

**THE REPUBLIC OF UGANDA**

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

**MISC. APPLICATION NO. 371 OF 2018**

**(ARISING FROM CIVIL APPEAL NUMBER 371 OF 2017)**

5 **CAR & GENERAL LTD ::::::::::::::::::::::::::::::APPELLANT**

**VS**

**AFS CONSTRUCTION (U) LIMITED:::::::::::::::::RESPONDENT CORAM:**

10 **HON. MR. JUSTICE. STEPHEN MUSOTA, JA**  
**(Single Justice)**

**RULING**

The applicant brought this application under Sections 79, 96 and 98 15 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 52 rules 1 & 3 of the Civil Procedure Rules for orders that;

- (i) The time for filing an Appeal to the Court of Appeal by the Applicant be enlarged.
- (ii) The costs of this Application be provided for.

20 I wonder why the applicant chose to cite provisions of the Civil Procedure Act yet there are clear provisions that enable the filling of such applications like the instant one in the Court of Appeal Rules Directions.

The applicant seeks to lodge an appeal against the ruling of Hon. 25 Justice Billy Kainamura which he alleges was delivered without notice to the applicant or its lawyers. This application is supported by the affidavits of Naveen Kumar and Mr. Brian Tendo.

The grounds in support of this application are;

the applicant nor its Legal Representative contrary to court undertaking on 30th June 2015.

2. THAT notice of the ruling in Miscellaneous Application No. 87 of 2015 delivered on 21<sup>st</sup> December 2016 by Justice Billy

5 Kainamura came to the attention of both the Applicant and its counsel on 8<sup>th</sup> November 2017 when the Applicants Bankers were served with the Garnishee Order Nisi.

3. THAT the Appeal raises very important matters of fact and law which ought to be heard and resolved by this Honourable Court

10 on the merits.

4. THAT there has been no delay either on the Applicant or its legal representatives in filing this application.

5. THAT it is necessary that the Applicant be allowed to file its Appeal out of time in order to ensure that all the contentious

15 matters are resolved.

6. THAT it will be just and equitable for the Court to set aside Miscellaneous Cause No. 4 of 2015 and the ruling in Miscellaneous Application No. 87 of 2015 and grant the Applicant leave to file an Appeal in order for all matters in

20 controversy to be resolved. (Sic)

The respondent filed an affidavit in reply deponed by Daphine Joy Kaheru dated 18<sup>th</sup> May 2018. She deponed that the application Justice Kainamura heard and disposed of in the respondent's favour was to set aside the Arbitral Award upon which Arbitral Award was

25 set aside by the High Court vide HCCM No. 4 of 2015. She denied knowledge of the contents of paragraphs 10-13 and stated that this application filed on 15<sup>th</sup> November 2017 has since been overtaken by events and ought to be dismissed because the garnishee order nisi has been made absolute.

30 At the hearing of the application, Mr. Brian Tendo represented the applicant while Mr. Kandebebe Ntambirweki represented the respondent. The parties were directed to file written submissions.

Counsel for the applicant submitted that had the ruling in Misc. Application No. 87 of 2015 been delivered on notice as had been

35 directed by the Honourable Judge, this application would not have arisen. Further, that the applicant's appeal raises very important issues of fact and law as laid out in the Memorandum of Appeal. That there was no delay in filing this application having been filed one week from the time the applicant got to know about the court's ruling.

**5 Counsel cited the case of Fazalbai Vs Custodian AIR 1961 SC 284**

in which it was held that notice is to be given even if the statute does not contain any provision to the issue of notice.

The respondent's counsel argued that a party is bound by its pleadings under sections 101 and 102 of the Evidence Act which 10 provides that a plaintiff cannot be allowed to succeed on a case that was not pleaded by him. That by the applicant's pleadings in HCCS 354 of 2018, the applicant is now estopped by record from arguing an appeal in the nature of the proposed Memorandum of Appeal. The applicant is estopped by its own affidavit in the High Court where it 15 admitted that the only outstanding issue is a claim for an amount in excess of USD

105,187.0 which claim will be settled in HCMA No. 354 of 2018. Further, that provided the applicant herein settles the execution costs and legal fees, all money received on the USD claim in the Award in excess of USD 105,187, if any, will be refunded.

20 Counsel cited the South African case of *Nehawu Obo V. N Tumana Vs Commission for Conciliation, Mediation and Arbitration & others Case No. PI 15/08* where court ruled against the act of approbate and reprobate, as follows;

*“The doctrine is based upon the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold to approbate and reprobate.....”*

Rule 5 of the *Judicature (Court of Appeal Rules) Directions*, gives this Court discretionary powers to extend time within which an act 30 is required to be done by the rules. The rule provides as follows:

**“The Court may, for sufficient reason, extend the time limited by these Rules or by any decision of the Court/of the High Court for the doing of any act authorized or required by these Rules,**

**whether before or after 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 reference to the time as extended.”**

5 The condition for the grant of the extension of time is that the applicant must show sufficient reason as to why the Court should grant the extension of time; in this case, extension of time within which to appeal.

In *Re. Christine Namatovu Teba.jjuk.ira Versus Noel Shalita 10 (1992-93) HCB 85*, it was held that an application for extension of time must show sufficient reason before the court can exercise its discretion in granting the same.

The sufficient reason as envisaged by the rules must relate to the inability to take a particular step to do an act within the prescribed 15 time. (*See Dr. Rubinga Versus Yakobo Kato & 2 Ors SCCA No.35 /1992*).

The starting point, is to determine whether or not sufficient reason has been shown for the failure to act in time. The expression ‘sufficient reason’ is not defined anywhere in the Rules of this Court. 20 In the case of *Rosette Kizito v Administrator General and others, Supreme Court Civil Application, No. 9 of 1986*, reported in Kampala Law Reports, Volume 5 of 1993 at page 4, it was held that ‘Sufficient reason must relate to the inability or failure to take the particular step in time’.

25 In the present case, the applicant’s case is that neither he nor his counsel was served with the hearing notice of the ruling and as such, they could not file a notice of appeal in time. The respondent claims that both parties had an agreement in the High Court that the amount in excess of the USD 105,187.0 would be refunded and as 30 such the applicant’s intended appeal has no merit.

The determining factor in a case seeking for grant of extension of time such as this, is whether there was sufficient reason for failure to file an appeal in time. Delving into the claim to be paid by the applicant

would amount to going into the merits of the appeal. At this stage, this court cannot go into the merits of the intended appeal since no appeal is before it. Court's concern now is to determine whether there is sufficient cause to extend time

5 In my view, failure to give notice to the applicant of the ruling in the High Court was improper. Neither the applicant nor its counsel attended the ruling session and as a result could not make a decision whether to appeal or not in time. Failure to serve the applicants the said notice is sufficient reason to allow this application. In the final 10 result, an extension of time being sought by the applicant is hereby granted. The Notice of Appeal should be lodged within 7 days from the date of delivery of this ruling.

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

Dated this 29<sup>th</sup> of May 2018

**Justice Stephen Musota,**

**JA Justice of Appeal**

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