THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Miscellaneous Application No. 41 of 2020

(Arising out of High Court at Kampala Miscellaneous Application No. 597 of 2018)
(Arising out of High Court of Uganda at Kampala Civil Suit No. 410 of 2014)

Justice Anup Singh Choudry :::::::::::::::::::::::::::::::: Applicant

Versus

1. Sikh Association Uganda
2. Ajit Singh Sagoo
3. N.P. Singh Panesar
4. Inderpal Singh Panesar
5. Gurcharan Singh Marwah

:::::::::::::::::::: Respondents

Coram: Hon. Justice Remmy Kasule, Ag. JA sitting as a single Justice

Ruling of the Court

This application is brought by the applicant to this Court under, among other provisions of law, Rules 2(2), 5, 42(2) and 43 of the Judicature (Court of Appeal Rules) Directions SI 13-10.

It is by Notice of Motion supported by the affidavit of the applicant.

The orders sought in this application are:

"1. ***That the time within which to serve the Memorandum of Appeal and Record of Appeal in Civil Appeal be extended or enlarged.***

2. Costs of this application be provided for."

The grounds of the application are that:

"1. ***There is sufficient reason why Memorandum of Appeal was not served in time.***

2. That if the Application is not granted, the Applicant's right of Appeal will be violated and there will be grave miscarriage of justice as a properly constituted defamation case was dismissed in the High Court, Kampala, on a point of law by wrong application of law and the main suit was not heard.

3. That the applicant should not suffer injustice by misapplication of law on part of the Court.

4. That it is in the interest of the justice (sic) that this application be granted as it has been made without undue delay.

5. The applicant is now in receipt of the certified record of proceedings and is read (sic) and able to lodge his Record of Appeal and the Appeal Bundle forthwith.

6. That the applicant has a fundamental right to have his main suit heard on its merits.

7. The intended appeal raises serious point of law in relation to defamation cases." (Sic).

At the hearing, the applicant appeared in person, self-representing himself. Learned Counsel Denis Sembuya holding a brief for Andrew Kasirye, Senior Counsel, of Kasirye, Byaruhanga & Co., Advocates, appeared for the 1st, 3rd, 4th, 5th and 6th respondents.

Counsel for respondents communicated to Court, and the applicant did not dispute the information, that the 2nd applicant had since passed on. Court accordingly ordered that the names of the 2nd respondent be struck off the application.

Learned Counsel for the respondents prayed Court to cross-examine the applicant as to the contents of the pleadings he had filed in Court in respect of the application. The applicant did not object to this application. The Court allowed the application. The applicant affirmed and was cross-examined by Counsel for the respondents.

In his submissions in support of the application, the applicant maintained that he sued the respondents for defamation in HCCS No. 410 of 2019. Since the cause of action was in defamation, the trial High Court, was wrong in law, to uphold the preliminary objection of Counsel for the respondents that the rest of the respondents, other than the 1st respondent, could not be sued in their respective personal capacities for acts done in the name of the 1st respondent, a registered entity with corporate personality. The learned trial Judge thus erred in rejecting the plaint and

dismissing the suit with costs against the rest of the respondents apart from the 1st respondent, on 19.09.2018. Yet, none of the respondents had put up a plausible defence to the suit.

The applicant further argued that, on appreciating the ruling upholding the preliminary objection of 19.09.2018, he applied for a review of the same on 10.10.2018 under High Court **Miscellaneous Application No. 597 of 2018**.

He pursued a review of the ruling because he did not want to waste time of the Court as he was convinced that the Court had made an obvious error on the face of the record, which error, the Court could easily correct.

He had lodged the application for review in the High Court on 10.10.2018 and the same was heard and dismissed on 08.08.2019. The reason for the dismissal was because the application had not been served upon the opposite party within 21 days as required by Order 5 Rule 2 of the Civil Procedure Rules. After the dismissal of the Review, he decided to appeal the order of dismissal of the suit made 19.09.2018. He thus had plausible reasons as to why he had not been able to file in Court and serve the Memorandum and the Record of Appeal in time to the opposite parties.

He had requested for the record of proceedings on 10.09.2019 and had collected the same on 12.02.2020, the date the Court proceedings were ready. He was now ready to file the Memorandum of Appeal and the Record of Appeal once the Court allowed him to do so by extending the time within which to do so. He was very much likely to succeed in his appeal.

He prayed this Court to allow the application as it was just and equitable and involved no miscarriage of justice.

Respondents' Counsel opposed the application. He submitted that the applicant's application had no merit at all. The applicant had not initiated any appeal process as he had not filed a Notice of appeal against the High Court decision of 19.09.2018 and or the order dismissing **Miscellaneous Application No 597 of 2018** for Review, made on 08.08.2019. The applicant could not pursue an application to be granted an extension of time within which to serve the Memorandum and the Record of Appeal when he had no appeal where the Memorandum and Record of Appeal are to be filed.

The applicant had not complied with Rules 76 and 78 of the Judicature (Court of Appeal Rules) Directions and accordingly had not shown any likelihood of success of the appeal. Counsel prayed Court to dismiss the application with costs, on this ground alone.

Respondents' Counsel contended, in the alternative, that any intended appeal by the applicant would be grossly out of time. This is because the striking out of the plaint in **HCCS No. 410 of 2014** was made on 19.09.2018. Yet the purported application for the record of Court proceedings was made almost a year after on 10.09.2019.

There was therefore total non-compliance with Rule 83 of the Rules of this Court as to the time within which an appeal has to be instituted. This renders this application to be totally without merit, Counsel so submitted.

Respondents' Counsel also submitted that the applicant's application was incompetent in law as it had no valid accompanying affidavit. The purported affidavit of the applicant, in support of the application, had not been dated let alone signed by the applicant as its deponent, though the same had the certificate, signature and a stamp of the Commissioner for Oaths. This rendered the purported affidavit to be invalid. Counsel prayed for the application to be dismissed or struck out by reason of these grounds.

In reply, the applicant admitted that the affidavit in support of the application was not dated and he had not signed the same. He however blamed the Commissioner for Oaths for commissioning the affidavit before asking him i.e. the applicant, as deponent, to first sign the same. To him, as the applicant, what had happened was a mere overlooking of a small detail of not signing the affidavit, which ought not affect the validity of the application. He was ready, as the applicant, to have another affidavit commissioned, and filed in the application.

As to the Notice of Appeal being not lodged in Court in time or at all, the applicant contended that when he wrote to Court on 10.09.2019 requesting to be supplied with the certified Court Proceedings in **HCCS No. 410 of 2014**, this act amounted to his lodging in Court a Notice of appeal.

The applicant thus prayed Court to allow this application so that this Court resolves on merit, the fundamental issue whether or not the learned trial Judge was right to dismiss the suit against the respondents, other than the 1st respondent, on the ground that

those respondents were not personally liable for the acts of the 1st respondent.

In resolving this application this Court is empowered by Rule 5 of its Rules to grant the prayer sought by the applicant. The Rule provides:

> ***"5. Extension of time***
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> *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 prayer sought by the applicant in this application as set out in the Notice of Motion is:

> *"That the time within which to serve the Memorandum of appeal and Record of appeal in Civil Appeal be extended or enlarged."*

The background to the applicant's prayer is that in 2014 the applicant came to the conclusion that he had been defamed in a public notice that was published in the "New Vision" Newspaper advert placed therein by the 1st respondent, a company limited by guarantee. The 2nd (now deceased), 3rd, 4th, 5th and 6th respondents constituted at the material time the Management Committee of the 1st respondent.

The applicant, having come to the conclusion that he had been defamed by the said Newspaper advert, instituted in the High Court, Kampala, **Civil Suit No. 410 of 2014** against the 1st respondent, as one who placed the advert in the newspaper and the 2nd to 6th respondents as the Management Committee of the 1st respondent. The applicant prayed in the suit for damages for being defamed, amongst other prayers.

On 19.09.2018, the High Court, (Bashaija, J.) upheld a preliminary objection of Counsel for the respondents that it was erroneous and legally untenable of the applicant to have sued the 2nd to 6th respondents in their individual names as members of the Management Committee of the 1st respondent for the actions of alleged defamation by the 1st respondent, an incorporated company. The learned Judge further held that, it is settled law that where there is a disclosed principal, it is that principal to be sued and not the agent. In this case, the 1st respondent was the principal and the 2nd to 6th respondents were the 1st respondent's agents. The applicant ought therefore to have sued the 1st respondent only as the principal.

The learned Judge, on upholding the above stated preliminary objection, rejected the plaint in **HCCS No. 410 of 2014** as disclosing no cause of action against the 2nd to 6th respondents and pursuant to Order 7 Rule 11 (a) of the Civil Procedure Rules. He dismissed the suit with costs against the 2nd to 6th respondents. The suit remained only sustained against the 1st respondent. The said suit is still pending determination in the High Court.

On dismissal of the suit, the applicant under Section 66 of the Civil Procedure Act had a right to appeal to this Court against the dismissal Order. He did not appeal as he filed no Notice of Appeal in Court. Instead the applicant opted to seek a review of the dismissal Order under Section 82(a) of the Civil Procedure Act that provides:

> *"82. Review*
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> *Any person considering himself or herself aggrieved*
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> (a) *by a decree or order form which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
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> (b) *by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to the Court which passed the decree or made the order, and the Court may make such order on the decree or order as it thinks fit."*

The applicant accordingly on 10.10.2018 lodged in the High Court at Kampala, **Miscellaneous Application No. 597 of 2018**, pursuant to Order 46rr1 to 4 of the Civil Procedure Rules, seeking for an order setting aside the ruling of the High Court dated 18.09.2018 striking out the 2nd to 6th defendants from **HCCS No. 410 of 2014.**

Had the applicant chosen the option of pursuing an appeal, then, pursuant to Rule 76 of the Court of Appeal Rules, he ought to have lodged a Notice of Appeal in duplicate with the registrar, High Court, Kampala, stating that the applicant intended to appeal against the dismissal Order. The Notice of Appeal ought to have been lodged within fourteen (14) days from the 18.09.2018, the

date the High Court made the dismissal Order. The applicant did not lodge in Court any Notice of Appeal. Instead on 10.10.2018, the applicant lodged in the **High Court Miscellaneous Application No. 597 of 2018** seeking a review of the dismissal Order of 18.09.2018.

On 09.08.2019 the High Court (Bashaija, J.) delivered a ruling in the application for review, i.e. **High Court Miscellaneous Application No. 597 of 2018.** The same was dismissed with costs for being incompetent because the same had been served upon the respondent out of time contrary to Order 5 Rule 1(2) of the Civil Procedure Rules. It is after the dismissal of the application for review that the applicant lodged in this Court this application for extension of time within which to serve the Memorandum and Record of Appeal.

This Court holds that on the facts before it, the applicant having had the option of either pursuing an appeal or a review of the High Court Order of 18.09.2018, he chose to pursue a Review. Once he opted to pursue a review, then he, by choice, gave up the right to pursue an appeal. The Uganda Supreme Court has so held in **Dr. Rubinga vs Yakobo Kato and Another: Civil Appeal No. 35 of 1992 (02.07.1993) [1993] KALR 243.** In that case a party had the option of either pursuing an appeal by applying for leave to appeal or to pursue a revision of the decision made by the High Court. The party chose to pursue a revision. Later the same party attempted to pursue an appeal. Wambuzi C.J, with the concurrence of the other Justices, held at p.249:

"..... I also agree that in this case the appellant had a right of appeal but quite clearly preferred revision proceedings from which he did not appeal. In these circumstances it would be very unlikely that a Court would extend time to institute an appeal the right to which the party had by conduct abandoned."

Earlier in the same Judgment at p.246 Platt, JSC, had ruled that:

"It follows that by taking the revision proceedings on 6th January, 1989, the applicant had to state that no appeal had ben preferred, even though one was allowed. It is clear therefore that revision proceedings had been preferred to an appeal. It further follows that an unsuccessful applicant for revision cannot then allege that the period of limitation for instituting an appeal is still running."

The applicant in this application only decided to pursue an appeal against the High Court Order made on 19.09.2018 dismissing the main suit against the 2nd to 6th defendants (now respondents) on 09.08.2019. This is when the High Court dismissed the applicant's application for review, that is **High Court Miscellaneous Application No. 597 of 2018**. This was after a period of almost eleven (11) months since the date of 19.09.2018 when the Court passed the Order, the subject of the now intended appeal. Having elected at the beginning to pursue review proceedings of the said order, the applicant cannot now be heard to pursue the appeal against the said order made on 19.09.2018, eleven (11) months out of time.

The prayer of the applicant, as stated in the Notice of Motion, is for extension of time within which to serve the Memorandum of Appeal and Record of Appeal. But the applicant never lodged a Notice of Appeal within the stipulated time of 14 days, or at all, since the 19.09.2018 when the High court made the order dismissing the suit against the 2nd to 6th defendants. The applicant thus failed to comply with Rule 76 of the Court of Appeal Rules.

There is absolutely no merit in the submission of the applicant that he lodged a Notice of Appeal when he applied in writing to the High Court to be supplied with certified Court proceedings. Rule 76 of the Rules of this Court is very clear as to the lodgement, contents and form of a Notice of Appeal. The applicant absolutely failed to observe this Rule in this regard.

In the absence of a Notice of Appeal, the applicant cannot rely on Rule 83 of the Court of Appeal Rules that provides that an appeal shall be instituted in the Court by lodging in the Court Registry, within sixty (60) days after the date when the Notice of Appeal was lodged, a Memorandum of Appeal in six (6) copies, or as the Court Registrar may direct, the record of appeal in six (6) copies, payment of the prescribed fee and depositing in Court security for costs.

It follows therefore that one who has not lodged a Notice of Appeal in Court, cannot apply to Court that time be extended for such a one within which to serve the Memorandum of Appeal and Record of Appeal.

The Memorandum of Appeal and Record of Appal can only be received by Court within sixty (60) days after the date when the Notice of Appeal was lodged according to Rule 83(1)(i) and (ii) of the

Court of Appeal Rules. Accordingly having not lodged a Notice of Appeal, the applicant in this application has no basis upon which he seeks, from this Court, the extension of time within which to serve out of time the Memorandum and Record of Appeal upon the respondents.

The applicant, in his testimony to Court and also in his submissions, tended to confuse the prayers he was seeking from this Court in this application. As already pointed out, his prayer in the Notice of Motion is for this Court to extend the time within which to serve the Memorandum of Appeal and Record of Appeal. However, in an answer to a question from Counsel for the respondents, the applicant answered to the effect that he was pursuing an appeal against the High Court order of dismissal of the main **High Court Civil Suit No. 410 of 2014** against the 2nd to 6th defendants delivered on 19.09.2018. Yet to another question under cross-examination, the applicant stated:

> *"I did not attach a draft Memorandum of Appeal to this application because I am waiting for leave to appeal out of time".*

The above answer is a gross error on the part of the applicant. This application is not for leave to appeal out of time. That is not the Order prayed for in the Notice of Motion. This application has been considered and determined on the basis of the prayer stated in the Notice of Motion, namely: to extend or to enlarge the time within which to serve the Memorandum of Appeal and Record of Appeal.

The Notice of Motion drawn and filed by the applicant personally is stated to be supported by an affidavit deponed to by the

applicant, specifically setting out the grounds of the application. There is attached to the Notice of Motion what is said to be an *"Affidavit in support of Motion for leave to appeal out of time"*. This affidavit, showing that it was sworn at Kampala in February, 2020 is without a date when it was sworn in "February, 2020"; and the same is not signed by the deponent, though there is a stamp and a signature of the Commissioner for Oaths, one Annet Okwera.

The applicant, under cross-examination, confirmed that he had not signed the said affidavit, but he blamed the Commissioner for Oaths for commissioning the same without first having required him, as the deponent, to sign the same. The applicant, in his submission, contended that this was a minor error on his part, which the Court should overlook, and put stress on the fundamental issue of resolving whether or not the trial Judge was right in dismissing a defamation case against the 2nd to 6th defendants on the ground that there was no cause of action against them in **HCCS No. 410 of 2014**.

Section 5 of the Commissioner for Oaths (Advocates) Act. Cap. 5, and Section 6 of the Oaths Act, Cap 19, provide that every Commissioner for Oaths before whom any oath or affidavit is taken or made, shall, state truly in the Jurat or attestation, at what place and on what date the oath or affidavit is taken or made. The applicant's affidavit in question is contrary to this Statutory law as the same is not dated as already pointed out.

An affidavit, being a written statement in the name of the deponent, by whom it is voluntarily signed and sworn to or affirmed, this Court holds that the purported affidavit of the

applicant in support of the Notice of Motion is no affidavit at all in law by reason of the same not being signed by the applicant and not being dated as to when it was commissioned. It was the duty of the applicant himself to ensure that he properly signed and dated the affidavit while before the Commissioner for Oaths for commissioning the same. It is no excuse at all for the applicant to point out the Commissioner for Oaths as the only one who was at fault.

It follows therefore that the applicant's Notice of Motion had no detailed supporting grounds since those grounds were supposed to be set out in the rejected affidavit. The applicant who was arguing his own application never sought for an adjournment from Court to file a proper affidavit. He only asserted that he could sign another affidavit and then continued to argue his application to the very end.

This Court has come to the conclusion that the applicant has paid scant attention in observing the Civil Procedure Rules of the High Court as well as the Judicature (Court of Appeal Rules) Directions, as regards this application. The Rules of Civil Procedure of Courts of law must be observed and complied with, and if there is non-compliance, that non-compliance must be explained to Court by the non-complying party, who seeks justice from the Court. *"Ignorantia facti excusat, ignorantia juris non excusat"*. i.e. Ignorance of the fact excuses; ignorance of the law does not excuse. See: **Revici vs Pentice Hall Incorporated and Others [1969] 1 ALLER 772**.

In conclusion this Court holds that the applicant has not made out a case as to why this Court should grant him the order he prays for:

> *"That the time within which to serve the Memorandum of Appeal and Record of Appeal be extended or enlarged".*

Accordingly the application stands dismissed with costs to the 3rd, 4th, 5th and 6th respondents. No costs are awarded to the 2nd respondent who passed on and whose name has been taken off the Court record.

It is so ordered.

Dated at Kampala this 13th day of July **2020**.

Remmy Kasule
Ag. Justice of Appeal