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The Republic of Uganda
In The High Court of Uganda
Holden at Soroti

Miscellaneous Application No.112 of 2022

(Arising out of Misc. Application No. 181 of 2021)

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(Arising out of Civil Appeal No. 023 of 2020)

(Arising out of Civil Suit No. 0074 of 2015)

Aenu Joseph Applicant

Versus

Otuba Levi Respondent

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Before: Hon. Justice Dr Henry Peter Adonyo

Ruling:

1. Background:

This is an application by way of notice of motion brought under section 96 and 98 of the Civil Procedure Act and Order 52 rule 1 of the Civil Procedure Rules for orders that leave to appeal Civil Suit No. 0074 of 2015 out of time is granted and costs of the application provided for.

The grounds of this application as set out in the application and further expounded in the affidavit in support sworn by the applicant are briefly that the applicant lost Civil Suit No. 0074 of 2015 in a judgment delivered on the 26th day of November 2019 and soon thereafter instructed his lawyers M/s Otee and Co. Advocates to pursue an appeal.

Civil Appeal No. 023 of 2020 was filed but later dismissed for want of prosecution on the 25th of November 2021. The applicant then instructed

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5 M/s Ssetimba & Co. Advocates to pursue an application for reinstatement of the appeal vide Misc. Appln. No. 181 of 2021 and court ruled that the appeal intended to be reinstated had been filed out of time without leave of court hence a nullity.

10 The applicant then realised the mistake of his former counsel and that the failure to seek leave to appeal out of time is a mistake of the then duly instructed lawyers which should not be visited on him an innocent applicant.

15 The respondent in his affidavit in reply stated inter alia that the applicant and his current lawyers should have known by exercise of legal diligence that Civil Appeal No. 023 of 2020 was filed out of time and accordingly should have filed an application to file it out of time instead of seeking to reinstate it.

20 That the applicant was always aware that his appeal was filed out of time and it is not enough to instruct a lawyer, the litigant should always follow up and ensure that his instructions are being carried out.

That this is a digital era which did not require the applicant to travel to Soroti to follow up with his lawyers and he could have demanded for a copy of the memorandum of appeal to be sent to him digitally so that he can satisfy himself that the appeal was filed in time.

25 That there is no sufficient reason warranting the grant of this application and if the applicant was genuine about his averments he would have promptly filed this application at least within 30 days from the day that court ruled Civil Appeal No. 023 of 2020 was filed out of time unlike the four months he took to file the application.

30 That he has not shown any reasons for filing this application after four months. That the applicant is guilty of dilatory conduct and litigation must



5 come to an end. That in the alternative if this Honourable Court is inclined to grant the application, the applicant should be ordered to deposit security for costs so far standing at Ug. Shs. 15,000,000/=.

2. Submissions:

10 M/s Ssetimba and Co. Advocates for the applicant submitted on whether the applicant has any ground warranting enlargement of time in which to file an appeal. Counsel submitted that the power to grant leave to file an appeal out of time is discretionary and the party seeking such orders must satisfy court by placing some material before the court upon which such discretion may be exercised. (***Muzamil Ayile vs Rose Tarapke &***
15 ***Others Misc. App. No. 24 of 2013***)

Counsel submitted that the evidence in the applicant's affidavit indicates that his former lawyers failed to file the Memorandum of appeal within 30 days as envisaged under section 79(1)(a) of the Civil Procedure Act.

20 That this was purely a mistake a dilatory conduct of the applicant's former counsel but not the applicant himself and this conduct should not be visited on the applicant as a litigant who all along had intentions of prosecuting the appeal.

Counsel additionally relied on ***Andrew Bamanya Vs Shamshelali Zaver SCCA no. 70/ 2001*** cited in ***Muzamil Ayile*** where a delay of
25 two and a half years in filing an application was caused by Applicant's counsel and the court held that the other principle governing extension of time is that the administration of justice requires that all substances of disputes should be heard and decided on merit.

30 Counsel added that section 98 of the Civil Procedure Act gives this honourable court unlimited inherent powers to make such orders as may be necessary for the ends of justice or prevent abuse of court process.

5 Counsel further submitted that the appeal involves a land dispute and the decree in the matter is not yet executed and it would be injustice to block the doors of justice by disallowing this application considering the fact that the delay to file the appeal was purely caused by the dilatory conduct of the applicants former lawyers.

10 Counsel finally prayed that this honourable court be pleased and grants this application.

M/s Natala & Co. Advocates for the respondent in reply before submitting on the merits of the application sought to bring to court's attention that this application is arising from Misc. Application No.121 of 2022 yet the
15 orders sought are for leave to file appeal out of time and the application should accordingly arise from Civil Suit No. 74 of 2015 but not from Misc. Appln. No. 121 of 2022 which was dismissed.

Counsel submitted that, that is an irregularity that should lead to the dismissal of this application.

20 On the merits of the application, counsel submitted that there has been inordinate delay in bringing this application.

First counsel showed that there was delay of 8 months in filing the appeal as the lower court record was certified on the 15th day of January 2020 and availed to the applicant and Civil Appeal No. 023 of 2020 was filed on the
25 5th day of August 2020 after 8 months.

Relying on ***Tiberio Okeny and Anor vs The Attorney General and 2 Ors Civil Appeal No. 51 of 2001*** counsel submitted that the instant case of an error of judgment on part of the applicant's former lawyers but a deliberate inordinate delay by the applicant's former lawyers who failed
30 to observe a plain requirement of law that appeals should be filed within

5 30 days but instead chose to file the same after 8 months without seeking leave of court first.

Counsel additionally submitted that even if this court takes the argument that the applicant and his counsel did not know that Civil Appeal No. 023 of 2020 was filed out of time, they got to know so when Misc. Appln. No. 181
10 of 2021 was determined and if the applicant was surely interested in pursuing justice he should have filed his application for leave to appeal out of time at least within 30 days instead of the 4 months.

That the applicant who claims to have suffered injustice from his former lawyers should have exercised more due diligence in trying to remedy the
15 mistakes of his former lawyers by bringing this application promptly and no reason has been given for this delay.

Counsel, while acknowledging that there is no specific law that stipulates time frames when an application of this nature should be filed, submitted that litigants should not be at liberty to file the same whenever it pleases
20 them without furnishing reasons for delay.

That the applicant is guilty of dilatory conduct and furthermore litigation should come to an end.

Counsel, finally prayed that this application be dismissed with costs but that should this court be inclined to grant this application the applicant be
25 ordered to deposit security for costs so far standing at Ug. Shs. 15,000,000/=.

3. Determination of Application:

Before I proceed to determine the application on its merits, I will first address myself on the issue raised by counsel for the respondent that that
30 this application is wrongly cited as it arises from Misc. Application No.121 of 2022 yet the orders sought are for leave to file appeal out of time and

5 so this application should accordingly arise from Civil Suit No. 74 of 2015 but not from Misc. Appln. No. 121 of 2022 which was dismissed.

Counsel submitted that this is an irregularity that should lead to the automatic dismissal of this application. On this point, Counsel for the applicant never replied to this aspect of submission.

10 First, from the record I note that there has been the respondent misquoting of the application number throughout pleadings. The current application is Misc. Appln. No. 112 of 2022 and not Misc. Appln. No. 121 of 2022.

Secondly, this application to file the appeal out of time would ordinarily
15 be filed as arising from Civil Suit No. 0074 of 2015, however, I note that the circumstances of this case are not ordinary.

From the record, it would seem that an appeal was filed out of time and the same proceeded up to the level of submissions but was later dismissed for want of prosecution.

20 The fact that the appeal was filed out of time was only discovered when an application to reinstate it was filed meaning that this application arises from Misc. Appln. No. 181 of 2021.

That being the case, ordinarily, Counsel's submissions on this can only be noted but are not tenable for dismissal of this application.

25 Under normal circumstances, an order for enlargement of time to file the appeal should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court, has not presented a reasonable explanation of his failure to file the appeal within the time prescribed by the Act, or where the extension will be
30 prejudicial to the respondent or the court is otherwise satisfied that the intended appeal is not an arguable one.

5 It would be wrong for the court to shut an applicant out of court and deny him or her the right of appeal unless it can fairly be said that his or her action was in the circumstances inexcusable and his or her opponent was prejudiced by it.

10 This is because, the courts have since held that in an application of this nature, the court must balance considerations of access to justice on the one hand and the desire to have finality to litigation on the other.

When an application is made for enlargement of time, good cause showing that justice warrants such an extension must be proved by the applicant before court can exercise its discretionary powers and grant the extension.

15 This is the position which was resonated in ***Tight Security Ltd v. Chartis Uganda Insurance Company Limited and another H.C. Misc Application No 8 of 2014*** where it was held that for an application of this kind to be allowed, the applicant must show good cause. “***Good cause***” that justifies the grant of applications of this nature has

20 been the subject of several decisions of courts such as those in ***Mugo v. Wanjiri [1970] EA 481*** and ***Pinnacle Projects Limited V. Business In Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010***, where the decision was that the sufficient reason must relate to the inability or failure to take a particular step in time.

25 On the other hand, the holding in ***Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993*** highlights the fact that a mistake by an advocate, though negligent, may be accepted as a sufficient cause and that things like ignorance of procedure by an unrepresented defendant or illness by a party may also

30 constitute sufficient cause but emphasis was made to the fact that the failure to instruct an advocate is not sufficient cause.

5 The above principles were further re-echoed in **Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001** where it was held that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant and that where there are serious issues to be tried, the court ought to grant the application. The case of **Sango**
10 **Bay Estates Ltd v. Dresdner Bank [1971] EA 17** and **G M Combined (U) Limited v. A. K. Detergents (U) Limited S.C Civil Appeal No. 34 of 1995**), all follow these principles.

However, the holding in **Rossette Kizito v. Administrator General and others, S.C. Civil Application No. 9 of 1986 [1993]5 KALR**
15 **4)** highlights the fact that an application for filing an appeal out of time will not be granted if there is inordinate delay in filing it.

Arising from the above legal positions, the courts have since then come up with the considerations which should guide courts in arriving at the appropriate decision when confronted with applications like the instant
20 one.

The case of **Tiberio Okeny and Another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001** outlines such considerations, which are;

- 25 a. The application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.
- 30 b. The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.

- 5 c. Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.
- 10 d. Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.
- e. 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 requirements of the law.
- 15 In *Tiberio Okeny and Another* case (above), Hon. Justice Twinomujuni pointed out further that it is only after "**sufficient reason**" has been advanced that a court considers whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors before exercising its discretion.
- 20 In this application, counsel for the applicant is solely relying on the negligence of his former counsel as sufficient cause.

Counsel for the respondent, on the other hand, while recognizing that there was negligence and mistakes on the part of the applicant's former counsel stoically argues that there was inordinate delay in filing this application and as such it should be dismissed.

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The law in relations to the applications of this nature is clear. Section 79 (1) (a) of the Civil Procedure Act provides that

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

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

(b)

as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of
10 limitation prescribed by this section has elapsed.

In the instant case, judgment in Civil Suit No. 0074 of 2015 was delivered on 26th of November of 2019 in the respondent's favour and the next day, 27th November 2019 applicant duly instructed M/s Otee and Co. Advocates to file an appeal, M/s Otee and Co. Advocates were not the
15 Advocates that represented the applicant in the lower court.

Instructed counsels filed a notice of appeal and requested for certified record of proceedings which were certified and availed on 15.01.2020. However, counsel did not file the appeal till 05.08.2020.

Civil Appeal No. 0023 of 2020 was later dismissed on 25.11.2021 for want
20 of prosecution and the applicant then instructed M/s Ssetimba and Co. Advocates to file an application to reinstate the appeal.

The result of Misc. Appln. No. 181 of 2021 was a dismissal because the appeal sought to be reinstated was filed out of time.

This now brings us to this current application to file an appeal out of time.

25 I have carefully read and considered the pleadings and submissions of both parties and what I find is clear is that the applicant has all along by his actions shown interest in prosecuting his appeal to the extent that he duly instructed lawyers to file an appeal immediately after the judgment was delivered.

5 However, from the record, the applicant seems to have been let down by
instructed counsels, who acted negligently even after a request for the
typed and certified record of proceedings was made and the same availed
but proceeded to file the appeal after 8 months.

Counsel's negligence further extended to the prosecution of the appeal to
10 extent that the same was dismissed for want of prosecution when counsel
failed to file submissions as directed by court.

The applicant in his affidavit aver that the filing of the appeal happened
during the COVID-19 pandemic period and he was based in Kampala and
could not travel to monitor what his lawyers were doing in court and that
15 he purely relied on his lawyers and trusted them to do the correct thing
with the feedback he was always receiving from the lawyers being that the
lawyers had done the needful.

On the other hand, I note that Counsel for the respondent seems to fault
the applicant for having failed to exercise due diligence and determined
20 that his appeal was filed out of time, which argument would have been
tenable were the applicant to have been shown to be knowledgeable on the
various time limits set by the law.

This is not the case for the applicant in his affidavit avers that he was a
man with no legal background who simply relied and trusted his lawyers
25 to open and manoeuvre the labyrinth of justice for him. This was not to be
and as such I would find that it was counsels for the applicants who failed
the applicant in this aspect and acted negligently by filing the appeal out
of time and the same shortfall cannot be visited on the applicant.

Counsel for the respondent further faults the applicant and his new
30 counsel for failing to realise that the appeal they sought to reinstate was
filed out of time. I note that on this point, Counsel for the applicant made

5 no rejoinder in this regard but I still find that this mistake again cannot not be visited on the applicant who has shown sincerity in his pursuit of his appeal.

The next issue for consideration is that of inordinate delay in filing this application as pointed out by counsel for the respondent who alludes that
10 the applicant having suffered injustice at the hands of his former counsel should have filed this application at least within 30 days if he was serious about the appeal.

This application was filed almost four months after the ruling in Misc. Appln. No. 181 that determined that the appeal was filed out time without
15 leave. Counsel for the applicant made no reply to this.

The tests for extension of time within which to file an appeal as cited above require that sufficient cause be shown and in this case, the applicant has ably proved that his former counsel was negligent and failed to take the necessary steps to file the appeal within the prescribed time.

20 While recognising mistakes of counsel as sufficient cause, inordinate delay or negligence to observe or ascertain plain requirements of the law cannot amount to sufficient cause.

However, as was pointed out by Hon. Justice Twinomujuni in ***Tiberio Okeny and Another case (above)***, unless it is proved that the
25 Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant and where an Applicant has shown that he or she had instructed a lawyer in time, his rights should not be blocked on the grounds of the lawyer's negligence or omission to comply with the requirements of the
30 law.

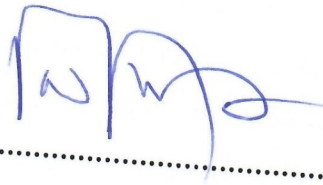
5 Accordingly, I would find that the applicant in this instant case cannot be faulted or found guilty of any dilatory conduct for he instructed his counsels, both the previous and current in time with the advocates then negating their duties by letting him down through their negligence and mistakes, consequently, the applicant's rights to appeal cannot be
10 obstructed because of the unprofessional actions of his counsels. Furthermore, as already stated above, the effective administration of justice requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily exclude a litigant from pursuit of his or her rights.

15 Arising from the above conclusions, I would accordingly find that this application has merits and thus succeeds accordingly with the applicant directed to file his intended appeal within 30 days so that the same is determined on its merits. The costs of this application, would in any event be in the cause.

20 4. Orders:

- This application is found to have merits and is thus allowed.
- The applicant to file his intended appeal within 30 days from the date of this ruling so that the same is determined on its own merits.
- The costs of this application, in any event to be in the cause.

25 I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

22nd February 2023