

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
MISCELLANEOUS APPLICATION NO. 96 OF 2021
(ARISING FROM CIVIL SUIT NO.4 OF 2017)**

KAGASHA JOSHUA

(LAWFUL ATTORNEY OF KHAIZ KATUNGUKA):.....APPLICANT

VERSUS

1. **SENOGA PATRICK**
2. **SEKABIRA**
10 3. **NTEGE PAUL:.....RESPONDENTS**

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

RULING

The Applicant brought the instant application under Section **220 (1) (e)** and **(3)** of the Magistrates Courts Act, Cap 16, **Sections 96** and **98** of the Civil Procedure Act, Cap 71, **Section 33** of the Judicature Act, Cap 13 and **Order 52 Rules 1, 2** and **3** of the Civil Procedure Rules, S.I 71-1 against the Respondents for the following orders;

- 20 1. That the applicant be granted leave to appeal out of time against the judgment of Civil Suit No. 4 of 2017.
2. Costs of this application be provide for.

The application is supported by an affidavit sworn by Kagasha Joshua and premised on the following grounds;


- 30 1. That the Applicant is the lawful attorney of Khaiz Katunguka who filed Civil Suit No. 4 of 2017 in this Honorable Court against the Defendant for inter alia trespass to land.
2. That on the 3rd day of July 2019, the trial Magistrate delivered judgment dismissing the Applicant's suit.
3. That the Applicant was/is aggrieved by the judgment of the trial Magistrate in Civil Suit No. 4 of 2017.
4. That the Applicant intends to appeal against the judgement and decree/orders of this Honorable court delivered in Civil Appeal No. 4 of 2017.
5. The decision intended to be appealed against involves a substantial question of law.
6. The decision intended to be appealed against has caused a substantial miscarriage of justice.

7. That, in law, the Applicant requires leave of this Honorable Court to appeal against the judgment and decree/orders of this Honorable Court.
8. That on the 25th day of May 2021, the Applicant's impugned Appeal was dismissed on grounds that leave of this Honorable Court was not sought.
9. That the time within which leave to appeal ought to have been applied for has since expired.
10. That the delay in the filing of the necessary application for leave to appeal was caused by the negligence and or omission of the Applicant's former lawyers which should not be imputed on the Applicant.
- 10 11. That the Applicant operated under the mistake of former Counsel having been misinformed and misguided which has rendered the delay.
12. That the Applicant is still desirous of pursuing his right to appeal.
13. The Applicant has a highly meritorious appeal which has high chances of success.
14. That the Respondent will not be prejudiced in anyway if this application is granted.
15. That it is just, fair and in the interest of justice that this application be allowed.

The application was opposed by an affidavit sworn by the 1st Respondent on the following grounds;

1. That this application lacks merit, an abuse of court process and the same should be struck out with costs.
- 20 2. That the applicant has already appealed against the decision of the trial magistrate in his appeal No. 37 of 2019 and the same was dismissed with costs on the 25th day of May 2021 by this Honorable Court.
3. That the decision of the learned Judge Hon. Oyuko Anthony Ojok dismissing the said appeal has never been challenged, varied or set aside.
4. That the applicant's affidavit in support of the Notice of motion specifically paragraphs 2, 3 and 5 are full of lies and the same should be struck out with costs.
5. That the judgment of the trial Magistrate dismissing the applicant's civil suit no. 004 of 2017 was delivered on the 24th day of September 2018.
- 30 6. That there has been inordinate delay in filing this application for leave to appeal against the judgment delivered 3 years ago by the trial Magistrate.
7. That the applicant is personally guilty of dilatory conduct and cannot blame the same on his former lawyers.
8. That the applicant has continued to deny the respondents quiet and peaceful enjoyment of the suit land.
9. That the respondents are greatly prejudiced by the continued stay of this matter in this Honorable Court.
10. That it is in the interest of justice to have the applicant's application dismissed with costs.

Representation:

40 Mr. Bikadho of M/s Imran Advocates & Solicitors represented the Applicant and Mr. Bukenya Abdul Wahab of M/s A.W.Bukenya & Co. Advocates represented the Respondents. 

Issues for determination;

1. Whether there are grounds for leave to appeal out of time?
2. What remedies are available to the parties?

Resolution by Court:

At the commencement of the hearing of the application, counsel for the applicant raised a preliminary objection regarding the affidavit in reply which according to him was defective.

He pointed out that this application was filed against the three parties/Respondents and that Senoga Patrick swore an affidavit on behalf of the two other respondents without their authority.

10 He further pointed out paragraphs 13, 14 and 15 of the affidavit in reply and noted that an affidavit deponed on behalf of others without authority is defective and bad in law. Counsel relied on the authorities of *Bishop Patrick Baligasiima Vs Kiiza Daniel & 16 Ors High Court Misc App 1495 of 2016*, *Lena Nakalema Binaisa & 3 Ors Vs Mucunguzi Myers Misc App No. 460 of 2013*.

He submitted that an affidavit is curably defective if deponed on behalf of others without authority of the said party(ies) and he prayed that this Court be pleased to strike out the affidavit in reply in the instant case with costs.

20 In reply, Mr. Bukenya Abdul Wahab, counsel for the respondents, submitted that the objection was misplaced, and that the affidavit in reply particularly paragraph 1 mentions that the 1st Respondent made the affidavit in reply in his capacity as the 1st respondent and not on behalf of others.

That in the instant affidavit in reply, paragraphs 13, 14 and 15 are in the knowledge of the 1st respondent who has crops on the land, being prejudiced and born on the suit land for over 45 years.

Counsel prayed that the objection be overruled.

In rejoinder, counsel for the applicant reiterated his earlier submission and stated that, the arguments in paragraph 13, 14 and 15 are general. He therefore prayed that not all the respondents should be considered as having put in this reply but only the 1st respondent. He ended by praying that he proceeds against the 2nd and 3rd respondents ex-parte.

30 I have carefully considered the submissions of both sides on the preliminary objection raised by counsel for the applicant regarding the affidavit in reply which according to him is defective. Counsel claimed that Senoga Patrick, the 1st respondent swore the affidavit in reply to the application on behalf of the two other respondents without their authority. Whereas I agree with the authorities submitted by counsel for the applicant, the authorities are misplaced in regard to the facts of this application and they do not apply.

According to paragraphs 1, 14, 15 of the affidavit in reply sworn by the 1st respondent, he stated and I will reproduce them here.

“That I am an adult male Ugandan of sound mind, the 1st respondent herein and I make this affidavit in that capacity”.

Paragraph 14 of the affidavit in reply,

“That they are greatly prejudiced by the continued stay of this matter in this Honorable Court”

Paragraph 15 of the affidavit in reply, he stated;

“That all the respondents, him inclusive were born on the suit land and have been in occupation and utilization of the same for over 45 years”.

10 The affidavit in reply at paragraphs 1, 13, 14 and 15, made it clear that the facts sworn by the 1st respondent were within his capacity, knowledge and that he did not require authority from the 2nd and 3rd respondents to state them. Therefore, the 1st respondent made clear the capacity he was swearing the affidavit in reply.

As a result, this preliminary objection is over ruled and costs are granted to the respondents .

I will now proceed with the merits of the application.

Applicant's Submission

Counsel for the applicant submitted that, negligence of the applicant's former lawyers should not be visited on the applicant. That, the applicant filed a notice of appeal himself seeking to appeal the decision held in civil suit no.4 of 2017.

He further submitted that the former lawyers of M/s Odokel Opolot Advocates, on 18th march 2021 did not file for leave to appeal out of time.

20 The applicant's Counsel put the whole blame on the advocate and stated that this application has merit and that it raises both questions of law and fact. He submitted that **Section 96** of the Civil Procedure Act gives Court discretionary powers to grant leave to the applicant to appeal out of time.

Respondents Submission

The respondents counsel contended that this matter was decided on the 30th day of November 2018 and that judgment was delivered and read on the 24th day of September 2018. That the appellants took time and filed notice of appeal on the 23rd October 2018 outside the 30 days.

30 In addition, he submitted that the appeal was commenced by a memorandum of appeal, already out of time and that the applicant instructed a lawyer on the 18th day of March 2019 which was already outside time and that the applicant's newly instructed lawyers went ahead to file a memorandum of appeal instead of an application for leave to appeal out of time.

The respondents' counsel submitted that they appeared before this Court on the 25th day of May 2021 for the hearing of the appeal in the presence of Counsel Odokel where court dismissed the appeal with costs and that after the dismissal, the appellant filed this application under the wrong law.

Counsel for the respondents proceeded to submit that according to the affidavit in support of the application, there was no ground raised to justify the granting of this application except for the assertion that counsel was negligent.

He relied on the authority of *Hadondi Daniel Vs Yolamu Egondi CO Civil Appeal No. 67 of 2003*, specifically at page 490 for the proposition that it's enough that the appellant put herself/himself in the hands of the advocate. In the process, the advocate was doing his best to discharge the mandate. That the applicant's counsel however took a wrong cause of action and a wrong decision.

10 That the appellant has therefore lock stock and barred bound it would be absurd that every time an advocate takes another step thereby losing a case his client would seek to be exempted by pleading negligence of counsel. This is what this case is all about.

He proceeded to submit that counsel for the applicant chose to file a memorandum of appeal and fix the appeal for hearing yet the appeal was dismissed and after the dismissal, the applicant now seeks leave to appeal and that the law does not apply that way. In addition, he submitted that the maxim of equity states that he who comes into equity, must come with clean hands and that equity aids the vigilant.

He concluded with his submission by stating that the applicant's counsel cannot plead mistake of counsel when counsel was instructed out of time and he prayed that this application be dismissed with costs.

20 **Applicant's rejoinder**

In rejoinder, counsel for the applicant submitted that according to the affidavit in support specifically paragraphs 10-11, the applicant relied on the guidance of counsel who had proper knowledge of the essential steps to be taken and further to file notice of change of advocate but did not do the needful.

He submitted that the negligence of counsel, should not be visited on the innocent litigant and citing a wrong law is not fatal.

That in the circumstances this Court be pleased to grant leave, so that the appeal can be heard.

Analysis of court:

30 I will begin by pointing out that this Court is enjoined under *Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995* to administer substantial justice and avoid technicalities. In an application of this nature, this Court is mindful of the fact that the purpose of litigation is to try as much as possible to promote justice so that all matters in controversy between parties are fairly adjudicated upon, determined and they come to an end.

From the evidence on record, the judgment in civil suit no.4 of 2017 was read and delivered on the 24th day of September 2018, the notice of appeal was filed by the applicant himself on the 23rd day of October 2018 and it was not in doubt that Odokel Opolot & Co. Advocates were instructed on the 18th day of March 2019.

The applicant's advocate upon receiving instructions proceeded by fixing an appeal out of time without leave of court and the appeal was dismissed by this Honorable Court on the 25th day of May 2021.

According to *section 79 (1) of the Civil Procedure Act*, every appeal should be filed within thirty days from the date of the decree or order of the court, except where it is otherwise specifically provided in law. These time specifications are aimed at avoiding delays, dictating a time schedule within which certain steps ought to be taken as such was held in *Njagi Vs Munyiri (1975) EA 179* for any delay to be excused, it must satisfactorily be explained such that litigation also comes to an end.

- 10 Further to note is that where a litigant decides on his own frolic not to engage the services of an advocate yet he/she does not know the law, and its procedures, he/she cannot blame Court for that, but herself/himself.

In this case, the applicant had an advocate in the lower court, much as the advocate might have lost the case, he/she had the freedom to engage another lawyer and give instructions which he did not do but he chose to represent himself by filing a notice of appeal, took his time, and later engaged an advocate who messed up his case.

Whereas I agree that where there is a professional negligence like in this case, the advocate should first file for leave, the advocate in this case placed with instructions by the applicant did not do so.

- 20 In case the litigant/applicant, believes there is any professional negligence, he can proceed and file the same before the Law Council to determine it.

This application is dismissed with costs to the respondent.

Right of appeal explained.



.....
OYUKO ANTHONY OJOK

JUDGE

8/02/2022