

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 990 OF 2014

(Arising From Miscellaneous Application No. 762 of 2014)

(Arising From Civil Appeal No. 34 of 2013)

(Arising From Mengo Civil Suit No. 2688 of 2011)

JOSEPH YIGA MAGANDAZI ::: APPLICANT
VERSUS

ANDREW MAVIRI ::: RESPONDENT

BEFORE: HON MR. JUSTICE B. KAINAMURA

RULING

The applicant filed this application arising from an application for stay of execution which arose from an appeal against a decision from the Chief Magistrate’s Court at Mengo. The applicant seeks an order for extension of time within which to deposit security for the due performance of the decree which had already lapsed and costs of the application to be in the cause.

The brief background of the application is that the applicant is an appellant in Civil Appeal 34 of 2013. Before the commencement of the appeal the respondent threatened the appellant with execution prompting the applicant to file Miscellaneous Application No. 762 of 2014 for stay of execution. When the application came up for hearing, the respondent conceded to the same on condition that the applicant deposited in court security for due performance of the decree. Consequently court allowed the application on those grounds and granted the applicant 21 days within which to deposit the security in that case a land title in his names and upon failure the respondent would execute the decree. The applicant was unable to deposit security within the 21 days as ordered by court because he was still transferring the same in his names and by the time the title was transferred the 21 days had lapsed hence this application.

Applicant's Submissions

Counsel for the applicant submitted that the applicant had taken time to deposit the security i.e. the land title because he was still processing it to be transferred to his name and by the time it was done, the time had expired. Counsel submitted that **Section 96 of the CPA** and **Order 51 rule 6 of the CPR** permit Court to extend time granted by it for doing any act in cases where such time has expired and there is sufficient reason. Counsel relied on the case of *Kabu Auctioneers and Court Bailiffs & Another Vs F.K Motors Ltd C/Apl. 29 of 2009*. Counsel invited the Court to exercise discretion in favour of the applicant and grant the orders sought.

Respondent's Submissions

Counsel for the respondent submitted that there is no where in the proceeding that the applicant was required to deposit security for costs. Counsel added that the application is fatally defective and ought to be dismissed with costs.

Counsel objected to the affidavit in support of the Notice of Motion submitting that it is not dated contrary to **Section 6 of the Oaths Act cap 19**. Counsel cited the case of *Balikuddembe Jumba Peter & 2 Ors Vs Jjagwe Mbuga & Anor Misc Appl. No. 976 of 2012* in which the case of *Teddy Namazzi Vs Anne Sibo [1986] HCB 58* was relied on where Court held that the affidavit in support did not state the date it was made and was therefore rendered defective and could not be entertained.

Counsel further raised an issue with regard to the filing of an amended Notice of Motion without leave of court. Counsel submitted that the amendment should not be allowed to stand and the application should be dismissed with costs.

Counsel submitted that in the event that the applicant's application is not summarily dismissed for failure to comply with orders as prayed, then the respondent should be allowed to respond to their submissions whilst making a rejoinder to their submissions on the preliminary objections.

Applicant's Submissions in Rejoinder

Counsel for the applicant in response to the prayer to dismiss the application because the submissions were not filed in time submitted that the applicant's submissions were on the court record by the time the respondent served the applicant with his submissions. Counsel also relied on the case of *Godfrey Magezi Vs Sudhir Rupaleria (2005) 1 ULSR 82* and submitted that Counsel's mistake should not be visited on the client. Counsel prayed that the matter be dispensed with without undue regard to technicalities.

In response to the preliminary points of law raised by Counsel for the applicant, Counsel submitted that the applicant filed Misc Appl 990 of 2014 seeking to extend time within which to deposit security for the due performance of the decree but inadvertently used the words "security for costs" instead of "security for the due performance of the decree". The applicant then filed an amended Notice of Motion correcting the mistake. Counsel submitted that the application is to deposit security for performance of the decree and Counsel is alluding to what was overtaken by the amendment.

Responding to the issue of the undated affidavit, Counsel cited the decision in the case of *Saggu Vs Road Master Cycles (U) Ltd (2002) 1 E.A 258* which is to the effect that a Judge has power to order that an undated affidavit be dated in Court. Counsel submitted further that the failure to date the affidavit is a mere lapse and error which should be treated as a technicality so that the application is disposed on its merits.

Counsel lastly regarding amendment without leave relied on **Order 6 rule 7 of the CPR** which provides that a petition and or application shall be amended without leave of court.

In conclusion, Counsel prayed that all the respondent's objections be overruled for lack of merit and the application for extension of time to deposit security for the due performance of the decree be allowed so that the appeal is heard on its merits.

Decision of Court

I have read the pleadings and submissions of both Counsel. The application is for extension of time within which to deposit security for the due performance of the decree.

A litigant that defaults in regard to a time set by statute or court order has a remedy in Section 96 of the Civil Procedure Act Cap 71 which is to the effect that;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired.”

In addition, **Order 51 rule 6 of the CPR** gives Court power to enlarge time given by statute or order of Court.

The facts clearly show that the applicant was granted by Court 21 days within which to deposit a certificate of title in his name which he defaulted to do and applied for time to be extended. Counsel for the applicant submitted that this is a sufficient reason for the application to be granted. Under **Section 96 of the CPA** it is clear that Court has the discretion to enlarge time which has expired and give the applicant a chance to be heard.

However, Counsel for the respondent in opposition raised objections in regard to; the non-existence of security for costs on court record which the applicant seeks to extend time for, filing an undated affidavit and filing an amended Notice of Motion without leave of court. I will address each objection with regard to what the law provides.

The applicant was given the 21 days to deposit security for performance of the decree before the appeal is heard. However, Counsel applied for extension of time to deposit security for costs which was not the case. Counsel for the respondent objected stating that the application is therefore fatally defective and ought to be dismissed. The law is settled on amendment of pleadings and specifically **Order 6 rule 7 of the CPR** which is to the effect that;

“No pleading shall, not being a petition or application, except by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings.”

The amendment of the pleading from the use of the words *security for costs* to *security for performance of the decree* is in my opinion a mistake which ideally should not terminate the proceedings. This is irrespective of the fact that Counsel did so without seeking leave of court. I respectfully disagree though with Counsel for the applicant’s submission that **Order 6 rule 7 of the CPR** provides that a petition and or application shall be amended without leave of court. All

the Order emphasizes is the introduction of new grounds in the amendment. It is O 6 r 20 which provides for amendment of pleadings and within the time lines mentioned therein which I find the amendment fall within.

In any event in the case of ***Francis Wazarwahi Bwengye Vs Haki. W. Bonera HCT-OO-CV-CA-0033-2009***, court relied on the Supreme Court decision of ***Re Christine Namatovu Tebajjukira [1992-93] HCB 85*** in which court held that;

“The administration of justice should normally require that the substance of disputes should be investigated and decide on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights”

It is therefore my view that the amendment to the Notice of Motion was done in accordance with the law.

On the question of the undated affidavit I have addressed my mind to the legal provisions regarding affidavits including the Oaths Act and decisions of court cited by Counsel for the respondent. In the case of ***Kikongo Noelina vs Electrol Commission & Yusufu Zulaika Election Appeal No. 75 of 2011*** while addressing a similar issue regarding affidavits in light of section 6 of the Oaths Act, court held that;

“I have already stated that the decision in SAGGU (supra) would not have been reached if the “shall” in S.6 of the Oaths Act was mandatory. The Court added in that case that any grievance by the omission should be cured by award of costs. I therefore agree with the appellant’s advocates that the “shall” as raised in S.6 of the Oaths Act is more DIRECTORY than MANDATORY (emphasis mine)”

In my view the failure by the applicant to date the affidavit is not a default that goes to the root of the case and the preliminary objection raised is accordingly not sustained.

In the result I grant the order for extension of time and allow the applicant 10 days within which to deposit the certificate of title and have the appeal proceeded with.

Costs will be in the cause.

I so order.

B. Kainamura

Judge

19.11.2015