THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – MA – 0057 OF 2015

(Arising from FPT – 00 – CV – LD – CS – N0.0018 of 2007)

AUGUSTINE KIIZA through his Attorneys Kijwara Christopher, Muzoora George William and Nyemera Francis .....APPLICANT

VERSUS

KATUSABE VINCENT .....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

RULING

This is an application by Notice of Motion under **Section 96** of the Civil Procedure Act, **Order 51 Rule 6** and **Order 52 Rules 1-3** of the Civil Procedure Rules. The Application is for orders that;

1. The time within which to appeal against the decree in Civil Suit No. FPT – 00 – CV – LD – CS – 018 of 2007 made on 8th April 2014 be enlarged or extended.
2. That execution in FPT – 00 – CV – LD – CS – 018 of 2007 be stayed pending the determination of the intended appeal.
3. The costs of this application be provided for.

Background

The Applicant instituted a Civil Suit on 3rd August 2007 against Stella Bonabaana for trespass on his land situate at Kigonyera, Mwenge, Kyenjojo District. Stella died and was substituted with the Respondent in 2008. On April 8th 2008 the suit was dismissed for failure to produce any evidence by the Applicant. The Applicant then applied for re-instatement of the Civil

Suit but his Application was dismissed with costs for reason that the Applicant should have lodged an appeal and not an Application to re-instate the suit. However, time for appealing had elapsed and thus the instant Application.

The grounds of the Application as per the Affidavit Sworn by Muzora George William one of the Attorneys of the Applicant are;

1. That Court on 8th April 2014 dismissed Civil Suit No. FPT – 00 – CV – LD – CS 018 of 2007 and the said Counsel filed Misc. Application No. FPT – 00 – CV – LD – CS – 018 of 2007 under **Oder 17 Rule 4** Civil Procedure Rules.
2. That the Applicant engaged M/s J. Musana & Co. Advocates to challenge the dismissal of Civil Suit No. FPT – 00 – CV – LD – MA – 40 of 2014 seeking for reinstatement of the suit.
3. That M.A No. 40 of 2014 was dismissed on the 19/6/2015 on ground that the Applicant should have appealed against the decree instead of applying to re-instate the suit.
4. That the Applicant is a lay man who believed that his Counsel J. Musana & Co. Advocates followed the right procedure.
5. That the Applicant is an elderly man of 82 years and he has been sick suffering from hypertension.
6. That the subject matter between the Applicant and the Respondent is land where the Applicant and his family derive livelihood.
7. That the intended appeal has high chances of success and if execution is not stayed the intended appeal will be rendered nugatory.

On the other hand the Respondent objected to the Application averring that there was no proof that the Applicant was bedridden and unable to attend Court at the time the main Suit was dismissed nor did he inform Court of the same. The Respondent also disputed the Power of Attorney as attached and also stated that the Applicant was at all times represented by an Advocate. That, the Applicant, is only trying to deny the Respondent the fruits of his judgment. That the Applicant is also time barred to lodge the said appeal and lacks sufficient cause to have the time enlarged and thus the Application should be dismissed.

Counsel Bwiruka Richard appeared for the Applicant and Counsel Kateeba Cosma represented the Respondent.

Section 96 of the Civil Procedure Act provides that;

"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."

Order 51 Rule 6 of the Civil Procedure Rules provides that;

"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."

Counsel for the Applicant cited the case of **Tight Security Ltd versus Chartis Uganda Insurance Co. Ltd and Brazafric Enterprises, High Court Miscellaneous Application No. 8 of 2014**, where it was held that;

*"Any period of time for the lodgement of an appeal under **Order 51 Rule 6** of the Civil Procedure Rules may be enlarged for good cause."*

He then submitted that the Applicant through his Counsel applied for a re-instatement of the Civil Suit rather than lodge an appeal which was a procedural mistake and the Application was dismissed with costs. That the Applicant ran out of time to lodge an appeal and in the circumstances the mistake of the then Applicant's Counsel should not debar the Applicant from the pursuit of his rights. That in the interest of justice, time should be extended so that the main suit may be heard on its merits.

In the case of **Leona Kareija & Another versus David Kabucia, CACA 60/1998** where Court quoted with approval the case of **Grindlays Bank (U) LTD versus Katende & Brothers, CACA No.1/1980** as cited by counsel for the Applicant, it was held that; a mistake by Counsel might not necessarily be a bar to a litigant obtaining extension of time and the administration of justice normally requires that the substance of all the disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights.

Counsel for the Applicant went to submit that mistake of Counsel and the lapse of time are sufficient reasons for the Applicant to be granted extension of time within which to appeal. Further, that the Applicant is an elderly man who was sick and could not attend Court.

Counsel for the Respondent on the other hand submitted that the Application is misconceived and not maintainable and only intended to deprive the Respondent enjoyment of fruits of his judgment. That **Section 96** of the Civil Procedure Act is only applicable where extension of time is granted by the Rules or fixed by the Court and not where it is fixed by statute and in the instant case **Section 76** of the Civil Procedure Act.

Counsel for the Respondent went to note that in the case of **Tight Security Limited versus Chartis Uganda Insurance Co. Ltd & Another, High Court Miscellaneous Application No. 8 of 2014** as cited by Counsel for the Applicant it was stated that;

*"**Section 96** of the Civil Procedure Act deals with enlargement of any period fixed or granted by the Court for the doing of any act prescribed by or allowed by the Civil Procedure Act of time granted by Court under the Law. In other words the enlargement is of a period of time granted by the Court under the law. It does not deal with enlargement of time granted by statute... Section 96 is not applicable to applications for extension of time where a period prescribed by the law has expired..."*

That in the instant case therefore **Section 96** of the Civil Procedure Act is inapplicable because the time limit is fixed by statute and not Court.

In my opinion **Section 96** is applicable in the instant case. The Section is very precise and states that: "*...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...*" meaning that the Act applies to time as set under it and not the rules as submitted by Counsel for the Respondent. The case as cited above is irrelevant in that regard. The instant case does fall in the ambit of **Section 96** of the Civil Procedure Act and Court can order for enlargement of time to have the appeal lodged.

Counsel for the Respondent also submitted that the Applicant did engage a lawyer and is therefore precluded from pleading ignorance of his agent's dealings. Counsel for the Respondent went on to cite the case of **Captain Philip Ongom versus Catherine Nyero Owota, SCCA No. 67 of 2001**, quoted in **Hadondi Daniel versus Yolamu Egondi, CACA No. 67 of 2003[2006] KARL 486 at page 490** where it was held that;

"It is an elementary principle of our legal system, that the acts and omissions of an advocate in the course of representation bind a litigant who is represented by an advocate. However, in applying that principle, the Court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. To my mind, a proper guide in applying the principle in its premise, namely that the advocate's conduct is in pursuit of and within the scope of what the advocate was engaged to do..."

That in the circumstances the Applicant was aware and bound by the actions of the previous Advocate and that this was deliberate and the advocate was doing what he believed to be in the best interests of his client.

In the case **of Hadondi Daniel versus Yolamu Egondi, CACA No. 67 of 2003 (supra), pages 490-491**, it was stated that;

"It is enough that the Appellant put himself in the hands of the advocate. In the process, the advocate was doing his best to discharge that mandate. He however, took a wrong course of action. It was a wrong decision. The Appellant was therefore lock, stock, and barrel bound. It would indeed be absurd or ridiculous that every time an advocate takes a wrong step thereby losing a case his client could seek to be exonerated. This is not what litigation is all about."

Further that the Applicant was not vigilant in pursuing his matter. That, there is no evidence, that the Applicant was ever bedridden when the main suit was being dismissed and that the medical forms as submitted are lacking in substance.

Counsel for the Respondent also submitted that in regard to sufficient cause, the Applicant did indulge an advocate and therefore he is precluded from pleading ignorance and cited the case of **Captain Philip Ongom versus Catherine Nyero Owota, SCCA No. 14 of 2001**, quoted in **Hadondi Daniel versus Yolami Egondi, CACA No. 67 of 2003, [2006] KARL 486 at page 490** where it was held that;

"It is an elementary principle of our legal system, that the acts and omissions of an advocate in the course of representation bind a litigant who is represented by an advocate. However, in applying that principle, the Court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. To my mind, a proper guide in applying the principle is its premise, namely that the advocate's conduct is in pursuit of and within the scope of what the advocate was engaged to do..."

It is my considered opinion that in the interest of justice the Applicant should not bear the burden of his former Counsel's miscalculated legal action as this would be unjust and unfair. In the instant case the Applicant has a chance to remedy this mistake which he should not be denied. There is medical proof on record that the Applicant is a sick man and has been sick for a long period of time. It is therefore common knowledge that there would be times that he would not be able to attend Court. The Applicant therefore has sufficient cause for the Application to be granted.

Counsel for the Applicant also submitted that the Applicant seeks an order for stay of execution pending determination of the appeal and that if this order is not granted it would cause a substantial loss to the Applicant and cited the case of **Kampala City Council Authority versus Donosio Musisi Sekyaya, CACA 3/2000** which was cited with approval in the case of **Lawrence Musiitwa Kyaze versus Eunice Busiiga, SCCA No. 18/1990** where Court held that; one of the conditions is that the Applicant will suffer substantial loss unless stay is granted. Substantial loss was held to mean loss that cannot be adequately atoned for by payment of money.

Counsel for the Applicant finally submitted that if stay of execution is not granted the Applicant in his old age with his family shall be left with nowhere to stay and to derive a livelihood. Secondly, that the intended appeal will be of no consequence and it will be rendered nugatory.

Counsel for the Respondent on the other hand submitted that there is no evidence that there in fact is an appeal the pendency of which would justify the stay of execution and there is no sufficient cause for the same to be granted.

Since the subject matter is land which is an infinite resource and a threshold of one's livelihood it is not advisable to shut out a litigant from Court prematurely. In the circumstances if this Application is not granted the intended appeal will be rendered nugatory and there is sufficient cause for the same to be granted. A memorandum of appeal is also attached as Annexure 'E'.

This application is therefore granted without costs and let execution be stayed.

.....

OYUKO. ANTHONY OJOK

JUDGE

18/10/16