IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: MULENGA J.S.C.

CIVIL APPLICATION NO. 27 OF 2007

BETWEEN

BONEY M. KATATUMBA ::::::::::::::::::::::::::::::::::::::APPLICANT

AND

WAHEED KARIM Administrator of late Suleiti

Haji's estate ::RESPONDENTS

(Application for extension of time for instituting appeal from decision of Court of Appeal (Mukasa-Kikonyogo DCJ, Kitumba & Kavuma JJ.A) at Kampala in Civil Appeal No.55/04 dated 23rd May 2006).

<u>RULING</u>

In this application, the applicant seeks extension of time for instituting an appeal against the judgment of the Court of Appeal in Civil Appeal No.55 of 2004 delivered 23rd May 2006. The application is by Notice of Motion, brought under rules 1(3), 4 and 43 of the Supreme Court Rules. Originally, late Suleiti Haji, the successful respondent in the said appeal was cited as the respondent to this application, but when the application came before me for

hearing on 14th December 2007, Waheed Karim, her legal representative was, by consent order, substituted as the respondent. The application is supported by the affidavit of Boney M. Katatumba, the applicant, sworn on 26th November 2007.

The applicant filed the Notice of Appeal on 29th May 2006 through Mwesigye, Mugisha & Co. Advocates who apparently on the same day applied to the Registrar for the record of proceedings, and on the following day served copy of the Notice of Appeal on Mulira & Co. Advocates then acting for the respondent. By a letter dated 11th April 2007 addressed to the latter and copied to the former advocates, the Registrar intimated that [copy of] the proceedings and judgment were ready for collection. Apparently both firms received the letter on 18th April 2007 but neither responded. Over three months later, the applicant instructed Lex Uganda Advocates, to act for him. The new advocates wrote to the Registrar on 1st August 2007, renewing the request for typed copy of the record of proceedings. Nearly four months later, they filed this application. The respondent also subsequently instructed a new firm, Kibeedi & Co. Advocates. On 13th December 2007 they filed the respondent's affidavit in reply opposing the application.

The grounds of the application as summarised in the Notice of Motion are –

1. ***That there was lack of proper communication from the Registrar Court of Appeal to the applicant's lawyers M/s Mwesigye, Mugisha & Co. Advocates in respect of the availability of the record of proceedings.***
2. ***That the Notice of Appeal was in time but there was a delay and/or failure on the part of Counsel for the applicant M/s Mwesigye, Mugisha & Co. Advocates in collecting and filing the record and memorandum of appeal in time.***

3. ***That the omission or oversight of counsel should not be visited on the applicant.***
4. ***That this application accords with the interest of substantive justice.***

At the hearing, Mr. Byamugisha, counsel for the applicant submitted that failure to institute the appeal in time resulted from oversight on the part of the applicant's former advocates and the Registrar's lapse in communicating to the advocates when the record of proceedings was ready for collection. Counsel conceded that the applicant's former advocates had not been diligent in pursuit of the record as their last request for it was by letter dated 31st January 2007, and thereafter they did not check on the registry, where they would have discovered when the record was ready. In addition, when the Registrar wrote on 11th April 2007 to intimate that the record was ready for collection, she did not directly address the letter to the applicant's former advocates who had asked for the record but only copied it to them. Counsel asserted that the applicant had all along been interested in pursuing the appeal and that the lack of diligence on the part of his former advocates should not be visited on him. He prayed that in exercising the Court's discretion I should lean more towards enabling the applicant to appeal than stopping him. In support of the prayer he cited ***In re Alexander Jo' Okello s. Kayondo & Co. Advocates*** Civil Appl. No.17/96 (SC); ***Yona Kanyomozi vs. Motor Mart (U) Ltd.*** Civil Appl. No.8/98 (SC) and ***Shiv Construction Co. Ltd. vs. Endesha Enterprises Ltd.*** Civil Appl. No.15/92 (SC).

Mr. Kibedi, counsel for the respondent submitted that both the applicant and his former advocates were blameworthy because, apart from the conceded lack of diligence on the part of the former advocates, the applicant had not shown any interest in ensuring that his instructions to appeal were pursued

diligently. Secondly, relying on averments in the respondent's affidavit that the applicant had preferred settlement to appealing, and that he had been offered to pay reduced damages subject to signing a formal agreement, which averments were not rebutted, counsel asked me to deduce that this application was prompted by bankruptcy proceedings taken out against the applicant upon his failure to sign and pay the reduced amount. Thirdly, learned counsel submitted that the applicant waived his right of appeal when in an agreement with Mulira & Co. Advocates, copy of which was annexed to the respondent's affidavit, the applicant agreed to pay the advocates' fees in exchange for a discharge in respect of costs and an undertaking that no further execution proceedings would be undertaken against him. Counsel cited ***Ddegeya Trading Stores (U) Ltd. vs. URA*** Civil Appeal No.44/96 (CA) in support of that proposition. Lastly, counsel urged me not to grant the extension because the applicant had not shown that without the extension he would suffer injustice. In support of this, he cited ***Yona Kanyomozi Case*** (supra) and ***Shah vs. Jamnadas*** (1959) EA 838. In the alternative he prayed that if extension is granted it be on condition that the applicant pays the decretal amount in court.

Under r. 5 of the Supreme Court Rules, the Court may, for sufficient reason, extend the time prescribed by the Rules. What constitutes "sufficient reason" is left to the Court's unfettered discretion. In this context the Court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. But even where the application is unduly

delayed the Court may grant the extension if shutting out the appeal may appear to cause injustice.

Clearly, in the instant case the delay in instituting the appeal and/or applying for extension of time was inordinate. After nearly a whole year that it took the registry to prepare the proceedings, the applicant took another seven months before making this application. His only explanation worthy of consideration is that his former advocates ineptly handled his instructions to appeal; and as I will indicate shortly, his later advocates exacerbated the situation.

I take it that it is well settled that a party should not be penalized for the mistake of counsel unless the mistake is caused by the party's own conduct, like failure to give adequate or proper instructions. For that reason I was inclined to grant the application summarily on the ground that the applicant had promptly instructed advocates to appeal but had been failed by reasons beyond his control. However, I paused to consider the cogency of the applicant's explanation and whether as contended by the respondent, an inference of dilatory conduct on the applicant's part, could be made from the undisputed averments in the respondent's affidavit concerning the attempted settlement and the agreement to pay the fees of the respondent's advocate.

Although the affidavit evidence placing blame on the applicant's former advocates is plausible, I do not find it sufficiently cogent. In paragraphs 4 and 5 of his affidavit, the applicant averred -

"4. That I have always believed that my lawyers M/s Mwesigye, Mugisha & Co. Advocates complied with all the procedural steps necessary for lodging an appeal in the Supreme Court.

5. That on 1st August 2007 after getting no feed back from the said lawyers in spite of several reminders I issued additional instructions for the conduct of the appeal to Lex Uganda Advocates & Solicitors."

He then averred in succeeding paragraphs, that his new lawyers informed him that they -

- had found in photocopy of a file obtained from former lawyers that despite original request and reminder dated 29/5/2006 and 31/1/2007 respectively the record had not been received;
- wrote to the Registrar on 1/8/2007 again requesting for the record but never got a reply;
- were surprised to discover annexed to an affidavit in BM 09 of 2007, copy of the Registrar's letter intimating that the record of proceedings was ready,

In paragraphs 9 and 10 he averred –

"9. That the said letter from the Registrar Court of Appeal is misleading because M/s Mwesigye Mugisha & Co. Advocates had applied for the record but have never been invited to get a copy.

10. That the inadvertence or omission of my former lawyers is excusable and should in any event not be visited on me."
(Emphasis is added)

I am compelled to first say that there appears to be a common misconception among advocates about the operation of the rule that has the effect of "suspending the running of time" during the process of preparing the record of proceedings for appeal. Rule 79 (2) of the Supreme Court Rules reads –

> ***"(2) Where an application for a copy of the proceedings in the Court of Appeal has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the Court of Appeal as having been required for the preparation and delivery to the appellant of that copy."*** (Emphasis is added)

The running of time is suspended for only that period certified by the registrar to have been required for the preparation and delivery of the copy. The suspension is from the date of the application for the copy to the certified date. It does not extend to the time when the requesting advocate receives the information that the copy is ready or an invitation to collect it. Nor, in my opinion does it cover the period preceding the application. After the initial application for the copy therefore, a diligent advocate engages more in monitoring progress of preparation of the record than in writing letters to the registrar or waiting for his invitation to collect the copy record.

I am not impressed by the view expressed, both in the applicant's affidavit and in his counsel's submissions, that the Registrar's lapse in addressing his letter of 11th April 2007 exonerated or mitigated the conceded lack of diligence on the former advocates' part. Although counsel submitted that it was not known if the former advocates received the letter, the respondent annexed to his affidavit copy of the letter, which bears an endorsement that appears to be the former advocates' stamp acknowledging receipt on 18th April 2007. No evidence was adduced from the former advocates to rebut this or to explain what effect, if any, the Registrar's lapse had on them. I was not persuaded that the said advocates ignored the contents of the letter simply because it was not directly addressed to them.

What is more, I note that the new advocates exacerbated the situation by doing exactly what the former advocates did and for which, ironically, they were criticised by Mr. Byamugisha. On receipt of instructions on 1st August 2007, they promptly wrote to the Registrar renewing the request for the record, instead of checking in the registry where they would have discovered that the record had been ready for collection since 11th April 2007. Thereafter they sat back and did nothing until later when, according to the applicant's affidavit, they came across the Registrar's said letter annexed to an affidavit in Bankruptcy proceedings, BM 9 of 2007.

Turning to the respondent's averments, I would not ordinarily be inclined to deny an applicant extension of time to institute an appeal on the ground that after filing Notice of Appeal he indicated a willingness to settle amicably. Frequently, settlement is resorted to, and not frowned upon by courts, as a compromise more out of a desire to end conflict than out of concession that an appeal would be without merit. Secondly in fairly and professionally conducted process for settlement it is usually without prejudice. Besides, the respondent's averment on the attempted settlement was not sufficient proof that the applicant preferred to settle since apparently he ultimately refused to sign a formal agreement. However, the agreement to pay the fees of the respondent's advocate, is less innocuous. Although it does not amount to approbating and reprobating of the court order on costs, and is in my opinion, distinguishable from the facts of ***Ddegeya Trading Stores (U) Ltd. case*** (supra) on which the Court of Appeal found approbation and reprobation of the lower court order, it lends weight to the respondent's contention that the applicant is not free from blame for the delay.

In that agreement dated 15th June 2007, the applicant agreed to pay to Peter Mulira, Advocate, shs.15m/- in full and final settlement of his fees upon which the advocate would issue to him a discharge in respect of costs; and the advocate warranted to the applicant that ***"no further execution proceedings shall be undertaken in the matter".*** I refrain from commenting on the propriety of this agreement since I was informed from the bar that it was subject of complaint in the appropriate forum. It suffices to say that the apparent purpose and purport of the agreement was to satisfy the advocates' quest for his fees while purporting to deny the decree holder the benefit of the law of execution. It seems to me unlikely that when he entered into that agreement the applicant had the appeal in contemplation any more.

The final challenge to this application is that the applicant did not show that a rejection of his application would cause any injustice. As I stated earlier in this ruling the Court has very wide discretion in an application of this nature. Notwithstanding that I have virtually found that the applicant is at least in part responsible for the inordinate delay, it is open to me to consider if there is any other reason why the appeal should be instituted out the prescribed time.

In ***Shah vs. Jamnadas*** (supra), at p.840, the Court of Appeal for E.A. said of its equivalent rule -

> ***"The object of including r.9 in the rules of court is to ensure that the strict enforcement of the limitation of time for filing of documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under r.9 should support by a sufficient statement of the nature of the judgment and of his reasons for desiring to***

appeal against it, to enable the court to determine whether or not a refusal of the application would appear to cause injustice."

The same is true of rule 5 of the Rules of this Court. It follows that where it is not shown that enforcement of limitation of time would result in manifest denial of justice, extension of time is not justfied. This imposes on the applicant, the burden to show that if he is not allowed to appeal out of time he would suffer injustice. See also ***In re Alexander Jo' Okello s. Kayondo & Co. Advocates*** (supra); ***Yona Kanyomozi vs. Motor Mart (U) Ltd.*** and ***Shiv Construction Co. Ltd. vs. Endesha Enterprises Ltd.*** (supra)

The applicant made no serious attempt to show that a refusal of extension of time would result in manifest injustice. Although the applicant averred in paragraph 11 of his affidavit that his appeal touches on a number of novel points of law and fact, neither in his affidavit nor in his learned counsel's submissions was any such point identified. I have read the Court of Appeal judgments the applicant seeks to appeal against, which he annexed to his affidavit but was unable to discern the novel points in his contemplation.

In the result, I do not find sufficient reason to grant the extension of time applied for. Accordingly, I dismiss the application with costs.

DATED at Mengo this 12th day of March 2008.

J.N. Mulenga
Justice of Supreme Court.