

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

TAXATION APPEAL NO.34 OF 2021

**(Arising from Mengo Chief Magistrates Court, Misc. Application No.015
Of 2021)**

NYANZI FRED SSENTAMU:.....APPLICANT

VERSUS

NSEREKO MUHAMMAD:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Section 62(1) and Regulation 3 of the Advocates (Taxation of Costs)(Appeals and References) Regulations, Order 51 rule 6 of the Civil Procedure Rules for orders that;

1. *Time for filing this taxation Appeal be extended and /or Appeal be validated.*
2. *Ruling of the Chief Magistrate given on the 21st April, 2021 in respect of instruction fees and advocates attendance fees under items 1 and 4 of the respondent's bill of costs in Misc. Application No. 15 of 2021 be reviewed/revised downwards in accordance with sixth schedule to the Advocates (Remuneration and Taxation of costs)(Amendment) Regulations.*
3. *This Appeal be allowed.*
4. *Costs of this Application be provided for.*

The application is supported by the affidavit of the applicant Nyanzi Fred Ssentamu which briefly states as follows;

1. The applicant filed Misc. Application No. 15 of 2021 in the Chief Magistrates court of Mengo seeking to nullify election results for the position of Member of Parliament for Kampala central Constituency 2020, a recount of votes and tallying of the same.
2. That the applicant's application was dismissed and ruling on the said application was entered in favour of the respondent with costs and the respondent subsequently filed a bill of costs on 12th February 2021.
3. That on the 21 day of April, 2021, the Chief Magistrate/ taxing officer made a ruling on the said bill of costs, which was taxed and allowed at 38,761,000/=.
4. That the applicant being aggrieved by the said award, instructed his lawyers M/s Jingo, Ssempijja & Co Advocates together with M/s Baingana & Co Advocates to file an appeal against the said ruling but the said lawyers neglected to do so within the required time.
5. That the applicant was prevented by sufficient cause from taking the necessary step of filing the appeal within the 30 days due to previous lawyers negligence and failure to take necessary steps for filing the appeal before lapse of time.
6. That on 14/06/2021 the new lawyers M/s Kibuuka Rashid & Co. Advocates wrote a letter requesting for the typed and certified ruling in Misc. Application No. 15 of 2021, however, a lockdown of 42 days was announced in the country and were only able to get certified copies of the ruling after the lifting of lockdown.

The respondent-Muhammed Nsereko opposed the application and filed an affidavit in reply stating that;

1. That the applicants has not attached any evidence of instruction to prove that he had instructed his former lawyers to file an appeal against the court award.
2. That the applicant failed to follow up to know whether his lawyers acted accordingly which is a clear sign of dilatory conduct aimed at wasting court's time, the applicant's time and resources.
3. That during the lockdown referred to by the applicant, courts were open and Advocates were given special permits by Uganda Law Society to attend to their clients court needs and he would have access to court documents and file an application for court record.
4. That the applicant neglected to file a taxation appeal for a period of 2 months from the date of the ruling to prove that he was dissatisfied and has not given any reasonable ground to prove that he is not guilty of unreasonable delay since no evidence is attached.

The applicant was represented by *Ms. Nabukenya Racheal* while the respondent was represented by *Ms. Karungi Karen*.

The main issues for determination.

1. *Whether the application/Appeal is competently before the court? Or Whether the court should extend the time to file an appeal or validate the appeal.*
2. *Whether the bill should be reviewed or revised for being excessive?*

Determination

Whether the application/Appeal is competently before the court? Or Whether the court should extend the time to file an appeal or validate the appeal.

The applicant filed the appeal out of time and sought that this court extends the time within which to file the appeal as well as validate the appeal. This was on grounds that after the ruling in Misc. Application No. 15 of 2021 was entered, he instructed his former lawyers to file an appeal against the award however the said lawyers never took the necessary steps to do so. On realizing this negligence, he instructed new lawyers who wrote a letter to the court dated 14/06/2021 requesting certified copies of the ruling which were availed on 12/08/2021, and this appeal was filed on 20/08/2021 after receipt of the certified ruling.

The applicant contended that he was also delayed by the 2nd countrywide lockdown which as a result of, the applicant's new lawyers were unable to get certified copies of the ruling from June until August 2021. Counsel cited the cases of *Sitenda Sebalu vs Sam Njuba & Anor EPA No. 26 of 2007 and Afayo Luiji, Kudrass Enterprises Limited vs Izio Enzama Akueson HCMA No. 73 of 2017* where the courts discussed the issue of extending/enlargement of time.

The respondent rebutted the applicant's contention on negligence of his lawyers stating that the applicant never led any evidence to show that he had instructed the lawyers in the first place. Counsel submitted that failure to instruct an advocate did not constitute sufficient cause and cited the case of *Roussos v Gulam Hussein Habib Virani & Anor SCCA No.9 of 1993*.

On delay being caused by the 2nd countrywide lockdown, counsel for the respondent submitted that courts were open and advocates were given special permits by the Uganda Law Society to attend to their clients but the applicant never adduced any evidence of an application for the special permit to the Uganda Law Society.

Counsel rejoined, submitting that the respondent's submission that the applicant had failed to prove by any evidence or letter that he had instructed his previous lawyers to file the appeal was absurd since there is no legal requirement to prove instructions strictly in writing.

Further that there was indeed no inordinate delay from the applicant and the court be pleased to allow the extension of time within which to file the appeal.

Analysis

The effect of limitation law is that legal proceedings cannot be properly or validly instituted after the expiration of the period prescribed by law. Leave to appeal out of time is not granted to a party as a matter of course. The power is exercisable at the discretion of court and the court is expected to bear in mind that the rules of court are meant to be obeyed and as such there must be materials before the court upon which to base the exercise of discretion.

From the evidence on record, it is very clear that the applicant filed their application out of time and they have filed the application which is by way of a reference to this court without seeking leave. The *omnibus* application seems to be seeking to extend the time/validation and also hear the application by re-taxing the bill of costs downwards. This is irregular and wrong to file an application/Appeal out of time and later seek to validate the same. Once statute barred always statute barred. A party should only come to court after the time has been extended by the court and not the other way round. The law does not allow you to file an appeal out of time and later you seek to have the appeal validated. The reverse order of doing things would defeat the purpose of the limitation periods in any legislation.

The applicant has argued that there is sufficient cause to justify the extension of time within which to appeal or make this application. The consideration will depend on whether the law under which it is brought allows such an extension of time. The court pronounced in **Afayo & Anor v Izio Enzama (Miscellaneous Civil Application-2017/73) [2017] UGHCCD**

175, "...In an application for enlargement / extension of time, what is required to be proved is that; -

(a) 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)..."

Section 62(1) of the Advocates Act provides;

*Any person affected by an order or decision of a taxing officer made under this Part of this Act or any other regulations made under this Part of this Act may Appeal within **thirty days** to a judge of the High Court who on that appeal may make any order that the taxing officer might have made.*

This time prescribed to lodge an appeal is set out in the statute and such time cannot be extended by stretch of imagination or ingenuity. The applicant seems to run away from the strict provisions of specific law (Advocates Act section 62) and seek solace in the liberal statute which is a general legislation (Civil Procedure Act-Section 79) which may grant extension of time. A general statutory provision under the Civil Procedure Act cannot by any means override a special statutory provision. Therefore, where an issue is governed by a specific statutory provision and a general statutory provision, the former ought to be invoked in the interpretation of the issue before the court.

Where no statutory powers exist to grant an application for extension of time, the court cannot hide under any equitable or inherent jurisdiction to exercise her powers to grant any remedy. The court cannot extend the time for doing an act when time is of essence unless there is a rule of law that empowers the court to do so. The sum effect of the above is that where

limitation time is imposed under a statute, such period cannot be extended by any court unless there is a provision in the statute for such exercise of discretion.

Secondly, the applicant seems to argue that applicant was unable to lodge an appeal in time due to mistake of counsel or negligence of counsel. The courts should be wary of advocates who come before it 'chest thumping' mistake or negligence of counsel. The general principle is that negligence or fault on the part of counsel should not be visited on litigant.

This rule however is not a universal talisman, the waiver of which will act as a panacea in all cases. Before the court accepts it, it must be satisfied not only that the allegation of fault of counsel is true and genuine, but also that it is available having regard to the circumstances of the particular case. When grave injustice will be done to the adverse party or where the mistake of counsel affects the court's jurisdiction, the mistake of counsel should not assist the party whose counsel has committed a mistake.

The Supreme Court in *Capt Phillip Ongom vs Catherine Nyero Owota* SCCA No. 14 of 2001 stated that:

"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 relief sought."

In light of the above decision, the applicant's lawyer therefore cannot claim mistake of counsel where she had an opportunity to correct the said mistake upon receiving instructions to promptly apply for extension and instead they also became indolent. The applicant's counsel ought to have filed an application for extension of time promptly since she was aware that time had lapsed, but instead she opted to write a letter seeking a certified ruling which was not necessary at the moment. It is not a

requirement to file a certified ruling before the application for extension of time is filed. In my view, the law cannot be dispensed with to one's convenience; the law is put in place as a guiding tool on what the correct procedure in litigation is or ought to be.

On the objection as to time within which an appeal can be lodged, **Section 79 (1) of the Civil Procedure Act** is very clear. It states that;

(1) Except as otherwise specifically provided in any other law, every appeal shall be entered—

a) within thirty days of the date of the decree or order of the court; or

b) within seven days of the date of the order of a registrar, as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.

The applicant has failed to show how the two advocates of separate law firms (two law firms) who were purportedly instructed became negligent and the manner of instructions to the said law firms. It is not enough to merely allege that I instructed the lawyers and they failed in their professional obligation through negligence. An Advocate who is duly instructed and becomes negligent in execution of his duties should be reported to the Disciplinary Committee of the Law Council instead of coming to lament about the negligence of counsel in court for sympathy.

There is need for caution, otherwise, the courts will be encouraging tardiness on the part of counsel which ultimately affects the administration of justice. The practice of counsel attributing every procedural non-compliance to mistake of counsel must not be allowed to escalate. A litigant should be vigilant and diligent in respect of his case in court. Where a counsel has exhibited tardiness or incompetence, the court should not indulge him and hold such an excuse as good.

In this case, the applicant does not present any sufficient cause for failure to lodge an appeal in time. He does not avail court material facts that failed him and yet he cites the lockdown (the presidential directive of the 2nd countrywide lockdown). The applicant does not state when he instructed the said two law firms to appeal and what role each of the law firms was supposed to play in filing the application/appeal. He does not even state when and how he discovered that they had failed to execute the instructions to appeal.

The application for extension of time and the appeal seems to be an afterthought which this court should not entertain.

This application fails and is dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

31st October 2022