

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

*Coram: Fredrick Egonda-Ntende; Stephen Musota; Percy Night Tuhaise,
JJA*

Civil Application No. 347 OF 2018

Kawooya Kigongo Samuel Twaha :::::::::::::::::::::::::::::::::::::: Applicant

V

1. Attorney General

2. Judicial Service Commission :::::::::::::::::::::::::::::::::::::: Respondents

*(Arising From HCCA No. 144/2016; Miscellaneous Cause No. 131/2016;
Arising From High Court Civil Suit No. 91 of 2018)*

Ruling of Percy Night Tuhaise, JA

This application was brought under rules 5 and 43(1) & (2) of the Judicature (Court of Appeal) Rules) SI 13-10 (referred to as “the Rules of this Court” in this application). It seeks orders that time in which to lodge a notice of appeal be extended; and that costs be in the cause.

The grounds of the application are that:

VPAT

“1. The applicant had previously applied in time having sought leave from the High Court panel who had adjudicated in this matter, leave was subsequently granted and a notice of appeal was filed in time, but I was advised by Madam Muwonge, the officer in charge of personnel at the High Court establishment to withdraw my notice of appeal if the file for my pension and gratuity were to be processed, I did withdraw but time has dragged and no pension or gratuity in sight and I had been advised that the two processes can go on legally, that is the appeal and the

processing of pension and gratuity. I am now formally seeking extension of time for leave to file notice of appeal and serve the same out of time.

2. The sanction in HCCA No. 144 of 2016 was excessive, I will argue mainly against the severity of punishment being excessive in all respect, thus failing to re-evaluate the evidence on record.

a) To a first offender judicial officer who has served nineteen (19) years of interrupted (sic) service.

b) With a professional award of excellence for being the most active magistrate by Uganda Judicial Officers Association.

c) On a mere technical none moral turpitude offence of absenteeism.

I will argue that the Learned Honorable Judges of the High Court erred in law and fact to confirm punishment on to the applicant with a harsh and conscionable punishment of retiring the applicant in public interest by the Judicial Service Commission.

3. That it is just and equitable that this application be granted since the interest of service for both parties in the judiciary includes professionalization of the bench for which the applicant was pursuing.

4. The appeal has high chances of success so let time be extended so as to be heard on merit.”

VVA

Representation

At the hearing of this application, the applicant represented himself. The respondents were duly served but did not appear on the hearing date neither did they file affidavits in reply.

The applicant in his affidavit in support of this application, which also gives the background of this application, states that:-

“1. ...I am a male adult Ugandan of sound mind aged 48 years applicant herein...”

2. That I have filed an application against the decision of the High Court which confirmed the decision of Judicial Service Commission dated 4th October 2018' (certified date) which decision was harsh and unconscionable punishment for a first offender in 19 years of Judicial Service.

3. That in August 2017, I filed a notice of appeal in time while at the same time pursuing my pension and gratuity so I was advised by the Head Personnel Officer at High Court to withdraw the notice of appeal if I were to get my pension and gratuity. I was not properly advised because there is no law barring one to pursue both. So I discontinued that appeal but to date, no gratuity or pension or hope of getting the same, so it would be fair, just and equitable to hear this appeal on merit for this would be the only sustainable way for me to regain my job and get my arrears and earn an income.

WVA

4. That I have read and understood the judgment of the High Court from which I have strong grounds of appeal with high chances of success.

5. That the High Court Learned Judges erred in law and fact to punish the applicant with a harsh and unconscionable punishment of retirement in public interest by the Judicial Service Commission Tribunal whose decision had been arrived at having considered evidence of charges against me which did not constitute an offence neither constituted a professional offence nor were I charged with those so called misconduct of taking my child to court for having quarrelled with a police prosecution in court, having laughed in court and for having intended to contest a parliamentary seat in 2006 (Lwemiyaga County) thus the judges erred in law and fact when they considered extraneous circumstances and evidence thus failing to re-evaluate the evidence therefore coming to unfair punishment yet the law within which I was charged had appropriate sanctions for failure to apply for leave/absenteeism while I was at Law Development Centre for my Bar Course. A copy of the memorandum of appeal is hereto attached.

6. *That the decision of the High Court merit and appeal, it is therefore just and equitable that this case be heard on merit so that whatever I have stated herein is true to the best of my knowledge."*

Submissions for the applicant

The applicant submitted that he is a young retired Magistrate and that he was forcefully retired hence why he is seeking leave for extension of time within which to file his appeal. He submitted that he had initially appealed in time but was advised to withdraw, and that he will avail documentary evidence that he filed his appeal in time.

Secondly, he submitted that when he approached the High Court establishment about his gratuity and pension he was advised to withdraw the appeal on the basis that they would pay him his gratuity and pension; that on that ground he withdrew the notice of appeal. He acknowledged that it was not an appeal before the memorandum of appeal was filed, but he insisted he had filed the notice of appeal in time.

~~was~~ He further submitted that he relied on the promise to be paid when he withdrew the appeal. He contended that since the 1st and 2nd respondents have not honoured their promise, he is seeking an extension of time to appeal or reinstatement of the same notice of appeal on the same grounds. He availed Court with a notice to discontinue of a suit in Civil Appeal No. 144 of 2016.

The applicant further argued that the respondents are estopped from opposing this application because it will be inequitable even if they were present. He submitted that the 1st and the 2nd respondents will not be prejudiced in the application for extension of time because they would not suffer any injustice but that, in his case, if his application is not granted, he will be affected regarding his reputation as well as financially; that in the interest of justice it is fair, equitable and justifiable that he is given his chance to appeal on those grounds.

The applicant referred Court to his notice of motion where he stated that he is a first offender who has served 19 years, charged on a technical non-moral turpitude offense which could even have been handled administratively; that he joined Law Development Centre (LDC) and then, while at Kasangati Court as a Magistrate Grade 2 concurrently pursuing the Bar course at LDC, the Inspector of Courts went to Kasangati Court and did not find him there and said he absconded; that they charged him with the offenses of absenteeism and absconding from duty without reasonable excuse contrary to regulation 23(d) and 31 of the Judicial Service Commission Regulations. He submitted that the record will show he was summoned to Judicial Service Commission and unfairly treated.

He submitted that when he appealed, the Chief Registrar of the High Court of Uganda, instead of communicating to him the decision of the Judicial Service Commission that he had been retired with all benefits, wrote to him saying he had been dismissed. He maintained that he challenged the decision of the Chief Registrar and the Judicial Service Commission on grounds that he was a first offender, and also that the offence was not of moral turpitude. He argued that the punishment of being retired or dismissed was unfair.

VR

Court's Resolution

The hearing of this matter proceeded in the absence of the respondents (*ex parte*), under rule 56(2) of the Rules of this Court, after Court was satisfied, relying on the affidavit of service of this Court's process server, that the respondents were sufficiently served but did not attend court or give reasons for their non-attendance. However, even if a case proceeds *ex parte*, the burden on the part of the party bringing it to court to prove it to the required standards remains.

The record in the instant case shows that on 12th July 2017, the High Court partially allowed the applicant's appeal against the decision of the Judicial Service Commission (JSC) tribunal. The appeal partially succeeded only on ground 5, to the extent that the punishment of dismissal was set

aside and substituted with orders that the appellant (applicant in this case) would retire in public interest with all his benefits, and that each party would bear its own costs.

The record also shows that the applicant filed a notice of appeal in the Civil Registry of the High Court on 24th July 2017. On 11th January 2018 he filed in the same Court a Notice of Discontinuance of Suit where he indicated his decision to withdraw the notice of appeal, and prayed that it be allowed with no order as to costs. The Registrar of the High Court allowed the withdrawal with no order as to costs on the same date it was filed. A copy of the Notice of Discontinuance of Suit was received in this Court the following day on 12th January 2018.

The applicant's affidavit evidence and submissions dwell mostly on the merits of his intended appeal which is not the subject of this application. The only relevant part of his application is contained in ground 1 of his application to the effect that a notice of appeal was filed in time. This was supported by paragraph 3 of his supporting affidavit, which, in part stated that:

KAT

"...in August 2017, I filed a notice of appeal in time..."

The date when he filed the notice of appeal is not August 2017 as stated in his supporting affidavit (which date would, in any case, render the same to have been filed out of time), but is 24th July 2017 as reflected on record. That notwithstanding, going by the record, it is a correct position that the applicant filed the notice of appeal within time, to be exact, 12 days from the date of the High Court judgment delivered on 12th July 2017. This clearly falls within the required fourteen days set out under rule 76 of the Rules of this Court.

There is nothing on record however to show that the applicant ever instituted the appeal within the required time. This should have been done within sixty days after the date when the notice of appeal was lodged, as required under rule 83 of the Rules of this Court. The record shows that the applicant withdrew the notice of appeal on 11th January

2018, about seven months after filing it. By the time he withdrew the notice, he had not yet filed a memorandum of appeal. He in fact never filed a memorandum of appeal. There is a document on record titled "Memorandum of Appeal" bearing a signature of the appellant (applicant in this matter), but there is nothing to indicate it was ever filed or lodged in the registry of this Court. The applicant acknowledged in his oral submissions that the notice of appeal was not an appeal before the memorandum of appeal was filed.


It is therefore a fallacy for the applicant to argue, as he did before this Court, that he "*he withdrew the appeal*". In my considered opinion, the fact that the notice of appeal was filed within time means the applicant had intention to appeal, which is an appeal within the meaning of "appeal" under rule 3 of the Rules of this Court. However, this was negated by the fact that the applicant failed to institute the appeal within the stipulated time in that he never filed the required documents. According to rule 83 of the Rules of this Court, an appeal shall be instituted in Court by lodging in the Registry, within sixty days after the date when the notice of appeal was lodged, among other things, a memorandum of appeal, in six copies, or as the registrar shall direct. This was not done by the applicant, neither is there anything on record to show he ever procured leave of Court to file the memorandum of appeal out of time. In any case he eventually withdrew the notice of appeal. There is therefore no appeal on court record. The applicant cannot rely on his inefficiencies or illegalities to obtain justice. RAT

It is moreover not clear from the applicant's affidavit evidence as to what point in time, within the seven months after filing his notice of appeal, he got the advice from the High Court not to appeal as he claims. There is no supporting documentary evidence from which the dates could be discerned by this Court, nor did the applicant state any such dates in his supporting affidavit.

Thus, having considered the grounds of this application, the applicant's affidavit evidence and submissions, plus the law applicable, is my

finding that this application has no merit. It is accordingly dismissed. There will be no order as to costs since the respondents did not defend it or attend court.

Dated at Kampala this 28th day of May 2019.


Percy Night Tuhaise
Justice of Appeal.

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPLICATION NO. 347 OF 2018

5 **KAWOOYA KIGONGO SAMUEL TWAHA :::::::::::::::::::::::::::::: APPELLANT**

VERSUS

10 **1. ATTORNEY GENERAL**

2. JUDICIAL SERVICE COMMISSION::::::::::::::::::::::::::::RESPONDENT

(Arising from H.C.C.A No. 144 of 2016; Misc. Cause No. 131 of 2016; Arising from H.C.C.S No. 91 of 2018)

15 *(Coram: F.M.S Egonda, S. Musota, P.N. Tuhaise, JJA)*

RULING OF JUSTICE STEPHEN MUSOTA, JA

20 I have had the benefit of reading in draft the ruling of my learned sister Hon. Lady Justice Percy Tuhaise, JA.

I agree with her reasoning and conclusion that this application must be dismissed. I will make no order as to costs.

Dated at Kampala this.....^{28th}.....day of May.....2019

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Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musota & Tuhaise, JJA]

Civil Application No. 347 of 2018

BETWEEN

Kawooya Kigongo Samuel Twaha=====Applicant

AND

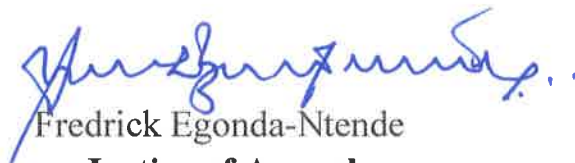
1 Attorney General
2 Judicial Service Commission =====Respondent

Ruling of Fredrick Egonda-Ntende, JA

- [1] I have had the benefit of reading in draft the ruling of my sister, Tuhaise, JA., and I agree with her conclusion that this application must be dismissed.
- [2] I will just make a few remarks. The facts and submissions of counsel have been ably set out in the ruling of my sister aforesaid.
- [3] It is clear that the applicant had filed his notice of appeal in time and voluntarily chose to withdraw the same. He filed a notice of discontinuance on 12th January 2018 in the High Court of Uganda where he had filed his notice of appeal. He has now changed his mind and would like to pursue the appeal but is out of time. He has not provided sufficient justification as to why this court should exercise its discretion to grant him an opportunity to pursue an appeal in this matter.
- [4] Metaphorically speaking this is a case of making one's bed and having to lie in it. The applicant must accept the consequences of the decisions he made.

[5] As Musota and Tuhaise, JJA, agree this application is dismissed with no order as to costs as the respondent did not appear at the hearing.

Signed, dated and delivered at Kampala this 28th day of May, 2019



Fredrick Egonda-Ntende

Justice of Appeal