

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**COMMERCIAL COURT DIVISION**

HCT-00-CC-CA-0019-2012

(Arising out of MISC. CAUSE NO. 28 of 2012)

NATIONAL SOCIAL SECURITY FUND ..... APPLICANT

**VERSUS**

JOSEPH BYAMUGISHA T/A J. B. BYAMUGISHA .... RESPONDENT

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

**RULING**

This is an appeal arising out of miscellaneous cause No 28 of 2011. It was brought by Chamber Summons under S.62 (I) of the Advocates Act and Regulation 3(I) of the Advocates (Taxation of Costs) (Appeals and References) Regulations. It was praying for order that the Appeal be allowed, and that the order of the Learned Registrar/Taxing Officer in Misc. No. 28 of 2011 be set aside and / or be substituted with an appropriate order. The Appellant, National Social Security Fund was represented by Mr. Andrew Kasirye and Mr. Paul Rutisya, while Dr. Joseph Byamugisha was represented by Mr. Masembe Kanyerezi.

Before the appeal could be hear, Mr. Masembe Kanyerezi for the Respondent raised a preliminary objection. He made reference to S. 62 (I) of the Advocates Act to the effect that such an appeal should be filed within 30 days. And that under paragraph (3) of the Dr. Byamugisha's affidavit, the appeal was file one day out of time and should therefore be struck out as incompetent.

Counsel for the Respondent quoted the case of **Uganda Electronics and computer Ltd Vs Kimtuma Magala & Co Advocates, HCT-00-MA-No 481 of 2006 before Justice Egonda Ntende as he then was**, and added that whereas time can be extended under section 79 of the Civil Procedure Act, it is a general provision which does not apply where there is a specific law provided. And that in this particular case, the appeal is not under the Civil Procedure Act, but under the Advocates Act where time limit is set by statute and hence nor residual jurisdiction to extend time. Learned Counsel for the Respondent further made reference to another case of **Makula International Vs D His Eminence Cardinal Nsubuga & Another (1982) HCB II**; where it was held that a court has not residual or inherent jurisdiction to enlarge a period of time laid down by the statute.

Lastly, Mr. Masembe Kanyerezi quoted or made reference to another case of **Barclays Bank (U) Ltd Vs Eddy Rodriguez Court of Appeal Civil Appeal No 5 of 1987** reported in (1992) IV KALR where the Notice of Appeal was out of time by one day. It was held that since not leave to extend time within which the appeal was granted, the appeal was incompetent. Mr. Masembe Kanyerezi therefore called upon this court to strike out Civil Appeal No 19 of 2012 as defective.

In reply, Mr Andrew Kasirye for the Appellant submitted that filing an appeal out of time does not render it a nullity. He referred to the Case of **Sitenda Sebalu Vs Sam K. Njuba and the Electoral Commission, Supreme Court Election Petition Appeal No 26 of the 2007**, where the Supreme Court ruled that although nullification is a breach of the rules, the rules are not mandatory. Learned Counsel referred to page 10, paragraph 1 where the Supreme Court was considering S. 2 of the Parliamentary Elections Act. The time set there under of 7 days had not been complied with and the Trial Judge struck out the petition. The supreme Court

faulted the trial judge decision and emphasized that Rule fixing time should be taken as directory and not mandatory.

Mr. Kasirye Andrew further added that even the provisions of **section 62** of the Advocates Act had a directory Character, and that the section does not use the word **shall**, but **may**. Counsel for the appellant added that there is not prejudice suffered by an appeal filed one day late as the appellant has demonstrated a serious intention of participating in the proceedings and that he should not be penalized for being one day late. Mr Andrew Kasirye further submitted that the Supreme Court decisions in **Sitenda Sebalu Vs Sam K., Njuba and the Electoral Commission, Supreme Court Election Appeal No, 26 of 2007** overruled the decision of **Besweri Kibuuka Vs Electoral Commission and another Vs Civil Appeal No 5 of 1987** and that of **Makula International Vs Cardinal Nsubuga and another.**

He added that the decision of **Barclays bank (U) Ltd Vs Eddy Rodrigues** was a decision of the court of Appeal prior to the promulgation of the 1995 Constitution. And that the Spirit of the 1995 constitution dealt always with the mechanical and technical Application of justice and adopted a liberal approach. Mr. Andrew Kasirye concluded that under S 96 of the Civil Procedure Act, this court has powers to validate the appeal without the requirements for fresh proceedings, and that the long title of the Civil Procedure Act should be considered. He cited the case of Crane Finance Ltd Vs Makerere Proprieties, Supreme Court Civil Appeal No 1 of 2001 where the court considered rules 4 of the enlargement of time, the same as section 96 of the Civil Procedure Act. The court held that there was jurisdiction to validate late filing, particularly where there was not much delay.

This court has had ample opportunity to consider and internalize all the submissions by both sides on the preliminary objection that the appeal be struck out as it was filed one day out of time. I have also read through the authorities cited by both learned counsels, including those cases decided by the Supreme Court of Uganda on the related subject of enlargement of time. For avoidance of doubt, I shall reproduce section 62 (i) of the Advocates Act.

**“S. 62 Appeal and references.**

**(I) Any person affected by an order or a decision of a taxing officer made under this Act or any regulation made under this part of this Act may appeal within thirty days to a Judge of the High Court who on that appeal may make any order that the taxing officer might have made.”**

There is no doubt that in deciding cases or preliminary matters of this nature, the court in this country and elsewhere in the common wealth and the world, are guided by the doctrine of stare decisis and the principle of precedence. The decisions of the court of record made under similar situations or which apply the same or similar provisions of the law are a guiding factor and should in most case be followed or applied. However, it is my humble and most considered view that such an application of the law on decided previous authorities or cases is not mechanical and automatic. This is because society as everyone knows is dynamic and the circumstances of each case have to be considered differently. The case and decisions made there under may be similar but not exactly the same and each case would be considered on its own merits and in its own circumstances.

I have carefully analysed the precious court decisions in **Uganda Electronics and Computer Ltd Vs Kituma Magala & Co Advocates** before the Honourable Justice Egonda – Ntende. In my view the circumstances of that case were different from those of the present preliminary objection. In that case of **Uganda Electronics (Supra)**, the Ruling of the Registrar appealed against was delivered on the 8.5. 2006. The appeal against that ruling or order was made on 6.7.2006, almost 60 days or two months thereafter.

In the present case, and for all practical purposes and intends 60 days late is definitely not the same as one day late. In fact being 60 days late shows total laxity and lack of seriousness as opposed to being one or two days late. I am therefore inclined to agree with the submissions of Mr. Andrew Kasirye for the appellant that although appellant was one day late, there would be no prejudice caused as appellant demonstrated all the serious intentions of participating in the appeal proceedings and should not be penalized for being one day late. The circumstances of the **Uganda Electronic and compute Vs Kitumwa Magala & Co Advocates** case are therefore different and distinguishable from the present one.

The other case in serious contention was **Makula International Ltd Vs His Eminence Cardinal Nsubuga & Anor**. In my view, the circumstances in that case were similar to those in **Kituma Magala & Co Advocates** case as it was filed **several months** after the expiry of the statutory period. The emphasis of this court is that the concern in Makula International case was “**several months after the expiry of the statutory period.**” As emphasized under holding No. 11 on page 14 of that **Makula International** case.

In my humble view and again for all practical purposes and intends, **several months** are different from one or two days. Again the circumstances in the Makula case are distinguishable to the present preliminary objection to the extent of being several months out of time.

The other matter issue taken in consideration by this court is that the provisions of S. 62 of the Advocates Act are not mandatory. The word used is may and not shall. So where may is used as opposed to shall, then the jurisdiction of the court in a matter like the present one to allow an appeal filed one day out of time to be heard and determined on the merits cannot be said to have been ousted. In fact even if the inherent powers of the court under S. 98 of the Civil Procedure Act are not used this court has powers under S.33 of the Judicature Act, Cap 13, laws of Uganda. S. 33 of the Judicature Act for emphasis provides:-

**“S.33 The High court shall, in the exercise of the jurisdiction vested in it by the constitution this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a case or matter is entitled to in respect of any legal or equitable claim properties brought before it, so that as far as possible all matter in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.”**

The matters in controversy in this court now is whether the amount of costs taxed and awarded by the registrar to the respondent were proper and should be

confirmed by this court or not. And that is what this court will decide on under the powers conferred by S. 33 of the judicature Act and not whether the appeal is one or two days late. That will not completely determine the contentious matter of costs.

Finally, and by the application of the doctrine of precedent, this court is obliged **to follow the latest decisions of the highest court of the land (in our case Supreme Court) on the same or similar subject as opposed to earlier decisions of the high court, court of appeal or even the Supreme Court itself.** I have no doubt whatever in my mind that the decision on the subject matter of court's powers to enlarge time was elaborately dealt with by the justice of the **Supreme Court in Sitenda Sebalu Vs (1) Sam Njuba (2) the Electoral Commission.** That was Supreme Court Election petition Appeal No. 26 of 2007, decided on the 22<sup>nd</sup> day of May 2008. It overruled the decision of **Besweri Kibuuka Vs Electoral Commission and another, constitution Petition No 8 of 1998,** and **Makula International Ltd Vs His Eminence Cardinal Nsubuga and another (1982) HCB II.**

That is not withstanding my earlier ruling that the circumstances or Makula International case were distinguishable from the present preliminary objection. In the Sitenda Sebalu case (Supra), the Supreme Court considered the time limit set up under section 62 of the parliamentary elections Act and rule 6 (I) of the parliamentary Elections (Election Petitions) Rules. In their concluding remarks, their lordships held that whereas the purposes and intentions of the legislature was to ensure that disputes concerning election of peoples representatives are resolved without undue delays, but was also to ensure, equally in the public

interest, that such allegations are subjected to a fair trial and determined on merit. They held that the legislature could not have intended the rigid application of S.62 by sticking to the time limits set there under, and excluding any court discretion over the same. The Supreme Court faulted the trial judge for striking out the petition for failure to serve the same within the time set. The conclusion was that rules fixing time should be taken as directory and not mandatory.

In my view, the same applies to S.62 of the Advocates Act which is directory in character and so the powers of the court to enlarge time are not curtailed, particularly where no substantial miscarriage of justice will be occasioned by allowing the appellant to urge their appeal on the merits other than striking it out because it was filed one day late.

Furthermore, a close scrutiny of the long title of the civil procedure Act of the preamble there of is:-

**“An act to make provision for procedure in Civil Courts”**. So under S. 96 of the Civil Procedure Act, this court has the discretionary powers to enlarge the period or time fixed for doing any Act. Advocates operate in Civil Courts and so they come under the provisions Act.

Before taking leave of this matter, I want to emphasize the spirit of the 1995 constitution, whereby under **Article 126 (2) (e) thereof**, the courts are to administer substantive Justice as opposed to emphasis on technicalities like of one of being one day late as in the present preliminary objection.



How will the ordinary person on the streets of Kampala react to the news that the appellant was denied the chance to urge his appeal in the court because it was filed one day late?

Will that be within the mandate of the judiciary whose power is derived from the people and to be exercised by the courts in the name of the people and in conformity with law and with the values, norms and aspirations of the people? The answer would be No. I accordingly overrule the preliminary and allow the appeal to proceed on the merits. Costs to be in the cause.

Judge

20.3.2013

Mr. Bwogi Kalibala holding brief for Mr. Masembe Kanyerezi for Respondent present

M/s Diana Nabuso, holding brief for Mr. Andrew Kasirye, Counsel for the Applicant

Mr. Isaac Ogwang Legal Officer of Applicant present

Mr. Albert Byamugisha Legal Partner of Respondent present

Ojambo, Court Clerk present

Judge

Court Ruling read out in open court

Judge

Court hearing on 20.3.2013 at 10:00 a.m.

Judge

Hon Justice M. W. Musene

**JUDGE**