

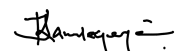
THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 3460 OF 2023
(ARISING FROM CIVIL APPEAL NO. 0123 OF 2023)
(ALL ARISING FROM CIVIL SUIT NO. 048 OF 2011)
KAGGWA SSONKO ::::::::::: APPLICANT
VERSUS
JOSEPH KASOZI LUBEGA & 3 ORS ::::::: RESPONDENTS
BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING.

Introduction:

1. This was an application by way of Notice of motion brought under Section 33 of the Judicature Act, Section 98 of the civil procedure Act and Order 52 rules 1 and 3 of the Civil Procedure Rules for orders that:-,

- i) The High Court Civil Appeal No. 0123 of 2023 be dismissed with costs.
- ii) The costs of this application be provided for.



Background;

2. That the Applicant is the Judgment Creditor in Civil Suit No. 49 of 2011 from the Chief Magistrate Court of Entebbe at Entebbe. That the respondent together with others filed High Court Miscellaneous Application No. 0217 of 2023 for leave to file an Appeal out of time. That this honorable Court granted the leave to file their Appeal within 30 days from the date of the ruling delivered on the 28th day of June 2023.
3. That the respondent did not comply with the Court Order hence filing their Appeal on 24th August 2023 which was 57 days after the ruling, hence this application.

Applicant's evidence;

4. The grounds of the application are contained in the affidavit in support of the application deposed by **Kaggwa Sonko** the Applicant which briefly states as follows: -
 - i) That I am the successful party in Civil Suit No. 48 of 2011 from the Chief Magistrate Court of Entebbe at Entebbe.



- ii) That the respondents were part of the defendants in the said suit.
- iii) That being dissatisfied with the Judgment in Civil Suit No. 48 of 2011, the respondents together filed Miscellaneous Application No. 0217 of 2023 for leave to file an Appeal out of time.
- iv) That this honorable Court granted the respondent leave to file the Appeal out of time within 30 days from the date of the ruling
- v) That however, the respondent filed the memorandum of Appeal on the 24th day of August 2023 out of time provided by court vide Misc. App No.0217 of 2023

Respondent's evidence;

5. The application is responded to by an affidavit in reply deposed by Joseph Kasozi Lubega which briefly states as follows;

- i) That I have the authority to depone this affidavit on behalf of other co-respondents.
- ii) That when the Application came up for hearing, court reserved its ruling to be delivered on notice.
- iii) That the respondents never got the notice of when the ruling was to be delivered by the trial Judge.

- iv) That the respondents' lawyers only came to know that the ruling had been delivered when they checked on ECCMIS and found out that it had been delivered without any notice to them.
- v) That the respondents are desirous of prosecuting their appeal since mistake of counsel cannot be vested onto them.

Representation;

6. The applicant was represented by Mr. Semwogere Emanuel of M/S Moria Advocates whereas the respondents were represented by Mr. Kusiima Ivan of M/S Rwakafunzi & Co. Advocates. Both parties filed their affidavits and submissions which I have considered in the determination of the application.

Issues for determination;

Whether High Court Civil Appeal No. 48 of 2011 be dismissed for being filed out of time?

Resolution and determination of the issues;

Counsel for the applicant submitted that this honorable court extended an olive branch to the respondent when they allowed his application No. 217 of 2023 for leave to file his

Appeal out of time despite the inordinate delays for two years an opportunity they did not take.

7. Counsel further submitted that under Section 79 (a) of the Civil Procedure Act, every appeal from the Magistrates Court to the High Court is supposed to be filed within 30 days from the date of the decree or order of court.

8. Counsel also submitted that the ruling was delivered on the 28th day of June 2023 meaning that the respondent was supposed to file their memorandum of Appeal by 28th day of July 2023 however they opted to file after 57 days that is on 24th day of August 2023.

9. That this constituted dilatory conduct which this court ought to punish heavily and the same should not be entertained within the temples of justice.

10. Counsel for the applicant prayed that court be pleased to allow this application by dismissing with Costs High Court Civil Appeal No 123 of 2023 for being incompetent.

11. In reply, Counsel for the respondent submitted that this a proper and deserving case where substantive justice should be exercised and the inherent powers of court invoked to disallow the application by taking into account the facts and circumstances of the case that gave rise to

the application.

12. Counsel submitted that whereas it is undoubtedly true that the learned judge allowed Miscellaneous Application No. 217 of 2023 and granted the respondents leave to file an appeal out of time and this was to be done within 30 days from the date of ruling, facts need to be placed in context for court to appreciate the reasons that hindered the present respondents from filing their appeal within the prescribed timeline.
13. Counsel stated that the record of court in MA No. 217 of 2023 clearly indicates that the application came up for hearing before the learned judge on 12/4/2023 wherein directions were issued to include inter alia that ruling was to be on notice.
14. Counsel further submitted that no notice of the said ruling was communicated to the respondent or their respective counsel - Rwakafuuzi & co. Advocates as was expected since court had indicated that ruling would be on notice.
15. Counsel for the respondent also submit that the above is what led to failure to file the appeal in time. An inadvertent mistake or negligence on the respondents'

counsel should not in all fairness be visited upon the parties to defeat the ends and interests of justice.

16. In this case, the respondents cannot be said to have acted with dilatory conduct and be punished as counsel for the applicant seems to suggest. Counsel relied on **Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998** for the proposition that a mistake, negligence, oversight or error on the part of Counsel should not be visited on the client.

17. Counsel for the respondent also submitted that an application has already been filed to validate the appeal that was filed out of time.

18. I have carefully perused the affidavits of the parties and the submissions and will proceed to determine this application in light of the same.

19. Section 79 of the Civil Procedure Act provides thereof that every appeal shall be filed thirty days from the date of the decree or order. Section 96 of the Civil Procedure Act provides thereof that where any period is fixed or granted by the court for doing of any act specified under the Act, the court may in its discretion from time to time, even though the period originally or granted may have expired.

20. It is without doubt that this court allowed MA No 217 of 2023 which granted the respondents leave to file an appeal out of time which was supposed to be done within 30 days from the date of the order or decree. The respondents in that application did not however proceed to file an appeal within the set time lines.
21. It is trite law that an appeal that is filed out of time without leave of court is incompetent. **(See: *Hajji Mohammed Nyanzi v Ali Ssegane [1992-1993] HCB 218*)**
22. The respondent must demonstrate factors which caused inability to file the appeal within the prescribed period of 30 days.
23. The respondent states under paragraphs 6,7,8,9 and 10 of the affidavit in reply that the notice of the ruling was not brought to their attention until the 23rd day of August 2023 and such a mistake could not be visited on their part.
24. However, the applicant in the affidavit in rejoinder pointed out that there was sufficient notice on Eccmis about the ruling and a copy of the Eccmis ruling notification was attached and marked Annexure A.
25. This Court in **Mwesigye Nicholas v P & A Credit Investment Limited MA No. 1677 of 2022** held that it is

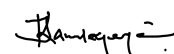
outright negligence to disregard the notices sent on Eccmis.

26. In this case I find that it was outright negligence of counsel to disregard the notices sent on Eccmis concerning the matter.

27. However, a litigant ought not to bear the consequences of default by an advocate unless the litigant is privy to the default or the default results from the failure on the part of the litigant to give the advocate due instructions. **(See: Zamu Nalumansi & Anor v Sulaiman Lule SCCA No. 2 of 1992)**

28. In the instant case, I am inclined to believe that the respondent's counsel disregarded the ruling notice on Eccmis which was outright negligence on their part however I also find that such mistake and or negligence cannot be visited on the litigant in absence of evidence that the respondent was privy to the default. In addition, the time lapse from the expiry of the 30 days that were given to the parties to file the appeal is excusable and does not bar the litigant from holding on to "mistake of Counsel".

29. In the premises, it is the finding of this court that the application lacks merit and the same is dismissed with no orders as to costs.



I SO ORDER.



NALUZZE AISHA BATALA

JUDGE

04/03/2024