

**THE REPUBLIC OF UGANDA**

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

**CIVIL APPLICATION NO. 131 OF 2009**

**DIAMOND TRUST BANK UGANDA LIMITED ..... APPLICANT**

**VERSUS**

10 **ELDREDA MUCHOPE ..... RESPONDENT**

**CORAM: Hon. Mr. Justice Alfonse Owiny- Dollo, DCJ**

**Hon. Mr. Justice Kenneth Kakuru, JA**

**Hon. Mr. Justice Stephen Musota, JA**

**RULING OF THE COURT**

15 This is an application by way of Notice of Motion brought under *Rules 2 (2), 43 (1) & (2), 44 (1), 100(2) & 5* of the Rules of this Court seeking the following orders;-

1. *The dismissal of Civil Appeal No. 82 of 2006 be set aside.*
2. *Civil Appeal No. 82 of 2006 be set down for hearing and be heard and determined on its merits.*
- 20 3. *Costs of the Application be in the cause.*

The grounds for the application are set in the motion as follows;-

1. *That Civil Appeal No. 82 of 2006 came up for hearing on 4<sup>th</sup> May 2009 in the presence of both Counsel for the applicant and respondent.*
2. *That on the scheduled date (4<sup>th</sup> May 2009) the Appeal did not proceed because*  
25 *the appellant had filed a supplementary Record of Appeal and the parties were*

- 5            *yet to complete scheduling. The Court accordingly ordered the parties to file joint scheduling notes by 14<sup>th</sup> May 2009 and additionally directed the appellant to file submissions by 4<sup>th</sup> June 2009, the respondent to file submissions by 25<sup>th</sup> June 2009 and the appellant to file a rejoinder by 2<sup>nd</sup> July 2009.*
- 10           *3. That however Counsel for the appellant Masembe-Kanyerezi was engaged during the period covering the dates that the Court had set for the filing of the submissions and asked his assistant Noah Wasige Advocate to agree with opposite Counsel the Joint scheduling notes and then to prepare and file the submissions on the appellant's behalf*
- 15           *4. That however Noah Wesige inadvertently failed to take a proper note of the dates and consequently the parties did not file the Joint scheduling notes nor did either party file submissions. Counsel was only reminded when he received a Ruling Notice on the 25<sup>th</sup> August 2009 setting down the matter for Ruling on the 26<sup>th</sup> August 2009 on which date the appeal was dismissed for want of prosecution.*
- 20           *5. That the dismissal was through human error of Counsel in failing to have properly diarized the matter and it completely skipped Counsel's attention. This error is regretted but should not be visited on the appellant/ applicant.*
- 6. That the appellant/applicant's written submissions are now ready for filing in Court.*
- 25           *7. That the appellant/applicant is interested in the Appeal and has been diligent in prosecuting it.*
- 8. That the appeal is of great importance to the appellant/applicant.*
- 9. That it is in the interest of Justice that the appeal is heard and determined on its merits.*

5 **Representations**

When the application came up for hearing, Mr. Stephen Zimula learned Counsel appeared for the applicant. Neither the respondent nor Counsel on her behalf appeared. Court allowed the applicant to proceed in the absence of the respondent, as there was evidence on record that the respondent had been served at the address provided to this Court of M/S Kahara & Company Advocates who accepted service.

**Consideration of the applicant's grounds**

The issue in this application is whether the applicant has shown sufficient reason to set aside the dismissal of *Civil Appeal No. 82 of 2006* and have the same reinstated. The appeal from which this application arises was dismissed on 26<sup>th</sup> August 2009 for want of prosecution, as the appellant's Counsel failed to file written submissions on time and was absent when the same was called for hearing. Counsel admits that the dismissal of the appeal was as a result of his negligence.

It has been held in a number of cases that mistakes, faults, lapses or dilatory conduct of Counsel ought not be visited on a litigant except where it is shown that the said litigant was privy to such conduct or he or she failed to give proper instructions to Counsel in time. In *Attorney General Vs AKPM Lutaaya, Supreme Court Civil Appeal No. 12 of 2007*, it was held that, the litigant's interests should not be defeated by the mistakes and lapses of his Counsel.

The Supreme Court in *Godfrey Magezi and Brian Mbazira Vs Sudhir Rupaleria, Supreme Court Civil Appeal No 16 of 2001*, while discussing this issue followed its earlier decision in *Crane Finance Co. Ltd Vs Makerere Properties, Supreme Court Civil Appeal No. 11 of 2001*, in which it was held as follows:-

"It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on to the litigant, leading to the striking out of his appeal thereby denying him justice. There are many decisions from this court and other

5            *jurisdictions in which it has been held that an application for extension of time, such as this one, where mistake or error or misunderstanding of the applicants' legal advisor, even though negligent have been accepted as a proper ground for granting relief under rules equivalent to Rule 4 (read 5) of the Rules of this court, which is the rule under which this application was brought...*

10           *Further, errors / mistakes of court officials have been held to be sufficient grounds for granting extension of time to the applicant to file his or her appeal out of time. "*

See also: *Mulwooza & Bros Ltd Vs N. Shah & Co. Ltd, Supreme Court Civil Appeal No. 20 of 2010.*

15           We are now required to apply the above principle to the facts set out in this application. It is clear from the affidavit of Noah Wasige in support of this application that Counsel admits that the appeal was dismissed due to his negligence. The negligence is not in any way attributed to the applicant. Upon realizing his mistake, the applicant filed this application without delay on 21<sup>st</sup> September 2009, 20           the appeal having been dismissed on 26<sup>th</sup> August 2009. Since then, the applicant has been vigilant in pursuing the hearing of this application. He wrote a number of letters to this Court requesting that the matter be given a hearing date, 24<sup>th</sup> November 2009, 19<sup>th</sup> January 2010, 21<sup>st</sup> April 2011, 16<sup>th</sup> February 2012, 28<sup>th</sup> April 2014 and 10<sup>th</sup> September 2018.

25           We are satisfied that this is a case where this Court ought to exercise its discretion to allow the orders sought by the applicant. No doubt Counsel failed to file the Joint scheduling notes by the date which was given to them by the Court and the appeal was dismissed for want of prosecution. It would be an error for this Court to visit the mistakes, omissions or failures admitted by Counsel upon the applicant. The 30           justice of this matter demands that the appeal from which this application arises be

5 heard on its merits as it raises serious issues of law and fact and is neither frivolous nor vexatious.

In the circumstances we allow the application. The dismissal of Civil Appeal No. 82 of 2006 is set aside. We make no order as to costs since the respondent, who was duly served with this application did not bother to defend it.

10 **Dated at Kampala** at ..... 21<sup>st</sup> this Feb. .... 2018



ALFONSE OWINY-DOLLO  
DEPUTY CHIEF JUSTICE

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KENNETH KAKURU  
JUSTICE OF APPEAL

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STEPHEN MUSOTA  
JUSTICE OF APPEAL