

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-MA-204-2009

(FROM HCCA NO. 0090 OF 2009)

OLUKA MATIYA SULAIMANAPPLICANT

VERSUS

CHANGA MOSES.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

The applicants, Oluca Matiya Sulaiman through his lawyers M/s Madaba, Madoi & Co. Advocates brought this application by way of Notice of Motion under s.98 of the Civil Procedure Act (CPA) O.5 r.6 and O.52 rr 1, 2 and 3 of the Civil Procedure Rules (CPR) for orders that

- a) Time be extended/enlarged to file the memorandum of Appeal, and;
- b) Costs of the application be provided for.

The grounds of the application are contained in the Notice of Motion and the supporting affidavit of the applicant and are that;

1. The applicant was prevented by sufficient cause from filing his memorandum of appeal within time as stipulated by the law.
2. The applicant obtained the record of proceedings and judgment after the time for filing the memorandum of appeal had expired.
3. The interest of justice demand that court extends time to enable the applicant file his memorandum of appeal.

The intended appeal arises out of a defamatory suit which the applicant filed in Pallisa Chief Magistrate's Court against the respondent and was struck out under O.7 r.11 (a) and (e) of the CPR for disclosing a no cause of action.

The respondent, Changa Moses represented by M/s Dagira & Co. Advocates files no affidavit in reply.

Court allowed counsel for either side to file written submissions. Mr. Madaba for the applicant reiterated the contents of the application and the supporting affidavit.

Mr. Dagira for the respondent raised two preliminary objections and urged that this application is misconceived and incompetent. That it should be struck out with costs because:

- A) The application was brought under S.98 of the Civil Procedure Act and O.51 r.6 CPR. That S.98 CPA only applies where the law does not expressly provide a procedure. That it also applies where the proceedings have in the first instance been brought before court in a proper way in terms of procedure prescribed by the CPR. That a party to a dispute cannot ordinarily

invoke the inherent jurisdiction of the court under S.98 if another remedy is available.

B) Order 51 r.6 CPR applies to time fixed by the Civil Procedure Rules and by order of Court only but not to admission of appeals out of time. That the proper section to have been invoked by the applicant to have his appeal out of time is S.79 (1) of the CPA. That this section allows an appeal to be filed within 30 days and if that is not done, then the appellate court has power to admit an appeal out of time if good cause is shown.

In reply to the objections Mr. Madaba submitted that the existence of a specific procedure provision or remedy cannot operate to restrict or exclude the court's inherent jurisdiction under S.98 of the Civil Procedure Act which gives residual powers to the court to prevent or correct any injustice.

Secondly that learned counsel for the respondent has misconstrued and misinterpreted the provisions in O.51 r.6 CPR that it applies to time fixed by the CPR and orders of court only and not to admission of appeals out of time. That Civil Procedure Rules are applicable in all civil matters before the High Court and O.51 r.6 CPR is the enabling provision and procedure to invoke in applications of extension of time to do any act or take any proceedings before the High Court. Finally that Ss 79 (1) and 79 (3) CPA only state the position of the law but are not enabling provisions stipulating the proper procedure to be invoked.

It is enacted under S.79 of the Civil Procedure Act that:

“79 (1) Except otherwise specifically provided in any other law, every appeal shall be entered.

- a) Within thirty days of the date of the decree or order of the court; or*
- b) Within seven days of the date of the order of a registrar as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.*

(2) In compiling the period of limitation prescribed by this section the time taken by the court or the Registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.”

I have considered the submission by respective counsel regarding the two preliminary objections. I uphold the submission by Mr. Dagira that S.98 CPA applied where the law does not expressly provide a procedure. See ***ALCON INTERNATIONAL LTD V. KASIRYE B. BYARUHANGA CO. ADVOCATES 1996 HCB 61.***

It is also trite law that a party to a dispute cannot ordinarily invoke the inherent jurisdiction of the court under s.98 CPA if another express remedy is available ***AHAMED HASSAN MULJI V. SHIRIMBAL JADAVJ [1963] EA 217.***

In the instant application however, the application is not solely premised on the inherent powers of this court. The application was brought under o.51 r.6 and O.52 RR 1, 2 and 3 CPR. I would only fault the applicant for parading S.68 CPA first as if it is the primary basis under which this application was brought. The practice has been that this section is cited last after the principle provisions of the law applicable have been listed. It would be better to refer to the said section last.

It is now settled that the existence of specific remedies to various issues under litigation no longer restricts or exclude exercise of inherent powers of court for the ends of justice to be realized. It was held by Kasule J. and I agree, in ***STANDARD CHARTERED BANK OF UGANDA V. BEN KAVUYA & BARCLAYS BANK (2006) 1 HCB 134*** that:

“It is now settled that the existence of a specific procedure provision or remedy cannot operate to restrict or exclude the courts inherent jurisdiction under S.98 of the Civil Procedure Act which gives undue residual powers to the court to prevent or correct any injustice.”

In my view, citing S.98 CPA together with the other enabling provisions would not be fatal to the application or prejudicial to the respondents. It would be so if a lazy lawyer brought the application solely under S.98 CPA yet enabling laws do exist.

Regarding the second objection I agree with Mr. Dagira that the proper section to have been invoked by the applicant to ask court to admit his appeal out of time is

S.79 (1) of the CPA (ibid). The said law empowers an appellate court for good cause to admit an appeal though the period of limitation prescribed by the Act has elapsed.

A literal interpretation of O.51 r.6 CP shows that the said rule does not apply to time frames fixed by the Act but rather time fixed for doing certain acts under the rules or orders of court. It states that:

“6. Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by order of court(emphasis added), the court shall have power to enlarge time upon such terms, if any, as the justice of the case may require.....”

Therefore this application ought to have been brought under S.79 (1) of the Civil Procedure Act and O.52 r.(1) CPR. This application is incompetent and misconceived for having been brought under S.98 of the CPA and O.51 r.6 CPR instead of s.79 (1) of the CPA and O.52 r.1 CPR. It is struck out with costs.

Musota Stephen

JUDGE

28.4.2010

28.4.2010

Both parties in court.

Madaba for Applicant.

Dagira for Respondent.

Wanale Interpreter.

Madaba: Matter for ruling.

Court: Ruling delivered.

Musota Stephen

JUDGE

28.4.2010