

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

[Coram: Bossa, Kakuru & Egonda-Ntende, JJA)

CIVIL APPLICATION NO. 96 OF 2015

(Arising out of Civil Appeal N0.16 of 2008)

(Arising out of High Court of Uganda Civil Suit No. 0052 OF 2005)

BETWEEN

BERNARD TUMURAMYE.....APPLICANT

AND

BENON TUSHEMEREIRWERESPONDENT

RULING OF THE COURT

Introduction

1. This an application by way of notice of motion brought under Rules 43(1), 100(2) and of the Judicature (Court of Appeal Rules) Directions S I 13-10. The applicant primarily seeks for an order to set aside the dismissal of civil Appeal no. 16 of 2008 and the restoration of the appeal for hearing before this court. The applicant also prays for costs.
2. The ground for the application is that counsel for the appellant was not served with the hearing notice for day of hearing of the appeal. The motion is supported by the affidavit of the applicant deponed on the 20th day of April 2015. The application is opposed by the respondent and is supported by the affidavit deponed by Benon Tushemerweire, the respondent.
3. The applicant's case is that he lodged civil appeal no. 16 of 2008 which was dismissed for non-appearance by the Appellant on the hearing date with costs to the respondent under rule 100(1) of the Judicature (Court of Appeal Rules) Directions S 1 13-10. The applicant / appellant contends that he was neither

served with the hearing notice nor were his counsel. The hearing notice was served on M/s Kwesiga – Bateyo & Co. Advocates who was not, at the time, counsel for the Appellant. M/s KGN Advocates, were the counsel for the applicant and had filed a notice of change of advocates in this court.

4. It is further ~~contended that~~ the Ms KGN Advocates, the appellant's counsel participated in conferencing of the appeal along with counsel for the Respondent, M/s Bashasha & Co. Advocates. That it was equally erroneous and irregular for counsel for the respondent as an officer of court not to bring this error/irregularity of service to the attention of court and instead proceeded ex parte when he was actually aware that the appeal was handled by KGN Advocates.
5. The respondent denies the applicant's allegation and contends that the applicant should have been vigilant in following up the Appeal and should not blame court for its laxity.

Analysis

6. This application is brought under Rule 100(2) of the Judicature (Court of Appeal Rules) Directions S I 13-10. The Rule stipulates as follows;-

‘Where an appeal has been dismissed under sub rule (1) of this rule or any cross- appeal heard under that sub rule has been allowed, the appellant may apply to the court to restore the appeal for hearing or to rehear the cross appeal, if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing.’

7. For an applicant to succeed in an application brought under Rule 100 (2) of the Rules of this court the applicant has to satisfy court that he or she was prevented by sufficient cause from appearing when the appeal was called for hearing.
8. The power given to this court by the said Rule 100 (2) is discretionary and can only be exercised after sufficient reason for non-appearance by the applicant has been established.

9. Sufficient reason in this case must relate to the inability of the applicant or his counsel to attend court. See Rosette Kizito v Administrator General & OTHERS, Supreme Court Civil Application No.9 of 1986 (unreported). Taking into account the above obligation the applicant has the burden to show why the failure to appear in court on the date scheduled for hearing should be excused.
10. The applicant contends in his affidavit that he was not served with the hearing notice for the day of hearing. Under Rule 99 (1) of this court, the duty to give such notice is imposed on the Registrar. The hearing notice was served on M/s Mwesiga-Bateyo & Co. Advocates who are not counsel for the applicant. He relied on annexure A1 (hearing notice dated 12th January 2017) attached to the affidavit by the applicant. It is evident from annexure A1 that the hearing notice was served on counsel who no longer had instructions from the applicant.
11. The applicant further contends that he filed a notice of change of advocates in this court on 5th December 2015 (annexure B1) which was served on M/s Bashasha & Co. Advocates (counsel for the respondent) and M/s Birungyi, Barata & Associates. By the time the hearing notice was served on Kwesiga Bateyo & Co. advocates, there was already a notice of change of advocates on court record. It is also evident that the notice of change of advocates was filed after M/s KGN Advocates had filed the notice of appeal and amended conferencing notices on behalf of the appellant. We believe the notice of change was filed to provide clarity as to who is currently representing the appellant given the appellant history of legal representation. This error in service ought to have been rectified by court when Kwesiga Bateyo & Co. Advocates notified court that they no longer had instructions in the matter. An examination of the court record would have borne this out.
12. In Joseph Muluta versus Sylvano Katama SCCA No.2 Of 1999 G.W Kanyeihamba, JSC., stated that;

‘It is now trite law that a vigilant litigant should not be penalized by the dilatory conduct of his Advocate or of the

Court if he or she has not directly or indirectly contributed to it.'

13. It is evident that neither the applicant / appellant nor his counsel were served with hearing notices in respect of the hearing of the appeal. This is sufficient explanation for their non-appearance on the day of the hearing.

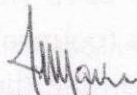
DECISION

14. We allow this application and reinstate the appeal. Costs of this application shall abide the outcome of the appeal.

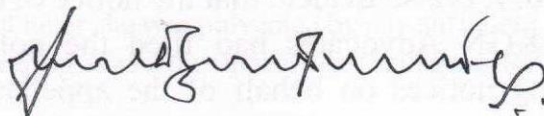
Signed, dated and delivered at Kampala this 10th day of May 2018



Solomy Bossa
Justice of Appeal



Kenneth Kakuru
Justice of Appeal



Fredrick Egonda-Ntende
Justice of Appeal

10/5/18

Byamugisha Guma for the Applicant

Applicant is absent

Habonugisha Innocent for the Respondent

Njerezi Nando Paul

Respondent is absent

de - Melissa Markande

Byamugisha For ruling

cont Ruling read out in court

by D/R Es for Nantagga



10/5/18