**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[CIVIL DIVISION]**

**MISCELLANEOUS APPLICATION No.345 OF 2019**

***(Arising from Mengo Chief Magistrate's Court MA No.816 of 2016 &***

***(Arising from Civil Suit No.1004 of 2016)***

**KWIZERA CHRISTOPHER T/A**

**KWIZ HONEST AUCTIONEERS :::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**JEPHTAR & SONS CONSTRUCTION**

**ENGINEERING WORKS ::::::::::::::::::::::::::::::::::**

**RESPONDENT**

***BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW***

***RULING*:**

Kwizera Christopher T/a Kwiz Honest Auctioneers *(hereinafter referred to as the "Applicant")* brought this Omnibus application against Jephtar & Sons Construction Engineering Works *(hereinafter referred to as the "Respondent")* under Order 51 r. 6, Order 36 r. 11, Order 52 rr. 1,2 & 3 of the Civil Procedure Rules, SI

71-1; Section 79 (b), 96 and 98 of the Civil Procedure Act Cap. 71; Section 14, 16 and 33 of the Judicature Act Cap. 3; Section 220 (1)(a) of the Magistrates' Courts Act, Cap. 16; and Article 28, 44 and 139 of the Constitution of Uganda 1995; for orders that;

1. ***The time for filing the appeal against the ruling the learned trial magistrate delivered on the 30/11/2018 in MA No. 816 of 2016 be enlarged/extended.***
2. ***Execution of judgment and decree be stayed.***
3. ***Costs of the application be provided for.***

The grounds of the application are that the Applicant intends to appeal against the ruling which was delivered in his absence and his Advocate. That he was unable to file an appeal because him and his lawyers were not notified of the date of delivery of the ruling and only came to know of it after the time for filing the appeal had expired. That there is eminent danger of the execution of judgment and decree which will cause him irreparable damage/loss, and it is in the interest of justice that the orders applied for be granted.

The grounds are supported by the affidavit sworn by the Applicant. He majorly states that he is aggrieved by the ruling in MA No.816 of 2016, in which his application for leave to appear and defend Civil

Suit No. 1004 of 2016 was dismissed with costs and judgment entered against him which denied him the right to be heard in the suit. That he was not notified by his lawyers of the date of the ruling and was therefore not present when it was delivered, but was informed of its delivery by his former lawyers, *M/s. Fitz Patrick Furah & Co. Advocates,* on 20/05/2019. That even, then the said lawyers informed him that they could not attend the ruling and inform him because they were also not notified by court, although the former trial magistrate, His Worship Muhamed Kasakya, had verbally informed them that the ruling would be delivered on notice. That his said lawyers further informed him that they later learnt that the ruling was delivered on 20/05/2019, when they had gone to court to inquire as to why the ruling was not being delivered.

The Applicant also states that upon perusal of the court record, he observed that the Respondent's counsel misled the new trial magistrate who on several occasions proceeded to adjourn the suit without notice to the Applicant or his Advocates; and in disregard to directions of the trial magistrate to extract and serve hearing notices to enable the Applicant and his counsel to attend. That for this reason the Applicant could not appeal in time. That further,

from the court record, counsel for Respondent received the ruling and proceeded to file and have the bill of costs taxed without notice to the Applicant and his counsel. That time for filling an appeal the ruling had expired necessitating an order for the extension of time.

The Applicant maintains that his failure to file the appeal in time was due to the mistake and negligence of his former lawyers to keep vigilance and know what was happening in court, and such should not be visited on him since, as a litigant, he expected his lawyers to take all necessary steps to conduct and protect his interests in the suit. That now the Respondents are in the process of executing the judgment, and a letter has been sent to the Chief Magistrate for the transfer of the file to the Execution Division of the High Court. That for those reasons, it is in the interest of justice that the orders applied for are granted.

The Respondent opposed the application in the affidavit in reply sworn by Ms. Claire Neillah Nakabubi, an Advocate in *M/s. Okecha Baranyanga & Co. Advocates*. She states that she is well conversant with the facts of this case and swears the affidavit in that capacity. She swears that the Applicant was duly given an opportunity to be heard when the trial magistrate, on 16/10/2017, ordered that

parties proceed by way of final written submissions in MA No. 816 of 2016, which were duly filed on 18/10/2017, the Respondent filed a reply on 20/10/2017, and a rejoinder was filed on 24/10/2017. That that the initial trial magistrate, His Worship Muhamed Kasakya, was then transferred before he could deliver the ruling and as such, hearing notices were extracted fixing the matter for ruling on 20/09/2018. That on that date, the ruling was not ready and the matter was further adjourned to 22/10/2018, when it was further adjourned to 30/11/2018. That Muhiga Hamza, a duly authorized court process server, at *M/s Okecha Baranyanga & Co. Advocates,* informed her that hearing notices for the said dates were duly served on the Applicant's counsel and affidavits of service filed in that regard. That as such, the Applicant's counsel willfully neglected to adhere to the hearing notices and this prompted counsel for the Respondent to pray that the ruling be delivered *ex parte*.

Further, that the Applicant abandoned his application for leave to appear and defence since efforts were only made by counsel for the Respondent to fix a matter for ruling as final submissions had been filed in October, 2017. That the Respondent's bill of costs was filed

on 07/01/2019 and taxed on 26/02/2019 according to scale. That in any case, the Applicant does not need to appeal the entire decision if he is dissatisfied with the taxed bill of costs, but would rather apply for review of the same. The deponent maintains that the Applicant was given opportunity to be heard and has no any reasonable grounds for appeal since the ruling in MA No. 816 of 2016 was delivered after due consideration of both parties' final written submissions. That the hearing dates which the Applicant alleges he was not informed of were dates for the delivery of a ruling and all arguments in MA No. 816 of 2016 were already contained in the parties' final written submissions.

Furthermore, that a client is bound by actions of his counsel and the incompetence in counsel's vigilance or negligence thereof, should not be an excuse for the Applicant to escape being bound by the actions of his counsel. That the Respondent had indeed commenced execution proceedings and requested for the court file to be transferred to the High Court of Uganda (Execution Division) because the Applicant's former counsel rejected service of the court order in M.A 816 of 2016 and decree in Civil Suit No.1004 of 2016 and efforts to serve the Applicant personally had proved futile. That

a decree may only be set aside where it is shown that the service of summons was not effective; which is not the case herein as the Applicant was clearly aware of Civil Suit No. 1004 of 2016 and even filed an application for leave to appear and defend MA No. 816 of 2016 and also filed final written submissions thereto. That this application should, therefore, be dismissed with costs.

The Applicant filed a rejoinder whose content in essence re-emphasizes the gist of the affidavit in support. As such it needs not to be reproduced here in details. At the hearing herein, the Applicant was represented by Mr. Luswata – Kibanda of *M/s. Luswata – Kibanda & Co. Advocates* while the Respondent is represented by Mr. Brian Akimanzi of *M/s. Okecha baranyanga & Co. Advocates*. Both counsel argued the application by filing written submissions, which are on court record and have been considered in this ruling. The following are the issues for determination;

1. ***Whether the Applicant has shown sufficient cause for his non-appearance when the ruling in Mengo Chief Magistrate's Civil Suit No. 816 of 2016 was delivered.***

***2. Whether time for the Applicant to file the appeal should be extended and the execution of judgment and decree stayed.***

***3. What remedies are available to the parties?***

***Resolution of the issues:***

***Issue No.1: Whether the Applicant has shown sufficient cause for his non-appearance when the ruling in Mengo Chief Magistrate's Civil Suit No. 816 of 2016 was delivered.***

The extension of time within which to file an appeal out of time is within the discretion of court. However, court must exercise the discretion judicially taking into account the facts of each case and the principles of the law applicable. This settled position was restated in ***Afayo Luiji & Anor vs. Izio Ezama Ekueson HCMA No. 73 of 2017 (Arua High Court)*** at page 5. Therefore, the applicant for the extension of time must demonstrate to court's satisfaction, that there was sufficient cause for the failure to file the appeal within the prescribed time. In ***William Odoi Nyandusi vs. Jackson Oyuko Kasendi C.A.Civ. Appl. No.32 of 2018,*** the Court of Appeal held that the expression 'sufficient cause' has no

statutory definition. Relying on the case of ***Rosette Kizito vs. Administrator General & Others SC Civ. Appln. No. 9 of 1986*** reported in ***Kampala Law Reports Vol.5 of 1993 at page 4***, the Court went on to hold that;

> ***"'Sufficient reason' must relate to the inability or failure to take any particular step in time."***

Similarly, in ***Bishop Jacinto Kibuuka vs. The Uganda Catholic Lawyers Society & Anor MA 696 of 2018*** Sekaana J., aptly observed as follows;

> "***Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man.***

***In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."***

Applying the above principles and basing on the documents on court record to the instant case, this court finds that sufficient cause has been demonstrated that prevented the Applicant from filing his appeal within the time prescribed by law. From the proceedings in the Mengo Chief Magistrate's Court Civil Suit No. 816 of 2016, it is shown that neither the Applicant nor his former Advocates, *M/s. Fitz Patrick Furah & Co. Advocates*, were notified of the date the ruling was to be delivered. It is evident on the record that the Respondent extracted hearing notices. These notices were clearly for previous dates that were fixed, but on which dates the

ruling was not delivered. There is nothing to show that the hearing notice for the date when the ruling was read were ever served on the Applicant or his Advocates by the Respondent.

In addition, the record of proceedings does not indicate that the notices for the ruling on 30/11/2018 were even issued or that the trial court cautioned itself to ascertain that the notices were issued and served on the Applicant before delivering the ruling. As was the case in ***Afayo Luiji & A'nor vs. Izio Ezama*** (supra) on page 7 paragraphs 5-20 of its judgment, the court took into account the fact that the notice was not served on the applicant therein, to arrive at the conclusion that there was sufficient cause that prevented the Applicant from appealing within time. Similar conclusion was arrived at by the Court of Appeal in ***William Odoi Nyandusi vs. Jackson Oyuko Kasendi*** (supra).

In the instant case, the proceedings also show that after the ruling had been delivered neither the Applicant nor his Advocates were notified of the date for the delivery of the ruling. After the ruling was delivered on 30/11/2018, the Respondent went ahead and secured the date for taxation of the bill of costs without extracting a taxation

hearing notice or informing or notifying the Applicant or his Advocate of the delivery of the ruling and the date for taxation of the bill of costs. It is thus easy to read into the Respondent's counsel conduct the intention to deny the Applicant the right to be heard. One can also infer a serious lapse on part of the trial court in not bothering to ensure presence of the Applicant or his Advocate. This is easily discernible from failure to ascertain service of notices by the taxation taking place *ex parte* on 26/02/2019.

It must be emphasized that the right to be heard is sacrosanct and constitutional and cannot be derogated from. In ***James Bwogi & Sons Enterprise Ltd vs. KCC & Anor SCCiv. Appl. No.09 of 2017,*** the Supreme Court citing Rule 5 of its Rules, held that;

> ***"The court may, for <u>sufficient reason</u>, extend the time prescribed by these Rules or by any decision of the court or the Court of Appeal for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any***

***such time shall be construed as a reference to the time as so extended.”***

It may as well be true that counsel for the Applicant in the instant case, could have been negligent in executing his duties by the failure to attend court on the date fixed for ruling on taxation and also failing to inform the Applicant on the dater of delivering of the ruling of the dismissed application. The Respondent in fact acknowledges this fact in paragraph 7 of the affidavit in reply where the deponent she stated as follows;

***“That in reply to paragraphs 4, 7 and 5, of the affidavit in support, I know the Applicant’s Counsel willfully neglected to adhere to the hearing notices and this prompted counsel for the Respondent to pray that the ruling be delivered ex parte.”***

A perusal of the record does not show any reason, whatsoever, for the delivery of the ruling *ex parte*. Apart from that even if counsel was negligent, courts have always taken the view that mistakes or negligence of counsel should not be visited on the innocent litigant. In ***Joel Kato and A’nor vs. Nuulu Nalowga SC Misc.Appl No. 04 of 2012,*** citing with its previous decisions in ***Mulowooza &***

***Brothers Ltd vs. N. Shah & Co. Ltd SCCA No 20 of 2010*** and, ***Attorney General Vs. AKPM Lutaaya SCCA No.12 of 2007*** the Supreme Court at page 14, guided that;

> ***"This court has in several cases held that inadvertence of counsel can constitute sufficient reason to extend time. In Kaderbhai & Anor vs. Shamsherali & ors (supra) Okello, JSC, held that the inadvertent failure of counsel to serve a Notice of Appeal and to copy to and serve the letter requesting for the record of proceedings constituted the necessary sufficient cause."***

The Court went on, at page 16 of its ruling, to hold that;

> ***I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the***

***applicants found it necessary to engage new lawyers to deal with them."***

In the instant case, there was sufficient cause that prevented the Applicant from filing his appeal within time. Issue No.1 is answered in the affirmative.

***Issue No.2: Whether time for the Applicant to file the appeal should be extended and the execution of judgment and decree stayed.***

Having found that there was sufficient cause that prevented the Applicant from filing his appeal within time, this court exercises its discretion and extends the time and grants leave to the Applicant to file his appeal out of time.

On the issue of stay of execution, it is quite apparent from the evidence that there is imminent threat of execution of the judgment which calls for an order of this court staying the execution. There is clear evidence of the threat of execution in a letter authored by the Respondent's lawyers, dated 27/02/2019, that requesting for the transfer of the case file to the High Court (Execution Division) for

execution of judgment. Courts have always considered the eminent threat of execution as a good ground to grant the order for stay of execution. See: ***Francis Lubega vs. Attorney General. & 2 Others SCCiv. Appl NO. 13 of 2015.*** Clearly, if execution is not stayed the pending appeal, the appeal will be rendered a nugatory and the Applicant will suffer irreparable damage and loss by either losing his property or subjected to civil prison. The execution of the judgment of the trial court is stayed. Issue No.2 is answered in the affirmative.

***Issue No.3: What remedies are available to the parties?***

The application is allowed. The execution of the judgment of the trial court is stayed. Time is extended and leave is granted to the Applicant to file his appeal out of time. Cost of this application shall abide the outcome of the appeal.

***BASHAIJA K. ANDREW***
***JUDGE***
***15/05/2020***