

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT  
KAMPALA

(CORAM: *Tumwesigye, Dr. Kisaakye, Arach-Amoko;*  
*Dr. Odoki Okello, JJ.SC*)

CIVIL APPLICATION NO. 1 OF 2013

GIULIANO GARIGGIO.....APPLICANT

VERSUS

CLAUDIO CASADIO.....RESPONDENT

*[Application for extension of time for instituting an appeal against the decision of the Court of Appeal in Civil Appeal No. 91 of 2003 delivered on the 16<sup>th</sup> December, 2009 and validation of documents already filed in the Supreme Court.]*

RULING OF THE COURT

This is an application by Notice of Motion under Rules 2(1) & (2), 5, 42 and 50(1) of the Rules of this Court, seeking orders for extension of time for instituting an appeal against the judgment of the Court of Appeal in Civil Appeal No. 91 of 2003 delivered on the 16<sup>th</sup> December 2009. The applicant further seeks the validation of the Notice of Appeal, Memorandum of Appeal and the Record of Appeal already filed in this Court. He also prays that the costs of the application be provided for.

The application is supported by the affidavit of the applicant sworn on the 31<sup>st</sup> January 2013.

### The Grounds:

The eleven grounds on which the application is based are set out in the Notice of Motion and repeated in the applicant's affidavit in support of the application. They are summarized as follows:

1. The applicant instructed his lawyers M/S Muhimbura & Co. Advocates to file an appeal against the judgment but due to an oversight, the lawyers failed to take the necessary steps to file the appeal within the prescribed time.
2. That the applicant subsequently instructed M/S Magellan Kazibwe of Kasolo & Kiddu Advocates to apply for leave to file a Notice of Appeal out of time, but out of mistaken belief, applied for leave to the Registrar of the Court of Appeal instead of the Supreme Court and who, nonetheless, granted an order of extension of time which Mr. Kahuma Andrew of M/S Kahuma, Kalayi and Kaheeru Advocates, Counsel for the Respondent approved.
3. Subsequently, the appeal was filed in the Supreme Court as Civil Appeal No.13 of 2010. However, long after the Notice of Appeal had been filed in the Supreme Court, Andrew Kahuma filed Misc. Application No. 1 of 2010, seeking to strike it out for having been filed on the basis of the extension of time granted by the Registrar Court of Appeal instead of the Supreme Court.
4. When the said application came for hearing before a full bench of the Supreme Court, the same Mr. Kahuma withdrew it.
5. On 22<sup>nd</sup> March, 2012, when the appeal came for hearing before a full bench of the Supreme Court Justices and after the applicants' counsel had closed his submissions, Kahuma challenged the competence of the appeal on the same grounds. The Justices of the Supreme Court struck out the appeal on the ground of incompetence.

6. The matter involves possible loss of valuable machinery worth a huge sum of money belonging to the applicant and the applicant's appeal has high chances of success.

7. The mistake or oversight of counsel and the Registrar of the Court of Appeal should not be visited on the applicant.

8. It is in the interest of justice that the time within which to file the appeal is extended and the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal already filed in court be validated.

**Background:**

The background to this application is the following: The applicant and the respondent were business associates. However, they fell out sometime in 2001. A dispute arose between them over some machinery which was at the material time lying at the premises of the respondent's company called Domus Aurea, at Plot 123, 6<sup>th</sup> Street, Industrial Area in Kampala. This resulted into a civil suit in the High Court by the applicant where he claimed that he had an oral agreement with the respondent to set up a joint venture to run a carpentry workshop and the machinery was his contribution to the joint venture. He prayed for a declaration that he is the owner of the machinery and for an unconditional order releasing the said machines to him, a permanent injunction, general damages and costs of the suit.

The respondent on the other hand denied the claim asserting that they had a sale agreement under which the appellant agreed to sell and actually sold some of the machinery to the respondent's company Domus Aurea, for UGX. 75,920,000/= out of which 30,000,000/= had already been paid to the applicant. That he was the one who had negotiated the recovery of the machinery on behalf of the applicant from Kava International Ltd. The respondent further set up a counter claim for commission totaling UGX 24,143,000/= that the applicant allegedly owed him for successfully

negotiating the deal on behalf of the applicant with Kava International Ltd and for selling some of the machinery to Kapkwata Saw Mills Ltd.

The trial judge did not believe the applicant and dismissed his claim but allowed the respondent's counterclaim. He was dissatisfied with the decision of the High Court and lodged Civil Appeal No. 91 of 2010 out of which the instant application arose, in the Court of Appeal. The respondent also cross-appealed against parts of the trial judge's decision. The Court of Appeal dismissed the main appeal but allowed the cross-appeal. The applicant wished to appeal to this Court but the time for filing the appeal had long expired. His lawyers then filed an application before the Court of Appeal for extension of time to file the appeal. The Registrar of the Court of Appeal entertained that application and granted it.

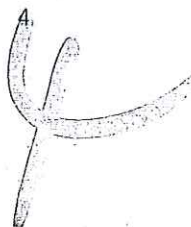
Subsequently, the applicant lodged Civil Appeal No. 13 of 2010 in this Court. However, in their submissions before the Supreme Court, the respondent's counsel challenged the competence of the appeal on the ground that the Registrar of the Court of Appeal who had granted the extension of time which allowed the applicant to file it, lacked the jurisdiction, and prayed that the appeal be struck out.

The Supreme Court, after a thorough perusal of the record, established that mistake and struck out the appeal with costs to the respondent, hence this application.

The respondent opposed the application and the reasons for his opposition are set out in the affidavit in reply sworn on the 18<sup>th</sup> August, 2014 by Ms. Lilian Khalayi, a partner in the law firm of M/S Kahuma, Khalayi & Kaheru Advocates.

**Submissions:**

The parties filed written submissions. At the hearing of the application on the 25<sup>th</sup> September 2014, Mr. Michael Kaggwa and



Mr. Muwawu James appeared for the applicant while Mr. Andrew Kahuma represented the respondent. They adopted the written submissions.

Counsel for the applicant submitted that the failure to institute the appeal in time was due, firstly, to an oversight of his former lawyers who delayed to file the appeal in the Supreme Court in time. Secondly, it was due to the inadvertence of his subsequent lawyers who wrongly filed the application for extension of time to the Registrar of the Court of Appeal instead of the Supreme Court. He submitted further that this was compounded by the Registrar who entertained the said application and granted the order sought when he had no jurisdiction. He contended that it is now settled that the omission or mistake or inadvertence of counsel, even though negligent, ought not to be visited on the litigant.

Counsel asserted that the error of the court official coupled with that of the applicant's counsel, amount to sufficient reasons for extension of time to the applicant to appeal-out of time. He prayed that the Court exercises its discretion in favour of the applicant. In support of his prayer, he cited *Florence Nabatanzi vs Naome Zinsobedde, SC Civil Application No. 5 of 1997*; *Karia & Anor vs Attorney General SC Civil Application No. 1 of 2003*; *Godfrey Magezi & Another vs Sudhir Ruparelia SC Civil Application No. 10 of 2002*.

Regarding validation, counsel submitted that this Court has long accepted the position that where there is already an appeal filed, despite the mistake and incompetence of the appeal, the court validates the appeal which has been filed out of time. He prayed that the documents already filed in this Court, be validated. In support of his submissions on this point, he relied on the decisions of the Supreme Court in *Crane Finance Co. Ltd vs Makerere Properties SC Civil Application No. 1 of 2001*; *Mansukhala*

*Ramji Karia Vs. AG (supra) and Godfrey Magezi v Sudhir Ruparelia Civil Application No. 10 of 2002 (also supra).*

Without prejudice to the foregoing, counsel submitted that, should the court find that the applicant's appeal has since been struck out and the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal are no longer pending in this court and cannot be validated, the applicant be allowed to re-file the said documents.

Learned Counsel for the respondent opposed the application on a number of grounds. Firstly, he argued that the nine (9) page submissions violate Rule 5(a) of Practice Direction No. 2 of 2005 which prescribes a maximum of 5 pages in case of applications. He prayed that the submissions should be rejected and the matter be treated as if the applicant never filed submissions and be dismissed with costs for that reason.

Secondly, counsel attacked the form of the Notice of Motion for violating the Court's Rules which require motions to be brief and concise without repeating the grounds in the affidavit. He asserted that this practice was condemned by the Supreme Court in the recent case of *Goodman Agencies Ltd vs Attorney General & Anor, Constitutional Application No. 1 of 2012* and invited the Court to reject or dismiss the application with costs for this reason as well.

Regarding the substance of the application, Counsel submitted that the application is untenable because the applicant has not shown sufficient reason why the appeal was not filed in time. He submitted further that the reasons for delay are mere afterthoughts. There is no affidavit from the applicants lawyers admitting that the applicant instructed his former lawyers to file an appeal within the prescribed time or that they were under a mistaken belief when they applied for leave from the Court of Appeal instead of this Court, as alleged.

He further argued that the applicant was lying that he instructed his then lawyers M/S Muhimbura & Co. Advocates to file an appeal because there is on record an affidavit sworn by the applicant in Civil Application Nos. 18 and 20 of 2010, that when the judgment was delivered in the Court of Appeal, he was not in the country and Mr. Muhimbura did not inform him of the outcome of the case until he discovered it himself a day after his return. His hands are therefore dirty and he cannot be granted the equitable remedies he seeks. Counsel also contended that the appeal had no possibility of success at all. The respondent stands to be greatly prejudiced and inconvenienced if this application is granted because since 2003, he has been prevented from realizing the fruits of his successful litigation by the applicant's actions.

Lastly, counsel contended that, having been struck out by the Supreme Court in 2013, Civil Appeal No. 13 of 2010 was concluded and there is nothing to be validated. That the applicant should have instead applied for leave to file a fresh Notice of Appeal out of time to commence the process of appeal afresh, but the applicant is not seeking such an order in this application. All in all, he prays that the application should, in the interest of justice and for all the reasons enumerated above, be dismissed with costs.

Alternatively but without prejudice to the foregoing, Counsel submitted that, if this Court is inclined to grant this application, which it should not, Court should, pursuant to its powers under Rule 2(2) of the Rules of this Court, order the applicant to deposit the sum of **UGX. 200,000,000/= (Two hundred million)** for the due performance of the decree.

**Issues:**

Apart from the two preliminary points, from the pleadings and submissions, there are, in our view, basically two issues to be addressed by the Court under this application, namely:

1. Whether the applicant has satisfied the conditions for extension of time for instituting the appeal.

2. Whether the applicant has complete and proper documents in court to be validated.

**Preliminary Points:**

There are some issues raised in the arguments of counsel for the respondent which we consider as preliminary and wish to dispose of before we consider the arguments on the merits of the application. The first of the preliminary points was about the failure of counsel for the applicant to comply with paragraph 5 of Practice Direction No. 5 of 2005 which restricts the length of written submissions in support of or opposition to an application to five pages. Learned counsel for the respondent submitted that counsel for the applicant had violated this paragraph when he filed written submissions of nine papers. Learned counsel prayed that the applicant's written submissions be rejected as it was so filed without leave from the Court and the matter be treated as if the applicant never filed any submissions in the result that the applicant's application be dismissed with costs.

Counsel for the applicant made a rejoinder in which he conceded that he had filed submissions of nine pages to establish "**sufficient reason**" required for the success of the application. He contended that the length of the submissions was dictated by the complexity of the case. He prayed that this Court exercises its inherent powers to allow the submissions.

We have carefully considered the point raised above. In our view, failure to comply with the Practice Direction amounts to failure to comply with court procedure. This is bad practice which has been condemned by this court on several occasions. We would have ordered the applicant to go back and redraft the submissions to comply with the Practice direction, however, in the interest of



justice; the impugned written submissions will not be rejected or struck off the record as prayed. Counsel is however sternly warned against repeating such a practice in future.

The second complaint faulted the form of the Notice of Motion in this application. Learned counsel for the respondent complained that the Notice of Motion in this case violated this Court's Rules which require motions to briefly state the order sought and the grounds of the application. He submitted that the grounds on which the application is based are clumsily set out and virtually repeated in the affidavit in support of the application, a practice this Court criticized in Goodman Agencies Ltd vs. Attorney General & Anor, Constitutional Application No. 01 of 2012. He prayed that the Notice of Motion be rejected and or the application be dismissed with costs.

On the other hand, learned counsel for the applicant responded that the Notice of Motion in this application satisfies the requirements of the law. It sets out the orders sought and the grounds for the application as detailed in the affidavit in support. In the alternative, learned counsel submitted that, should the court find that the Notice of Motion was otherwise, then it should, in the interest of justice, like in the case of Goodman Agencies Ltd (supra), consider the merits of the application.

The form of Notice of Motion is governed by Rule 42(1) & (2) of the Rules of this Court. The provisions of the said Rule read as follows:

*"(1) Subject to sub-rule (3) of this rule and any other rule allowing informal application, all applications to this court shall be by motion which shall state the grounds of application.*

*(2) A notice of motion shall be substantially in Form A in the first schedule and shall be signed by or on behalf of the applicant.*

9

(3).....”

Form A in the first schedule to the Supreme Court Rules requires a Notice of Motion to set out briefly and concisely, the orders sought and the grounds on which the application is based.

We looked at the impugned Notice of Motion dated the 31st January 2013. We agree that the grounds contained in the Notice of Motion are not only prolix but have also been reproduced in the greater portion of the contents of the supporting affidavits. A supporting affidavit is intended to provide the requisite evidence to substantiate the grounds of the application. The procedure adopted in this application, like in Goodman Agencies Ltd (Supra), is clearly improper and is symptomatic of the deteriorating legal practice in this country which must not be condoned by the courts of law. There is therefore merit in the complaint.

In the case of Goodman Agencies, a similar mistake was made in drafting the documents and this court warned that:

**“ ... This is bad practice and must stop.”**

We repeat that warning with equal force in this Ruling. However, since the fault has not caused any prejudice to the respondent, we shall, in the interest of substantive justice, consider the merits of the application.

**Consideration of the main arguments:**

***Issue No. 1: Whether the applicant has satisfied the conditions for extension of time for instituting an appeal.***

As we move to consider the merits of this application, it is instructive to note that Rule 5 of the Rules of this Court under which extension of time within which to file an appeal is sought gives these Court wide powers to extend the period provided that “sufficient reason” is shown. Sufficient reason must relate to the inability or failure to take the particular step in time. It was so held

by this Court in a number of decisions and by the former Court of Appeal for East Africa. (See: Nabatanzi vs Naome Zinsobedde Civil Application Supra; Karia & Anor vs Attorney General Godfrey Magezi & Another vs Sudhir Ruparelia (Supra) and Shanti vs Hindocha (1973) EA 208.

The Rule does not define what amounts to "sufficient reason". It is however settled law that the fact that an appeal appears likely to succeed cannot of itself amount to "sufficient reason". It was so held in Shanti vs Hondencha (Supra), where the Court of Appeal for Eastern Africa said:

*"The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the most persuasive reason that he can show, like, in Bhatt's case, is that the delay has not been created or contributed to by a dilatory conduct on his part. But there may be other reasons and these are all matters of degree. He does not necessarily have to show that his appeal has reasonable prospect of success or even that he has an arguable case..."*

This rule envisages four scenarios in which extension of time for the doing of an act so authorized or required may be granted, namely:

- (a) Before the expiration of the limited time;
- (b) After the expiration of the limited time;
- (c) Before the act is done; and
- (d) After the act is done.

See: Godfrey Magezi & Another vs Sudhir Ruparelia and Crane Finance Co. Ltd vs Makerere Properties Ltd, (Supra).

The situation in the instant case is a combination of scenarios (b) and (d). The applicant deponed in paragraphs 5 and 6 as follows:

*"5. That I instructed my former lawyers M/S Muhimbura & Co. Advocates to file an appeal against the Court of Appeal judgment to the Supreme Court.*

*6. That my former lawyers delayed to take the necessary steps to file the appeal within the prescribed time whereof I again instructed Magellan Kazibwe formerly of M/S Kasolo & Kiddu to apply for leave for extension of time within which to file my appeal".*

The respondent challenged the above averments in paragraph 9 of the affidavit in reply of Ms. Lilian Khalayi in this manner:

*"9 That the applicant is lying that he instructed his then lawyers M/S Muhimbura & Co. Advocates to file an appeal because in the Court of Appeal Civil Application Nos. 18 and 20 of 2010, the applicant deponed that when judgment was delivered in the Court of appeal, he was not in the country and his then lawyers M/S Muhimbura did not inform him of the outcome of the case until he discovered it himself a day after his return. See Annexure A1 and A2".*

Annexure A1 is application No.18 OF 2010 with the supporting affidavit sworn by the applicant on the 11<sup>th</sup> day of February 2010. Ground (b) of the application and paragraphs 4 and 7 of the supporting affidavit read thus:

*"(b) That by the time the judgment was delivered on the 16/12/2009, the applicant was not in court and his lawyers did not inform him about the judgment*

date and the outcome thereof until the applicant discovered by himself on the 19/01/2010 one day after he had come back from Italy.”

“4. That by the time the judgment was delivered on the 16/12/2009 I was not in court and only came to know about it one day after I had come back from Italy. Refer to copies of the travel documents attached herewith and collectively marked as annexure “B”.

5. That my former lawyer Mr. Paul Muhimbura of M/S Muhimbura & Co. Advocates did not inform me of the judgment date nor did he brief me on the outcome of the appeal.

6. That I am advised by my said new lawyers that my former lawyer was supposed to lodge the Notice of Appeal within 14 days from the 16/12/2009.

7. That since my former lawyers did not inform me of the outcome of the appeal, I could not instruct him to appeal against the decision.

Annexure “A2” is Application No. 20 of 2010 with the supporting affidavit sworn by the applicant on 5<sup>th</sup> February 2010, repeating the same reasons in ground (c) and averments in paragraphs 5 to 8 respectively. There is no evidence as to the time and the manner the instruction had been given as claimed by the applicant in his supporting affidavits.

In view of the above, we are not persuaded that the applicant had instructed his former lawyers M/S Muhimbura and Co. Advocates to file the appeal against the decision of the Court of Appeal in Civil Appeal No. 91 of 2013 as the applicant claimed in his affidavit in support of this application.

However, in Bhatt vs Tejuwat Singh (1962) EA 497, the Court of Appeal for East Africa granted an extension of time where the delay was attributed entirely to the court official.

X  
In the case before us, it is our considered view that, the failure of M/S Muhimbura & Co Advocates, the former Counsel of the applicant to inform him of the outcome of the appeal, the mistake of Magellan Kazibwe who filed the application for extension of time in the wrong court and the inadvertence of the Assistant Registrar of the Court of Appeal, a judicial officer who entertained an application for and granted extension of time to file an appeal when he had no jurisdiction, amounted to a "sufficient reason" to justify the grant of the extension of time sought.

**Issue No.2: Whether the applicant has on Court record documents to be validated.**

This Court has quoted with approval Crane Finance Co. Ltd vs Makerere Properties Ltd (supra) the following obiter dictum expressed by Odoki JSC ( as he then was) in The Executrix of the Estate of Christine Mary N. Tebajukira & Anor vs Joet Grace Shalita SC Civil Application No. 8 of 1988, thus:

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

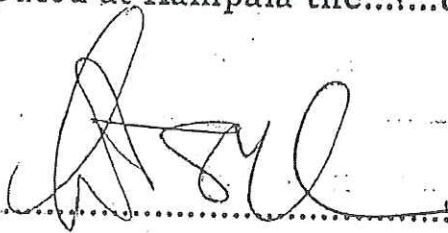
Clearly, where an applicant has on the Court record complete documents which are in proper form save for their late filing, extension of time has the legal effect of validating them or excusing their late filing. In the instant case, the applicant had filed out of time the Notice of Appeal and eventually Civil Appeal No. 13 of 2010. This appeal was however, later on struck out by this Court at the instance of the respondent's counsel on ground of incompetence. That striking out of the appeal legally, in our

opinion, wiped out the documents like the Notice of Appeal, Memorandum of Appeal and Record of Appeal filed to institute the said appeal. Therefore, the applicant no longer has any document on the Court record in respect of that appeal to be validated. The answer to this issue is accordingly in the negative.

In the result and for the reasons given above, we rule that the interest of justice will better be served by giving the applicant an opportunity to have his appeal considered on merit so as to put to rest this protracted litigation. In our view, the respondent will not be unduly prejudiced since the machinery which form the core subject of the dispute between the two parties is still in his possession. He can surely wait a little longer for the dispute to be resolved finally. The application is accordingly granted and it is ordered that:

1. The applicant shall file and serve the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal within fourteen (14) days from the date of this order.
2. The costs of the application shall abide the outcome of the intended appeal.

Dated at Kampala the 28<sup>th</sup> day of November 2014



J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

*E. Kisaakye*

Dr. E. KISA AKYE

JUSTICE OF THE SUPREME COURT

*M. S. Arach-Amoko*

M. S. ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

*B. J. Odoki*

Dr. B. J. ODOKI

AG. JUSTICE OF THE SUPREME COURT

*G.M. Okello*

G.M. OKELLO

AG. JUSTICE OF SUPREME COURT