

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO
CORAM: CM. KATO J.S.C (SINGLE JUSTICE)
CIVIL APPLICATION NO. 18/2002

BETWEEN

ERIC TIBEBAGA:::APPLICANT

AND

1. **Fr. NARSENSIO BEGUMISA)**
2. **B. NTIMBA)**
3. **D. KOMUNDA)::::::::::::::::::::: RESPONDENTS.**
4. **F. KOMONDO)**

Ruling of the Court (Single Justice).

This is an application for extension of time. The application is by a notice of motion dated 7th November 2002. It was lodged under the provisions of section 99 of Civil Procedure Act, Rules 4, 41(1)(2) and 42(1) of the Supreme Court Rules 1996. An affidavit dated 6th November 2002 was sworn by applicant's counsel Mr. Salimu Makeera in support of the application. The same counsel swore a second affidavit on 20/1/2003 in reply to one sworn by Grace Babihuga on behalf of the respondents dated 17/1/2003.

There is basically one ground upon which this application is based. The ground is that it was the fault of the process server of the counsel for the applicant who did not file the submissions on time and that the applicant should not be punished for the mistake or negligence of advocate's clerk.

The brief facts giving rise to the application are that on 21/10/2002 the applicant was ordered by this court to file his written submissions on or before 31/10/2002. The applicant did not adhere to that order, hence this application.

Mr. Makeera, who appeared for the applicant, submitted that section 99 of the Civil Procedure Act under which this application was partly filed did not require the applicant to give any reason as to why he did not act on time. According to him the section gives the court a wide discretion to grant or refuse extension of time. It was his view that even if there was need for the applicant to give reasons for his failure to act on time, in this case sufficient reason had been given as to why the applicant did not file his submissions on time. Mr. Makeera contended that his process server by the name of Silver Ahimbisibwe, who was supposed to file the submissions, left for Kabaale to serve summons in another case HCCS No. 594 of 2002 but he delayed there and by the time he returned the time had expired. It was his contention that the granting of the application would not be prejudicial to the interests of the respondents and that the applicant should not be punished for the negligence or mistake of the process server.

Mr. Babigumira, for the respondents, opposed the application on two main grounds namely.

(a) That section 99 of civil procedure Act did not apply to the proceedings before this court. According to him the applicable law is to be found in rule 4 of the rules of this court.

(b) That the affidavit in support of the application and that sworn in reply to the one sworn in opposition to the application were incurably defective on two grounds: -

(i) they (affidavits) were contentious as they contain falsehood and

(ii) they (affidavits) are hearsay.

I shall deal with the issues raised by Mr. Babigumira in the order listed above, starting with the first issue.

With due respect, I do agree with Mr. Babigumira's contention that section 99 of the Civil Procedure Act does not apply to this sort of application. The applicable law here is rule 4 of Supreme Court Rules 1996, which the applicant correctly relied upon. This is in view of the provisions of section 1(2) of the Civil Procedure Act and Rule 1(2) of the Rules of this court. Section 1(2) of the Act reads:-

"This Act shall extend to proceedings in the High Court and in all (subordinate courts and) Magistrates' courts"

Rule 1(2) states as follows:-

"The practice and procedure of the Court in connection with appeal and intended appeals from the court of Appeal and the practice and procedure of the Court of Appeal in connection with appeals to the Court shall be as set out in these Rules."

It is important to decide whether the matter falls under section 99 of the Civil Procedure Act or under rule 4 of the rules of this court because if one is to proceed under the Act it may not be necessary to give reasons why the applicant did not act within the required time but under rule 4 the law places a burden of proof upon the applicant to give "sufficient reason" why there was a delay.

I observe that the Evidence Act, until 1996, also used to be applicable only to the High Court and subordinate courts under section 2 that Act. Section 49(a) of the Judicature Statute 1996, however, amended the Evidence Act and made it applicable to the Supreme Court and Court of Appeal. It is suggested that the legislators should revisit the provisions of section 1(2) of the Civil Procedure Act in same way they did with section 2 of the Evidence Act.

That leads me to the last point raised by Mr. Babigumira, namely: that the affidavits sworn in support of the application and in rejoinder were incurably defective. As indicated earlier in this ruling, the counsel attacked the affidavits on two grounds, firstly, that they contained falsehood and secondly that they are hearsay.

On the issue of falsehood, the respondents' counsel argued that it was not true to say that Silver Ahimbisibwe was in Kabaale on 31/10/2002 serving summons upon one Rudul

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Raval in a different Civil Suit No. 594 of 2002 Nilesh Kumar Patel -v- Quick Photo Lab and Rudul Raval. Mr. Babigumira, based his argument on the affidavit of Nakato Moreen sworn on 10/12/2002 which is annexure "C" to Grace Babihuga's affidavit of 17/1/2003. In that affidavit Nakato stated that it was she (Nakato) who served Rudul in Kampala on 31/10/2002 at 3.30 p.m in the chambers of the applicant's counsel where she herself works.

On his part, Mr. Makeera, submitted that there was no falsehood about where and when Rudul was served because he was served both in Kabaale and in Kampala on the same day. According to the counsel, the service in Kabale was on Rudul in his personal capacity as a second defendant and the service in Kampala was in his capacity as a manager of the first defendant company in the same civil suit No. 594 of 2002.

To appreciate the seriousness of this point, I have found it necessary to reproduce the affidavits of Mr. Makeera and that of Ms. Moreen Nakato.

Moreen Nakato's affidavit reads:

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCCS NO. 594 OF 2002

NILESH KUMAR PATEL

PLAINTIFF

VERSUS

1. QUICK PHOTO LAB

2. RUDUL RAVAL

DEFENDANTS

AFFIDAVIT OF SWEAR

I Nakato Maureen c/o Mukeera & Co. Advocates P.O. Box 23528. I hereby swear.

1. That I am an advocate of High Court and all courts subordinate thereto practicing with M/S Makeera & Co. advocates, and therefore capable of swearing this affidavit.

2. That on 25th October 2003 my employer M/S Makeera & Co. Advocates took out summons with plaint from this honourable court to be served on the defendants

3. "That on 31st October 2002 at around 3.30 p.m., the plaintiff came to our chambers with Mr. Rudul Raval whom he introduced to me as the 2nd defendant and manager of the 1st defendant in above civil suit".

4 "That I tendered court process to the 2nd defendant which he accepted, read through and seemed to understand and thereafter endorsed his signature on the original copy in acknowledgement of service for both 2nd and 1st defendants a copy of which is hereby attached".

5. That what is stated herein is correct to the best of my knowledge.

SWORN AT Kampala By the said

NAKATO MAUREEN

This 10 day of December 2002.

DEPONENT

BEFORE ME:

A COMMISSIONER FOR OATHS"

Makeera's affidavit of 6/11/2002 reads as follows:

"THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT MENGO

MISC. APPLICATION NO. 18 OF 2002

ARISING OUT OF CIVIL APPEAL NO. 17 OF 2002

BETWEEN

ERIC TIBEBAGA APPLICANT/RESPONDENT

VERSUS

1. FR. NARSENSIO BEGUMISA}
2. B. NTIMBA }
3. D. KOMUNDA } ..RESPONDENTS/APPLICANTS
4. F. KAMONDO }

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION

I SALIM MAKEERA of C/o Makeera & Co. Advocates, Metropole House, Ground floor, Suite G-II, Plot 8/10, Entebbe road, P.O. Box 23528 Kampala do solemnly swear and state as follows.

1. That am an advocate of the High Court and courts subordinate thereto practicing law with Makeera & Co. Advocates counsel for the applicant.
2. That on the 21st day of October 2002, the applicant was ordered by this honourable court to file written submissions in reply to the respondents submissions on or by 31st October 2002.

3. That I wrote the applicants submissions and handed them to our clerk Silver Ahimbisibwe in the afternoon of 30th October 2002 to take to Supreme Court Registry for filing. A copy of the submissions is attached hereto marked as Annexure "A"

4. That on the same day I went for leave up country for three (3) days to attend to urgent domestic issues.

5. That on the 30th October 2002 the clerk carelessly/negligently instead of first filing the submissions, decided to first serve summons in Kabaale in HCCS No. 594/2002 NILESH KUMAR PATEL VS. QUICK PHOTO LAB & RUDUL RAVAL. A copy of the summons is attached hereto marked as Annexure "B".

6. That I am informed by the said clerk that he was alive to date of filing the submissions but thought he would be back in Kampala on 31st October 2002 to file the submissions.

7. That unfortunately their bus broke down at Nyeihanga in Mbarara district and they did not reach Kabaale till the following day on 31st October 2002.

8. That he looked for the defendants in HCCS No. 594/2002 above-mentioned and only managed to get them in late afternoon of 31st October 2002. He therefore spent the night in Kabaale.

9. That he came back on 1st November 2002 in the afternoon and went to the Supreme Court Registry with the submissions but was told that he was out of time and that counsel for the appellant had already written a letter complaining. A copy of the letter is attached hereto marked as Annexure "C".

10. That I verily believe that it is equitable and in the interest of justice that the applicant be allowed to file submissions for consideration of court.

11. That I swear this affidavit in verification of the above particulars and in support of an application for extension of time within which to file the submissions.

12. That what is stated herein is true to the best of my knowledge save paragraphs 5, 6, 7, 8 and 9 which is information from the clerk.

SWORN at Kampala by the said SALIM MUKEERA this 6th

Day of November 2002

DEPONENT

BEFORE ME:

A COMMISSIONER FOR OATHS"

Mr. Makeera's affidavit in rejoinder reads as follows:

AFFIDAVIT IN REJOINDER

I, SALIM MAKEERA of C/o Makeera & Co. Advocates, Metropole House, Ground floor, Suite G-II, Plot 8/10, Entebbe road, P.O Box 23528 Kampala do solemnly swear and state as follow:-

1. That am an advocate of the High Court and courts subordinate thereto practice law with Makeera & Co. counsel for the applicant.
2. That I have read the respondent's affidavit in reply sworn by Grace Babihuga and hereby reply as follows
3. That the facts stated in the application for extension of time in which to file the written submissions and affidavit in support sworn on 6 November 2002 are true.
4. 4. That on 30th October 2002 our clerk Silver Ahimbisibwe went to Kabale to serve summons in HCCS No. 594/2002 NILESH KUMAR PATEL VS. QUICK PHOTO LAB & RUDUL RAVAL and effected service on the second defendant on 31st October 2002.
5. 5. That on 31st October 2002 at around 6.30 p.m. Rudul Raval the second defendant in Hccs No. 594/2002 Nilesh Kumar Patel Lab came to our chambers pleading to be allowed time to settle the matter amicably.
6. 6. That I asked Maureen Nakato an advocate practicing with Makeera & Co. Advocates to serve the summons for Quick Photo Lab on Rudul who signed for himself and on behalf of Quick Photo Lab.
7. 7. That when drafting an affidavit of service Annexure "C" on Grace Babihuga's affidavit considered the summons that were signed by Rudul while in our chambers in

Kampala since he had signed for himself and on behalf of the first defendant but for purposes of this suit, I had to exhibit the summons which had been signed in Kabaale.

8. 8. That the applicant has shown that he was not able to file the written submissions within the prescribed time because the clerk who was supposed to file the same was prevented by reasonable cause from filing.

9. 9. That I swear this affidavit in reply to the respondent's affidavit stating that the Misc. application No. 18 of 2002 is based on falsehood.

10. That what is stated herein is true to the best of my knowledge except paragraph 4 which is information from our clerk Silver Ahimbisibwe.

SWORN at Kampala by the said SALIM MAKEERA this 20th day of June 2003

DEPONENT

BEFORE ME

.....

A COMMISSIONER FOR OATH

Drawn and filed by: Makeera & Co. Advocates Metropole House, suite G-11 Plot 8/10, Entebbe Road P.O. Box 23528 Kampala."

Looking at these affidavits it is glaringly clear that the story as told by Mr. Makeera in his affidavits does not agree with the one which was sworn by one of his own staff. I do not agree with Mr. Makeera when he says that Rudul was served in Kabale personally then in Kampala as a manager of the first defendant in Civil Suit No. 594 of 2002. That explanation cannot be sustained in view of what Nakato stated in paragraph 4 of her affidavit above, where she said that Rudul accepted service in Kampala for himself and for the first defendant. If this man had been served in Kabale on the same day personally then what was the point of his being served again personally and on behalf of the 1st defendant in Kampala? One other matter which I find difficult to accept as truthful is that Silver Ahimbisibwe served Rudul in Kabale so late that he (Silver) had to sleep in Kabale on 31/10/2002 but Rudul was able to reach Kampala before 3.30 p.m. Although we are not told the means by which Rudul travelled from Kabale so as to reach Kampala by 3.30 p.m. by whatever means he came, he could not have been served very late in the

afternoon in Kabaale as stated in paragraph 8 of Makeera's affidavit. In paragraph 5 of his affidavit in rejoinder, Mr. Makeera says Rudul came to his chambers at 6.30 p.m. but Ms. Nakato says that the time was actually 3.30 p.m. One of the two must be telling lies, in view of the contents of paragraph 8 of Makeera's affidavit, Ms. Nakato might be telling the truth, but not Mr. Makeera.

In view of the above affidavits, I am inclined to agree with Mr. Babigumira that the two affidavits sworn by Mr. Makeera on 6th November 2002 and 20/1/2003 are false. The truth of the matter is that Silver Ahimbisibwe did not travel to Kabale on 30/10/2002 to effect service on Rudul Raval in civil Suit No 594 of 2002. The affidavit of Nakato, which I believe is truthful, has effectively established that on that date Rudul was not served in Kabale but in Kampala which means that the reason why the applicant's counsel did not file his submissions in time is not that stated in his affidavit. It is remarkable that Silver Ahimbisibwe did not swear any affidavit to inform the court as to what exactly happened that prevented him from filing the documents before 31/10/2002; nor was Ahimbisibwe's affidavit of service in Kabaale availed to the court to show what he did in Kabaale.

I now turn to the second issue raised by Mr. Babigumira about the validity of the affidavits. It was counsel's submission that the affidavits sworn by Mr. Makeera were nothing but hearsay and as such they could not be said to have complied with the requirement of rule 42(1) of the rules of this court. On his part, Mr. Makeera argued that his affidavits were not hearsay since he distinguished those facts which were of his own knowledge from those from other source.

It is trite law that a party cannot rely on hearsay to prove his or her case unless that case falls under exceptions to the general rule which govern hearsay evidence. In the present case, the law governing evidence relating to applications brought before this court is to be found in rule 42(1) which stipulates who can swear affidavits in support of one's case. That rule reads:

"(42(1) every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other persons having knowledge of the facts".

My understanding of the rule is that a person swearing an affidavit in support of an application of this nature must have knowledge of the facts involved. In the instant case the person who knew the reasons relating to the delay in filing the submissions is Silver Ahimbisibwe who, for reasons unknown to the court, did not swear any affidavit. In the absence of Ahimbisibwe's evidence in form of an affidavit or otherwise, what Mr. Makeera stated regarding what Ahimbisibwe did or failed to do is mere hearsay and of no help to the applicant's application. The situation cannot be cured by merely stating the source of information, as Mr. Makeera would like the court to believe. The provisions of Order 17 rule 3(1) of Civil Procedure Rules, are not applicable to this application which was filed under rule 42(1) of the rules of this court. In view of the fact that the affidavit in support of this application is riddled with falsehood and it is a mere hearsay, I find that the application has not been supported by a valid affidavit as is required by rule 42(1) of the rules of this court. That being the position, there is no evidence to establish that the applicant had sufficient reasons, within the meaning of rule 4 of the rules of this court, which prevented him from filing the submissions on time.

In conclusion, I find no merit in this application which is accordingly dismissed with costs to the respondents.

Dated at Mengo this 21st day of March 2003.

CM. Kato

Justice of the Supreme Court