

c. The affidavit in reply;

In the respondent's affidavit in reply, it is averred that the late filing was occasioned by mistake
5 of counsel which ought not to be visited upon the respondent. Counsel for the respondent having
received the record of proceedings on 7th October, 2020 filed a memorandum of appeal on 9th
October, 2020 believing the last day of filing to have been 7th November, 2020 which happened
to be a Saturday.

10. Submissions of counsel for the applicant.

M/s Geoffrey Nangumya and Co. Advocates on behalf of the applicant submitted that the
respondent lost the right of appeal when it failed to file a memorandum of appeal within the
thirty (30) days stipulated by section 79 (1) (a) of *The Civil Procedure Act*. The judgment was
15 delivered on 19th September, 2019 and the record of proceedings was availed to the respondent
on 7th October, 2020 yet the memorandum of appeal was filed on 9th November, 2020. Although
the respondent on 8th October, 2019 filed a letter requesting of the record of proceedings, he did
not serve it upon the applicant until 4th January, 2021.

20. Submissions of counsel for the respondent.

M/s ABNO Advocates on behalf of the respondent submitted that having received instructions
on 18th October, 2019 they immediately filed a notice of appeal and applied for a certified copy
of but were not availed the record of proceedings until 7th October, 2020 whereupon they filed a
25 memorandum of appeal. The respondent did not realise the appeal had bene filed out of time
until they ewer served with the current application. Counsel inadvertently computed the last day
of filing the appeal to be 7th November, 2020 which happened to be a Saturday, hence the
extension to the next working day, 9th November, 2020. This being a mistake of counsel, it soul
dot be visited upon the respondent. The appeal ought to be validated in the interests of justice.

f. Submissions in rejoinder by counsel for the applicant;

Timelines set by the law are not mere technicalities. An appeal lodged out of time and without
5 the leave of court is incompetent. Service of a letter requesting for a certified copy of the record
of proceedings is necessary for keeping the opposite party informed of the intention to appeal.

g. The decision.

10 Section 79 of *The Civil Procedure Act* provides that an appeal to the High Court shall lie within
30 days of the date of the decree or order of the court. A notice of appeal does not commence an
appeal in the High Court from the judgment of the Magistrate's Court. An appeal is commenced
by a memorandum of appeal lodged in the High Court. An appeal filed out of time without the
leave of court is incompetent and will be struck out as incompetent (see *Maria Onyango Ochola*
15 *and others v. J. Hannington Wasswa [1996] HCB 43; Loi Kagani Kiryapawo v. Gole Nicholas*
Davis, S. C. Miscellaneous Civil Application No.15 of 2007 and *Hajj Mohammed Nyanzi v. Ali*
Sseggane [1992 – 1993] HCB 218).

However, in computing the period of limitation prescribed by the section, the time taken by the
20 court or the Registrar in making a copy of the decree or order appealed against and of the
proceedings upon which it is founded is excluded (see section 79 (2) of *The Civil Procedure*
Act). Where an appellant is unable to frame his or her grounds of appeal for want of a certified
copy of the Decree, Order or record of proceedings and has been prompt in making application
thereof, and through delay on the part of Court from which appeal is sought to be made has not
25 been able to obtain such certified copy, the applicant thereby furnishes sufficient cause for not
filing the appeal in time, in which case an application for extension of time to appeal will be
allowed. Furthermore, section 79 (1) of *The Civil Procedure Act* provides that an appellate court
may for good cause admit an appeal though the period of limitation prescribed has elapsed. Good
cause must relate and include the factors which caused inability to file the appeal within the
30 prescribed period of 30 days (see *Tight Security Ltd v. Chartis Uganda Insurance Co. Ltd H.C.*
Misc. Application No. 8 of 2014).

It is the respondent's case that the judgment was delivered on 19th September, 2019. The respondent requested for a record of proceedings within a month thereafter on 18th October, 2019. The record of proceedings was availed to the respondent on 7th October, 2020 and the memorandum of appeal was filed on 9th November, 2020. The respondent having applied for a certified record of proceedings within a month of the decision, that the certified copy of the record was availed only on 7th October, 2020 is through delay on the part of Court that cannot be blamed on the respondent or its counsel. However, time for filing the appeal run out on 6th October, 2020 yet the advocates filed the appeal on 9th October, 2020 three days out of time.

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Under section 79 (1) of *The Civil Procedure Act*, an appellate court may for good cause admit an appeal though the period of limitation prescribed has elapsed. Enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed. Proportionality is key to a proper application of these powers. While the court may properly allow extra time for compliance, there will come in the end a stage where the only order which is fair and which does not infringe the purpose of the original order is that of dismissal of the application. Moreover article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* is to the effect that substantive justice shall be administered without undue regard to technicalities. Doubtless the provision was not intended to do away with rules of procedure but in a reflection of the saying that rules of procedure are handmaidens of justice in (see *Utex Industries Ltd v. Attorney General S.C. Civil Application No. 52 of 1995*). They are to be applied with due regard to the circumstances of each case. It is not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in interpreting pleadings

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Irrespective of the timing, extension of time will be granted where it is found that the mistake was that of the court (see *Mansukhalal Ramji Karia and Crane Finance Co. Ltd. v. Attorney General and two others, S.C. Civil Application No. 1 of 2003*). It is also now trite that the mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant (see

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the Supreme Court decisions in *Andrew Bamanya v. Shamsherali Zaver*, S.C. Civil Appln. No. 70 of 2001; *Ggoloba Godfrey v. Harriet Kizito* S.C. Civil Appeal No.7 of 2006; and *Zam Nalumansi v. Sulaiman Bale*, S.C. Civil Application No. 2 of 1999). I have not found any unjustifiable inconvenience that will be suffered by the applicant in the event of dismissing this application, yet a determination of the dispute on merits on appeal, would be in the best interests of both parties.

While a step taken out of time is voidable, it may be validated by extension of time. An extension of time may be granted even where the step has been taken out of time and before the application (see *Shanti v. Hindocha and others* [1973] 1 EA 207; *Mansukhalal Ramji Karia and Crane Finance Co. Ltd. v. Attorney General and two others*, S.C. Civil Application No. 1 of 2003; *Godfrey Magezi and another v. Sudhir Rupaleria (2)*, S.C. Civil Application No. 10 of 2002 and *Crane Finance Co. Ltd v. Makerere Properties Ltd*, S. C. Civil Appeal No. 1 of 2001). Time may be enlarged by validation of a belated step taken in the proceedings where it does not result in abridging, enlarging or modifying any substantive right. It will not have such an effect where it only facilitates the fair and accurate performance of the truth-finding function of the court rather than providing a substantive basis on which to resolve the pending litigation.

Enlargement of time in the instant case by way of validation has no discernible substantive impact on the merits of the appeal. The legal effect of extending time to perform an act out of time when the act has already been duly performed, albeit out of time, is to validate that act or to excuse the late performance of the act. In other words the legal effect of extending time is to validate or excuse the late step taken in the proceedings. The party in default need not take a further step of compliance if that already taken is complete and in proper form (see *The Executrix of the Estate of Christine Mary N. Tebajjukira and another v. Noel Grace Shalita*, S. C. Civil Application No.8 of 1988). This is a proper case in which the court ought to, and does hereby, validate the respondent's belated filing of the memorandum of appeal. The application is accordingly dismissed. The costs of the application will abide the outcome of the appeal.

Delivered electronically this 7th day of December, 2022 **Stephen Mubiru**.....

Stephen Mubiru

Judge,
7th December, 2022.