THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

BEOFORE: HON. JUSTICE G.W. KANYEIHAMBA

CIVL APPLICATION NO. 2 OF 99

BETWEEN

JOSEPH MULUTA >>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>APPELLANT

AND

SYLVANO KATAMA >>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>RESPONDENT

RULING:

By Notice of Motion dated 23rd July, 1999, the appellant applied for an order granting him leave to file Notice of Appeal and institute the appeal out of time.

The following is the background to the application. The applicant sued the respondent in the High Court in civil case No. 445/95 for general damages for trespass and breach of contract for the sale of mailo land. The applicant was successful in the High Court. Thereafter, the respondent appealed to the Court of Appeal and the Court of Appeal allowed the appeal and set aside the judgment and orders of the High Court. The applicant instructed counsel to appeal to this court. On 4th December, 1998 the said counsel gave Notice of Appeal which notice was served on the respondent. On 6th December, 1998, the applicant's counsel applied for a copy of the proceedings and judgment of the Court of Appeal for the purposes of filing an appeal in this court. However, a copy of that application was neither copied to nor served on the respondent notwithstanding allegations to the contrary by former counsel for the applicant. On 5th March, 1999 Mr. Charles Mwebembezi, the present counsel for the applicant was instructed by the applicant to prosecute his appeal as the former counsel was doing nothing about it. On the day the new counsel received instructions, he perused the file and made enquiries in the courts' Registrar's office and the chambers of the applicant's former counsel as to the stages so far reached in the prosecution of the appeal for which notice was filed. The new counsel found that in effect, no further steps in the prosecution of the appeal had been taken since the filing of the notice of appeal. In consequence, the notice of appeal had expired and so had the right to appeal - hence this application by way of Notice of

Motion.

Before civil application No. 2 could be heard the applicant filed civil application No. 12 of 1999 by way of notice of motion seeking leave to amend civil application No. 2 of 1999. The motion to amend was accompanied by an affidavit sworn by Mr. Mwebembezi. The amendments were intended to deal with the consequences of the non-prosecution of the appeal and the fact that any steps which could have been taken had been halted through effluxion of time. Mr. Nkurunziza, counsel for the respondent, intimated that he had no objection to the amendments but in his opinion these were amendments which could have been easily framed in the original application No. 2 of 1999 and this being the case, he prayed for costs incurred in the application to amend. In accordance with Rule 43 (3) of the rules of this court, I granted leave to the applicant to amend and directed that the amended motion be served immediately to enable the respondent to reply within a few days so as to enable the application to appeal out of time to be heard on 25th October, 1999. Respondent was awarded costs for the disposal of the application to amend.

On 25th October, I conducted the hearing of the amended application. The Notice of Motion contained the following 9 grounds of application.

1- Immediately on the day judgment in civil appeal No. 12 of 1998 was read, the applicant instructed his lawyers, M/s Akampurira & Co. Advocates to appeal and was informed that the said lawyers had taken the necessary steps.

2- Of recent it was found out that although the Notice of Appeal was lodged in time, the application for a copy of proceedings and judgment was neither copied to nor served on the respondent.

3- It was not possible to get certified copies of the proceedings and judgments in time to file the appeal within 60 days and the applicant could not take the advantage of the

provisions of rule 78 of the Rules of this court.

4- It was due to the inadvertence of the said lawyers that the letter applying for proceedings and judgment was not served and proof retained and such inadvertence should not be visited on the applicant.

5- The Notice of Appeal that was lodged has since elapsed because the appeal was not instituted within the time stipulated.

6- In view of the above, it is necessary that we make an application for leave to lodge a fresh notice of appeal and institute the appeal out of time.

7- The applicant is not guilty of any dilatory conduct on his part and that there is a sufficient cause for not having instituted the appeal within the prescribed time.

8- The intended amendment does not prejudice (the interest of) the respondent.

9- In the interests of justice this honourable should be pleased to exercise its discretion and grant the applicant leave to lodge a fresh Notice of Appeal and institute the appeal out of time.

The application was supported by the affidavit of Richard Mwebembezi which was sworn on the 23rd day of July, 1999.
It was also supported by an affidavit by the applicant, Mr. Joseph Muluta which stated, *inter alia*,

(1) …

(2) that immediately after judgment was delivered in Civil Appeal No. 12 of 1998 I instructed my advocates, M/s Akampurira, & Co. Advocates to lodge an appeal against it.

(3) that the said lawyers informed me that they had taken the necessary steps to lodge the appeal and in fact lodged a Notice of Appeal and served a copy to the Respondent (photocopy attached and marked “A”)

(4) that I have also been informed by my current lawyers and I believe the same to be true that by the 5th of May, 1999, they were still pursuing certified copies of judgment and relevant exhibits (a photocopying (sic) of our letter is attached and marked “B”).

(5) that I have been informed by my current lawyers, M/s Babigumira & Co. Advocates, and verily believe the same to be true that although my former lawyers applied for a copy of proceedings and judgment, they neither copied nor served a copy of the letter on the Respondent (photocopies of the letter requesting for proceedings and my current lawyers ‘correspondence are attached and marked “BB1”, “BB2” and “BB3”, respectively.

(6) that I have been further informed by my current lawyers and believe the same to be true that I cannot take advantage of the provisions of rule 78 of the rules of this court to file the appeal outside the prescribed 60 days.

(7) that it was due to the inadvertence of the said lawyers that the application for proceedings and judgment was not served on the Respondent and such inadvertence should not be visited on me.

(8) That I have also been informed by my current lawyers and I believe the same to be true that the said Notice of Appeal has since elapsed.

(9) …

(10) that there is sufficient cause for not instituting the appeal within the prescribed time and in the interest of justice I should be granted leave to lodge a fresh Notice of Appeal and institute the appeal out of time.

Mr. Richard Mwebembezi for the applicant addressed court on the application after summarising both the grounds of the application and the reasons contained in the applicants' affidavit. He first made submissions on grounds 1, 2, 5, and 6 of the application.
Counsel submitted that as a result of the enquiries carried out by his firm, it was discovered that contrary to the applicant's former counsel's claims, there was no proof of service of the relevant notice of the appeal to the Respondent nor had the record of proceedings been issued.

In consequence, the applicant is unable to take advantage of Rule 78 (2) and (3) of Rules of this court. Secondly, as the record of proceedings has not been availed by the court, it is not possible for the applicant to appeal within 60 days as required by the Rules of court. Counsel indicated that the application was founded upon Rule 4 of the Rules of this court which empowers the court to extend the period in which to lodge an appeal beyond the sixty days limit. It was counsel's contention that there was sufficient cause for the applicant to have failed to take a particular step in the proceedings. Counsel cited the case of Isaac Bushari v. VitaFoam. Misc. App. No. 2 of 1994 (S.C.), (unreported), in which the court, (Odoki, J.S.C.) said that in applications of this nature the court has wide powers to decide and is only limited by the words "for sufficient reasons."
Counsel further contended that as was held in such cases as Mugo and Others v. Wanjiru & Another (1970) E.A. 481 and Shanti v. Hindoche & Others, (1973)W.A 207, all that the applicant needs to show is that failure to take any step in the proceedings was not attributed to him personally. Counsel submitted that in this particular case, applicant had done his best to instruct his lawyers to prosecute the appeal and he gave these instructions immediately after the delivery of the judgment in the Court of Appeal. In addition, the applicant was informed by his former lawyers that they had taken the necessary steps in the process of the appeal and applicant had no reason to disbelieve or doubt the words of his counsel. Counsel

further submitted that it is clear from the facts of this application that it was the inadvertence or negligence of the applicant's former counsel, that there had been a failure to take the necessary steps in the proceedings, and it is now a well known principle of justice that the sins of counsel should not be visited on his client. Counsel submitted that in this particular case, appellant had done his best to instruct his lawyers to prosecute the appeal and he gave these instructions immediately after the delivery of the judgment in Court of Appeal. Counsel cited the case of Executrix of the Estate of Christina v, Tibajjukira vs. Debrah Namukasa (1978) Civil Application No. 8 of 1998 (C.A), in support of his submission.

Mr. Mwebembezi finally made submissions on grounds 3 and 7. He contended that court had delayed in the compiling and issuing of the record of proceedings and this had contributed to the delay in taking the necessary steps in the prosecution of the case. Counsel referred to a number of authorities including Bakitara Transport Bus. Co. Ltd. V. Emmanuel Biribonwa, Civ. App. No. 7 of 1978, and Balwantrai D. Bhatt v. Tejwant Singh And Another (1962) E.A. 497 for the proposition that a party should not be penalised if the fault is entirely attributed to counsel or court. Counsel contended that in this case, the applicant was entirely blameless. He asked court to allow the application, order that the Notice of Appeal be renewed and extend the time within which to appeal to sixty days.

Mr. Nkurunziza for the Respondent opposed both the revival of the Notice of Appeal and the extension of time within which the applicant may appeal. He submitted that the applicant had not shown any sufficient reason to warrant the exercise of discretion in his favour by the court. He contended that notwithstanding that the applicant's former lawyers were negligent, the applicant had not given sufficient reasons why the record of proceedings had not be obtained in time. The reasons for this failure have not been disclosed to court. After all, there is evidence that the record of proceedings was freely available and was presented in the Court of Appeal. The applicant has not produced any evidence from the court below as to why the issuing of the record of proceedings was delayed. Counsel submitted that the contents of paragraph 4 of the applicant's affidavit were inaccurate or, at worst, contained a falsehood, in that while he stated on oath that by the 5th, August, 1999, they were still pursuing certified copies of the judgments, in fact the letter seeking those copies was first written and presumably sent on that same day. Counsel submitted that on the basis of the case of Joy

Tumushabe v. Anglo- African Limited and Another, Civil Application No. 14 of 1998, it is for the applicant to show that he or she has not directly or indirectly contributed to the delay.

Counsel for the Respondent further contended that the applicant had not shown that if this appeal proceeds there are prospects for the success of the appeal as was held in the cases of Balwantra D. Bhatt v. Tejwan Singh and Another (supra) and Pollack House Ltd v. Nairobi Wholesalers Ltd. (No. 2), (1972) E.A. 172.

Mr. Nkurunziza submitted further that on the other hand, the affidavit of Mr. Katama, the Respondent, shows that this case has been going on since 1995. The applicant instituted his plaint in the High Court, on 14.5.95. In the same affidavit, the Respondent shows in paragraph 9 that he would be prejudiced by long litigation which would deny him the benefits of the judgment in his favour. This litigation has extended to more than four years and it was Mr. Nkurunziza's contention that further delay would harm the interests of the Respondent. The court must weigh the interests of both parties, not simply those of the applicant. Counsel finally submitted that it could have assisted the court if the applicant had disclosed the grounds upon which he intends to appeal but he chose not to do so. He prayed that the application be dismissed with costs to the Respondent. On the issues of the prospects for the success of the appeal and disclosure of the grounds of appeal, Mr. Mwebembezi, responded by saying that the rules under which a court may extend the time in which to appeal do not require that the applicant should show the grounds or chances of success of the pending appeal since that would be tantamount to hearing the appeal itself. The rules only require that the applicant show why a certain step or steps were not taken in the proceedings. It was counsel's submission that the grounds advanced by the applicant are sufficient and he repeated his prayer that the application be granted.

It is clear from the facts and submissions of counsel that the reasons which caused the Notice of Appeal to expire without any further steps taken are attributed to former counsel for the applicant. Although an attempt was made by counsel for the applicant to portion some blame for the court registrars who are responsible for preparing records of proceedings, no conclusive evidence was shown in this respect. Therefore the only question is whether the applicant has satisfied me that he was utterly blameless and that the negligence or omissions

of his former counsel were such as will justify a remedial order in his favour, bearing in mind that the right of the respondent granted by the judgment in his favour may be prejudiced thereby.

In a recent decision of this court, Motor Mart (U) Ltd. V. Yona Kanyomozi, Civil Application No. 6 of 1999, we had occasion to confirm the ruling of a single judge of this court in which he, having reviewed the relevant authorities, granted a similar application to an applicant who had been let down by a defaulting advocate.

The authorities underscoring the principle that the faults of counsel should not be visited upon a litigant include Mugo v. Wanjira (1970) E.A. 481, Shanti v. Hindocha & Others, (1973), E.A. 120, Shiv Construction v. Endesha Enterprises, Ltd., Civ. App. No. 15 of 1992 (S.C.) (unreported), Haji Nurdin Matovu v. Ben Kiwanuka, Civ. App. No. 12 of 1992 (S,C) (unreported), The Executrix of the Estate of Christine N. Tibajjukira v. Deborah Namukasa, Civil Application No. 8 of 1988 (supra) and Joy Tumushabe v. Anglo- African Limited And Another (supra). In the latter case, the court said,

> *"It is trite law that a vigilant litigant should not be penalised for the dilatory conduct of his advocate or of the court f he or she has not directly or indirectly contributed to it."*

The facts of this particular case show that as soon as the applicant discovered that his appeal had stalled, he took immediate steps to correct the situation. He briefed new counsel and instructed him to take over the prosecution of the appeal. The new counsel acted quickly and took the necessary steps. This shows vigilance on the part of the applicant and his new counsel.

Unfortunately, it is true, as counsel for the Respondent argued, that in cases of this nature where lawyers for the other side have been too slow or negligent, the successful and innocent party who is or ought to be enjoying the fruits of the judgment is prejudiced. Nevertheless,

justice must strike a balance between the wronged applicant and the innocent Respondent.

In the circumstances of this case therefore I have no hesitation in exercising my discretion in favour of the applicant. I allow this application. The applicant shall file and serve Notice of Appeal within seven (7) days from the date of this ruling and file and serve the appeal within twenty one days (21) after filing and service of the said Notice of Appeal.

Since these proceedings were necessitated by the Applicant's default, costs in this application are awarded to the Respondent.

DATED AT MENGO THIS DAY 17th DAY OF NOVEMBER, 1999.

G.W. KANYEIHAMBA **JUSTICE OF THE SPUREME COURT**