

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1493 OF 2021

(Arising from Civil Suit No. 0672 of 2005)

DEBORAH NTANDA
APPLICANT

VERSUS

1. DR. D. B. KYEGOMBE (DECEASED) } **RESPONDENTS**
2. MRS. B. V. KYEYUNE }

Before: Hon Justice Stephen Mubiru.

RULING

15. Background.

The applicant's late husband sued the respondents jointly and severally seeking an order of specific performance of a contract of sale of a twenty three acre tea plantation out of 42.5 hectares comprised in Singo Block 185 plot 16, general and special damages for breach of contract, interest and costs. The contract was dated 24th October, 2004. The deceased applicant was required to have paid the agreed purchase price in full by 31st December, 2004 whereupon the respondents would cause a transfer of the title deed into his names. The deceased applicant made part payment in the sum of shs. 2,000,000/= leaving an outstanding balance of shs. 28,000,000/= to be paid upon the respondents producing a title free from encumbrances. In the meantime, the deceased applicant continued as a leasee in possession of the land, under a ten year lease. On or about 29th December, 2004 the deceased applicant tendered payment of the balance of the purchase price by way of a cheque payable to the estate of the late Eriya Ssajjabi, to which estate the respondents were joint administrators. The 2nd respondent rejected the cheque and instead the respondents repossessed the land on or about 19th February, 2005.

Judgment was on 8th April, 2013 entered in favour of the deceased applicant. He was awarded general damages of shs. 9,000,000/= with interest thereon at the rate of 25% per annum. He was directed to pay the balance of the decretal sum within 60 days thereof, less the sum recoverable

from the respondents as general damages and interest. The respondents were directed upon receipt of the balance to partition the 23 acres off the head title and transfer it into the names of the deceased applicant.

5 Sometime during the year 2021 the late applicant filed an application under the provisions of Order 22 rules 84 and 85 and Order 52 rules 1 and 2 of *The Civil Procedure Rules*. He sought an order allowing him to take possession of the 23 acres decreed to him. He contended that on his part he could not comply with the terms of the decree strictly within the period specified by the decree because the court file went missing soon after that decision and was only retrieved on or
10 about 31st March, 2014. On 18th July, 2014 he deposited in court, the cheque for the amount payable under the terms of the decree. The court on 21st July, 2014 notified the respondents to collect the cheque. The respondent refused to comply. The 1st respondent died on 5th February, 2016. To-date the decree remains unsatisfied.

15 When that application came up for hearing, in a ruling delivered on 27th May, 2021 the Court held that any person seeking benefit of the specific performance of a contract must manifest that his or her conduct has been without blemish throughout, entitling him or her to the specific relief. It is necessary that the applicant's conduct in performance of the contract or attempting to fulfil the same shows an unwavering intention of wanting to perform. It was for the applicant to
20 establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. In order to prove himself ready and willing, as purchaser it was not necessarily for him to produce the money or to vouch a concluded scheme for financing the transaction. It is not essential for the applicant to actually tender to the respondent or to deposit in court any money, except when so directed by the court. However, having been ordered, if he
25 failed to do so, his claim for specific performance had to fail. A judgment creditor is said not to come with clean hands if he had not completed all conditions precedent and performed, or at least tendered performance, of all the conditions of the decree. The judgment creditor seeking to enforce equitable relief had to be prepared to do equity i.e. to perform all his obligations under the decree. The application was accordingly dismissed.

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In effect when the applicant on 18th July, 2014 deposited the balance of the purchase price, it was after a year and a month after the decree, without first obtaining any order extending time to deposit that balance, which was due latest 8th June, 2013. The applicant now seeks an order for enlargement of time within which to comply with the terms of the decree before seeking its execution.

Counsel for the applicant submitted that the reason for failure to comply with the decree was that the court file was not available at the time after judgment for a period of over 60 days. There is no satisfactory explanation. The effect of not extending time would mean the decree is unenforceable. Enforcement would be achieved without further delay. Counsel for the respondents submitted that the decree was granted on 8th April, 2013. It related to specific performance and a timeline was given of 60 days. The applicant did not comply with the decree which had timelines. The judgment creditor filed a bill of costs after four months without bothering to file this application. He was not respecting the court order. The 1st respondent is deceased. The status of the suit land has changed. The decree is one of specific performance. It is affected by unreasonable delay. It is no longer enforceable without altering its essence in light of the interest accumulated.

b. The decision.

An order for enlargement of time for taking a step directed by Court should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his failure so to file within the time prescribed by the Rules, or where the extension will be prejudicial to the respondent. It would be wrong to shut an applicant out of court and deny him or her the right to secure a remedy unless it can fairly be said that his or her action was in the circumstances inexcusable and his or her opponent was prejudiced by it. In an application of this nature, the court must balance considerations of access to justice on the one hand and the desire to have finality to litigation on the other.

Therefore, when an application is made for enlargement of time, it should not be granted as a matter of course. Grant of extension of time is discretionary and depends on proof of “good cause” showing that the justice of the matter warrants such an extension. The court is required to carefully scrutinize the application to determine whether it presents proper grounds justifying the grant of such enlargement. The evidence in support of the application ought to be very carefully scrutinized, and if that evidence does not make it quite clear that the applicant comes within the terms of the established considerations, then the order ought to be refused. It is only if that evidence makes it absolutely plain that the applicant is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the respondent of a very valuable right to finality of litigation.

This requirement was re-echoed in *Tight Security Ltd v. Chartis Uganda Insurance Company Limited and another H.C. Misc Application No 8 of 2014* where it was held that for an application of this kind to be allowed, the applicant must show good cause. “Good cause” that justifies the grant of applications of this nature has been the subject of several decisions of courts and the examples include; *Mugo v. Wanjiri [1970] EA 481* and *Pinnacle Projects Limited v. Business In Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010*, where it was held that the sufficient reason must relate to the inability or failure to take a particular step in time; *Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993* in which it was decided that a mistake by an advocate, though negligent, may be accepted as a sufficient cause, ignorance of procedure by an unrepresented respondent may amount to sufficient cause, illness by a party may also constitute sufficient cause, but failure to instruct an advocate is not sufficient cause, which principle was further stated in *Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001* that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and further that where there are serious issues to be tried, the court ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank [1971] EA 17* and *G M Combined (U) Limited v. A. K. Detergents (U) Limited S.C Civil Appeal No. 34 of 1995*). However, the application will not be granted if there is inordinate delay in filing it (see for example *Rossette Kizito v. Administrator General and others, S.C. Civil Application No. 9 of 1986 [1993]5 KALR 4*).

What constitutes “sufficient reason” will naturally depend on the circumstances of each case. It was held in *Shanti v. Hindocha and others* [1973] EA 207, that;

5 The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reason (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part. But there are other reasons and these are all matters of degree. (Emphasis added).

10 Although such circumstances ordinarily relate to the inability or failure to take the particular step within the prescribed time which is considered to be the most persuasive reason, it is not the only acceptable reason. The reasons may not necessarily be restricted to explaining the delay. An applicant who has been indolent, has not furnished grounds to show that the intended appeal is meritorious may in a particular case yet succeed because of the nature of the subject matter of the
15 dispute, absence of any significant prejudice likely to be caused to the respondent and the Court’s constitutional obligation to administer substantive justice without undue regard to technicalities. I am persuaded in this point of view by the principle in *National Enterprises Corporation v. Mukisa Foods, C.A. Civil Appeal No. 42 of 1997* where the Court of Appeal held that denying a subject a hearing should be the last resort of court.

20 The considerations which guide courts in arriving at the appropriate decision were outlined in the case of *Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001*, where it was held that;

- 25 (a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.
- (b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.
- 30 (c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.

- (d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.
- (e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ...".

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Section 98 of *The Civil Procedure Act* is an omnibus provision available to enable the Court make suitable orders, which are necessary to meet the ends of justice. The Court retains the power to enlarge the time in favour of the decree-holder to pay the amount or to perform the conditions mentioned in the decree for specific performance (see *Kumar Dhirendra Mullick and others v. Tivoli Park Apartments (P) Ltd, 2005 (5) ALL MR 180 (S.C.)*). A decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the decree. A suit for specific performance is one for a discretionary remedy. The court exercises control even after passing the decree. The control would extend till the decree is executed. The conduct of the applicant, before filing the suit and after suit, are all relevant considerations. The court may, in its discretion, enlarge any period fixed or granted by the court for doing of any act prescribed or allowed, even though the period originally fixed or granted may have expired. Inherent in Order 22 rule 29 (5) of *The Civil Procedure Rules* is the power of the court to extend the time for payment or performing any other condition of a decree for specific performance.

Specific Performance means, a decree issued by the court that a party shall actually perform and carry out the promise that he has made, or the obligation, expressly or impliedly, cast upon him by the contract between the parties. In the instant application, the court file went missing soon after that decision and was only retrieved on or about 31st March, 2014. On 18th July, 2014 the applicant deposited in court, the cheque for the amount payable under the terms of the decree. The court on 21st July, 2014 notified the respondents to collect the cheque. The respondent refused to comply. The 1st respondent died on 5th February, 2016. To-date the decree remains unsatisfied

I have not found any evidence to suggest that the applicant had a hand in causing the misplacement of the Court file until its recovery a year later on or about 31st March, 2014. It appears to me that the blame is wholly attributable to the Court for whose mistake, fault, lapse or
5 dilatory conduct the applicant cannot be penalised. However, it took the applicant four months thereafter for him to tender performance of the decree by depositing in court a cheque for the balance of the purchase price on 18th July, 2014. By that act though the applicant showed that he was ready and willing to perform his part of the agreement. Previous non-performance was on account of any obstacle created by the Court. For that reason equitable considerations come into
10 play.

The Court has to consider all the attendant circumstances including whether the applicant has conducted himself in a reasonable manner under the decree, the question being whether the court can allow, as a matter of course, extension of time for payment of the balance of the purchase
15 price in terms of the decree, nine years after issuance of the decree. It is not the case of the respondents that on account of any fault on the part of the applicant, the amount could not be deposited as per the decree.

It is well settled that when no time limit is fixed in the decree to deposit the balance of the
20 purchase price, the decree-holder/purchaser must deposit the balance within the reasonable time. Delay in depositing the balance as directed by the court, will disentitle the decree-holder from executing the decree for specific performance. The decree required the applicant to deposit the balance within 60 days. When the obligation was not performed within the time stipulated in the decree and the applicant now seeks extension of time, such extension can be considered only
25 when the performance sought to be made is not barred by limitation. According to section 3 (3) of *The Limitation Act*, a suit cannot be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable. The decree in the instant case was granted on 8th April, 2013. It is now nearly nine years since. If a party fails to perform a decreed act within the time stipulated by the Court and allows such performance also to be
30 barred by limitation in the meantime, it is my considered view that the Court cannot enlarge the time beyond the period of limitation under section 3 (3) of *The Limitation Act*. To grant an

enlargement of time in the circumstances of this case though would not have the effect of extending the period of limitation for enforcement of a decree. The time for the enforcement of the decree expires in the year 2025.

5 According to section 3 (6) of *The Limitation Act*, the prescribed periods of limitation do not apply to any claim for specific performance of a contract or for other equitable relief, except insofar as any provision thereof may be applied by the court by analogy in like manner as the periods of limitation in force before the commencement of the Act have heretofore been applied. The limitation period for all suits for specific performance of contract of sale of land is 12 years,
10 not 6. This is because this type of suit, for specific performance of a contract of sale of land, even though founded on contract, it is regarded as an action to “recover land” (see *Williams v. Thomas (1909) 1 Ch. 713* and). To recover any land is not limited to regaining something which the plaintiff previously had and has lost, but includes obtaining any land by judgment of the Court or obtaining possession of any land by judgment of the Court.

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While exercising discretion in favour of a person, the Court is bound to consider equity in the light of background and surrounding facts. The applicant wants the decree dated 8th April, 2013, to be executed now, notwithstanding the fact that the mandatory deposit that was decreed is to be made after a period of nearly ten years. Considering the fact that the applicant did not obtain in a
20 timely manner an order extending time to deposit the balance of the purchase price as decreed such that the value of the payment has enormously been affected by inflation during the past nine years of delay, I hold that in equity and in the interest of justice, the amount now to be deposited should include interest at the rate of 15% per annum from 8th June, 2013 until 6th May, 2023. The increase in value of the 23 acres which the respondents retained when the deal did not close is
25 disregarded because had the applicant taken possession of the land in accordance with the decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property.

The court has the discretion to extend time for compliance with a conditional decree. When the
30 decree specifies the time for performance of its conditions, the court may extend the time on such terms as it deems necessary, to allow an applicant for extension to pay the purchase price or

other sum which the court has ordered him to pay. The applicant having demonstrated that he was ready and willing to perform the agreement and that the non-performance was on account of obstacles placed by the court when it failed to avail the applicant the court file within the decreed sixty days, and otherwise by the respondents when on 21st July, 2014 they were notified by the court to collect the cheque, and they refused to comply, the application is allowed. The applicant is accordingly granted a sixty day extension of time from the date of this order (i.e. up to 6th May, 2023), within which to comply with the decree.

Delivered electronically this 6th day of March, 2023

10 **Mubiru**.....

.....**Stephen**

Stephen Mubiru
Judge,
20th March, 2023.