

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION NO 59 OF 2006
(Arising From Civil Appeal No. 47 of 2004)

EDWARD KAYIWA.....APPELLANT

VERSUS

DEO WASSWA RESPONDENT

BEFORE HON. JUSTICE GIDEON TINYINONDI:

RULING:

The Notice of Motion herein reads: -

NOTICE OF MOTION

(Under 0.39 r 16, and 048 rule 1 and 2 C.P.R.)

TAKE NOTICE that this honourable court will be moved on the.....day of.....2006 at..... O'clock in the fore/afternoon or soon thereafter as counsel for the applicant can be heard on the hearing of an application for orders that:

- a). Civil Appeal No. 47 of 2004 which was dismissed on 3rd February, 2001 be re-admitted.
- b). Shs. 4,000,000/= paid in execution be refunded to the applicant.
- c). The costs of this application be provided for.

The grounds of this application are set out in the attached affidavit of Nelson Nerima but briefly they are that:

- a). The appellant and his counsel were prevented cause from appearing when the appeal was called for hearing because the case file was re-allocated and fixed for hearing by the respondent without notice to the appellant.

Dated at Kampala this day of March 2006.

For: Sendege, Senyondo & Co. Advocates

Counsel for the Applicant.

The affidavit in support reads:

I NELSON NERIMA of M/s Sendege Senyondo & Co. Advocates, Jumbo Plaza, Plot 2 Parliament Avenue, P. O. Box 5027, Kampala do solemnly make oath and state as follows:

- “1. I am an advocate of the High Court practicing with the firm of M/s Sendege, Senyondo & Co. Advocates.
2. I had the conduct of Civil Appeal No. 47 of 2004 on behalf of the appellant.
3. The appeal was filed on 30th September, 2004 and I made several visits to the court to have it fixed but failed because it had not been allocated.
4. When Justice Oguli was posted to Nakawa the case was allocated to her as I found out from the Registrar. A copy is annexed hereto marked “A”.
5. I subsequently made attempts to fix the appeal for hearing but the file was then missing from the Registry.
6. On 13th March, 2006, the appellant informed me on phone that he had been arrested in execution of a decree of dismissal of the appeal with costs.
7. I rushed to the court Registry and found out on perusal of the file that the appeal had been dismissed by His Lordship Justice G. Tinyinondi on 3rd February, 2006.
8. On perusal of the bill of costs, it transpired that counsel for the respondent had caused the file to be moved from **Nakawa** to **Kampala** on 13th April, 2005 after the case was apparently re-allocated to Justice Tinyinondi. The re-allocation was not noted in the Register.

9. Counsel for the respondent subsequently fixed the appeal for hearing on 3rd February, 2006, according to a copy of the hearing notice on the file.
10. We were not served with the said hearing notice and there is no affidavit of service on the record.
11. The appellant and his counsel were therefore prevented from appearing due to re-allocation of the file without notice, and fixing the hearing without service of a hearing notice.
12. After the dismissal, the respondent's counsel filed and had a bill of costs taxed without notice to the appellant's counsel. A copy of the letter praying for ex parte taxation is annexed hereto marked "B".
13. Costs were taxed and allowed at Shs. 3,470,000/= on 15th February, 2006.
14. Without any demand for payment, the respondent's counsel commenced execution proceedings and a warrant of arrest was issued against the appellant without service of a Notice to Show Cause.
15. The application for execution and the warrant stated a sum of Shs. 6,118,000/= which was far in excess of the taxed costs of Shs. 3,470,000/=. Copies are annexed hereto marked "C" and "D" respectively.
16. On arrest of the appellant on 13th March, 2006, he paid Shs. 2,500,000/= to the court bailiff as part of the sum claimed plus a further Shs. 1,500,000/= as bailiff's costs. A copy of the receipt for the decretal costs is annexed hereto marked "E".
17. I pointed out the irregularities to the Deputy Registrar, who recalled the warrant on 16th March, 2006. A copy of the letter is annexed hereto marked "F".
18. I therefore swear this affidavit in support of an application to re-admit the appeal, order for refund of monies paid, and for costs of the application."

I certify that whatever is stated hereinabove is true to the best of my knowledge save where it is stated to be based on information the sources whereof are disclosed.

The Respondent filed an affidavit in reply. It reads:

I **DEO WASSWA** of c/o M/s Semuyaba, Iga & Co. Advocates, P. O. Box 12387, Kampala do hereby solemnly take oath and state as follows:

- “1. That I am a male adult Ugandan of sound mind, and the respondent in this matter.
2. That I have read the affidavit of Nelson Nerima in this application and I have this to answer.
3. That I am represented by Mr. Justin Semuyaba of M/s Semuyaba, Iga & Co. Advocates who attended the hearing of the appeal against me on the 3rd day of February 2006.
4. That I am advised by Mr. Justin Semuyaba that the said appeal was fixed for hearing on the 3rd day of February 2006 and was heard and dismissed on the same day in the absence of the appellant and his counsel.
5. That I am advised that the reason advanced by the appellant’s lawyer that he was prevented by sufficient cause to attend the hearing is frivolous as it was the duty of the appellant to know when his appeal was to come up for hearing and indeed my counsel attended court on the day it was fixed for hearing.
6. That thereafter taxation was duly conducted and execution issued and the Deputy Registrar could not recall an execution already issued and conducted.
7. That execution was duly done and the Court Bailiff filed a return which has an agreement in which the appellant undertook to pay the balance of Shs. 3,618,000/= (Shillings three million six hundred eighteen thousand only) A photocopy of the said return is hereto attached and marked as Annexure “A”.

8. That the sum of Shs. 6,118,000/= (Shillings six million one hundred and eighteen thousand only) is inclusive of the taxed costs of the High Court for the Appeal and Chief Magistrate's Court proceedings.
9. That it is not true the appellant paid Shs. 1,500,000/= (Shillings One million five hundred thousand only) on top of Shs. 2,500,000/= (Shillings Two million five hundred thousand only) as per the Court Bailiff's receipt.
10. That the actions of the Registrar to recall the warrant was unjustified since the appellant undertook to pay the balance.
11. That I swear this affidavit in reply to the application for re-instatement of the appeal.
12. I certify that whatever is stated hereinabove is true to the best of my knowledge, information and belief from the sources herein above mentioned."

After listening carefully to both Counsel's submissions and perusing the documents on the file it is my:

1. holding the appellant be allowed. Clearly paragraphs 8 and 11 of the affidavit in support were not replied to by the Respondent although he merely alluded to them in paragraphs 4 and 5 of his affidavit in reply.
2. On account of lack of diligence on the part of the Appellant to have the appeal fixed, I refuse to give him the costs of the application but instead award them to the Respondent.

Gideon Tinyinondi

JUDGE

30/06/2006.

30/06/2006:

Mr. Sendege for Appellant.

Mr. Semuyaba for Respondent.

Ms. Kauma, Court Clerk.

COURT:

Ruling delivered in open court.

Gideon Tinyinondi

JUDGE

30/06/2006.