

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENDO

BEFORE: HON. JUSTICE KAROKORA, JSC.

CIVIL APPLICATION NO. 10 OF 2002

B E T W E E N

1. GODFREY MAGEZI

2. BRIAN MBAZIRA: :::::::::: :::::::::: APPLICANTS

A N D

SUDHIR RUPALERIA: :::::::::: :::::::::: RESPONDENT

RULING OF KAROKORA, JSC:

This is an application by Notice of Motion tiled under Rules 1(3), 4, 41 and 42 of the Rules of this Court seeking extension of time within which to tile an appeal out of time against the decision of the Court of Appeal in Civil Appeal No. 61 of 1999. The application further seeks that the tiling of Civil Appeal No. 16 of 2001 out of time against the decision of the Court of Appeal be validated. The application seeks the costs of the application to be in the cause.

The grounds for the application are stated as follows:

1) The applicants instructed M/s. Birungi & Co. Advocates to file an appeal in the Supreme Court against the decision of the Court of Appeal No. 61 of 1999.

- 2) ***That M/s. Birungi & Co. Advocates filed Supreme Court Civil Appeal No. 16 of 2001 and paid all the requisite charges and fees for security for costs and filing fees amounting to Shs. 520,000=.***
- 3) ***That Supreme Court Civil Appeal No. 16 of 2001 was filed out of time due to the mistake, inadvertence and or omission of M/s. Birungi & Co. Advocates, counsel for the applicants.***
- 4) ***That the applicants have changed counsel to M/s. Nyanzi, Kiboneka and Mbabazi Advocates who have discovered the mistake which mistake ought not to be visited on the applicants as litigant but requires to be corrected by Court.***
- 5) ***That in the interest of justice, it is fair and just that the substance of the appeal be heard on merit without debarring the applicants from pursuing their rights to be heard and accorded justice in accordance with article 126(2) (e) of the Constitution.***

The application is supported by affidavit sworn by Godfrey Magezi c/o M/s. Nyanzi, Kiboneka and Mbabazi Advocates, which affidavit I feel constrained to reproduce the paragraphs which spell out mistakes of counsel and mix up of dates by either his counsel or the court.

Godfrey Magezi stated in his affidavit as follows:

"(1) I am the applicant herein and the appellant on SSCA No. 16 of 2001.

(2) That I did instruct my former counsel M/s. Birungi & Co. Advocates to file an appeal against the Court of Appeal decision in Civil Appeal No. 61 of 1999.

(3) That the said M/s. Birungi & Co. Advocates filed a Notice of Appeal together with a letter requesting for proceedings both of which are annexed hereto as annexes '1' and '2'

(4) That on 23rd August 2001, the Registrar of Court of Appeal did notify M/s. Birungi & Co. Advocates that the record of Appeal was ready for collection. Copy of the letter of the Registrar is hereto annexed annexture '3'

(5) That the requisite fees were duly paid vide receipt No. 2171963 hereto annexed as annexture '4'

(6) That according to the court file the Memorandum and Record of Appeal was duly filed on 9th November 2001, and the security for costs and filing fees in the amount of shillings Four hundred thousand (Shs. 400,000=) and shillings One hundred and twenty thousand (Shs. 120,000=) respectively was duly paid vide receipt No. 42608199 and 42608198. Copy of the extract of the court file is annexed as annexture '5'.

(7) That however, receipt No.42608198 is dated 9th November 2001, while receipt No. 42608199 is dated 9th October 2001, copies of both receipts are annexed as annexes '6a' and '6b'.

(8) That the received stamp for the record of appeal is dated 9th September 2001, as per copy of the extract hereto attached.

9. That the Registrar's seal certifying judgment of the record is dated 20th December, 2001.

10. That the Court of Appeal Registrar's Certificate of completion delivery of the proceedings was sealed on 9th November 2001.

11. *That it is therefore not easy to clearly tell the date when the appeal was filed although the date of 9th November 2001, would logically be the date of filing as it was the date the filing fees and security for costs was paid.*

12. *That the court stamp on the record of appeal together with the receipts of payment are equally misleading as to the date when the record of appeal was filed.*

13. *That the filing of the appeal on 9th November 2001, was clearly outside the prescribed time of sixty (60) days within which to file an appeal after the completion and delivery of the record of proceedings.*

14. *That all this mix-up of dates and when particular events occurred was done by my counsel M/s. Birungi & Co. Advocates without my knowledge.*

15. *That I only discovered this after the hearing on 23rd January 2002, whereupon I instructed M/s. Nyanzi, Kiboneka and Mbabali Advocates to take over the full conduct of my appeal from M/s. Birungi & Co. Advocates.*

16. *That I had originally instructed M/s. Nyanzi, Kiboneka and Mbabali Advocates to assist M/s. Birungi & Co. Advocates and jointly appear for the hearing on 23rd January, 2002.*

17. *That on my part I did all that was necessary and required of a diligent litigant seeking for justice including payment of all the court fees and charges to render my appeal ready for a hearing.*

18. *That such omissions and inadvertence of my former counsel ought not to be visited on me leading to the striking out of my appeal thereby denying me justice.*

19. That I swear this affidavit in support of my application for leave to extend time to file my appeal out of time and/or the validation of the due filing of SCCA No.16 of 2001."

The respondent's affidavit in reply was sworn by Paul Rutisya of M/s. Kasirye, Byaruhanga & Co. Advocates. He averred as follows:

"(3) That in reply to paragraph 6 of the deponent's affidavit in support of the application, the respondent maintains that the appeal was filed on the 9th September 2001, as the court stamp on the record and memorandum of appeal indicates.

(4) That in reply to paragraph 7 of the applicant's affidavit the date of 9th October is a reknown public holiday in Uganda depicting our Independence and all public officers and courts of judicature are closed and therefore, the receipt dated 9th October 2001, is suspect.

(5) That in reply to paragraphs 7 to 12 of the applicant's affidavit it cannot be that counsel for the applicant went to file an appeal on the 9th of November as alleged in paragraph 11, and the court stamp was back dated by two whole months (9th September), and the receipts issued for payment of filing fees and security for costs respectively appeared with two different dates a month apart, one of the days (9th October) having a holiday on which the Registry was closed and, further the date of lodgment on page 4 of the Memorandum of Appeal clearly indicates tampering.

(6) That in the absence of an affidavit from the Registrar acknowledging that errors were made by the staff of the Registry the generalization in the applicant's affidavit cannot suffice to explain the inconsistencies in the dates.

(7) *That prior to the main appeal the respondent in this application had filed Miscellaneous Application No. 3 of 2002 in which they sought orders for the dismissal of the appeal for non-compliance with rules of procedure.*

(8) *That at the hearing of the main appeal on the 23rd January 2002, the grounds contained in the said application No. 3 of 2002, were discussed in court which then adjourned the hearing to enable the applicant in this one to file an affidavit in reply.*

(9) *That to-date the applicants in this one have not filed the affidavit in reply to Miscellaneous Application No. 3 of 2002, which is still pending before the Honourable Court.*

(10) *That the orders sought in the present application even if granted, would not operate to cure the defect in Civil Appeal No. 16 of 2001.*

(11) *That the affidavit of Godfrey Magezi in support of the present application makes no mention of Brian Mbazira even when he is named as an applicant and it is not clear if he is a knowing part to this application*

(12) *That I swear this affidavit in reply to the affidavit of Godfrey Magezi and in opposition to the orders sought.*

(13) *That all what is stated herein is true and correct in my knowledge and professional experience.*

Mr. Mbabazi counsel for the applicants submitted that the application was seeking leave to be granted to applicants to file an appeal against the decision of the Court of Appeal Civil Appeal No. 61 of 1999 out of time and also to validate the filing of Civil Appeal No.

16 of 2001 which was tiled out of time. He also sought costs of the application to be in the cause.

The grounds of the application are in the body of the application. Reasons for the application are set out in the body of the application as inadvertence, error and omission by the former counsel M/s. Birungi & Co. Advocates. The other ground concerning Supreme Court Civil Appeal No. 16 of 2001 is that the applicants have already paid Shs. 520,000= as spelt out in the 2nd paragraph of the grounds for the application.

In the interest of justice, counsel submitted that it was fair that the substantive appeal No. 16/2001 be validated and be heard on merit.

The application is supported by affidavit of Magezi dated 9th April 2002. Mr. Mbabazi submitted that the relevant paragraphs show 3 steps taken to the Notice of Appeal.

Paragraph 5 shows requisite fees duly paid vide receipt No. 2171963 annexed as '4'.

Paragraph 6 shows extracts of Court Register and shows two receipts. These receipts have different dates but were issued by the Supreme Court one receipt No. 42608198 is dated 9th November 2001, while the second receipt No. 42608199 is dated 9th October 2001. These receipts are annexed as '6a' and '6b' respectively. The received stamp for the record of Appeal is dated 9th September 2001. Yet the Registrar's seal certifying lodgment of the record is dated 20th December 2001. That the Court of Appeal Registrar's certificate of completion and delivery of the Proceedings was sealed on 9th November 2001. Paragraph 11 brings home the mix-up. It avers that it is therefore not easy to clearly tell the date when the appeal was tiled, though the date of 9th November 2001, would logically be the date of filing, as it was the date the filing fees and security for costs was paid.

Counsel submitted that all the above was done by M/s. Birungi & Co. Advocates without the knowledge of the applicants, because payments were made by M/s. Birungi & Co. Advocates. He further submitted that when those things were being done by the perpetrators, the applicants was not aware. He contended that these things were done by court officials and former counsel. Counsel submitted that the law is that such mistakes, omission and inadvertence should not be visited on to the litigant. He contended that there was no evidence that litigants participated in these errors or mistakes.

Further, counsel for applicants referred to Mr. Rutisya's affidavit sworn in reply, dated 8th October 2002. He submitted that the thrust of Rutisya's affidavit was that the appeal was tiled out of time. Further in that affidavit Mr. Rutasya confirms mix-up in dates. Counsel also confirms tampering of the date when Memorandum of Appeal was received by the Registry -which imputes fraud - Mr.

Mbabazi submitted that the respondent's affidavit does not attribute fraud to any party.

On the issue of backdating of dates of receipt and issuance of receipt, counsel submitted that these receipts could not have been issued by the applicants because the receipts bear Uganda Government and were issued in favour of M/s. Birungi & Co. Advocates. Counsel submitted that emphasis in cases of this nature has been not to debar a litigant from accessing court and also not to encourage fresh suit or suing lawyers. Counsel cited the cases of *Executrix of the Estate of Christine Nantatovu Tibaijuka & Deborah Namukasa - vs - Noel G. Shalita S.C. Civil Application No. 8 of 1988*, *Haji Nurdin Matovu - vs - Ben Kiwanuka (S.C.) Civil Application No. 12 of 1991*, *David Nsubuga & 3 Others - vs - Margaret Kamuge (S.C.) Civil Application No. 31/1997*, in support of the above submission.

Counsel further submitted that where the courts have found that there is already an appeal tiled, despite the mistake, which may amount to tampering, the court has validated the appeal which had been tiled out of time. He relied on *Crane Finance Co. Ltd. - vs - Makerere Properties Civil Application No. 1 of 2001 (S.C.)* (unreported) and *Mansukhalal Ramji Karia & Crane Finance Co. Ltd. - vs - Attorney General & 2 Others Civil Application No. 1 of 2003 (S.C.)*.

Mr. Byaruhanga, counsel for the respondent, in opposition to the application submitted that the application did not set out sufficient cause for the delay in filing the application/appeal within the framework of the rules. Further, he submitted that the contradictions in the dates were not explained satisfactorily. Counsel submitted that after realising that they were out of time, they came up with this application alleging that the mistake or error was by counsel; but Mr. Magezi's affidavit does not disclose that he gave money to his counsel in time to tile the appeal. Counsel further submitted that in the absence of the evidence that

Magezi had paid money to his Lawyer to tile the appeal in time, the conclusion left was that there was complicity in tampering with the date of tiling the appeal between counsel and the applicant. Counsel further submitted that this was a peculiar case, because the alleged mistake was calculated by whoever chose to state appeal was tiled on 9-11-2001, and 9th October and 9th September having the date on the court record which bears court stamp. He submitted that if it cannot be found that it was done by counsel, then the applicant bears responsibility.

Moreover, counsel submitted that not all mistakes of counsel are excusable. Although court has wide powers to extend the period, sufficient reasons must be shown. Counsel cited the case of ***Florence Nabatanzi - vs -Naome Zinsobedde Civil Application No. 5 of 1997*** for proposition that sufficient reason depends on the circumstances of each case and must relate to the inability or failure to take a particular step in time. Claim by the applicant that the tile could not be traced in time, in that case was not substantiated because it had been contradicted.

Counsel submitted that it would not be proper exercise of the court's discretion to extend time for the applicant to file appeal out of time or to validate the appeal which was filed out of time. Moreover, in Civil Application No. 3/2002 Mr. Mbabazi and Birungi appeared together. In that application the respondents were seeking leave to have the appeal struck out. That application was adjourned and applicant's application was still pending. In the circumstances, this would not be a proper case for this court to exercise discretion to grant the extension. Counsel cited the case of ***Karia & Anor - vs - Attorney General & Others Supreme Court Civil Application No. 1 of 2003*** where extension of time was granted because it was found that the mistake was that of the court.

On the allegation of mix-up, this would not arise because the record of appeal was ready on 23rd August 2001. The dates of 9th November, 9th October and 9th

September, were deliberately inserted and designed to justify mix-up. He submitted that the application should be dismissed.

Rule 4 of the Rules of this Court under which this application was tiled reads:

"The Court may, for sufficient reason, extend the time presented by these Rules or by any decision of the Court or of the Court of Appeal for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; any reference in these Rules to deny such time shall be construed as reference to the time so extended."

There are many decisions of this Court and of the East African Court of Appeal which have interpreted Rule 4 of the Rules of this Court. I shall quote in extenso the portion of the decision of this Court from page 4 to page 6 in the case of ***Crane Finance Co. Ltd. - vs - Makerere Properties (Supreme Court) Civil Application No. 1 of 2001*** (unreported) which raised issues similar to those in the instant case. These we stated as follows

"The rule envisages four scenarios in which extension of time for the doing of an act so authorised or required, may be granted, namely -

- (a) ***before expiration of the limited time;***
- (b) ***after expiration of the limited time;***
- (c) ***before the act is done;***
- (d) ***after the act is done."***

The situation in the instant case is a combination of scenario (b) and (d). the appellant applied for, and Kitumba JA, granted extension of time for filing and serving of the record of appeal, long after limited time had expired, and also after the acts of filing and serving the record of appeal had been done. The bone of contention however, is in respect of scenario (d) namely the effect of such

extension on the acts which had already been done. We thin that it is obvious that the contended effect is to bring an act within the time as so extended. There would have been no reason to include that scenario in the rule if an act done out of time was an incurable nullity. It is because it is not a nullity that under rule 12 of the same Rules, the Registrar is required to accept documents filed out of time, and only to endorse them to that effect. A reading of rr 4 and 12 together clearly indicates that while a document filed out of time is voidable, it may be validated by extension on time.

Secondly, we share the view that it could be futile to construe the provision otherwise. That view was succinctly expressed by the Court of Appeal for East Africa in Shanti - vs - Hindocha [1973] E.A. 207. In that case the Court considered r 9 of its

Rules (which was in identical terms as r. 4), and all arguments (similar to that of Mr. Nangwala in the instant case), that the rule empowered the judge to authorise a future act not to validate a past one.

The Court held:

We think that when the time for lodging a document is extended, the document is duly lodged if lodged within the time as so extended, whether the actual lodging is before or after the order of extension. To hold otherwise would serve no purpose and would merely result in further costs being incurred. It is not irrelevant in this connection to note that under r 11 the Registrar has no power to refuse to accept an appeal on the ground that it is out of time, which clearly implies that the delivery of the appeal out of time may be excused or validated."

In an obiter dictum in *The Executrix of the Estate of Christine Mary N Tebaijuka & Anor - vs - Noel Grace Shalita Civil Application No. 8 of 1999 (S.C)*, Odoki JSC (as he then was) referring to the same scenario said:

'late filing of "The legal effect (of extending time for filing) is therefore, to validate or excuse the documents. The applicant need not file fresh documents if those already filed are completed and in proper form.' "

On the evidence available and submission made by counsel on both sides I am satisfied that although Mr. Byaruhanga, counsel for the respondent submitted that the back-dating of dates on the receipts and the mix-up in the dates appearing in the tiling of the appeal, payment of tiling fees and security for costs were deliberately calculated by whoever chose to insert them by design to justify the mix-up, in my view, there was no evidence by the respondent to prove that the mix-up of those dates was done by the applicants, as he was not personally handling the appeal. Those receipts were issued by the court officials on the Uganda Government receipts in favour of M/s. Birungi & Co. Advocates who was representing the applicants.

It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on to the litigant, leading to the striking out of his appeal thereby denying him justice. There are many decisions from this Court and other jurisdictions in which it has been held that an application for extension of time, such as this one, where mistake or error or misunderstanding of the applicants' legal advisor, even though negligent have been accepted as a proper ground for granting relief under rules equivalent to rule 4 of the Rules of this Court, which is the rule under which this application was brought. See *Getti - vs - Shoosmith [1939] B ALL ER 916*, *Bray - vs - Bray [1957] EA 302*, *Haji Nurdin Matovu - vs - Ben Kiwanuka* (supra) *Alex Jo Okello - vs - Kayondo & Co. Advocates Civil Application No. 17 of 1981, (SC)*, *David Nsubuga & 3 Others - vs - Margaret Kamuge (SC), Civil Application No. 31 of 1997*. Further, errors/mistakes of court officials have been held to be sufficient grounds for granting extension of time to the applicant to tile his or her appeal out of time. Seen *Bhatt - vs - Tejwart Singh [1962] EA 497*, *Mansulkalal Ramji Karia - vs - Attorney General & Others SCCA No. 1 of 2003*.

In view of the above, I am satisfied that sufficient reasons in this case exist for granting extension of time to the applicants to appeal out of time. Accordingly,

extension of time is granted. However, in the instant case, Mr. Birungi of M/s. Birungi & Co. Advocates, had already tiled Supreme Court Civil Appeal No. 16 of 2002 and paid all the requisite fees for tiling the appeal which included fees for security for costs totalling to Shs. 520,000=.

The appeal however, had been tiled in the Supreme Court out of time on 9th November 2001, due to the mistake, error or inadvertence of the former counsel, which must not be visited on to the litigant. See *Crane Finance Co. Ltd. - vs - Makerere Properties* (supra) *Gett. - vs - Shoosmith* (supra) *Executrix of the Estate of Christine Mary Tebajjuka & Anor - vs - Noel Grace Shalita* (supra) and *Mansukhalal Ramji Kania* (supra) *Shanti - vs - Hindocha* (supra) for the proposition that the legal effect of extending time to tile an appeal out of time when the appeal had already been duly tiled albeit out of time is to validate that appeal or to excuse the late tiling of that appeal. Consequently, the Supreme Court Civil Appeal No. 16 of 2001 is deemed to have been validly tiled on 9th November, 2001. Accordingly, application for validation of appeal No. 16 of 2001, is allowed.

Costs of this application to be in the cause.

Delivered at Mengo this 20th day of December 2004.

**A. N. KAROKORA
JUSTICE OF THE SUPREME COURT**