THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL MISCELLENOUS APPLICATION NO. 0011 OF 2022

(Arising from Civil Suit No. 0015 of 2013)

BUZANDORA CHARLES::**APPLICANT**

VERSUS

NDIHOREYE JULIET::**RESPONDENT**

BEFORE: HON. JUSTICE SAMUEL EMOKOR

RULING

The Applicant brings the instant application under **Section 98** of **Civil Procedure Act**, **order 51 rule 6, order 52 rule 1 and 3** of the Civil **Procedure Rules** seeing orders that the time within which to appeal against the decision in Kisoro land claim No. 0015 of 2013 be extended and that the Applicant is granted leave to file an appeal out of statutory time and that provision be made for costs.

The grounds upon which this application is premised is that the Applicant intends to appeal against the Judgment in Kisoro Land claim No. 0015 of 2013 the Judgment in the said matter having been delivered without notice to the Applicant. That the Applicant has been sick since the time of the said Judgment and could not take any step and only got to know about the existence of the Judgment in January 2021 when he was served with the taxation hearing notices and decree and that the application has been brought without inordinate delay and it is in the interest of justice that this application is allowed.

The application is supported by the affidavit of the Applicant who expounds there in on the grounds upon which this application is premised.

The Respondent filed an affidavit in opposition to the instant application and he avers that the application in issue is a mere deliberate ploy by the Applicant to deny him the opportunity to enjoy the fruits of his Judgment and that the affidavit of the Applicant contains material falsehoods since the Applicant was in Court when Judgment was delivered and the trial Magistrate noted him as present. Further that annexure "A" which is the discharge form indicates that the Applicant was admitted on the 29/10/2020 and the Judgment in issue was delivered on the same date and that it is thus not true that the Applicant fell sick before conclusion of the main suit.

Representation.

Messrs Nasiima Patience and Co. Advocates represented the Applicant while Messrs Mutungi & Co. Advocates appeared for the Respondent.

The parties in this matter proceeded by way of written submissions.

Both sides to the instant application raised preliminary points of law that I am constrained to deal with, first beginning with that of the Applicant.

Applicant's point of law.

It is the submission of Counsel for the Applicant that the Respondent was served with the Notice of Motion and hearing notice on 20/05/2021 as per the affidavit on record and that the Respondent filed his reply on 15/07/2021 after about two months from the date of service on her beyond the 15 days provided by statute with in which to file a reply.

To buttress her argument Counsel relies on the **Provisions** of order **8 Rule 1 (2)** of the **Civil Procedure Rules** that is to the effect that where a Defendant has been

served with a summons inform provided by **Rules 1 (1)** of **order 5** of these rules he/she shall unless some other or future order is made by the Court file his/her defence within 15 days after service of the summons.

It is the contention of Counsel that the above provision is coached in mandatory terms with the word *"shall"* and as such must be complied with. It is therefore the submission of Counsel that the Respondent did not seek extension of time or leave to file the reply out of time and as a result the affidavit of the Respondent is illegally before Court for being filed out of time and ought to be rejected.

The Respondent's Counsel in her submissions in reply contends that the issue raised is a mere technicality which is curable under **Article 126 (2) (e)** of the **1995 Constitution** as amended.

Counsel also argues that there are vast authorities where Courts have treated the same as mere technicalities since no injustice is caused to the opposite party.

To this effect Counsel relied on the decision in **Bishop Patrick Baligasiima** versus **Kiiza Daniel** and **16 others HCMA No. 1495** of **2016.** Counsel therefore prays that the same is treated as a mere technicality.

Determination.

The facts in this case are similar to those in the **Ramagarhia Sikh Society & 2 others** versus **The Ramagarhia Sikh Education Society Ltd & 8 others HCMA No. 352** of **2015** wherein the 1st to 7th Respondents filed their affidavits in reply to the application two months after they had been served with the Application.

The Court found that the replies had been filed outside the 15 days rule and as such out of the time prescribed by the rules. The Court however using its discretion stated as follows:

"However learned Counsel for the Respondent's prayed in the alternative that Court should exercise its discretionary powers to enlarge time and admit the affidavit in reply on the ground that it in the best interest of Justice... in view of this owing up of the omission by learned Counsel for the 1st to the 7th Respondent and request of indulgence of this Court, I will find that in the interest of justice the affidavit in reply will be admitted to allow Court to finally and effectively dispose of this matter. In this case the delay was only a matter of days"

In view of the similarity between the two cases of a lapse of sixty days and the **Provisions** of **Articles 126(2) (e)** of the Constitution as amended I will in the interest of justice therefore admit the affidavit in reply of the Respondent and hereby over rule the preliminary objection.

Respondent's point of law.

It is the submission of the Respondent that the application at hand was served outside the statutory time and thus the respondent was served with expired summons. Making reference to **order 5 rule 1** of **Civil Procedure Rules** Counsel submits that the summons should have been served within 21 days after the issuance of the summons and that no application was made for the extension of the same. It is the contention of Counsel that the instant notice of motion on record was filed on the 15/02/2021 and the summons were issued on 03/03/2021 and that the same was served upon the Respondent on the 20/05/2021 after the same had expired.

The Respondent therefore prays that the instant application is dismissed.

The Applicant's Counsel in her written submissions in rejoinder admits that while it is true that the summons had expired they were renewed by Counsel extracting fresh hearing notices which were served along with the Notice of Motion whose

days had expired and that therefore Counsel's objection does not hold since the summons were renewed through the hearing notice that was extracted and endorsed by this Court and prays that the objection is over ruled.

Determination.

It is not in dispute that the Applicant filed the instant Application on 15/02/2021 and that the same was endorsed by the Court for service on the 03/03/2021.

It is also not in dispute that the same was served upon the Respondent on the 20/05/2021. I have perused the record and found indeed that the Applicant obtained a hearing notice that was issued on the 29/04/2021 and served together with the instant application on the Respondent.

The same was served with in the 21 days rule as required under order **5 rule 1 (2)** of **Civil Procedure Rules**. It is imperative to note that the hearing of the instant application when it was endorsed on the 03/03/2021 was for 13/07/2021 and that the same did not change with the hearing notice annexed to it. No prejudice was occasioned to the Respondent who still had reasonable time to reply to the same and in any case the Respondent as already discussed above gave herself an extra 2 months beyond the period mandated by the law.

All in all I find no merit in the Respondent's preliminary objection and hereby over rule it.

The Respondent raised a second preliminary point of law that delves into the substantive application and the same shall be determined hereunder.

Counsel for the Applicant raised two issues for determination as follows:

1) **Whether there are substantive grounds for extension of time to appeal.**
2) **Remedies available to the parties?**

Issue 1.

It is the submission of Counsel for the Applicant that it is trite law in applications of this nature that the Applicant must satisfy Court that he/she was prevented by sufficient reason/just cause from adhering to the time limit set by the law and that the sufficient reason must relate to the inability to take a particular step in the first instance. To this effect Counsel relied on the decision in **Executrix of the estate of the late Christine Namatovu** versus **Mary Namatovu (1992 – 93) HCB 85.**

It is the contention of Counsel that the Applicant avers that before Judgment in Kisoro Land Claim No.0015 of 2013 could be delivered he got very sick and was eventually admitted at St. Francis Hospital Mutolere in Kisoro District and that annexure "A" to the affidavit is proof of discharge on the 09/11/2020. It is therefore Counsel's argument that there is no way the Applicant could be in Court on 29/10/2020 when he was admitted in hospital.

Counsel further submits that annexures "B" and "C" dated 23/12/2020, 26/12/2020 and 28/01/2021 respectively prove that even after discharge from hospital the health of the Applicant did not improve and the Applicant's sickness therefore even if he was aware of the Judgment prevented him from taking any step to challenge it. Further upon learning of the Judgment in January 2021 the Applicant sent his son to confirm and proceeded to get a lawyer who filed the instant application in February 2021 without in ordinate delay.

Counsel relied on the case in **Banco Arabe Espanol** versus **Bank of Uganda (1999) EA 22** in which the Supreme Court held that:

"The Administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and errors or lapses

should not necessarily debar a litigant from the pursuit of their rights and unless a lack of adherence to the rules renders the appeal process difficult and in operative it would seem that the main purpose of litigation namely the hearing and determination of disputes should be fostered rather than hindered"

It is therefore the pray of the Applicant that the application is granted.

It is the submission of Counsel for the Respondent that the Respondent in her affidavit in reply opposes the instant application and avers that the affidavit in support of the instant application contains falsehoods since the Judgment he seeks extension of time to appeal against was delivered in his presence and he was captured by the trial Magistrate as being present.

Further that annexure "A" to the application clearly shows that the Applicant was admitted on 29/10/2020 which is the same day that Judgment was delivered and that thus it is not true that the Applicant was sick when Judgment was delivered.

It is the contention of Counsel that the affidavit of the Respondent contains falsehoods that go to the root of this application and that the same ought to be disregarded and the application dismissed with costs.

Counsel for the Applicant in rejoinder submits that the Applicant avers that he became sick before delivery of Judgment in Civil Suit No.0015 of 2019 and that he was eventually admitted on 29/10/2020 as per annexure "A".

That the Applicant does not state that he fell sick on 29/10/2020 but avers that as a result of continued sickness he was eventually admitted on 29/10/2020 the same date that the Judgment was delivered.

It is the contention of Counsel that the Applicant does not rely on one ground of his absence when Judgment was delivered but also fronts that due to his sickness

he could not easily take any step as far as appealing was concerned and prays that the instant application is granted.

Determination.

I would agree with the Applicant that for the instant application to succeed the Applicant must prove/satisfy this Court that he was prevented by sufficient cause from adhering to the time set by the law and the same must relate to the inability to take a particular step in the first instance.

See Executrix of the Estate of the late Namatovu (Supra) what constitutes sufficient cause was defined in the Kenyan case of **Gideon Mosa Onchwati** versus Kenya oil Co. Ltd and another [2017] KLR650 as follows:

"It is difficult to attempt to define the meaning of the words 'sufficient cause' it is generally accepted however that the words would receive a liberal construction in order to advance substantial justice when no negligence, or in action or want of bonafides, is imputed to the Appellant"

It would appear from the pleadings on the record that the crux of the Applicant inability to take an essential step towards filing of his appeal is the fact that the Applicant has been sick for some time. The Respondent however challenges this narrative averring that it is a mere ploy by the Applicant to deny her the fruits of her litigation.

The Applicant has in annexure "A" attached a discharge form from St. Francis Hospital Mutolere that shows that he was admitted on the 29/10/2020 and discharged on the 09/11/2020 after undergoing treatment from the said hospital. It is not in dispute that the Judgment that the Applicant intends to appeal against was delivered on the 29/10/2020 and the record reflects that the Applicant was

present in Court at the time of delivery of the said Judgment. The Applicant did not rejoin to the Respondent's affidavit in reply to this regard. A perusal of the certified record filed by the Applicant indeed confirms that the trial Magistrate records the Applicant as being present at the time of delivery of the Judgment.

It is of course probable that the Applicant was taken sick soon after the delivery of the Judgment. There has not been sufficient evidence presented by the Respondent to dispute the treatment notes in annexures "B", "C" and "D" to the application. I will therefore accept them to be genuine and a true reflection of the Applicant's health at the time.

The above not withstanding it was with in the Applicant's knowledge on 29/10/2020 that he had lost Civil Suit No. 0015 of 2019.

The fact that the Applicant waited until the 15/02/2021 to file this application points to his laxity. The treatment notes in annexures "B –D" do not show that the Applicant was in capable of giving instructions to Counsel to represent him and file his appeal. In fact the Applicant was discharged on 09/11/2020 and this in itself is proof that his condition was not so grave.

In the interest of justice however and to prevent the Applicant from being closed out entirely at the temple of justice I will guided by the decision of the Supreme Court in **Banco Arabe Espanal** versus **Bank of Uganda (Supra)** allow the instant application but owing to the conduct of the Applicant that I have highlighted above Iam constrained to condemn the Applicant in costs.

In the result the instant application is hereby allowed with the following orders issuing.

a) The time with in which to appeal against the decision in Kisoro Land Claim No. 0015 of 2013 is hereby extended and the Applicant shall file his Appeal within 15 days of the delivery of this ruling.

b) The costs of this application is awarded to the Respondent.

Before me,

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SAMUEL EMOKOR

JUDGE.

28/02/2024