

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

*(CORAM: BUTEERA, DCJ; BAMUGEMEREIRE & MUSOTA, JJA)*

**CIVIL APPEAL NO. 63 OF 2018**

**BETWEEN**

**1. EMUNA MOSES  
2. OLILI VINCENT  
3. EBONG MOSES  
4. OGWAL SEZI**

**APPELLANTS**

**AND**

**OKELLO GEORGE EKWARO ..... RESPONDENT**

**JUDGMENT OF BUTEERA, DCJ**

**Introduction**

This is an appeal against the decision of the High Court of Uganda sitting at Lira presided over by Dr. Winfred Nabisinde, J, dated 8<sup>th</sup> October, 2014 vide Miscellaneous Application No. 16 of 2014.

**Brief facts**

The suit land formerly was for the late Ogwal Opwoit and the parties are his lineal descendants. The late Ogwal Opwoit begat Ogang Festo, Agona Constantino and Olwo Wilson. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants are grandchildren of Olwo Wilson, the 4<sup>th</sup> Appellant is a son of Agona Constantino and the respondent is the grandson of Ogang Festo.

The respondent filed a suit before the Apac Chief Magistrate's Court vide Civil Suit No 31 of 2003 seeking recovery of 2000 acres of customary land forming part of the estate of his late father Ekwaro Ogang situate at Pek-Akere Parish, Arocha Sub county in Apac District. The matter was decided in favour of the Respondent. The Appellants being dissatisfied with the decision of Magistrate Grade One, lodged a Notice of Appeal before the



High Court at Lira on 20<sup>th</sup> April, 2012. They filed a Memorandum of Appeal  
Vide Civil Appeal No. 6 of 2012 on 3<sup>rd</sup> May, 2013. When the matter came  
up for hearing on 27<sup>th</sup> May, 2013, the respondent raised a preliminary  
point of law that the appeal was filed out of time and the same was  
5 dismissed. The appellants filed Miscellaneous Application No. 16 of 2014  
seeking leave of court to file an appeal against the decision of the  
Magistrate Grade One out of time. The application was dismissed. The  
Appellants being dissatisfied with the decision of the High Court in  
Miscellaneous Application No. 16 of 2014 have now appealed to this Court  
10 on the following grounds;

1. **The learned appellate judge erred in law and fact when she failed to distinguish an application for leave to file an appeal out of time and point of law raised on failure to take essential steps to prosecute an appeal thus coming to the wrong conclusion that the application was barred by res judicata.**  
15
2. **The learned appellate judge erred in law and fact when she failed to appraise the affidavit evidence and decide whether a sufficient cause has been shown to extend the time for filing an appeal.**
- 20 3. **The learned appellate judge erred in law and fact when she failed to determine the issue of whether the inadvertence of counsel to file a memorandum of appeal at the time when she had instructions to do so should be visited on the appellants thus coming to the wrong conclusion that the appellants sought for an extension of time was an abuse of court process.**  
25
4. **The learned appellate judge erred in law and fact when she exercised her discretion wrongfully based on the wrong principle of law without determining whether the real grounds raised by the applicants in their application were canvassed in Civil Appeal No. 06 of 2012 hence occasioning a miscarriage of justice.**  
30
5. **The learned appellate judge erred in law and fact when she held that the grounds for the application were covered in Civil Appeal No. 06 of 2012 without showing which grounds were covered hence occasioning a miscarriage of justice.**  
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It sought the following orders:



**(i) That the appellants be granted leave to Appeal out of time the judgment and decree of His Worship Godfrey W. Mutenyo in Chief Magistrate's Court of Apac Civil Suit No. 31 of 2003.**

**(ii) The appellants be awarded costs of this appeal.**

5 **REPRESENTATION**

At the hearing of the appeal, the appellants were represented by learned Counsel, Justine Gumtvero. The respondent was not represented.

10 The parties filed written submissions and scheduling notes which were adopted. We shall rely on both the written submissions and the scheduling notes in the resolution of the appeal.

**SUBMISSIONS OF COUNSEL FOR THE APPELLANTS**

**Ground one**

15 Counsel for the appellants submitted that it was improper for the learned Judge in Misc. Application 16 of 2014 to conclude that the matter was res judicata given that it was the first time the appellants were seeking leave of court to file an appeal out of time. Counsel for the appellants contended that the Court in Civil Appeal No. 6 of 2012 considered a preliminary point of law on the competence of the appeal since the appellants did not seek leave of court to file the Memorandum out of time.

20 **Grounds two and four**

25 Counsel submitted that the learned trial Judge never considered the grounds for leave to file an appeal out of time in Misc. Appln No. 16 of 2014 and instead delved into the basis for dismissal of Civil Appeal No. 06 of 2012. Counsel further submitted that the mistake of counsel for the appellants of filing a Memorandum of Appeal out of time in Civil Appeal No. 6 of 2012 should not be visited on the appellants.

**Ground three**

30 Counsel submitted that the learned Judge did not consider the appellants' evidence in respect to the justification for failure to take essential steps and concentrated on the respondent's evidence.



**Ground five**

Counsel submitted that the learned Judge dwelt on the principles of res-judicata instead of the rules governing extension of time hence arriving at a wrong conclusion that the application was res-judicata whereas not.

5 **Ground six**

Counsel submitted that there were no formal grounds for extension of time raised for the Court's consideration in Civil Appeal No. 6 of 2012. He submitted that the decision of her lordship in Misc. Application No.16 of 2014 regarding the extension of time was arrived at in error.

10 **SUBMISSIONS BY THE RESPONDENT**

The respondent submitted that the appellants were guilty of dilatory conduct since the Notice and Memorandum of Appeal on the record of this court were filed out of time and the respondent was not served with a letter calling for the record of appeal. He submitted that the appellants ought to have filed an appeal in this court within 15 days from 22<sup>nd</sup> July, 2015. They, however, filed the appeal on 13<sup>th</sup> March, 2018. This was out of time. The record of appeal shows that the Memorandum of Appeal was lodged in the registry of this court 8 months after the period prescribed under Rule (1) of the Court of Appeal Rules.

20 **Ground one**

The respondent submitted that the appellants' averments in the affidavit in support of Misc. Application No. 16 of 2014 and the submissions in Civil Appeal No. 06 of 2012 contained grounds for extension of time to file an appeal in the High Court against the decision of the Trial Magistrate in Apac Civil Suit No. 31 of 2003 and concluded that the matter was res judicata.

**Ground two**

The respondent contended that the submissions made by counsel for the appellants during the hearing of Civil Appeal No. 6 of 2012 were not distinguishable from the grounds in Misc. Application No. 16 of 2014. The respondent further submitted that the issues raised in High Court Civil Appeal No. 6 of 2012 and grounds in Misc. Application No. 16 of 2014

were all answered by Hon. Justice Simon Byabakama Mugenyi in High Court Civil Appeal No. 6 of 2012. The respondent contended that High Court Misc. Application No. 16 of 2014 was intended to mislead court into entertaining a matter that had been adjudicated upon by a competent court.

### **Ground three**

The respondent submitted that, even if this court is to review the evidence of the record of appeal, it will still come to the same conclusion that the trial Judge was right when she refused to grant extension of time to file an appeal against the decision of trial magistrate in Apac Chief Magistrate's Court Civil Suit No. 31 of 2003. The respondent invited court to find that the appellants had not shown sufficient cause to warrant granting leave to appeal out of time.

### **Ground four**

The respondent contended that since the appellants were seeking extension of time to file an appeal, they ought to have provided evidence that they actively followed up their case with court and upon noticing delay in filing an appeal, took necessary steps to instruct new lawyers to file their appeal. However, the trial Judge in High Court Misc. Application No. 16 of 2014 noticed that there was no evidence on record that the appellants followed up on Civil Appeal No. 06 of 2012 hence the dismissal. He relied on the decision in the cases of **Joel & Anor Vs Nuulu Nalwaga, Supreme Court Civil Misc. Application No. 04 of 2012, Boney Katatumba Vs Waheed Karim, SCCA 27/2007 and Margaret Lugarama V Nkumba College School Misc. App No 4 of 2013**. He contended that there was no evidence on record to the effect that during the pendency of High Court Civil Appeal No. 06 of 2012, the appellants took any initiative to find out why the Memorandum of Appeal was not filed or instruct new lawyers to prosecute the Appeal.

### **Ground five**

The respondent contends that the issue of extension of time to file an Appeal was indeed canvassed during the hearing of High Court Civil Appeal No. 6 of 2012, that it can be deduced from the words used by Counsel of the Appellants when convincing Court to grant extension of

time to file a Memorandum of Appeal out time, to the appellants. He submitted that the learned trial judge was guided by the principle of res judicata in her ruling in High Court Misc. Application No. 16 of 2014

**SUBMISSIONS FOR THE APPELLANTS IN REJOINDER.**

5 Counsel for the appellants submitted that the trial Judge did not put into consideration the principle of substantive justice which requires that the substance of disputes ought to be investigated and decided on their merits when she dismissed the application for leave to file to an appeal out of time without considering whether grant of the same would have prejudiced the  
10 respondent.

**COURT'S DETERMINATION**

This was an Appeal against the decision of the High Court in Miscellaneous Application No. 16 of 2014. Dissatisfied by the dismissal of that Application, an appeal was lodged to this Court. This Court is, therefore,  
15 sitting as the first appellate court. Counsel for the appellant wrongly framed the grounds of Appeal when he referred to the judge that heard and determined that Application as '*the learned appellate judge*'.

The respondent argued that the appellants filed the Notice and Memorandum of Appeal out of time. It was his contention that the  
20 appellants were granted leave of court in Misc. Appln. No. 20 of 2014 to file an appeal against the decision of court in Misc. Application No. 16 of 2014 by 4<sup>th</sup> August, 2018. They filed an appeal on 10<sup>th</sup> August, 2015 instead which was out of time. He further contended that the present appeal is not properly before court since it was filed many years after lapse  
25 of the time and Court of Appeal Misc. Appln. No 83 of 2018 was not served on the respondent within time hence violating Rule 50 of the Court of Appeal Rules.

I shall first address the preliminary point raised by the respondent that the Notice and Memorandum of Appeal on the record of this court were  
30 filed out of time. The appellants filed High Court Miscellaneous Application No 20 of 2014 seeking leave of court to appeal out of time against the decision of court in Miscellaneous Application No.16 of 2014 which was granted on 22<sup>nd</sup> July, 2015 with the following orders; -

- i. The applicant shall bear the costs of this application



- ii. That the applicant deposits security of the total sum of taxed costs in Misc. Appln No. 16 of 2014 and Misc. Appln No. 20 of 2014 within 15 days from the reading of this ruling into High Court Account, Lira.
- iii. The Applicants are further ordered to file their application to the Court of Appeal within 15 days after providing proof that the above security in cash is proved to have been deposited onto the High Court Account, Lira.

The appellants contended that they endeavored to comply with the orders of court in Miscellaneous Application No. 20 of 2014. The certificates of taxation (annexures D1 and D2) were issued to them on 5<sup>th</sup> April, 2016 where upon they obtained annexures E1 and E2 bank draft and mandate from Centenary Bank of UGX 6,342,000 (Six million three hundred and forty-two thousand shillings) to be transferred to the Registrar of High Court as security for costs and filed the same in the registry on 17<sup>th</sup> May, 2016. The Notice of Appeal (Annexure H) was filed two weeks after and served on the respondent on 22<sup>nd</sup> July, 2016.

The appellants further contended that they failed to serve the respondent with a copy of the letter requesting for the record of proceedings in Misc. Application 16 of 2014 since the respondent had changed his known address. The appellants then filed Misc. Application No. 21 of 2016 seeking leave of court to serve the letter requesting for the record of proceeding on the respondent out of the time but the same was dismissed. The appellants contend that despite various reminders to court, a copy of the record of proceedings in Misc. Application No. 16 of 2014 has never been availed to them.

The appellants contended that they withdrew instructions from Ms. Acan Stella and instructed Mr. Justine Gumtwaro who wrote another letter requesting for the record of appeal in Misc. Appln No. 16 of 2014 on 10<sup>th</sup> August, 2015 and the same was availed to them on 20<sup>th</sup> February, 2018. The appellants then filed the present Appeal on 13<sup>th</sup> March, 2018 and Court of Appeal Miscellaneous Application No. 83 of 2018 seeking leave of court to file an appeal out of time and to validate the Memorandum of Appeal.

The appellants in the affidavit in support of Misc. Application No. 83 of 2018 specifically paragraphs 33 to 45 explained to court the various steps



taken to have the appeal filed. The appellants complied with the orders of court in Misc. Application 20 of 2014 and deposited the taxed costs of Misc. Application No. 16 of 2014 and Misc. Application 20 of 2014 as security immediately after the certificate of taxation was availed to them.

5 The appellants promptly filed a Notice of Appeal and the appeal on 13<sup>th</sup> March, 2018 shortly after the record of proceedings in Misc. Application No. 16 of 2014 was certified on 20<sup>th</sup> February, 2018. The appellants satisfactorily explained why they filed Court of Appeal Misc. Application 83 of 2018 seeking extension of time on 13<sup>th</sup> March, 2018 from 8<sup>th</sup> October, 10 2014 when a ruling in Misc. Application No. 16 of 2014 was delivered 8<sup>th</sup> October, 2014. From this flow of events, I am satisfied that the appellants acted promptly at all times and as such, grant of leave to appeal is necessary to protect their right of appeal and for attaining the ends of justice.

15 This being the first appellate court, I will keep in mind the role of this Court as was stated in **Kifamunte Henry versus Uganda Cr. Appeal No.10 of 1997**, thus: -

20 ***“The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”***

**Grounds one, two, three, four and five**

25 The gist of this Appeal is whether the learned trial Judge properly addressed the issue of whether there was sufficient reason for grant of leave to appeal out of time. The learned judge in her ruling in Misc. Application No. 16 of 2014 observed that the issues raised by the appellants in Civil Appeal No.6 of 2012 were similar to the grounds in Misc. Application No. 16 of 2014 and dismissed Misc. Application No. 30 16 of 2014 for being res judicata.

**Section 7 of the civil procedure Act on res judicata provides that; -**

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly



and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issues has been subsequently raised, and has been heard and finally decided by that court.

The doctrine was well addressed in the case of **James Katabazi & 21 others versus the Secretary General of East African Community & Anor Case Number, Ref No. 1 of 2007 [2007] EACJ 3** where the court stated that for the doctrine to apply;

- i) The matter must be directly and substantially in issue in the two suits.*
- ii) The parties must be the same or the same the parties under whom any of them claim, litigating under the same title.*
- iii) The matter must have been finally decided in the previous suit.*

Upon perusal of the ruling in Civil Appeal 6 of 2012, I observed the appeal was not heard on its merit owing to the preliminary point of law raised by the respondent that the suit was not properly before court.

The High Court in Civil Appeal No. 6 of 2012 held that; -

*The Court found this rule to be quite clear that a civil appeal is commenced in the high court by lodging with its registry a memorandum of appeal but not a notice. Thus a notice of appeal is not at all a legal requirement in the procedure commencing a civil appeal in the high court.*

In my view, the trial Judge of the High Court in Civil Appeal No. 6 of 2012 addressed issues relating to flouting the procedure for filing an appeal in the High Court by appellants as provided for under Order 43 of the Civil Procedure Rules. He reached this finding on the basis that they filed a Memorandum of Appeal a year later from the date of filing a Notice of Appeal. He did not consider the grounds for extension of time to file an appeal.

That being the case, I would fault the trial court for finding that the issues as were raised in Misc. Application No. 16 of 2014 are similar to

those addressed by the Court in Civil Appeal No 6 of 2012. The appellants in Misc. Application No. 16 of 2014 sought leave of court to file an appeal out of time. The appellants adduced evidence by affidavit evidence, however, the evidence was not considered by the court in its ruling. **The supreme court of Nigeria in the case of Woluchem v. Gudi (1981) 5 SC 91** held that; -

**“It is trite that the evaluation of evidence is essentially the function of the trial judge, where the trial judge has unquestionably evaluated the evidence before him and ascribed probative value to it, it is not the business of the appeal court to disturb such findings of fact, unless the findings are perverse”.**

In the instant case the learned Judge in her ruling relied on the decision of court in Civil Appeal No. 6 of 2012 to determine the application and not on the evidence adduced by the parties. This Court notes that there was no evaluation of the evidence as adduced by the parties in ruling of Misc. Application No. 16 of 2014. The High Court in Misc. Application No. 16 of 2014. held that;

*“I have noted the learned High Court Justice Simon Byabakama Mugenyi who first heard the issues pertaining to this appeal MA.06 OF 2012 clearly addressed his mind on the grounds the appellants are relying on in this application. It is clear that he was prompted the respondent to file a complaint that led to the fixing and hearing of the appeal before him. He in his ruling dated 27. 05 .2013 and delivered on 9.12.13 before elaborately addressed the very grounds that are relied upon by the applicants in this application. While I do not see the need to repeat them verbatim here since the record speaks for itself, but suffice it to state that the learned trial judge after a careful perusal of the events that led to the fixing and hearing of the appeal arrived at a decision that the applicants **“the appellants seem to have lost interest in the appeal and were only awakened from their slumber by the respondent. Their belated efforts in filing a memorandum of***

***appeal would appear to have been aimed at forestalling the striking out of the appeal”.***

*His lordship also addressed his mind to the mode of filing an appeal in the high court as provided for under Section 79 and Order 43 CPR, and also went and addressed his mind to Article 126 Constitution of the Republic of Uganda 1995. His lordship arrived at the informed decision that the appeal was incompetent and proceed to strike it out with costs to the respondent.”*

**(Sic)**

In the instant case, the learned Judge laid undue emphasis on the findings of court in Civil Appeal No. 6 of 2012 instead of evaluating the evidence on the record of High Court in Misc. Application No. 16 of 2014 to determine whether there was sufficient cause to grant the leave of court to file an appeal out of time.

This Court being the first appellate court has a duty to scrutinize and re-evaluate the evidence on record of High Court in Misc. Application No. 16 of 2014 and come to its own decision.

The appellants contended that the mistake of their former lawyer should not be visited on them. The appellants further contended that the former lawyer informed them that the record of the lower court proceedings was availed after the statutory period for filing an appeal had expired. They averred that they exercised due diligence in prosecuting the appeal and are still pursuing the appeal.

The respondent contended that the application for extension of time was abuse of court process since the grounds relied on were addressed by court in Civil Appeal No. 6 of 2012. In addition, that the same is deliberately designed to stop him from realising the fruits of litigation.

It is trite that the time can only be extended if sufficient cause is shown. The sufficient cause must relate to the inability or failure to take necessary step within the prescribed time. It does not relate to taking a wrong decision. If found to be guilty of dilatory conduct, the time will not be extended. See **Hadondi Danile Vs Yolam Egondi Court of Appeal Civil Appeal No. 67 of 2003.**

The appellants pleaded the delayed access of court record in Apac Civil Suit No. 31 of 2003 as the reason for their failure to file an appeal within the stipulated time. The evidence on the record of Civil Appeal No. 6 of 2012 shows that the appellants managed to secure the record of the proceedings on 20<sup>th</sup> February, 2018 despite the fact that the letter requesting for the same was filed in the registry of High Court at Lira on 20<sup>th</sup> April, 2012.

I find that the appellants demonstrated to court sufficient cause as to why they did not file an appeal within the prescribed period of 30 days. I appreciate the anxieties gone through by the respondent due to unending litigation, however, I will allow the appellants to file an appeal in the High Court Lira for the ends of justice to be met.

In the end result, the entire Appeal succeeds and it is accordingly granted with no order as to costs. As Bamugemerire, JA and Musota, JA, agree with my proposed orders in those terms, the Appeal hereby succeeds.

Dated at Kampala this 30<sup>th</sup> day of January 2023

  
R. Buteera  
**Deputy Chief Justice**

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**[CORAM: BUTEERA DC],BAMUGEMEREIRE & MUSOTA, JJA]**  
**CIVIL APPEAL NO.63 OF 2018**

**BETWEEN**

- 1. EMUNA MOSES
- 2. OLILI VINCENT
- 3. EBONG MOSES
- 4. OGWAL SEZI

**APPELLANTS**

**AND**

**OKELLO GEORGE EKWARO ..... RESPONDENT**

**JUDGMENT OF CATHERINE BAMUGEMEREIRE JA**

I have had the privilege of reading the draft Judgment of Hon. Justice Richard Buteera DC]. I am in agreement with the findings and conclusion that the appellants be granted leave to appeal out of time. I would allow the appeal with no order as to costs.

Dated this 30<sup>th</sup> day of January 2023



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**CATHERINE BAMUGEMEREIRE**  
**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEL NO. 63 OF 2018**

**1. EMUNA MOSES**  
**2. OLILI VINCENT**  
**3. EBONG MOSES ::: APPELLANTS**  
**4. OGWAL SEZI**

**VERSUS**

**OKELLO GEORGE EKWARO ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ**

**HON. JUSTICE CATHERINE BAMUGMEREIRE, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA**

I have had the benefit of reading in draft the judgment by my brother Hon. Justice Richard Buteera, DCJ.

I agree with his analysis, conclusions and the orders he has proposed.

Dated this 30<sup>th</sup> day of January 2023



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**Stephen Musota**  
**JUSTICE OF APPEAL**