likelihood of success as counsel for the respondent seem to suggest. I draw fortification from the case of **Kampala Capital City Authority vs Kabandize & Others; SCCA No. 21 of 2014** where Okello, Acting JSC quoted the decision of the former Court of Appeal of

East Africa in the case of **Shanti vs Hindocha and Others (1973) EA 207** to the effect that the applicant for extension of time does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case.

In the instant case, without delving into the merits of the intended appeal, this Court is satisfied from the affidavit evidence that the applicant has an arguable case which he should be given opportunity to present to this Court. I particularly note that at pages 4 -5 of the judgment of the High Court appealed from, parts of the content of the 3rd respondent's affidavit in reply to the applicant's affidavit in support of his application to the Magistrate's Court for review of the consent order was reproduced. Specifically paragraphs 4 and 5 of that affidavit allude to the fact that the amended plaint improperly filed by the applicant in the lower court was struck out upon an application by the 3rd respondent. It would therefore be important for this Court to investigate the basis of the consent order if the amended plaint was indeed struck out. To my mind the allegation of illegality surrounding the consent order cannot be overlooked on the basis of technicality.

The applicant needs to have opportunity to present it in his appeal and have it determined, if Court allows him to do so.

In conclusion, considering the facts and circumstances of this case, this Court is satisfied that the applicant has shown sufficient cause for his failure to take the essential steps in instituting his appeal in time. I am therefore inclined to grant the orders sought by this application in the interest of substantive justice so that the applicant can follow the proper procedure to institute his appeal and have it heard on the merits.

In the result, this application is allowed and the time within which to file the appeal is extended. The applicant is ordered to file and serve a fresh notice of appeal within 20 (twenty) days from the date of delivery of this ruling and to follow all the necessary steps prescribed under rule 83 of the Judicature (Court of Appeal) Rules.

Costs of this application shall abide the outcome of the appeal.

I so order.

Dated at Kampala this 9TH Day of FEBRAURY ...2016

HON.LADY JUSTICE HELLEN OBURA

JUSTICE OF APPEAL