THE REPUBLIC OF UGANDA

IN HIGH COURT OF UGANDA HOLDEN AT MBALE

MISCELLANEOUS APPLICATION NO. 370 OF 2019

(ARISING FROM SIRONKO CIVIL SUIT NO.06 OF 2020 & HIGH COURT MISC.APPLN NO.013/2013)

1. **PALAPANDE ZAITUNA**
2. **ABDULLAHTIF PALAPANDE LUBWAMA**
3. **MUHAMMAD PALAPANDE**
4. **HAJJATI NAKKU PALAPANDE**
5. **SAMIYA PALAPANDE :: APPLICANTS**

VERSUS

MUHAMMAD ALI KIGOZI :: RESPONDENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

RULING

[1] This application was brought by way of Notice of motion under **Orders 51 r.6, 52 rr.1&2 CPR** and **Sections 96 & 98 CPA** for enlargement of time to permit the Applicants file an appeal against the order by **H/W Awidi Suzan** in **Sironko Civil Suit No.016 of 2012** and costs of the application.

[2] The Application was supported by the affidavit of the 1st Applicant whose relevant grounds of the application were shown as;

1. *That the Applicants filed Civil Suit No. 016/12 in the lower court which was dismissed by the trial magistrate on 3/5/17 under O.17 r.4 CPR.*
2. *That upon dismissal of the suit, the Applicants filed H.C.Misc.Application No.013 of 2017 for Revision of the orders of the lower court which was also dismissed for flouting the right procedure.*
3. *That the delay to appeal was caused by the Applicants' pursuance of their rights in Revision which they believed would dispose of the issue.*
4. *That the applicants' appeal has merit as the trial magistrate dismissed the suit instead of proceeding to determine the matter on merit.*

5. *That they are ready to prosecute the suit whose subject matter is land their sole place of abode and livelihood.*
6. *That it is in the interest of justice that the Applicants are granted leave to appeal out of time.*

[3] In his affidavit in reply, the Respondent deponed briefly as follows;

1. *That the applicants maliciously filed C.S No.16 of 2012 against him which they failed to prosecute and it was dismissed.*
2. *That upon dismissal of the suit, the applicants filed H.C Revision Cause No.013 of 2017 which was also dismissed for having been filed wrongly.*
3. *That using a wrong procedure to bring an application in court does not amount to being prevented by a just cause from filing a just application.*

[4] In this application, the Applicants were represented by **Counsel Nangulu** of **N-Mugoda Advocates Mbale** and the Respondent was represented by **Counsel Obedo Deogracious** of **Owori and Co advocates, Mbale.**

[5] Both counsel agreed to proceed by way of written submissions for which this court shall rely on to determine this application.

[6] Counsel for the Respondent in his submissions raised the following preliminary point of law;

> *"This application is seeking orders that time be enlarged. The affidavit in support of this application is deponed to by the 1st applicant only who states in paragraph 1 that she is the 1st applicant, but without any written authority from the other applicants."*

[7] I agree with counsel for the Respondent's submissions that the law relating to swearing affidavits is that save in Representative suits, where the party who obtains the order to file the suit can swear affidavits binding on others on whose behalf the suit is brought, it does not apply otherwise. Where an affidavit is sworn on one's behalf and on behalf of others, there is need to prove that the others authorized the deponent to swear on their behalf. Proof of such authorisation is by a written document attached to the affidavit. Failure to do so is an irregularity that renders the affidavit defective and the application becomes incompetent; **KAHERU YASIN & ANOR Vs ZINORUMURI**

DAVID, H.C.C.M.A No.82/17, See also **KAIGANA Vs DABO BOUBON [1986] HCB 59.**

[8] In the instant application however, as rightfully submitted by counsel for the applicant, the perusal of paragraph 2 of the affidavit in support, it is to the effect that the 1st Applicant depones the affidavit in her individual capacity and not on behalf of the other applicants. From the foregoing, I firmly find that the legal authority cited by counsel for the Respondent in regard to the requirement for application as in this case, the authority to depone is not necessary since the applicant deponed the affidavit in her individual capacity. The preliminary objection is in the premises accordingly overruled and I proceed to determine the application on its merits.

[9] **Section 79(1)(b) CPA** is to the effect that every appeal shall be entered within thirty days of the date of the decree or order of court but the appellate court may for **good cause** admit an appeal though the prescribed period of limitation has elapsed. Counsel for the applicant cited the authority of **BONEY M. KATATUMBA Vs WAHEED KARIM S.C.CIVIL APPLICATION NO.27 OF 2002** for the principle that for an application for extension of time to succeed, sufficient reason must be shown and that the applicant must be vigilant. Justice Mulenga JSC (as he then was- RIP) had this to say;

> *"what constitutes **"sufficient cause"** is left to the court's discretion. In this context, the court will accept either a reason that prevented an applicant from taking the essential steps in time, or other reasons why the intended appeal should be allowed to proceed though out of time...even where the application is unduly delayed, the court may grant the extension if shutting out the appeal may appear to cause injustice."*

"Sufficient cause" has been given the same meaning with "Good cause" in various decisions which include **MUGO Vs WANJIRI [1970] EA 48** where "Good cause" was held to be a sufficient reason which must relate to the inability or failure to take a particular step in time.

[10] The issue therefore in this application is **whether the Applicants were prevented by sufficient cause from filing the appeal in time.**

It is deponed by the 1st applicant in the affidavit in support of the application that the Applicants instituted **Civil Suit No. 16 of 2012**

against the Respondent for inter alia, recovery of the suit land and the trial magistrate dismissed the said suit under the provisions of **0.17r.14 CPR** on account of the absence of the applicants' advocate.

[11] Following the dismissal, the applicant's counsel instituted **H.C Revision Cause No.13/17** for revision of the orders dismissing **C.S.No.16/12.** The Revision cause was dismissed for it was procedurally wrongly and erroneously filed instead of the applicant opting an appeal.

[12] It is the applicant's/contention that the delay in filing the appeal occurred as a result of mistake of their previous counsel whom the applicant trusted for guidance to adopt the most appropriate remedy but ended erroneously instituting Revision Cause.

[13] Counsel for the applicant submitted further that it is now settled that mistakes, errors, faults, lapses and dilatory conduct of counsel cannot be visited on the litigant. He cited **MATOVU Vs LUKWATA H.C.M.A.No.40/17.** That therefore the delay in filing the appeal occurred as a result of mistakes of the previous counsel and it should not be visited on the applicant.

[14] It is the correct principle of the law that a mistake by an advocate, though negligent, may be accepted as a sufficient cause, also ignorance of procedure by an unrepresented litigant may amount to sufficient cause but failure to instruct an advocate is not sufficient cause; **ROUSSOS Vs GULAM HUSSEIN HABIB & ANOR S.C.C.A No. 009/1993.**

[15] In the instant application, it has not been shown by the applicant that the previous counsel filed **H.C Revision Cause No.13/17** by mistake.

[16] On the contrary, I find that counsel for the plaintiffs/Applicants formed a deliberate strategy and filed the Revision Cause to upset the trial magistrate's dismissal orders. It was procedurally a wrong step.
Counsel had been duly instructed by the applicant to file the Revision Cause only that it ended by dismissal and now the applicant is attempting to distance herself from counsel and the results of the Revision Cause.

[17] As was held in **CAPT.PHILLIP ONGOM Vs CA CATHERINE NYEKO OLOTA S.C.C.A No.14 of 2001,**

"It would be absurd or ridiculous that every time an advocate

takes a wrong step, thereby losing a case, his client would seek to be exonerated. This is not what litigation is all about. Counsel applied a wrong strategy…no sufficient cause has been shown to entitle the applicant the relief sought."

[18] In the result, I find that surely, using a wrong procedure to bring an application in court does not amount to "sufficient cause" not to file the appeal in time or be sufficient cause to institute the appeal outside the prescribed time.

[19] It is however open to this court to consider if there is any other reason why the appeal should be instituted outside the prescribed time. I do note from the proceedings of the lower court that prior to the dismissal of the suit, the suit had suffered several adjournments. On the fateful day, the applicant informed court that their counsel was on the way. Counsel for the Respondent/defendant sought for an adjournment with costs of the day. In response to the prayer for costs, the 1st Applicant informed court that a previous order of payment of costs had not been complied with by the Respondent. This prompted the trial magistrate, on her own motion, without permitting the Applicants/plaintiffs or giving them an option to prosecute their case in person decided to dismiss the case under **O.17 r.4 CPR** which had an effect of determining the suit as if on merit.

[20] My sister Judge **Susan Okalany,** while considering the Revision Cause No.13/17 arising from the mother suit of this application, at **p.9 para.23** of her ruling, had this to say;

"The case had suffered several adjournments, clogged the system for five (5) years and had been presided over by four judicial officers. It is a good example of a poorly managed court process, since the presiding magistrates did not take charge of the proceedings that were hijacked mostly by counsel for the defendant who was granted several adjournments to the detriment of the plaintiffs."

At p.11 paragraph 28, she further observed thus;

"In the present case, although it is my opinion that the trial ***magistrate acted unjustly against the plaintiffs,*** *it is trite that a judgment pronounced under Order 17. r.4 of the Civil Procedure Rules is deemed to be a decision*

given on merits. It is thus my considered view that the best remedy for the applicants is to appeal..."

[21] I entirely equally have the same sentiments. This court is of the view that the appeal has merit and it is justified to enable the applicant against whom the magistrate acted against to explore his claims on appeal. Once it is found that the appeal is meritorious, it means that the applicant has shown that the enforcement of limitation of time would result in manifest denial of justice. Extension of time in the circumstances of this case is justified on this ground.

[22] In the result, I do find sufficient reason in the sense that the intended appeal is meritorious, to grant the extension of time applied for. Accordingly, I grant this application but with no order as to costs considering the fact that the applicant's counsel played a role for the present predicament the parties have found themselves in.

Order accordingly.

Byaruhanga Jesse Rugyema
JUDGE
3rd/08/21.