THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: JUSTICE G. M. OKELLO, JSC.)

CIVIL APPLICATION NO. 14 OF 2009

B E T W E E N

JULIUS RWABINUMI: :::::: :::::::::::: :::::: APPLICANT

A N D

HOPE BAHIMBISOMWE: :::::: :::::: :::::: :::::: RESPONDENT

[Application for extension of time for instituting appeal against the decision of the Court of Appeal at Kampala (Twinomujuni, Kitumba, and Kavuma, JJA) dated 19th June 2008, in Civil Appeal No. 30 of 2007].

RULING:

This application, by Notice of Motion, was brought under rules 2(1), 2(2), 5, 42 and 50 of the Rules of this Court for an extension of time for instituting an appeal against a decision of the Court of Appeal.

The background to the application is briefly that the applicant and the respondent were married couple whose marriage went sour. The applicant had lost a divorce petition against the respondent in the High Court which made various consequential orders against him. Dissatisfied with the decision and orders of the High Court, the applicant promptly instructed his lawyers to prefer an appeal to the Court of Appeal against that decision. His lawyers duly filed in the Court of Appeal Civil Appeal No. 30 of 2007, which the applicant again lost on 19th June 2008.

The applicant again promptly instructed his lawyers to prefer an appeal against that decision of the Court of Appeal to this Court. His lawyers lodged the Notice of Appeal on 3rd July, 2008 and on the same day wrote a letter requesting for a certified copy of the record of proceedings. The letter requesting for a copy of the record of proceedings was copied and served on counsel for the intended respondent.

By a letter dated 16th October 2008, the Registrar, Court of Appeal, informed M/s. Niwagaba & Mwebesa Advocates, now former counsel for the intended appellant, that the copy of the proceedings and the judgment were then ready for collection upon payment for the same. For inexplicable reasons, learned counsel for the intended appellant neither took any steps to collect the copy of the record of proceedings and prepare the record of appeal nor instituted the appeal within the prescribed period let alone informing the applicant that the record of the proceedings was made available to them, hence this application.

The grounds on which the application is based, as set out in the application, are as follows:

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(i) ***That the applicant herein filed Civil Appeal No. 30 of 2007, against the respondent seeking various remedies;***

(ii) ***That judgment in the said appeal was delivered on the 19th day of June 2008, in favour of the respondent;***

(iii) ***On the 3rd day of July 2008, the applicant's counsel filed a Notice of Appeal and a letter requesting for proceedings;***

(iv) ***That on the 7th day of January 2009, the Court of Appeal Registrar in a letter to counsel for the intended appellant advised the parties that the***

signed record of proceedings had been finalized and was ready for collection;

(v) ***That upon receipt of the said letter, counsel for the intended appellant did not take any action to prepare and file a Record of Appeal nor did he inform the intended appellant that the record of the proceedings of the Court of Appeal had been availed;***

(vi) ***That the Record of Appeal ought to have been filed on the 7th day of March 2009, but it has not been filed to-date;***

(vii) ***That as a result of negligence of counsel for the intended appellant, the Record of Appeal was not filed within the prescribed time;***

(viii) ***That the applicant has always pursued the underlying matter in a timely and conscientious manner but due to counsel's negligence he fell short on this occasion;***

(ix) ***That the applicant has good grounds of appeal and that the Appeal raises matters of great importance and it will be extremely prejudicial to the applicant if the intended appeal is not heard on its merits;***

(x) ***That it is just and equitable that the applicant's appeal be heard on its merits and the time be extended to validate the late filing of the Appeal."***

The application is supported by an affidavit sworn by the applicant on 15th July, 2009.

The respondent opposed the application and filed an affidavit in reply sworn on 28th July, 2009.

At the hearing, Mr. Isaac Walukaka represented the applicant while Mrs. V. Murangira represented the respondent.

Recounting the contents of the affidavit in support of the application, Mr. Walukaka, learned counsel for the applicant, contended that while the applicant instructed his former lawyers promptly to prefer an appeal against the decision of the Court of Appeal in Civil Appeal No. 30 of 2007, the former counsel did not take steps to file the Record of Appeal in time or at all. The applicant however, has always pursued this matter diligently but was let down by his former lawyers yet, the intended appeal raises a point of great importance relating to matrimonial property upon divorce. He submitted that this Court has held in a number of cases that negligence of counsel should not be visited on his client and that such negligence constitutes sufficient reason for granting an extension.

He cited a number of authorities which included ***F. L. Kaderbhai and N. H. Valiji - Vs - Shamsherali M. Zaver Virji, SR Kapale and Shabeer Kapale, Civil Application No. 20 of 2008, (SCU); Boney Katatumba - vs - Waheed Karim, Civil Application No. 27 of 2007 (SCU); Delia Almaida - vs - OrCoimo Rui Almaida, Civil Application No. 15 of 1990 (SCU),*** to support that view.

He concluded that it would be extremely prejudicial to the applicant if his intended appeal was not heard on its merits. He prayed that the application be allowed with costs to the applicant.

Mrs. Murangira, learned counsel for the respondent, strongly opposed the application. Relying on the affidavit in reply, she submitted that the applicant has not shown sufficient reason to justify grant of the application. While she concedes that there is a nine months delay since counsel for the applicant was informed of the availability of the record of proceedings from the Court of Appeal, Mrs. Murangira submitted that the applicant should take responsibility for the delay personally for the following reasons:- *Firstly, he changed his advocates three times and as a result can not pin point which firm of advocates caused the delay. Secondly, he had changed his mind not to pursue the appeal*

when he entered into a consent settlement with the respondent on how to settle the Court of Appeal decree which he has already started to pay.

Learned counsel further criticized the applicant for not attaching to the application the grounds of his intended appeal to show the likelihood of success of the intended appeal. She contended that the application lacks merit and prayed that it be dismissed with costs to the respondent.

Before I consider the merits of the application, I wish to observe briefly on what is stated in the application as grounds on which the application is based. Most of those so - called grounds are actually back ground facts leading to the application. They are repetitious and argumentative. A ground should be concise reason why the applicant is seeking court's intervention.

Having said that, I must point out that rule 5 of the Supreme Court Rules empowers this Court, for sufficient reason, to extend the time prescribed by these Rules or by any decision of the Court or of the Court of Appeal for the doing of any act. What constitutes *"sufficient reason"* however, is a matter that is left to the discretion of the court. (See ***Boney M. Katatumba - vs - Waheed Kevrim,*** (supra).

In ***Haji Mardin Matovu - vs - Ben Kiwanuka, Civil Application No. 12 of 1991 (SC),*** this Court while dealing with extension of time, held that ***"blunder of an advocate should not be visited on his client."***

In ***F. L. Kaderbhai*** and ***N. H. Valiji*** (supra), I referred to ***Zam Nalumansi - vs - Sulaiman Bale, Civil Application No. 2 of 1999 (SC),*** this Court re-stated the same principle that an error of counsel should not necessarily be visited on his client. This principle is now well settled.

In the instant case, it is clear from the affidavit evidence that the applicant instructed his lawyers promptly to prefer an appeal against the appellate decision of the Court of Appeal in Civil Appeal No. 30 of 2007. The lawyers lodged the Notice of Appeal in time and within time wrote a letter requesting for a certified copy of the record of proceedings

from the lower court. They duly copied and served the copy of the letter on counsel for the intended respondent.

However when the Register of the Court of Appeal by a letter dated 16th October 2008, informed them of the availability of the record of proceedings for collection upon payment, learned counsel for the intended appellant took no steps to collect the record of proceedings and prepare the Record of Appeal nor did they inform the applicant of the availability of the record of proceedings. As a result, they defaulted on instituting the appeal in accordance with rule 79(2) of the Rules of this Court.

Mrs. Murangira argued that the delay should be attributed to the applicant personally because he changed advocates three times and cannot pin point which firm of advocates caused the delay. Secondly, the applicant had changed his mind not to pursue the appeal when he entered into a settlement with the respondent on how to settle the Court of Appeal's decree which he has already, started paying.

With respect, I am unable to accept that argument. Just as an institution of an appeal is no bar to execution of a decree, similarly an execution of a decree does not necessarily prevent prosecuting an appeal. There is no evidence of withdrawal of the appeal. I am informed from Bar that the applicant entered into that settlement while he was in a Civil prison in execution of that decree. He clearly needed to regain his freedom to follow up his appeal. I am unable to attribute the delay to the applicant but to his former lawyers. That constituted sufficient reason to justify grant of this application.

As I had stated earlier in ***Kaderbhai and Valiji*** (supra), it would be a grave injustice to deny an applicant such as this one, to pursue his rights of appeal simply because of the blunder of his lawyers when it is well settled that an error of counsel should not necessarily be visited on his client.

In the result, I allow the application and order that the Memorandum and Record of Appeal be filed within 10 days from the date of this ruling. The respondent shall pay the applicant's costs of this application.

Dated at Mengo this: 5th day of August 2009.

G. M. OKELLO

JUSTICE OF THE SUPREME COURT