

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**MISCELLANEOUS CIVIL APPLICATION No. 0023 OF 2017**  
**(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 0127 of 2012)**

5 **OJARA OTTO JULIUS ..... APPLICANT**

**VERSUS**

10 **OKWERA BENSON ..... RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**RULING**

15 This is an application made under section 98 of *The Civil Procedure Act*, and Order 52 rules 1 and 3 of *The Civil Procedure Rules* for extension of time within which appeal to this court. The applicant states that he only became aware of the judgment and decree he intends to appeal on 8<sup>th</sup> February, 2017 when he was arrested in execution of that decree. The judgment had been delivered ex-parte two months earlier on 6<sup>th</sup> December, 2016. He contends that it is in the best  
20 interests of justice that he is granted leave to appeal out of time.

The respondent opposes the application. In his affidavit in reply he states that before the judgment was delivered on 6<sup>th</sup> December, 2016, the applicant had sought to set aside the ex-parte proceedings and be allowed to join the proceedings, which application was dismissed by the trial  
25 court giving way to the subsequent delivery of the ex-parte judgment. The applicant did not challenge any of the subsequent proceedings of taxation of costs, and execution. This application is therefore an abuse of court process and only intended to delay the respondent's enjoyment of the fruits of the judgment delivered in his favour.

30 In his submissions, counsel for the applicant Mr. Okot Edward David stated that the applicant was a defendant in that suit where he lost. The judgment was delivered on 6<sup>th</sup> December, 2016 in his absence. He became aware only when execution began on 8<sup>th</sup> February, 2017. He filed the application on 17<sup>th</sup> February, 2017. There was therefore no inordinate delay in seeking the intervention of this court. The subject matter of the suit is a dispute over land. The applicant has

interest in pursuing the matter. It is true that under section 79 (1) (a) of *The Civil Procedure Act*, appeals are to be made within thirty days, except where otherwise provided. It is incumbent upon the applicant to show good reason why they did not appeal within that time. The principle governing extension of time is that administration of justice requires that all substances of dispute should be heard and decided on merit. It would be a denial of justice considering the circumstances of the case to shut the applicant out since the court has inherent powers to administer substantive justice. The applicant and not the lawyer should be considered. The mistake of counsel should not be visited onto the applicant. He should be heard on appeal.

In reply, counsel for the respondent Mr. Geoffrey Boris Enyoru submitted that the respondent opposes the application. The suit was decided ex-parte. The applicants did not turn up for hearing in the lower court but before judgment was passed, the applicant appeared in court and applied under Miscellaneous Application No.106 of 2016 which application sought to set aside the ex-parte proceedings before the judgment was passed. It was fixed for 6<sup>th</sup> September, 2016 and the applicant served the respondent. On the date it was fixed for hearing, they did not turn up in court. It was dismissed for want of prosecution. Later judgment was passed as per annexure "B" to the reply. The subsequent step should have been under O 9 r 27 of *The Civil procedure Rules* to set it aside which they did not do. The affidavit in rejoinder in para 5 claims that he made an application but this is misleading as no document was attached. He should have appealed against dismissal of the application denying him to be heard on merit. He prayed that the application to appeal a decision to which they were not party and without grounds raised in support of the application showing how they are aggrieved should be dismissed. It will deny the respondent the fruits of the judgment of the lower court. It wastes court's time with an appeal that will not stand. The decree is fully executed already.

An order for enlargement of time to file the appeal should ordinarily 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 appeal within the time prescribed by Act, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that the intended appeal is not an arguable one. It would be wrong to shut an applicant out of court and deny him or her 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 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.

5 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  
10 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.

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This requirement was re-echoed in *Tight Security Ltd v. Chartis Uganda Insurance Company Limited and another H.C. Misc Application No 8 of 2014* where it was held that for an application of this kind to be allowed, the applicant must show good cause. “Good cause” that justifies the grant of applications of this nature has been the subject of several decisions of courts  
20 and the examples include; *Mugo v. Wanjiri [1970] EA 481* and *Pinnacle Projects Limited v. Business In Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010*, where it was held that the sufficient reason must relate to the inability or failure to take a particular step in time; *Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993* in which it was decided that a mistake by an advocate, though negligent, may be accepted  
25 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, which principle was further stated in *Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001* that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and further that where there are  
30 serious issues to be tried, the court ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank [1971] EA 17* and *G M Combined (U) Limited v. A. K. Detergents (U) Limited*

*S.C Civil Appeal No. 34 of 1995*). However, the application will not be granted if there is inordinate delay in filing it (see for example *Rossette Kizito v. Administrator General and others, S.C. Civil Application No. 9 of 1986 [1993]5 KALR 4*).

- 5 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;

10 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).

15 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 meritorious 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 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.

25 The considerations which guide courts in arriving at the appropriate decision were outlined in the case of *Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001*, where it was held that;

- (a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.
- 30 (b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.

- (c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.
- (d) Unless the Appellant was guilty of dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.
- (e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ...".

Similarly 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 instant application, the applicant instructed the advocates on time and indeed they filed the application expeditiously, nine days after he became aware of the ex-parte proceedings. There is evidence to show that there has been any dilatory conduct on the part of the applicant.

The general principle is that leave to appeal will be allowed where, prima facie, there are grounds of appeal that merit judicial consideration or the intended appeal has reasonable chance of success, or if the decision sought to be appealed conclusively determines the rights of the parties (see *Sango Bay Estates Ltd. and others v. Dresdener Bank* [1971] EA 17). Contrary to the submissions of counsel for the respondent, under section 67 (1) of *The Civil Procedure Act*, an

appeal may lie from an original decree passed ex parte. Although the applicant has not disclosed what the grounds of the intended appeal are, it is not in doubt that the subject matter in issue is land and that the decision he seeks to appeal was made ex-parte. It is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces  
5 itself on the matters in controversy between the parties. It is for that reason for example that an ex-parte judgment will be set aside if there is no proper service (see *Okello v. Mudukanya* [1993] I K.A.L.R. 110). The power to deny an applicant extension of time within which to appeal should be used sparingly with circumspection and in rarest of rare cases with an aim to prevent abuse of process of Court, but not to stifle legitimate prosecution of claims.

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Although the applicant had the option of applying to have the judgment set aside, that is not a bar to seeking to appeal it instead. A litigant, unless estopped by his or her conduct, or by a former adjudication, or by law, is not foreclosed or otherwise prevented from a determination of the merits of his or her cause or defence by means of any of the available remedies. Litigants are at  
15 liberty of choosing one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An election of remedies arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event she or he loses the right to thereafter exercise the other. The doctrine provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she has  
20 chosen one of them. The doctrine of election of remedies is only applicable when a choice is exercised between remedies which proceed upon irreconcilable claims of right, which is not the case here. since annexure "B" to the affidavit in reply is a copy of the current application and not a previous application to set aside, as alleged.

25 The application is therefore allowed but in order to bring this prolonged litigation to its finality as quickly as possible, counsel for the applicants should file and serve the memorandum of appeal within fourteen days from now and fix that appeal for hearing on a date falling within three months from the date of this ruling, failure of which the appeal may be dismissed. The costs of this application will abide the results of the appeal.

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Dated at Gulu this 6<sup>th</sup> day of September, 2018.

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Stephen Mubiru  
Judge  
6<sup>th</sup> September, 2018.