THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0024 OF 2013

(Arising out of the Judgment or Orders of the High Court at Arua given on 15th March 2013 in C.A. No. 0003 of 2008)

MUZAMIL AYILE ……..…… APPLICANT

VERSUS

1. **ROSE TARAPKE }**
2. **FIDEL BILODRIYO }**
3. **ISAAC }**
4. **AWAD SULIMAN } ……..…. RESPONDENTS**
5. **SALIM OJUKO }**
6. **AMALIA DRAITU }**
7. **VULOU CONSTANCE }**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for enlargement of time within which to appeal. It is by notice of motion dated 29th May 2013 and supported by the affidavit of the applicant sworn on the same date. The grounds of the application are mainly that the applicant was not in court on 15th March 2013 when the judgment on appeal was delivered, since he had travelled to Kampala the day before and was thereafter prevented by sufficient cause from filing an appeal on time because he was taken ill.

The respondents oppose the application. In an affidavit in reply sworn by the first respondent on 4th February 2014, the respondents contend that on the day the judgment was delivered, the applicant was represented in court by his counsel, Mr. Paul Manzi. They question the

authenticity of the applicant's documentation relating to his travel to Kampala and the medical treatment notes.

This application was first fixed for hearing on 8th April 2014. On that day, the respondents and their advocate were absent from court. It was then adjourned to 17th April 2014. Apparently the respondents had not been served and were not in court on that day. It was then adjourned to 2nd July 2014. On that day, none of the parties and their counsel was in court. The application was then adjourned sine die. The next time it came up in court was on 30th November 2015. On that date the applicant was in court but his counsel was not and neither were the respondents and their counsel. It was adjourned to 14th December 2015. There is nothing on record to indicate what transpired on that day. The next time the application came up was on 14th March 2016 but the trial Judge was conducting a criminal session in Adjumani. It was adjourned to 25th April 2016. There is nothing on record to indicate what transpired on that day. The next time the application came up was on 20th June 2016 but counsel for the applicant had it adjourned to 31st August 2016. This background demonstrates an apparent inordinate delay that has occurred in the disposal of the application. For two years, it has been pending in this court.

Enlargement of time is a discretion which must be exercised judicially on proper analysis of the facts and application of the law to the facts. The power to grant leave to file an appeal out of time is a discretionary one and the party seeking such discretionary orders which are only given on a case to case basis, not as a matter of right, must satisfy the court by placing some material before the court upon which such discretion may be exercised. Applications for enlargement of time within which to appeal will not be granted if the delay is inexcusably long, where injustice will be caused to the other party or where there is no reasonable justification. In this case, the judgment sought to be appealed was delivered on 15th March 2013, and the application was filed on 4th June 2013, nearly three months later. On the day the judgment was delivered, the applicant was represented in court by an advocate. He is therefore deemed to have been present and time began to run against him from that day, despite his claim that he had travelled to Kampala the day before.

Section 66 of the *Civil Procedure Act*, confers a right of appeal from decrees of the High Court to the Court of Appeal. According to section 79 (1) (a) of the *Civil Procedure Act*, every appeal shall be entered within thirty days of the date of the decree or order of the court, except where it

is otherwise specifically provided in any other law. Rule 76 (2) of *The Judicature (Court of Appeal Rules) Directions* requires lodgment of a notice of appeal in the High Court within fourteen days after the date of the decision against which it is desired to appeal to the Court of Appeal. Indeed the applicant has a right of appeal, but now has the added onus of explaining what prevented him from exercising that right within the fourteen days, i.e., between 15th March 2013 and 29th March 2013. The medical clinical notes he has attached account for the following days; 25th March 2013, 4th April 2013, and 18th April 2013. On each of those days, he visited Zam Zam Clinic and Laboratory Services along Avenue Street in Arua, for treatment. He complained of severe headache, severe vomiting, joint pains and general body pains. On the 25th March 2013, the medical practitioner who attended to him wrote; "impression- Simple malaria."

The applicant has a right to apply for enlargement of time to file the notice of appeal and such order should 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 to file the notice of appeal within the time prescribed by the rules, the extension will be prejudicial to the respondent or the Court is otherwise satisfied that his intended appeal is not an arguable appeal. It would be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his 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.

Under section 79 (1) (b) of the *Civil Procedure Act*, an appellate court may for good cause admit an appeal though the period of limitation prescribed by the section (30 days) has elapsed. 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.

I have scrutinized the evidence in support of the application. There is nothing to show what effort the applicant made, if any, between 15th March 2013 (the day the judgment was delivered) and 25th March 2013 (the day he fell sick), to find out from his advocate what the Court had decided. These are ten days unaccounted for out of the fourteen available to him to lodge a notice of appeal. Since his advocate was present in court when the judgment was delivered, the applicant had imputed or constructive knowledge of the decision he now intends to appeal. Although he claims to have travelled to Kampala on 14th March 2013, he does not disclose when he returned to Arua. It is clear though that on 25th March he was back in Arua since he received treatment from Zam Zam Clinic and Laboratory Services along Avenue Street in Arua. He does not claim to have been under any form of disability, physical or otherwise, between 15th March 2013 and 25th March 2013 that prevented him from instructing his advocate to file the requisite notice of appeal. In the circumstances, the applicant has not absolved himself of lack of diligence in pursuing his intended appeal. Nowhere is it averred that he was ignorant of the contents of the judgment. He has not adduced any evidence of facts from which it might have been ascertained or inferred, the he had taken all such steps (if any) as it was reasonable for him to have taken before that time elapsed, for the purpose of obtaining appropriate advice with respect to that decision. He therefore was not hindered from taking the vital step. He either was undecided and opted to appeal as an afterthought or was simply indolent. Either way, he is guilty of unexplained and inordinate delay in commencing his appeal.

In *Andrew Bamanya v Shamsherali Zaver, S.C. Civil Appln. No. 70 of 2001*, the Supreme Court decided that the mistakes, faults / lapses or dilatory conduct of Counsel should not be visited on the litigant. The Court also held that the other principle governing applications for extension of time is that the administration of justice requires that all substances of disputes should be heard and decided on merit. In that case there was a delay of 2 ½ years in filing the application for leave to appeal out of time. The delay was caused by the Applicant's lawyers. In that case the court found that it would be a denial of justice considering the circumstances of the case to shut the Applicant out from exercising his rights. The Supreme Court decided that it had inherent powers under its own rules to administer substantive justice.

In *Sabiiti Kachope and three others v Margaret Kamuje, S.C Civil Appln. No. 31 of 1997 [1999] KLR 238*, an application for leave to extend time within which to appeal was filed after two years and five months from the date the judgment was passed. The applicant accounted for the delay. The court held that the applicant had shown good cause for the extension of time. In the two cases above cited, enlargement of time was granted despite the relatively longer delay in comparison to the application before me because the delay was sufficiently explained.

The grounds for the intended appeal have not been furnished. I am unable to tell one way or the other whether they are substantial, because I do not have before me the record of proceedings giving rise to the intended appeal and the applicant has not specified the intended grounds in his application. The applicant has failed to show to the court the grounds on which he intends to challenge decision of the court.

Regarding prejudice to the respondent, the rules of procedure entail and regulate timelines and timeliness of procedural action for purposes of redressing the aberration of delays in litigation, so as to facilitate the timely and final resolution of disputes. It is a constitutional imperative that litigants should know with finality, and within reasonable time, the courts' decisions on the claims brought before courts. Parties should not be held captive to endless litigation. The delay in the prosecution of the intended appeal affects the certainty and finality of the decision which was delivered by the court on 15th March 2013. However, I observe that the respondent has not taken any steps yet in enforcing that judgment. Allowing the applicant to appeal out of time will in the circumstances inconvenience the respondent, whose enforcement of the decree will be delayed, but is unlikely to occasion him any significant prejudice. From a different perspective, the respondent will be more secure in his ownership over the disputed land if his rights are vindicated by an even higher court, in the event that the decision on the second appeal is in his favour. Finality of litigation at the highest possible judicial level will settle the dispute for good.

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;

> 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).

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 meritous may in a particular case yet succeed because of the nature of the subject matter of the 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 versus 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.

In *Phillip Keipto Chemwolo and another v Augustine Kubende [1986] KLR 495* the Kenya Court of Appeal held that:

> Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

Furthermore In *Banco Arabe Espanol v Bank of Uganda [1999] 2 EA 22* by the Supreme Court of Uganda that:

> The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

In the application before me, although the applicant has not furnished convincing explanations for the delay, the court is hesitant to block the doors of justice in his face considering that the underlying subject matter is a dispute over land and the decree of the court is yet to be executed. The right of appeal is one of the cornerstones of the rule of law. To deny the applicant that right in the circumstances of this application, would in essence be denying him access to justice and a fair hearing both of which are guaranteed by the Constitution. In my view, although the proposed grounds of appeal have not been furnished, it has also not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicant be accorded an opportunity to ventilate his grievances on appeal, he being aggrieved by the decision of this court. I believe that justice can still be done despite the relatively short delay found in the instant casein pursuing this remedy. But because the delay has not been sufficiently justified, he will be penalized in costs for the inconvenience caused to the respondent.

I accordingly grant the applicant enlargement of time. The applicant should file the notice of appeal within fourteen days from today. The costs of this application are awarded to the respondent. I so order.

Dated at Arua this 5th day of September, 2016.

Stephen Mubiru
Judge.