

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0073 OF 2017
(Arising from Civil Suit No. 004 of 2007)

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1. AFAYO LUIJI }
2. KUDRASS ENTERPRISES LIMITED } **APPLICANTS**

VERSUS

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IZIO ENZAMA AKUESON **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

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RULING

This is an application for extension of time within which to file an appeal against two taxation decisions made in civil suit No. 4 of 2007. In that suit filed on 12th February, 2007, the plaintiff / judgment creditor sued the applicants / judgment debtors for recovery of land comprised in plot 2 Hospital Road, Arua. Judgment was delivered in favour of the plaintiff / judgment creditor on 12th November, 2007 granting the plaintiff / judgment creditor an order of vacant possession of the land, shs. 10,000,000/= in general damages, interest thereon at the rate of 6% per annum from the date of judgment until payment in full, and the costs of the suit.

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Being dissatisfied with the decision, the applicants / judgment debtors filed a notice of appeal on 18th November, 2009. The applicants / judgment debtors apparently not having taken any further step to proceed with the intended appeal, the plaintiff / judgment creditor filed a party and party bill of costs on 9th February, 2012, claiming a total of shs. 22,154,000/= . The bill of costs was taxed in the absence of both parties and their counsel on 28th July, 2015 and allowed at shs. 16,895,000/=. He also taxed and allowed the bailiff's costs at shs. 13,035,000/=. It is not clear though from the available record as to how the bailiff's costs accrued at this stage.

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The plaintiff then on 30th June, 2017 applied for execution of the decree by way of arrest and detention of the first applicant / judgment debtor. A warrant of arrest was issued on 30th June,

2017, whereupon the first applicant / judgment debtor was arrested and committed to civil imprisonment on 3rd July, 2017. The bailiff who executed the warrant filed his bill of costs on 3rd July, 2017 claiming a sum of shs. 9,515,000/= which was on the same day taxed and allowed at shs. 5,748,000/=. The first applicant / judgment debtor thereafter having raised and deposited
5 shs. 15,000,000/= out of the total decretal sum of shs. 47,030,000/= was on that day, 4th July, 2017, released from civil imprisonment and given two months, expiring in September, 2017, within which to pay the balance.

The applicant / judgment debtors then on 14th September, 2017 filed an appeal against the Taxing
10 Officer's award, viz. Miscellaneous Civil Application No. 23 of 2017 and later filed Miscellaneous Civil Application No. 63 of 2017 seeking a stay of execution. the latter application was dismissed on 23rd October, 2017, the court observing that the purported pending appeal against the orders of the Taxing Officer had been filed more than two years out of time without the leave of court having been sought first. It is apparently for that reason that the
15 applicants / judgment debtors now seek an order with retrospective effect, to validate that appeal.

In the meantime, the grace period given to the first applicant having elapsed without the first applicant / judgment debtor having paid the outstanding balance, the respondent / judgment creditor on 20th September, 2017 renewed his application for execution of the decree by way of
20 arrest and detention of the first applicant / judgment debtor. A warrant of arrest was issued on 24th October, 2017, whereupon the first applicant / judgment debtor was re-arrested and committed to civil imprisonment on 30th October, 2017. The following day, having raised and deposited shs. 4,000,000/= in court out of the sum of shs. 37,778,000/= the outstanding, the first applicant / judgment debtor was released and granted an extension of time within which to pay;
25 conditional on him depositing a land title in court, pays half of the bailiff's costs and he pays the outstanding balance within a period of three weeks, i.e. on or before 20th November, 2017. The bailiff presented an additional bill of costs which was taxed immediately and allowed at shs. 3,945,000/=

30 When presenting the application on behalf of the applicants, Ms. Daisy Patience Bandaru submitted that the applicants were not aware of the taxation. No notice was served on the

applicants or their then lawyers. On the court record there is no hearing or taxation notice for that date or record on the day of the taxation. It is only the certificate of taxation signed by the registrar that shows that taxation was done on that day. It is for that reason that the applicant and the lawyers were not in court. The first applicant became aware on 3rd July, 2017 and he filed this application on 25th November, 2017. On 3rd July, 2017 the first applicant was arrested in execution of the decree and detained in civil prison. Thereafter he made an attempt to challenge the taxation proceedings by Misc Applications 0063 and 0064 of 2017 on 25th September, 2017. He had been released from civil prison on 4th July 2017. He had filed an appeal without seeking leave and the application for stay of execution was struck out. The litigant did all that he could; he was making payments to show that he was committed to meeting the terms, he deposited a title in court. Subsequent to that he has made some payments. He has a genuine grievance.

Whereas it is true that his lawyer then did not file any matter to challenge the decision immediately, this cannot be visited on the applicant. Having instructed the lawyers he had the faith that they would represent his best interest. When he learnt that they had failed, he then instructed another lawyer. On that basis he field the two applications and the appeal but the time had already elapsed. Because of his health condition he had given instructions to his lawyers. This application is not an afterthought. After being released from civil prison he took steps to seek redress. After two months is when he took the decision to engage the lawyers. The record of court and the letter show the lawyers had instructions to represent the applicant. The lawyers were negligent. Paragraph 8 and 11 of the affidavit in reply shows that he had a right to heard. There is no record on the court file as to what transpired during the taxation proceedings. The applicants were prevented by sufficient cause. They need to be heard. They are still aggrieved by the taxing master. They have taken reasonable steps, although some of which were abortive, to redress what was an injustice. This demonstrates a vigilance of the parties. It should be in their interest to give them room to be heard as they are challenging the bills taxed without notice to them since there is no record of taxation. This is a violation of the principle of natural justice.

Whereas the affidavit in reply sworn to by counsel for the applicant paragraph 11 that the applicant's from lawyers agreed that the taxation could be done in their absence and that they would abide by the results. It is not supported by any evidence on court record. From the court

record, there is no minute on the file to show that they appeared before the taxing master and consented to taxation being done in their absence. There is no consent by the parties so thus allegation remains hanging an unproved. Even if they had agreed, they did not do this in consultation with the applicants or giving them any feedback, then that would amount to acting
5 negligently in performing his legal duty. In support of that submission I refer to Paragraph 6 of the affidavit in rejoinder. I submit that in the interest f justice the application should be allowed.

In response, Mr. Byomugisha Guma, counsel for the respondent submitted that the affidavit in reply explains the position of the respondent. The applicants were two, one human and the other
10 a company. The two were represented by the same advocate; the deponent to the affidavit in rejoinder. The delay for period between July and September is not a reasonable as stated in paragraph 9 of the affidavit in reply. Counsel Ondoma was in the know of what happened. An advocate acts in the best interest of the client. Agreeing that the bill of costs be taxed in the absence of the parties was not a fraud on any of the litigants. They came many years later to
15 negotiate a settlement of the matter. He is cornered and makes undertakings to pay and then after some time engages another lawyer and tries to buy time. The record went missing at one time and he does not know whether it was recovered.

In reply counsel for the applicants submitted that the record indicated that taxation was done in
20 the absence of the applicants. The correspondences attached to the affidavit in reply were not received in the registry of court. There is nothing to show that they were filed in court. Therefore the applicant would not be in any position to explain what would have happened and this may explain the delay between the judgment and the current application. The bills were exaggerated and not taxed in accordance with the rules. This illegality should not be condoned.

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According to section 76 (1) (h) of *The Civil Procedure Act*, any order made under rules from which an appeal is expressly allowed, may be appealed. Under Order 50 rule 8 of *The Civil Procedure Rules*, any person aggrieved by any order of a registrar may appeal from the order to the High Court and according to section 62 (1) of *The Advocates Act*, any person affected by an
30 order or decision of a taxing officer made under the Act or any regulations made under that Act, may appeal within thirty days to a judge of the High Court. Therefore there exists a right of

appeal against an award of costs made by a Taxing Officer, save that the appeal has to be lodged within thirty days after the decision. In the instant case, the awards of the Taxing Officer sought to be appealed were made on 28th July, 2015 yet Miscellaneous Civil Application No. 23 of 2017, constituting the appeal, was filed on 14th September, 2017. The appeal was therefore filed 5 slightly over two years out of time. The question then is whether the applicant has furnished a sufficient explanation for that delay so as to justify exercise of the court's discretion in his favour by granting an order of extension / enlargement of time.

Enlargement of time is a discretion which must be exercised judicially on proper analysis of the 10 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 15 will be caused to the other party or where there is no reasonable justification. The 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 or her failure to file the 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. 20 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 or her action was in the circumstances inexcusable and his or her opponent was prejudiced by it.

In an application for enlargement / extension of time, what is required to be proved is that; - (a) 25 there is an enabling provision in the statute providing for the period within which to appeal, that allows for extension of time. In absence of such a provision, courts do not have jurisdiction to extend or enlarge the time fixed by statute (see *Makula International v. Cardinal Nsubuga [1982] HCB 11* where it was held that it is well established that a court has no residual or inherent jurisdiction to enlarge a period laid down by statute); (b) the applicant was prevented by 30 sufficient cause from taking the necessary step of filing the appeal within the period of time. Sufficient cause must relate to the inability or failure to take the particular step in time (see

Rosette Kizito v. Administrator General and others (1993) 5 K.A.L.R. 4); (c) the applicant is not guilty of any unexplained, dilatory conduct resulting in an inordinate delay in lodging the appeal; (d) there is a prima facie arguable appeal; and (e) the extension will not be prejudicial to the respondent. No prejudice is suffered by a party if it can be compensated by costs (see *Mohan Kiwanuka v. Aisha Chand S. C. Civil Appeal No. 14 of 2002*).

In an application of this nature, the court is concerned with finding sufficient reason why the applicant should be given more time and the most persuasive reason that he or she can show is that the delay has not been caused or contributed to by dilatory conduct on his or her own part (see *Shanti v. Hindocha and others* [1973] EA 207). Court must balance considerations of access to justice on the one hand and the desire to have finality to litigation on the other.

It has been held before that since *The Advocates Act* does not confer on courts power to extend time within which an order of a Taxing Officer may be appealed, courts cannot invoke their inherent jurisdiction to do so (see *National Social Security Fund v. Byamugisha H.C. Civil Appeal No. 13 of 2013* where it was held that section 96 of *The Civil Procedure Act* does not enable the court to enlarge time prescribed by statute. It only enables the court to enlarge any period of time fixed by the court itself as enabled by *The Civil Procedure Act*). It was considered in that decision that it is settled law that when time is fixed by the Statute itself inherent powers cannot be invoked to extend it. If there is no statutory provision or rule which gives the court discretion to extend or abridge the time set by statute or regulations, then the court has no residual or inherent jurisdiction to enlarge a period of time laid down by the statute or regulation.

However, the Supreme Court in *Sitenda Sebalu v. Sam Njuba and Another, Election Petition Appeal No 26 of 2007* stated that "a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, and if directory, whether there has been substantial compliance. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid..... In determining the question of purpose, regard must be had to the language of the relevant and the scope and object of the whole statute." It was held in that case that the provisions on limitation of time

within which to file a Parliamentary election petition was not mandatory and could be enlarged by invoking the court's inherent jurisdiction.

I have considered the language of section 62 of *The Advocates Act* and found that the time limit
5 of thirty days for lodgement of an appeal is not couched in mandatory terms. The expression is;
"may appeal within thirty days." Much as the purpose and intention of the legislature may be
construed as having been the desire to ensure, in the public interest, that disputes concerning the
costs of litigation are resolved without undue delay, it was as well to ensure that controversies
surrounding issues of costs are subjected to fair trial and determined on merit. I find therefore
10 that in a deserving case, the court may invoke its inherent power to extend time within which to
appeal an order of a Taxing Officer.

In the instant case, the applicants account for the period between 28th July, 2015 and 3rd July,
2017 by the fact that they were never notified of the taxation nor participated in the proceedings
15 leading to those awards. I have examined the record of proceedings and found that there is
indeed no affidavit of service certifying that they or their advocates were notified of that
taxation. Although the respondent in paragraph 11 of the affidavit in reply stated that counsel for
both parties agreed that the bill of costs be taxed ex-parte, it is not reflected in the record of
proceedings and in any event this was not a licence for the outcome not to be communicated to
20 the parties or their counsel. I therefore find that it has been proved that the applicants were never
notified of the outcome of the taxation proceedings until 3rd July, 2017 when the first applicant
was arrested in execution of the decree. The applicants therefore were prevented by sufficient
cause from appealing within the thirty days.

25 Having acquired notice of the outcome of the taxation proceedings on 3rd July, 2017, then time
began to run against the applicants and they ought to have filed the appeal not later than 4th
August, 2017. The applicants though filed the appeal (albeit without an order of extension of
time) on 14th September, 2017, a period of slightly over one month outside time. The explanation
for the delay is the first applicant's medical condition and inaction on the part of the advocates
30 then instructed by the applicants. I have to balance these considerations of access to justice on

the one hand and the desire to have finality to litigation on the other, considering that the decree sought to be executed was issued on 12th November, 2007, over ten years ago.

5 It is now accepted that a mistake by an advocate, though negligent, may be accepted as a sufficient cause, ignorance of procedure by an unrepresented defendant may amount to sufficient cause, illness by a party may also constitute sufficient cause, but failure to instruct an advocate is not sufficient cause (see *Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993*). It has also be held that before that where there are serious issues to be tried, the court ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank* 10 *[1971] EA 17* and *G M Combined (U) Limited v. A. K. Detergents (U) Limited S.C Civil Appeal No. 34 of 1995*). 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 15 extension of time.

I have perused the record and I have not found any ruling explaining the considerations that guided the Taxing Officer in making the awards in respect of the two bills of costs sought to be appealed, yet the applicants claim not to have participated in the proceedings relating to that 20 award. These circumstances merit a hearing on appeal. In the circumstances, I am persuaded 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, to find that in balancing considerations of access to justice on the one hand and the desire to have finality to litigation on the other, the balance tilts in favour of the applicants. There is no 25 explanation as to what prevented the advocates from filing the appeal within time but I have not found any evidence to suggest that the applicants had a hand in causing that failure or delay.

It appears to me that the blame is wholly attributable to the advocates for whose mistake, fault, lapse or dilatory conduct the applicants cannot be penalised. Allowing the applicants to appeal 30 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. The application

is accordingly allowed and as a result Miscellaneous Civil Application No. 23 of 2017, constituting the appeal, is validated retrospectively.

5 In light of the history of this prolonged litigation which must be brought to its finality as quickly as possible, counsel for the applicants should fix that appeal for hearing on a date falling within two weeks from this ruling, failure of which the appeal may be dismissed. The costs of this application will abide the results of the appeal.

Dated at Arua this 1st day of December, 2017.

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Stephen Mubiru
Judge
1st December, 2017.