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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application No. 11 of 2023

(Arising from Civil Appeal No. 27 of 2023)

(All arising from Civil Suit No. 39 of 2014 of the Chief Magistrate's Court of Kaberamaido at Kaberamaido)

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Erabu Francis Applicant

Versus

1. Ewui Julius

2. Ekoyu Valen Respondents

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Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

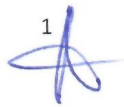
1. Background:

20 The plaintiff (now applicant) sued the defendants (now respondents) vide Civil Suit No. 39 of 2014 of the Chief Magistrates Court of Kaberamaido at Kaberamaido for a declaration of ownership of land measuring approximately four acres situate at Oyella Agule village, Kanyalam parish, Ochero sub county, Kaberamaido district.

25 The matter was heard *inter partes* and judgement was delivered on 4th February 2021 against the applicant. The applicant immediately lodged an application for review before the same court, which was dismissed with costs.

Execution proceedings ensued and on 17th August 2022, as per the warrant of committal, the applicant was remanded to civil prison in the execution of the taxed bill of costs of UGX 7,985,000. He was discharged upon payment of UGX 5,000,000 and promised to pay the balance later.

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5 He failed to pay the balance and was committed again to civil prison for UGX 2,985,000 on 15th February 2023 to serve a six months' period ending on 15th August 2023.

This application is brought by way of a Notice of Motion under Sections 98 of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act, Cap 13 and Order
10 52 Rules 1,2 and 3 of the Civil Procedure Rules SI 71-1 for orders that;

- a) The Applicant be granted leave to file a Notice of Appeal and Memorandum of Appeal in Civil Suit No. 039 of 2014 out of time or time within which to file the Memorandum of Appeal be enlarged.
- b) The Memorandum of Appeal filed in Civil Suit No. 039 of 2014 of the
15 Chief Magistrate's Court of Kaberamaido at Kaberamaido be validated.
- c) The costs of this application be provided for.

2. Grounds:

The grounds of this instant application set out in the application and supporting affidavit deposed by the applicant are briefly that;

- 20 a) The trial Magistrate delivered judgement vide Civil Suit No. 039 of 2014 of the Chief Magistrate's Court of Kaberamaido at Kaberamaido on 4th February 2021. **(A copy of Judgement is attached a 'A').**
- b) The applicant, through his former lawyers (M/s Geoffrey Nangumya and Company Advocates), wrote a letter requesting typed proceedings to
25 enable him to file a Memorandum of Appeal **(a copy of the letter is attached and marked as "B")**.
- c) The applicant wrote another letter dated 17th October 2022 requesting for the same typed record of proceedings to be availed to him, and the same has not been availed to date. **(A copy of the letter is attached as 'C')**
- 30 d) The applicant was prevented from filing the Notice of Appeal and Memorandum of Appeal in Civil Suit No. 039 of 2014 in the Chief

5 Magistrate's Court of Kaberamaido from which this appeal arises because of the delay in accessing the record of proceedings in the lower court which the applicant has failed to access to date.

10 e) Unless the time within which to file and serve the applicant's notice of appeal and memorandum of appeal is extended and/or enlarged, the applicant is likely to be prejudiced as the respondents are in the process of execution against the applicant. **(copies of the Notice to Show Cause and claim for the taxed bill are attached as annexures 'D' and 'E').**

f) The Memorandum of Appeal filed by the applicant be validated, and the time for serving the same be validated.

15 g) The respondents will not be prejudiced in any way if this application is allowed.

h) It is just and equitable that this application be granted.

On the other hand, the 1st respondent filed an affidavit in reply opposing the application based on the grounds stated therein with prayers that this application is dismissed with costs as it was a waste of court's time.

20 3. Representation:

The applicant is represented by M/s Mugarura, Kwarisiima and Company Advocates and whereas the respondent is represented by M/s Atyang Christine and Company Advocates.

25 4. Submissions:

The parties filed written submissions, which I have studied together with the pleadings and annexures thereto.

30 5. Issues:

5 5. Submissions:

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6. Issues:

10 a) Whether there is a proper case for grant of an order for a stay of execution?

b) What are the remedies to the applicants in the circumstances?

7. Resolution:

The applicants brought this application under **Section 98 of the Civil Procedure Act, Cap 71 (CPA)**, which enjoins this Court with inherent powers of this court to
15 make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The application was also brought under Order 22 Rule 23 (1) of the Civil Procedure Rules, which provides when a court may stay execution, it states that;
The court to which a decree has been sent for execution shall, upon sufficient
20 cause being shown, stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution of the decree, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of
25 first instance, or appellate court if execution has been issued by the appellate court or if application for execution has been made to it.

Order 23, rule 3 of the CPR, provides that before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the court may require such security from, or impose such conditions
30 upon, the judgment debtor as it thinks fit.

- 5 It is trite law that the duty and burden of proof lie on the applicants, who must prove their claim on a balance of probabilities. (See Sections 101 and 102 of the Evidence Act, Cap 6).

This court will examine the instant application to determine if the law as above has been duly complied with by the applicants.

- 10 a) Whether there is a proper case for grant of an order for a stay of execution?

The grounds upon which a stay of execution of the decree in such an instant application were stated in the case of *Lawrence Musiitwa Kyazze vs Eunice Busingye SCCA No. 18 of 1990*, which are:

- 15 a) The applicant must show that he lodged a notice of appeal
b) That substantial loss may result to the applicant unless the stay of execution is granted.
c) That the application has been made without unreasonable delay.
d) That the applicant has given security for the due performance of the
20 decree or order as may ultimately be binding upon him.

These grounds were reiterated in the Supreme Court decision in the case of *Hon Theodore Ssekikubo and ors vs The Attorney General and ors Constitutional Application No. 3 of 2014*.

- The Court of Appeal has also, in the case of *Kyambogo University vs Prof Isaiah Omolo Ndiege CACA No. 341 of 2013*, extended the list of the grounds to include;
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- a) There is a serious or imminent threat of execution of the decree or order, and if the application is not granted, the appeal would be rendered nugatory.
b) That the application is not frivolous and is likely to succeed.

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5 respectively to the affidavit in support is sufficient cause to entitle this Honorable Court to exercise its discretion for the grant of this application.

Relatedly, counsel for the applicant submits that the applicant has shown sufficient reason for his inability to file the Memorandum of Appeal within time, which can enable this court to exercise its discretion to validate the
10 Memorandum of Appeal already filed on the court record (Appeal No. 27/2023) and enlarge the time for serving.

In objection, the respondent contends that;

- a) the applicant abdicated his right of appeal when he opted to apply to review the Judgement instead of appealing against the decision.
- 15 b) formulation of the grounds of appeal is not dependent on the availability of a record of proceedings.
- c) the applicant's intended appeal does not show any bonafide arguable grounds of appeal, and neither does it raise any substantial question of law.
- 20 d) the appeal is nugatory and a non-starter, as the execution process in Civil Suit No. 39 of 2014 is now complete after the applicant was remanded to civil prison. The respondent contends that the applicant was availed a copy of the judgement after its delivery which, to the respondent, was enough to formulate the grounds of appeal.

25 Counsel for the respondent argued that the conditions to be satisfied by an applicant seeking leave to appeal out of time were raised in ***Degeya Trading Stores (U) Ltd versus Uganda Revenue Authority No. 16 of 1996***, cited in ***Kenganzi Angella vs Metl (U) Ltd Miscellaneous Application No. 471 of 2017*** that the applicant must show that the appeal has reasonable chances of success or that the appeal has
30 arguable grounds of appeal. According to counsel, the applicant failed to show


5 **b) That substantial loss may result to the Applicants unless the stay of execution is granted:**

The 2nd applicant averred in his affidavit in support that there is a serious threat of execution as the respondent has served a letter dated 30th March 2023 to the applicants demanding that they vacate and demolish their structures on the suit
10 land within five days and that as a result they will be deprived of their means of livelihood since the suit land is what they call home, burial grounds and where they cultivate for sustenance.

The respondent contends that the letter dated 30th March 2023 served to the applicants was merely to remind them to heed the Judgement and vacate the
15 suit land before they are evicted, and that cannot in any way amount to a threat to execution.

The respondent contends that the applicants do not aver or even demonstrate that they shall suffer a substantial loss in the event that the respondent enforces the decree so as to render their intended appeal nugatory should it succeed and
20 that the applicants have not demonstrated the need or cause for stopping the respondent from proceeding with any steps leading to execution pending the disposal of their intended appeal.

Counsel for the applicants submitted that if this instant application is not granted, the applicants stand the risk of their homes being demolished, losing land, which
25 is their means of livelihood and losing a place called home but, most of all, their ancestral home, which is a burial ground which they have an emotional attachment to before the determination of the appeal in the Court of Appeal will cause a substantial loss.

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5 proceedings of the lower court and resumes to run when copies of the proceedings are sent to the Appellant.

Court's Analysis:

I will first deal with the preliminary point of law that the respondent's counsel raised his submissions in reply that the intended appeal of the applicant is
10 incompetent for the sole reason that the applicant did not extract and/or attach a decree that he intends to appeal against which to counsel it is a requirement of Section 220 (1) (a) of the Magistrates' Courts Act, Cap 16. Counsel also cited the case of **Mambu Stella vs Minday Nicholas HCCA No. 1 of 2016**, where according to him, it was held that; a memorandum of appeal must be filed with a decree,
15 where there is no decree extracted and attached to the memorandum, the appeal is rendered incompetent.

In reply, the applicant's counsel, in his submissions in rejoinder, contended that the import of Section 220(1) (a) of the Magistrates Courts Act Cap 16 has recently
20 by its very nature emanates from a judgment or reasoned order but not from the decree and so, not extracting a decree shouldn't be fatal to the appeal, especially in light of Article 126(2) (e) which enjoins courts to render substantive justice without undue regard to technicalities.

According to counsel for the applicant the above position was most recently
25 adopted in the case of **Ruryabeita Frank V Beyunga Kenneth & 3 Ors Civil Appeal No. 59 of 2020 (Arising from Rukungiri Land Case No. 8 of 2015)** where Hon. Justice Moses Kazibwe Kawumi on the same issue held that he was bound by the decisions of the Court of Appeal in **Kibuuka Musoke William v Dr Apollo Kaggwa CACA No.46/1997** and **Banco Arabe Espanol v Bank of Uganda CACA No.42/1998**.

5 Section 220 (1) (a) of the Magistrates' Courts Act, Cap 16, which relates to civil appeals, provides that;

Subject to any written law and except as provided in this section, an appeal shall lie from the decrees or any part of the decrees and from the orders of a magistrate's court presided over by a chief magistrate or a magistrate grade I in

10 the exercise of its original civil jurisdiction to the High Court. (Emphasis mine)

In the case of *Kibuuka Musoke William v Dr Apollo Kaggwa CACA No.46/1997*, which dealt with a similar proposition to the preliminary objection raised by the respondent, the Court of Appeal held that;

15 *"It is clear from the above provisions that the extraction of a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal. An appeal, by its very nature, is against the judgment or a reasoned order and not the decree extracted from the judgment or the reasoned order. The extraction of a decree was therefore a mere technicality which the old municipal law put in the way*
20 *of intending appellants and which at times prevented them from having their cases heard on merits. Such a law cannot co-exist in the context of the provisions of the 1995 Constitution Art 126 (2) (e) where the courts are enjoined to administer "Substantive justice without undue regard to technicalities."*

25 Arising from the above, I am inclined to overrule the preliminary objection raised on the basis that the instant application is for leave for an extension of time to file an appeal, the expectation is that the appeal has not been filed or even if it was filed, requires to be validated, so to speak as there is no appeal *per se*.

Counsel for the respondent argued that the conditions to be satisfied by an
30 applicant seeking leave to appeal out of time were raised in *Degeya Trading Stores (U) Ltd versus Uganda Revenue Authority No. 16 of 1996*, cited in *Kenganzi Angella*

5 ***vs Metl (U) Ltd Miscellaneous Application No. 471 of 2017*** that the applicant must show; that the appeal has reasonable chances of success or that the appeal has arguable grounds of appeal.

Counsel for the respondent also cited the case of ***Hodandi Daniel vs Yolamu Engondi CA.CA No. 67 of 2003***, where it was held that the applicant must also
10 show sufficient cause.

According to counsel for the respondent, the applicant failed to show that his intended appeal has a likelihood of success or that he has arguable grounds of appeal in his affidavit in support of the instant application.

I must first distinguish the counsel for the respondent's contention that the
15 conditions to be satisfied by an applicant seeking leave to appeal out of time were raised in ***Degeya Trading Stores (U) Ltd versus Uganda Revenue Authority(supra)***, cited in ***Kenganzi Angella vs Metl (U) Ltd Miscellaneous Application No. 471 of 2017*** that the applicant must show that the appeal has reasonable chances of success or that the appeal has arguable grounds of appeal. Even though, according to
20 ***Mulindwa George William vs Kisubika Joseph SCCA No. 12 of 2014*** that the possible requirements for an application of such a nature are, among others, the possibility of success of the appeal.

I note that the decision in the decision of ***Kenganzi Angella v Metl (u) Ltd Misc. Application (Supra)*** was for an applicant seeking leave to appeal a default
25 judgement and not an application that seeks for leave for extension of time to appeal. The two are thus distinguishable as the circumstances and purposes differ.

As regards to whether there is a proper case for the Applicant to be granted leave to file a Notice of Appeal and Memorandum of Appeal in Civil Suit No. 039 of 2014
30 out of time or time within which to file the Memorandum of Appeal be enlarged?

5 **Section 79(1)(a) of the CPA** makes provision for limitation for appeals, and it states that except as otherwise specifically provided in any other law, every appeal shall be entered within thirty days of the date of the decree or order of the court.

Section 79(2) of the CPA provides that in computing the period of limitation prescribed by this section, the time taken by the court or the registrar in making
10 a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

Section 96 of the CPA enjoins this court with the discretion from time to time to enlarge any period which is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, even though the period originally fixed or
15 granted may have expired.

 The applicant seeks leave of this court for an extension of time within which to file a Notice of Appeal, Memorandum of Appeal against the judgement and orders in Civil Suit No. 039 of 2014 of the Chief Magistrate's Court of Kaberamaido at Kaberamaido. The applicant also seeks for the allegedly filed
20 Memorandum of Appeal to be validated.

 The applicant for an extension of time has the burden of proving to court satisfaction that, for sufficient reason, it was not possible for the appeal to be lodged in the time prescribed. (see *Delvi v Diamond Concrete Company [1974] EA 493*).

25 Normally sufficient reason for an extension of time must relate to the inability or failure to take the particular step. (see *Mugo and others v Wanjiru [1970] EA 481*) In the case of *Mulindwa George William versus Kisubika Joseph SCCA No. 12 of 2014*, the Supreme Court observed that;

"The applicant seeking for extension of time has the burden of
30 *proving to the Court's satisfaction that, for sufficient reasons, it was not possible to lodge the appeal in the prescribed time. Sufficient*

5 *reason must relate to the inability or failure to take a particular step*
in the proceedings. Each application must be viewed by reference to
the criterion of justice, and it is important to bear in mind that time
limits are there to be observed, and justice may be defeated if there
is laxity. Factors to be considered in an application for an extension
10 *of time are:*

- i. *The length of delay;*
- ii. *The reason for delay;*
- iii. *The possibility or chances of success;*
- iv. *The degree of prejudice to the other party.*

15 *Once a delay is not accounted for, it does not matter the length of the*
delay. There must always be an explanation for the period of delay."

The applicant has averred that the delay to file an appeal on time was orchestrated by his failure to obtain certified court proceedings, which, even up to now, he has not obtained but has lodged in the appeal anyway.

20 I have perused the letters requesting the record of proceedings, and indeed a copy of the letter marked as 'E' was written on 12th February 2021 and received by the Chief Magistrates Court of Kaberamaido on 15th February 2021, and also the follow-up of the record of proceedings' letter marked as "F" was received on 17th October 2021 by the Chief Magistrates Court of Kaberamaido at
25 Kaberamaido. It should be noted that the judgement *vide* Civil Suit No. 039 of 2014 was delivered on 4th February 2021, and the first letter requesting proceedings was received on 15th February 2021, which is 11 days.

The delay in obtaining court proceedings, which is the subject of an intended
30 appeal, is a ground for extension of time as per *Delia Almeida vs C Almeida SCCA No. 15 of 1990 (UR)*. (also see section 79(2) of the CPA earlier quoted).

5 *"...it is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution... as soon as possible and not have to wait until he has lodged his appeal to do so.*

10 *Owing to the long delay in obtaining the proceedings of the High Court, it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss."* (emphasis mine)

Upon perusal of the record, Judgement in Civil Suit No. 17 of 2018 was delivered on 10th March 2023, and this instant application was filed on 6th April 2023, hardly a month after the delivery of Judgement, which evidently, according to the case
15 of Ujagar Singh vs Runda Coffee Estates Ltd is "as soon as possible". The applicants have proved this ground.

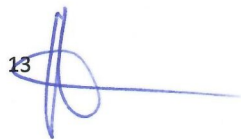
e) That the application is not frivolous and has a likelihood of success:

The 2nd applicant states in his affidavit in support of the application that their appeal has a likelihood of success.

20 The respondent contends that without the record of proceedings, it is impossible to assess the chances of success of the applicants' intended appeal.

Annexure "C" is the request for proceedings which, as per the applicants' averments and submissions, getting the record delayed, but according to the record, the proceedings were by letter dated 5th May 2023, ready to be collected
25 by the applicants' lawyers who acknowledged receipt of the same by name: Otim George and Lilian Omurangi on 5th May 2023.

Be that as it may, a memorandum of appeal wherein grounds of appeal are presented is where this court can be able to determine whether the appeal has a likelihood of success.

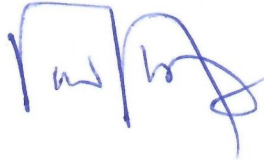
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5 However, since the applicant has proved sufficient cause why the appeal could not have been lodged in time, making in effect this instant application being for an extension of time in which to file the requisite Notice of Appeal and Memorandum of Appeal in Civil Suit No. 039 of 2014 out of time, then the requirement to validate any Memorandum of Appeal is there.

10 Accordingly, this application having been found to have merits is allowed with no order as to costs.

The applicant herein is directed to lodge a notice of appeal and any Memorandum of Appeal with this court's registrar not later than the last working day of August 2023.

15 I so order



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Hon. Justice Dr Henry Peter Adonyo

Judge

27th July, 2023

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