

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: SEATON, J.S.C

CIVIL APPLICATION NO.17 OF 90

BETWEEN

BEN KIWANUKA APPLICANT

AND

Haji NUDIN MATOVU RESPONDENT

(Appeal from the decision of the H/C of Uganda at

Kampala (Mr. Justice kato) dated 14/9/90 in H.C.C.S NO. 43/84)

IN

HIGH COURT CIVIL SUIT NO .43/84

RULING

This is an application under Rule 4 of the court Rules that the time for lodging the record of appeal in the intended appeal against the Judgment of Mr. Justice Kato, dated 10th September 1989 in High court civil suit No.43 of 1984 should be extended.

An affidavit in support of the application dated 19th October 1990 depones:

That the maker of the affidavit, an Advocate of the high court, was instructed to appeal from the decision of the trial Judge in the original suit herein and Duly filed the notice of appeal in accordance with the rules governing filing of notice of intended appeal;

That his firm then requested the Registrar of the High Court to supply him with the certified record of the proceeding in the lower court to enable him to lodge the appeal in this court;

That on 24th May 1990 .the Deputy Registrar of the High Court handed over to his firm the certified record of the lower court;

That his firm then with expedition bound the record of appeal and filed it in this court as Civil Appeal No.3/90 on 30th May 1990.

That on 5th October 1990, the said appeal came up for hearing when counsel for the respondent raised objection to the appeal as being incompetent on account of there being no decree therein.

That this court's Judges then adjourned the matter upon which the applicant withdrew instructions from the deponent and took the same to other Advocates.

That this deponent verily believes his firm was misled by the Registrar's certified record as being complete.

Relying on this affidavit during the hearing of the application, Counsel for the applicant submitted that the reasons for the failure to file the decree with the record of appeal were:

Mistake of the Registrar is not including the decree in the record

Or

Mistake of the former Counsel, who failed to notice the omission when filing the record.

Counsel urged that neither mistake should be visited on the applicant, who had been guilty of no dilatory behavior and been vigilant in attempting to prosecute the appeal.

Counsel for the respondent submitted that a no decree had been filed there was no proper compliance with Rules 81 and 85 (1) of the Rules of this Court, which accordingly lacked jurisdiction to entertain the appeal: He urged that the applicant should with draw the record of appeal that had been filed and re- file it together with the decree, in which event it would be a new appeal with a correspondingly new appeal number.

Before going into the merits of this application, I will make a few comments on the cases to which counsel have referred. In Ngoni- Matengo co-operative Marketing Union Ltd .V. Ali mohamed Osman (1999) E.A. 577. The applicant filed an appeal against a Judgment of the High court of Tanganyika incorporating what both he and the Registrar of the High Court believed to

be proper decree but in fact the copy decree supplied was an earlier one in the same action. At the hearing of the appeal, the Court of Appeal “dismissed” the appeal as incompetent on the ground that the proper decree was not lodged with the record by the due date. The applicant then applied to a single Judge for an extension of time within which to lodge a fresh appeal with copy of the correct decree.

The application was dismissed, the judge holding that though the applicant had shown “sufficient reason” for an extension of time, the appeal could not, or the authority of *Bhogal V. Karsan* (1953) 20 E.A.C.A.17 be restored by an application for leave to appeal out of time, as it had been “dismissed” by the Court of Appeal as incompetent. It was held *inter alia*:

The applicant had shown “sufficient reason” for an extension of time for the purpose of 8.9 of the Eastern Africa Court of Appeal Rule, 1954.

The passage in *Bhogal V. Karson* (1953) 20 to the effect that an appeal which has been dismissed for failure to comply with the prescribed conditions cannot be restored by an application for an extension of time to file the appeal in accordance with the Rules, was obiter and not binding upon the Court. The application was therefore granted.

I pause to observe that the above –cited case differs from the instant case in that a decree had been filed with the record of appeal albeit the decree was an incorrect one: in the instant case no decree at all was filed within the prescribed time. A case more similar to the instant one was *Mary Kyamulabi V. Ahamad Zirondamu* (1980) H.C.B.II, the facts of which were as follows:

The applicant, an elderly, crippled and sick woman, instructed her counsel to file the appeal well in time. Both counsel had disagreements on the wording of the decree and her counsel blundered when filing the appeal by omitting the decree and on discovering the error he did not proceed to correct it. Counsel’s second reason for the delay was that as he was being hunted by dictator Amin’s secret agents he was in hiding leaving the preparation and filing of the record of appeal to his staff.

It was held by **Nyamuchoncho. J.A.** *Inter alia* that:

Counsel for the applicant acted negligently in accepting the brief which he knew he could not handle when he was in hiding and in entrusting this important work to an incompetent

subordinate staff, who, had they been efficient, would have collected the decree from the Registrar and filed it with the memorandum of appeal.

Following Ngoni-Matengo Co-operative Marketing Union Ltd. V.Osman (above – cited) the discretion the Court of Appeal had to extend the time to file the record of appeal out of time provided sufficient reason had been shown was not fettered by the fact that the applicant's appeal had been struck out.

It had long been held that a mistake by counsel might not necessarily be a bar to his obtaining extension of time (Gutti V. Shoemith (1939) 3 all E.R, 916) and the administration of Justice normally requires that the substance of all 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 Essaji V.Solanki (1968) E.A.218). It would therefore be deplorable for a vigilant litigant to be penalized by refusing him to appeal because of the negligence of his counsel over whose actions he had no control:

A respondent would not lose any advantage that he might have had, had his appeal been lodged in time, in the interest of Justice, the applicant would be granted leave to appeal out of time.

In Essaji and Ors V. Solanki (1968) E.A 218 the applicant's memorandum of appeal against an eviction order had attached to it a document which did not amount to a formal order of the lower court's ruling and the learned Judge of the High Court of Tanzania dismissed the appeal. He refused to allow the applicant an extension of time to enable the papers to be put in order on the ground that would be tantamount to allowing the appellant to have a second chance. The applicant was allowed leave to appeal against this ruling. He then applied for an extension of time in which to lodge his appeal in proper form. It was held by Georges, C.J. Inter alia that the applicant's counsel's error in failing to realize that the order he was filing was not the correct order was not necessarily a bar to his obtaining an extension of time. In the course of his judgment the learned Chief Justice observed as follows (P.224):

“It can be said that counsel in the Ngoni-Matengo Co-operative Union case (supra) was negligent in not checking what order he received. It would seem only prudent to see whether one has in fact received what one has ordered. The Court administration may well be flattered by the assumption that what it issues is right, but this is hardly a prudent assumption.”

He went on to approve the following test, suggested by Windham, J.A, “Was there a failure to appreciate the legal necessity for getting the order or was there a lack of diligence in seeing that it was done in time?”. He then held that in the case before him there had been neither; rather, there was a failure to realize that the order as drawn up by the court was not in proper form. Although this was clearly more serious than a failure to realize that it was not the correct order nevertheless, in the circumstances, George.C.J. allowed the application.

In the light of the above mentioned cases, I ask myself: do the circumstances in the instant case, as indicated by the evidence adduced, provide material which would justify the extension of time.

If one were to apply the test approved in Essaji’s case (above- cited): was there a failure to appreciate the legal necessity for getting the decree or was there a lack of diligence in seeing that it was done in time? One would be constrained to answer that it was neither, but rather a failure to realize that the record as obtained from the Deputy Registrar contained no decree.

It will not be disputed, I think, that it is the duty of counsel for an intended appellant to peruse the record provided by the Registrar or Deputy, and to ensure that the record is complete before submitting it for filing the appeal; failure to do so amounts to negligence, in my view.

One might argue that the proper course for this court would be to dismiss the present application on the ground that negligence of counsel is no sufficient reason for exercising the court’s discretion in favor of the applicant in the instant case . If the application is dismissed, the applicant may have a remedy by way of suit for damages for loss suffered through her former counsel’s negligence.

But damages may not always be an adequate remedy. In dismissing the application, would one be penalizing an innocent would- be appellant who has done all she could to prosecute her appeal?

Both view- points have merit. There must also be given consideration to the respondent who has already obtained judgment and has a lot to lose if this dispute is not resolved in good time. For this loss it may not be possible for him to be compensated.

On the other hand , it is to be observed that under 0.18, .7 (2) of the Civil procedure Rules , it is the duty of the party who is successful in a suit in the High Court to prepare a draft decree , and submit it for the approval of the other parties to the suit . In the instant case, the respondent (the successful party in the High Court) has shown no initiative to prepare the decree without which he cannot enforce the judgment in his favor. Had he taken the appropriate steps, it may be urged, the decree would probably have been included in the other documents comprising the record of appeal obtained by counsel for the applicant.

The material in the instant application appears to be such that the court is faced with no easy decision. It is for the applicant to show sufficient reason under Rule 4. On balance, and with due respect to counsel for the respondent's valiant efforts. I believe the applicant has so shown. The application is granted. In all the circumstance I believe the respondent should have the costs of these proceedings paid by the applicant.

E.E. SEATON J.S.C

Kampala

16th November 1990