

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MUKONO**  
**MISCELLANEOUS APPLICATION NO. 64 OF 2021**  
**(ARISING FROM CIVIL APPEAL NO. 25 OF 2021)**

**J. MARK SEKIBULE :..... APPLICANT**

**VERSUS**

**1. SABASITIANO SEBAGALA**

**2. WALUSIMBI JAMES :..... RESPONDENTS**

**BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA**

**RULING**

1. This application was brought by Notice of Motion under the provisions of section 33 of the Judicature Act, Cap. 13, sections 96 and 98 of the Civil Procedure Act, Cap. 71, Order 51 rule 6 and Order 52 rules 1 and 2 of the Civil Procedure Rules, S.I. 71-1, seeking for orders that:

- (a) the time within which to file a memorandum of appeal be enlarged;
- (b) the memorandum of appeal filed by the Applicant be validated; and
- (c) costs of the application be provided for.

2. The grounds of the application are briefly contained in the Notice of Motion and supported in detail by the Applicant's affidavit. The grounds are that:



- (a) the Applicant instructed M/s Baruga Associated Advocates to institute a suit against the Respondents for trespass upon land comprised in Block 218, Plot 453 in the Chief Magistrate's Court of Mukono;
- (b) the Applicant's former lawyers named herein filed Civil Suit No. 130 of 2020, in the Chief Magistrate's Court of Mukono in which orders were sought for vacant possession in respect of land comprised in Block 218, Plot 453, a declaration that the 2<sup>nd</sup> Respondent was a trespasser on the suit land, a permanent injunction prohibiting the 2<sup>nd</sup> Respondent from further trespassing on the suit land, general damages and costs of the suit;
- (c) the suit was heard and the trial court delivered its decision on 6<sup>th</sup> April, 2021, dismissing the suit and awarded costs to the Respondents;
- (d) the Applicant was dissatisfied with the decision of the trial court and he immediately instructed his former lawyers M/s Baruga Associated Advocates to commence the process of lodging an appeal with this court;
- (e) the Applicant's former lawyers informed him that they would commence the appeal process upon receipt and perusal of the Judgement of the trial court;





- (f) the Applicant's former lawyers were then availed the judgement of the trial court but still did nothing geared towards the commencement of the appeal;
- (g) the Applicant did everything within his means to persuade his former lawyers herein named to lodge the appeal but the lawyer in personal conduct kept on dodging the Applicant until he discovered later that he was out of time to lodge the appeal in this court;
- (h) the Applicant persuaded his lawyers herein named by making several calls to counsel who was in personal conduct Mr. Baruga Moses on telephone No. 0783133336 / 0752133336 and by going to their chambers situated at the former Centenary Building in Mukono Town but Mr. Baruga declined to answer the Applicant's calls;
- (i) since the Applicant's former lawyers had informed him that they would file the appeal, he decided to cross check with this court's Registry to confirm if at all the appeal had been filed but to his dismay, nothing had been filed;
- (j) as a lay person not knowledgeable in the law, the Applicant purely relied on the advice of his former lawyers herein named which he verily believed to be true and correct;



(k) the Applicant has now engaged new lawyers M/s T. Odeke & Co. Advocates to commence the appeal process;

(l) the mistakes of the Applicant's former lawyers to lodge the appeal in time should not be blamed on him as he wholly relied on their technical advice and he is an innocent party;

(m) this application has been brought without delay;

(n) the Applicant is confident that the intended appeal has plausible grounds with a high probability of success against the Respondents as per the memorandum of appeal attached to the affidavit; and

(o) it is just and equitable that this application is allowed.

3. The application was opposed by the Respondents by an affidavit in reply deposed by the 2<sup>nd</sup> Respondent and filed in this court on 27<sup>th</sup> March, 2023. The grounds for opposing the application were that:

(a) the application is incompetent, devoid of any merit and an abuse of court process because no proof has been exhibited by the Applicant to prove that he instructed the advocates to file the memorandum of appeal;

(b) the Applicant makes no mention of any situation that barred him from checking with the High Court Registry before the expiration of the stipulated time;





- (c) the acts and omissions of the Applicant not to file the memorandum of appeal in time are all wilfully intended to bar the Respondents from enjoying the fruits of the judgement;
- (d) despite the fact that the Applicant applied to this honourable court to extend the time within which to file the appeal, he still without justifiable reason failed to serve the Respondents with the application and the memorandum of appeal on time even when directed by this honourable court;
- (e) it is not desirable to allow stale claims to be canvassed before this honourable court and that there should be finality to litigation;
- (f) the intended appeal is frivolous and has no plausible grounds with no probability of success against the Respondents as per the intended memorandum of appeal; and
- (g) the present application is a total abuse of court process and it is in the interest of justice for this honourable court to dismiss this application with costs.

4. In rejoinder it was averred by the Applicant that the assertions of the 2<sup>nd</sup> Respondent are misconceived as the instant application is by all standards competent as it raises valid questions of law to be determined by this honourable court. That the Applicant's former advocates of M/s Baruga Associated Advocates had represented him at the trial court and upon delivery of the judgement of the trial court which the Applicant was dissatisfied with. He immediately instructed

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them verbally to commence the appeal process as this is common practice to instruct advocates more especially by lay people like the Applicant. And that the 2<sup>nd</sup> Respondent having been a party at the trial does not dispute the fact that the Applicant was represented by the advocates named above.

5. Further, the Applicant re-joined that it is common parlance that oral communication via telephone conversation can neither be ordinarily reduced in writing nor did he foresee misconduct on the part of his former advocates which could have compelled him to record the telephone conversation. That the 7<sup>th</sup> to 12<sup>th</sup> paragraphs of the Applicant's supporting affidavit explain the circumstances that barred him from instituting the appeal in time. In specific rejoinder to paragraph 8 of the affidavit in reply, the Applicant stated that he is a dissatisfied party by the decision of the trial court which he intends to challenge on appeal as the same was decided on wrong principles of the law.

6. The Applicant added in rejoinder that the circumstances that prevented service of the instant application on the Respondents were addressed to court at the last appearance and this honourable court made a finding on the same and as a result, the same is not in contention. Also that finality to litigation can only be said to come to an end where a party has exhausted the available remedial measures including the right of appeal. That the instant application is not in any way an abuse of court process and the same should be allowed in the interest of substantive justice and the appeal be determined on merit.

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7. During the hearing of the application, the Applicant was represented by Counsel Mututa Martin from M/s T. Odeke & Co. Advocates. The Respondent was represented by Counsel Buyuni Joseph from M/s Sanywa Wabwire & Co. Advocates. Both counsel filed the parties' written submissions and the Applicant's counsel filed submissions in rejoinder which are considered hereunder.

### **Issue**

**Whether there is sufficient cause shown by the Applicant to warrant enlargement of time to file a memorandum of appeal in Civil Suit No. 130 of 2014.**

8. The Applicant submitted that he has sufficient grounds to warrant the grant of this application, with the most paramount being mistake of his former lawyers M/s Baruga Associated Advocates, whose technical expertise he relied on to commence the appeal process but later discovered that the lawyers were instead dodging him hence the delay to lodge a memorandum of appeal in time. That it is the law under section 96 of the Civil Procedure Act and Order 51 rule 6 of the Civil Procedure Rules S.I. 71-1, that this court has inherent power to enlarge time for a party to perform an act required by court if sufficient reasons are shown by such a party.

9. That if such reasons are shown to the satisfaction of court, then such party can be granted leave or time can be extended by the court to perform such an act that the party ought to have performed within



the statutory period. That it is also the law under Order 51 rule 7 of the Civil Procedure Rules that the extension of time may also be by consent of the parties. Counsel cited the case of **Kwera Stella Ngirabakunzi v. Ntabgoba Jeninah, Parliamentary Election Petition App. No. 17/1996**. The Applicant's counsel further reiterated the grounds of the application hence no need to reproduce them here.

10. That it is trite law that it is not only unfair but also unjust to close out a party who wishes to be heard in a matter where they have shown such interest, and that if this was to be the case, then such injustice would be in contravention of Articles 28 (1) and 44 (c) of the Constitution of the Republic of Uganda, 1995 as amended.

11. That in the instant matter, the Applicant has demonstrated sufficient and just cause for his inability to file his memorandum of appeal within the statutory period. And that the grounds in this respect are well illustrated in paragraphs 5, 6, 7, 8, 9, 11, 12 and 13 of the affidavit in support of the application. Counsel referred to the cases of **Hadondi Daniel v. Yolam Egondi, Court of Appeal No. 67 of 2003** and **Andrew Bamanya v. Shamsherali Zaver, Supreme Court Civil Application No. 70 of 2001**.

12. The Applicant's counsel argued that the Applicant had demonstrated through this application and the supporting affidavit that it was the former lawyers' mistake that he was unable to file the memorandum of appeal in time. That since he had instructed his





lawyers to commence the appeal, the Applicant was confident that his legal counsel would do that, within his technical means to ensure that the appeal was filed within the time required by the law. That he however discovered later that his counsel was dodging him instead and had nothing hence the change of advocates. Counsel cited the case of **Philip Ongom v. Catherine Nyero Owota, Civil Appeal No. 14 of 2001**. Learned counsel submitted that the Applicant has shown sufficient cause to warrant the grant of this application.

13. That the justice of this case demands that time be extended for the Applicant to file his memorandum of appeal or have the memorandum already filed on court record validated. Furthermore, that the delay and lapse of the Applicant's former advocates M/s Baruga Associated Advocates should not be visited on him as he is an innocent party. That under section 33 of the Judicature Act, Cap. 13 and section 98 of the Civil Procedure Act, Cap 71, this court has inherent powers to make any such orders necessary for achieving the ends of justice and that the justice that the Applicant seeks in the instant application is the extension of time within which to file his memorandum of appeal or have the memorandum of appeal filed validated. That this will minimize multiplicity of proceedings and thus save the wastage of court's valuable time. Counsel prayed that this court be pleased to enlarge the time within which the Applicant should file his memorandum of appeal or validate the Applicant's memorandum of appeal already filed in this court.



14. On the other hand, the Respondents' counsel contended that the time for which an appeal is to be filed starts to run when judgement or ruling is delivered and should be within 30 days from the date of the decree or order of the court. That paragraph 4 of the Applicant's affidavit in support of the application clearly states that the trial court delivered its decision on the 6<sup>th</sup> day of April, 2021, in favour of the Respondents hence knowledge of the existence of the judgement. That the Applicant however, filed this application and memorandum of appeal on the 14<sup>th</sup> day of July, 2021, which is 3 months after the delivery of the decision of the trial court.

15. That the application for extension of time has to be made prompt and good cause must be shown for the entire period of delay and that the delay was not by dilatory conduct on the part of the Applicant. The Respondents' counsel argued that the character of the Applicant is dilatory in nature as far as the Applicant is interested in delaying and frustrating the Respondents from enjoying the fruits of their judgement in the trial court.

16. That section 51 of the Advocates Act, Cap 267, clearly states that any engagement with the advocate should be in writing and signed by the person bound by it. That no evidence has been attached or adduced in court to prove that the Applicant instructed his lawyers to commence an appeal which the lawyers declined to do as averred in the 5<sup>th</sup> paragraph of the Applicant's supporting affidavit. And that the Applicant's supporting affidavit makes no mention of anything that

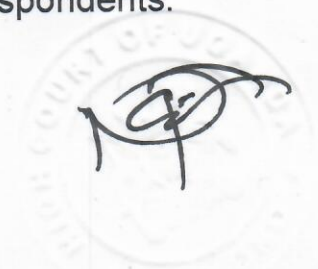




could bar him from cross-checking with the High Court Registry before the expiration of the set statutory time limits.

17. The Respondents' counsel further submitted that the Applicant's reliance on mistake of counsel is unfortunate and has no merit in as far as the follow up of the instruction to an advocate is not technical since he had the obligation to follow up on his matter and the court registry is open to all persons. That the Applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court. He has not presented a reasonable explanation for his failure to file the appeal within the time prescribed by the law. That litigation must come to an end.

18. Additionally, learned counsel averred that granting this application would be subjecting the Respondents to endless litigation which is in violation of their right to a fair and speedy hearing which this honourable court is tasked to ensure that proceedings are carried out expeditiously and in a timely manner. That this application is devoid of merit as far as the Applicant has not demonstrated grounds for the grant of the same and that the dilatory conduct of the Applicant should be discouraged and condemned by this honourable court. That the Applicant hiding under mistake of counsel without proof of whether he had instructed his former lawyers to file the appeal should be disregarded and condemned as the same is becoming norm for negligent litigants. Counsel prayed that this honourable court dismisses this application with costs to the Respondents.

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19. The Applicant's counsel submitted in rejoinder that the Applicant filed the instant application one month and twenty days after due date for filing appeal which cannot be described as dilatory conduct. That the circumstances why the appeal was not filed in time have been explained by the Applicant in his supporting affidavit to the application. That it would thus not be in the interest of justice to shut the Applicant out and yet he has plausible grounds of appeal. And that in any event, the Respondents will have the opportunity to present their case.

20. That the Respondents do not dispute the fact that the Applicant's former advocates never represented him at the trial. Counsel prayed that court finds that the Applicant indeed instructed his former lawyers M/s Baruga Associated Advocates to lodge the appeal which they failed to do in time.

21. As to whether allowing the instant application would be subjecting the Respondents to endless litigation, it was re-joined for the Applicant that an end to litigation can be said to have been attained when a party has exhausted his remedial measures including the right to appeal to the highest court. That this is merely the first appellate court and it cannot be said to amount to endless litigation. That in the interest of substantive justice, this court be pleased to allow the instant application so that the appeal is heard and determined on merit as the Respondents will have an equal chance of presenting their case.



### **Court's consideration**

22. The powers of this court to exercise its discretion to enlarge time are set out in section 96 of the Civil Procedure Act Cap. 71 which provides thus:

*"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired."*

23. Order 51 rule 6 of the Civil Procedure Rules, S.I 71-1, also vests courts with power to enlarge time where time for doing a specific thing has expired. It states as follows:

*"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order."*

24. The question of whether an oversight, mistake, negligence or error on the part of counsel should be visited on the party represented by the said counsel or whether it constitutes sufficient cause justifying discretionary remedies from courts has been dealt with by courts in various circumstances within Uganda. This relates to extension of time



for doing a particular act where time has already run out like the instant application. It also includes setting aside ex-parte judgment or reinstating dismissed suit.

25. These circumstances have a common feature of whether a party shall or shall not be permanently deprived of the right of putting forward a bona fide claim by reason of the default on the part of his or her advocates being his or her professional advisor. Whether the grounds for granting such reliefs will be acceptable by court depends on the facts of each case.

26. It is trite law that parties are not visited with punishment arising from the mistake or inadvertence or negligence of their counsel when the mistake, inadvertence or negligence is in respect to procedural matters in which case, the court would lean towards accommodating the parties' interests without allowing mere procedural irregularities, brought about by their counsel, to preclude the determination of a case on the merits. However, the court must be satisfied that the allegation of inadvertence of counsel is true and genuine.

27. In **Sabiiti Kachope and 3 others v. Margaret Kamuje**, Supreme Court Civil Application, No. 31 of 1997, Justice Oder, (as he then was), held that:

*"In applications of extension of time such as the present one, a mistake or negligence of the Applicant's counsel may be accepted as a proper ground for granting relief such as the leave to file out of time. The discretion of court is not fettered*



*as long as sufficient reason has been disclosed to justify court's exercise of its discretion in favor of the Applicant. In the present application, the inordinate delay was caused by the Applicant's previous counsel. Therefore, the Applicants have shown sufficient reason to justify the court's discretion in their favor."*

28. The law governing the instant situation has been laid down in numerous authorities including **Shanti v. Handocha [1973] EA 207**, **Essavi v. Solankirui [1968] EA 218**, **Mueo v. Wanjiru [1970] EA 461**, **Florence Nabatanzi v. Naume Binsobedde S.C. Civil Application No. 6/1987** and **Sipiriva Kvarulesire v. Justin Bakanchulike Bagamhe, Civil Appeal No. 20/1995**. The principles laid down in these cases can be summarized as follows:

- a. First and foremost, the application must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on its facts;*
- b. The administration of justice normally requires that substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights;*
- c. Whilst mistakes of counsel sometimes may amount to an error of judgment but not inordinate delay negligence to observe or ascertain plain requirements of the law;*

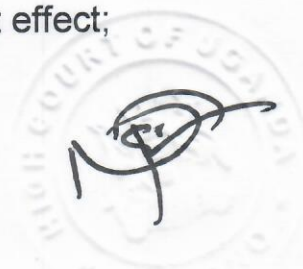


- d. Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law;*
- e. A vigilant Applicant should not be penalized for the fault of his counsel on whose actions he has no control.*

29. Basing on the above principles, I find that in the instant case, the negligence or omission on the part of counsel who deliberately ignored and failed to file an appeal within the 30 days' time period prescribed by the law should not be visited on the Applicant because the same lawyers represented him during full trial in the lower court. I find no genuine reason provided by the Respondents to fault the Applicant for failing to file an appeal within the stipulated time as an aggrieved party. In my judgment, the Applicant has shown plausible explanation as to why he was unable to file his appeal within the specified period. Therefore, he should be given an opportunity to pursue the appeal.

30. Pursuant to the foregoing, this application is hereby allowed with the following orders:

- (a) the Applicant is hereby granted leave to file appeal out of time;
- (b) the already filed memorandum of appeal on court record is hereby validated;
- (c) the Applicant is directed to serve the validated memorandum of appeal on the Respondents' counsel within 7 days from the date of this ruling and file an affidavit of service to that effect;





(d) each party shall bear their own costs of this application.

I so rule and order accordingly.

This ruling is delivered this ...<sup>24<sup>th</sup></sup>... day of ...<sup>July</sup>... 2023 by



**FLORENCE NAKACHWA**

**JUDGE.**

*In the presence of:*

- (1) Counsel Namugali Julius Gazza holding brief for Counsel Mututa Martin both from M/s T. Odeke & Co. Advocates for the Applicant;*
- (2) Mr. J. Mark Sekibule, the Applicant;*
- (3) Ms. Pauline Nakavuma, the Court Clerk.*