

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[Coram: Egonda-Ntende & Musota, JJA and Kasule, Ag JA]

Miscellaneous Application No. 245 of 2019

BETWEEN

Elizabeth Kobusingye ===== Applicant

AND

Annet Zimbiha ===== Respondent

RULING OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] This is an application by way of motion brought under Rules 2 (2) 5, 43 (1), (2) and 44 of the Judicature (Court of Appeal Rules) Directions S.I 13-10. The applicant seeks orders for extension of time to serve the letter requesting for proceedings upon the respondent and the validation of Court of Appeal Civil Appeal NO. 69 of 2019. The grounds for the application are set out in the affidavit of the applicant but briefly state as follows:

‘1) The Applicant filed Civil Suit no. 395 of 2014 in High Court Civil Division for breach of contract.

2) The suit was dismissed by Hon. Lady Justice Margret C. Oguli Oumo of the High Court Civil Division on a preliminary point of law on grounds that the contract entered into by the parties was champertous and illegal and therefore against public policy.

3) The Applicant having been dissatisfied with the said decision filed a notice of appeal and a letter requesting for a record of proceedings through their lawyers M/S Odokel

Opolot & Co. Advocates at the High Court, Civil Division in time.

- 4) The Notice of Appeal was duly served on the Respondent through her lawyers M/S Mutabingwa & Co. Advocates.
- 5) The Applicant instructed Kampala Associated Advocates (KAA) to jointly pursue the appeal together with M/S Odokel Opolot & Co. Advocates.
- 6) KAA discovered that M/S Odokel Opolot & Co. Advocates omitted an essential step while pursuing the appeal, which was failure to serve the letter requesting proceedings upon the Respondent.
- 7) The omission to serve the letter requesting the proceedings upon the Respondent was occasioned by mistake of counsel, which mistake should not be visited on an innocent litigant.
- 8) It is in the interests of Justice that this Honourable Court grants an extension of time within which the letter requesting for proceedings ought to have been served on the Respondent in order to validate the appeal lodged before this honourable court.
- 9) It is in the interest of justice that the appeal validated since the Respondent has already been served with a record of appeal containing a copy of the said letter.
- 10) This application has been brought without delay.
- 11) It is just and equitable that this application is granted.'

[2] The respondent opposes the application and filed an affidavit of reply to that effect. The gist of the respondent's affidavit is as follows:

5. That I am informed by my advocate, **Maxim Mutabingwa** and I verily believe him to be truthful that the applicant has never filed a letter requesting for proceedings in Court.
6. That the letter requesting for proceedings allegedly filed in Court on 3/7/2017 is not received by Court like the notice of appeal and does not bear the signature of the receiving clerk and no explanation is given by the applicant.
7. That my advocates M/S Mutabingwa & Co. Advocates have informed me further that they have never been served with the purported letter requesting for proceedings though it is copied to them.
8. That the Applicant has not come to court with clean hands as she wants Court to believe that she filed a letter requesting for proceedings whereas not.

9. That even the record of proceedings filed in Court on 20/3/2019 and served on to my lawyers on 27/3/2019 does not contain the purported letter requesting for proceedings.

10. That it appears the Applicant tried to file the letter requesting for proceedings in Court recently after filing the appeal but the clerk feared to receive it.

11. That the Applicant should not hide under the guise of mistake by counsel which in fact borders on fraud.

12. That the Applicant's appeal is incompetent and ought not be validated as the applicant has not given sufficient reason why the letter requesting for the proceedings was not filed in Court'

[3] At the hearing, the applicant was represented by Mr. Mwebesa Raymond and the respondent was represented by Mr. Max Mutabingwa. Counsel for the applicant submitted that the application was made because the appeal is out of time and the letter requesting for proceeding was not served on the respondent. He was of the view that the appeal can only be validated if this court grants the appellant extension of time to serve the letter requesting for proceedings on the respondent.

[4] Counsel for the respondent contends that the letter requesting for proceedings was not filed in court and neither was the letter served on the respondent. He contended that the letter was not received in court as required by the law since it does not bear the signature of the clerk who received it. Further, counsel for the respondent argued that the letter requesting for proceedings is a forgery and that it was not filed on the date it purportedly indicates.

Analysis

[5] Rule 83 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 requires that appeals be instituted by lodging a memorandum of appeal and the record of appeal within sixty days after filing a notice of appeal. However, rule 83 (2) states:

'(2) Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in

computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.'

[6] Rule 83 (3) provides:

'An Appellant shall not rely on sub-rule (2) unless his or her application for a copy of proceedings was in writing and a copy was served on the Respondent, and the Applicant has retained proof of that service.'

[7] Rules 83 (2) and 83 (3) permit an appellant to exclude, from the computation of the 60 days' limit, time taken by the Registrar to prepare and deliver copies of the typed proceedings to the appellant, provided that the application for proceedings was in writing and that a copy of the said letter/application was served upon the respondent.

[8] Upon perusing the evidence on record, there is no doubt that the Notice of Appeal was filed within time and served on the respondent's counsel. The notice of appeal is dated 27th June 2017 and is duly stamped by M/s Maxim Mutabingwa & Co. Advocates. The decision against which the applicant seeks to appeal was delivered on 15th June 2017. There is a letter requesting for proceedings that was written and delivered to the Registrar of the High Court within the time of 30 days from the date the decision was given by the court. It is indicated that this letter was filed in the High Court on 3rd July 2017. However, it is clear that the respondent or her counsel were not served with a copy of the letter. On the record there is a letter informing counsel for the applicant that the record of proceedings was ready. It is dated 18th January 2019. This would imply that the registrar took over one year and half to prepare the record of proceedings which fault cannot be visited on the applicant.

[9] Based on the law mentioned above, the applicant could have started computing the 60 days envisaged under rule 83 (1) from the date of receipt of the record of proceedings and by virtue of rule 4 (1), time started running from 19th January 2019. However, owing to the fact that the applicant had not served the letter requesting for proceedings on the respondent, she could not rely on rule

83 (2) by virtue of rule 83(3). While interpreting the import of Rule 79 (3) of the he Judicature (Supreme Court) Rules SI 13-11 that is similar to rule 83 (3), of the Court of Appeal Rules, Katureebe, JSC (as he then was) in Tropical Africa Bank Ltd v Grace Were Muhwana [2012] UGSC 8 stated:

‘It is noteworthy that the words used in Rule 79(3) do not prohibit reliance on Rule 79(2). It states that the appellant would not be entitled to rely on 79(2), i.e. he has no automatic right. But presumably the appellant may seek court intervention under Rule 5. It is this provision that has prompted this application.’

[10] Rule 5 of the Judicature (Court of Appeal Rules) Directions S.I 13-10 states:

‘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.’

[11] The power granted to this court under this Rule 5 is discretionary and can only be exercised upon the applicant satisfying court that there is sufficient cause for the extension of time. In Boney M. Katatumba v Waheed Karim, [2008] UGSC 3, Mulenga, JSC while interpreting rule 5 of the Supreme Court rules which is similar to rule 5 of the rules of this court stated:

‘Under r 5 of the Supreme Court Rules, the court may, for sufficient reason, extend the time prescribed by the Rules. What constitutes “sufficient reason” is left to the Court’s unfettered discretion. In this context, the court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than one that is brought after an explained inordinate delay.’

But even where the application is unduly delayed, the court may grant the extension if shutting out the appeal may appear to cause injustice.'

[12] The applicant in her affidavit contends that that the failure to serve the respondent the letter requesting for proceedings was an omission by her advocates M/s Odokel Opolot & Co. Advocates, which was discovered by Kampala Associated Advocates who she had instructed to jointly handle the appeal with M/s Odokel Opolot & Co. Advocates. The applicant seeks to validate the appeal but there is no evidence that the applicant filed the memorandum and record of appeal. The applicant should have made an application to extend time to file the appeal out time but none the less, it is in the interest of justice that applicant's appeal is heard. In Horizon Coaches Ltd v Edward Rurangaranga & Anor [2009] UGSC 7, Katureebe, JSC (as he then was) stated:

'Article 126 (2) (e) of the Constitution enjoins courts to do substantive justice without undue regard to technicalities. This does not mean that courts should not have regard to technicalities. But where the effect of adherence to technicality may have the effect of denying a party substantive justice, the Court should endeavour to invoke that provision of the Constitution.'

[13] Further, the Supreme Court has held in a number of cases that mistakes or inadvertence by counsel should not necessarily be visited on the litigants. See Godfrey Magezi and Anor v Sudhir Rupaleria [2004] UGSC 33, F.L.Kaderbhai & Anor v Shamsherali Zaver Virji & Ors [2008] UGSC 20. In Godfrey Magezi and Anor v Sudhir Rupaleria [2004] UGSC 25, while considering the matter of the effect of mistakes of counsel on appeals of litigants, Karokora, JSC stated,

'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 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.....

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.'

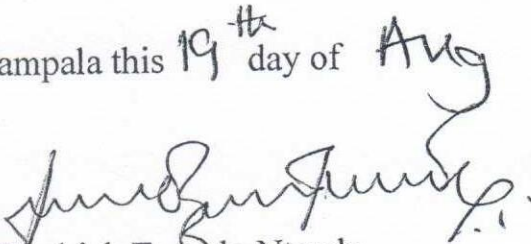
[14] For the above reasons, I would allow this application. I would grant the applicant 5 days within which to serve a copy of the letter in question from the date of delivery of this ruling. I would also validate the appeal, Civil Appeal No. 69 of 2019, so as to allow the parties proceed as soon as possible to hearing of the same.

[15] As the respondent is not at fault he must be entitled to costs in relation to these proceedings. I would order the applicant to pay the respondent her costs of this application.

Decision

[16] As Musota, JA and Kasule, Ag. JA agree this application is allowed on the terms set out above with costs to the respondent.

Signed, dated and delivered at Kampala this 19th day of Aug 2020.


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 245 OF 2019

5 **ELIZABETH KOBUSINGYE :::::::::::::::::::::::::::::: APPLICANT**

VERSUS

10 **ANNET ZIMBIHA :::::::::::::::::::::::::::::::::::::: RESPONDENT**

CORAM:

HON. JUSTICE F.M.S EGONDA-NTENDE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

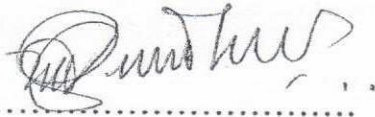
15 **HON. JUSTICE REMMY KASULE, AG. JA**

RULING OF JUSTICE STEPHEN MUSOTA, JA

20 I had the benefit of reading in draft the ruling of my brother Hon. Justice Egonda-Ntende, JA. I agree with the reasons, conclusions and orders proposed in allowing the application.

I also support the proposed order that the respondent gets the costs of the application and that the same be paid by the applicant's counsel M/S Odokel Opolot & Co. Advocates.

Dated at Kampala this.....19th.....day ofAug.....2020

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Stephen Musota
JUSTICE OF APPEAL

