

5 THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA

10 AT KAMPALA

[CORAM: NSHIMYE, A.G.J.S.C.]

CIVIL APPLICATION NO 09 OF 2017

15 JAMES BWOGI&SONS ENTERPRISES LTD :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

20 1. KAMPALA CITY COUNCIL

2. KAMPALA DISTRICT LAND BOARD::::::::::::::::::::::::::::::::: RESPONDENTS

RULING OF A.S NSHIMYE AG. JSC

25 By a Notice of Motion, the applicant sought for an order of Court Extending time within which to serve a Notice of appeal, under section 8 of the Judicature Act and rules 5,42,43 and 50 (1) of the rules of the Court.

The grounds of the application as set out in the Motion are that

- 30 1 *“Judgment in Court of Appeal Civil Appeal No.52 of 2009 was delivered on 1<sup>st</sup> August 2017.*
- 2 *Notice of Appeal was lodged in the Court of Appeal registry on 4<sup>th</sup> August 2017*
- 3 *There was delay to sign and seal the Notice of Appeal, until 14<sup>th</sup> August 2017.*
- 4 *The Notice of Appeal was served slightly late due to the delay to sing and seal it.*
- 35 5 *The substantive appeal was filed promptly on 7<sup>th</sup> September 2017 and served on the Respondents on 8<sup>th</sup> September 2017.*
- 6 *The subject matter of the appeal is a prime property at plot 38 Nile Avenue Kampala.*
- 7 *The interest of Justice demands that Civil Appeal No.09 of 2017 be heard on its*
- 40 *merits.”*

According to counsel for the applicant Mr. Nelson Nerima and the supporting affidavit of Counsel Benedict Lwanga Nsibambi, the applicant was not satisfied with the judgment of the Court of Appeal in Civil Appeal No. 52/2009 delivered on 1<sup>st</sup> August 2017. He lodged a Notice of Appeal in the Court of Appeal on 4<sup>th</sup> August 2017, within the time prescribed by the law for lodging a Notice of Appeal.

It was submitted for the applicant that the substantive appeal was promptly filed on 7<sup>th</sup> September 2017 and served on the respondent on 8<sup>th</sup> September 2017. This evidence of filing the appeal on time and service to the respondent is not in dispute.

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However, the applicant pleaded and his counsel argued that the Registrar of the Court of Appeal did not sign the lodged Notice of Appeal on time. The Clerk of Counsel for the applicant received and served the Respondent's Counsel on 14<sup>th</sup> August 2017 which was 3 days out of time. In any case, counsel added that, the two days preceding Monday 14/8/2017 when service was effected, were Saturday and Sunday which were not working days. Counsel apportioned the blame on to the Court Staff and the court process which failed to make available a signed Notice of Appeal on time, in spite of several checks by Daniel Kasozi , the clerk of Counsel for the applicant.

20 Counsel urged me to find that there was sufficient reason why service of the Notice of Appeal was out of time, and grant the application so that the Notice of Appeal and the appeal itself are validated. He relied on the authority of ***Joseph Muluta vs Sylvano Katama, SC Civil Application No 02 of 1999*** to submit that if the application is granted no injustice will be caused to the respondents.

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He also relied on the authority of ***Godfrey Magezi & Brian Mbazira vs Sudhir Ruparellia*** of this court ***Misc Application 06 of 2003*** to the effect that where there was an application for extension of time and one to strike out the appeal, the one for extension of time, ought to be disposed of first. He prayed that the application be granted with costs to abide the outcome of the appeal.

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Counsel Mwanja Brian held brief for Counsel Denis Byaruhanga for the 1<sup>st</sup> Respondent. The 1<sup>st</sup> respondent filed no affidavit in reply and had nothing to say.

However, Counsel Paul Kaweesi for the 2<sup>nd</sup> respondent opposed the application.

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In his view, the application was an afterthought and was intended to defeat the respondent's earlier application *No.33/2017* to strike out the appeal on ground of the applicant's failure to take an essential step in the process of appeal. He pointed out that the said application was pending hearing and awaiting the next convenient civil session. He suggested that I should adjourn this application under rule 50 (1) of the rules of court to a full bench which would also hear the application to strike out the appeal.

In the **Alternative**, he submitted that for the applicant to succeed, he had to show sufficient reason why he did not serve. He relied on the authority of *Boney Katatumba vs Waheed Karim, Civil Application No 27 of 2007* in which this court defined sufficient reason as that thing that prevent the applicant from taking the essential step. According to counsel, the application did not disclose why the applicant did not serve on time.

In his view there should have been a supporting affidavit from an official of court to corroborate the affidavit in support of the applicant that the Registrar delayed in signing the Notice of Appeal. He pointed out that the purported letter of 5/12/2017 from court was not attached to the affidavit in rejoinder. Therefore there, was no corroborative evidence from court.

He also distinguished the case of *Mulata* (Supra) from the circumstances of the present application. According to him, *Mulata's* case was dealing with mistake of Counsel which should not be visited on a client. That in this case mistake of counsel was not pleaded.

Counsel wondered why the Notice was not served on Friday the day it was received from court as deponed, but waited until Monday.

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Counsel contended that the applicant was guilty of inordinate delay and the application was intended to defeat the earlier application. He prayed that the application be disallowed with costs.

5 In rejoinder Counsel Nelson Nerima submitted that once his learned friend indicated that he was ready for the hearing of this application, it was too late to invoke rule 50(1) of the rules of this court.

As to when the signed Notice of Appeal was received from court, in the absence of contrary  
10 evidence, the evidence Daniel Kasozi the law clerk, should be taken as the truth. He reiterated his earlier prayer that the application be granted and have the appeal validated.

**Consideration:**

Rule 5 of this court under which the application for extension of time was brought provides:

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***“The court may, for sufficient reason, extend the time prescribed by these Rules or by any decision of the court or the Court of Appeal for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any  
20 such time shall be construed as a reference to the time as so extended.”***

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The power given to court under the above rule is discretionary. Before it is exercised, court ought to find that “sufficient reason” has been shown by the applicant for not doing what he was supposed to do after the pronouncement of the judgment of the Court of Appeal.

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He promptly filed the Notice of Appeal and thereafter within half the time of 60 days prescribed within which to file the appeal, did so. That demonstrated zeal on the part of the applicant.

Notwithstanding the above promptness, it is not shown why it took counsel for the applicant from 14<sup>th</sup> August 2017 to file this application for extension of time on 7<sup>th</sup> December 2017.

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Nearly 4 months after service of the Notice of appeal which was out of time.

In the case of **Boney M. Katatumba Vs Waheed Karim** (Administrator of late Suleiti Haji's Estate SC, xvii application No. 27 of 2007) cited by counsel for the 2<sup>nd</sup> respondent, Justice Joseph Mulenga (RIP) was dealing within a similar application and he had to say on what constituted a sufficient reason.

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***“Under r.5 of the Supreme Court Rules, the Court may, for sufficient reason, extend time prescribed by the Rules. What constitutes “sufficient reason” is left to the Courts 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.” (Underlining is mine)***

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In the instant case the applicant has shown that he promptly filed the Notice of appeal and the appeal. If by human error he did not realize that service was out of time, why did it take Counsel nearly 3 months to apply for extension of time after the 2<sup>nd</sup> respondent filed an application to strike out the appeal itself.

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Secondly apart from the evidence of the law clerk, who claimed that he went to court several times to check whether the Registrar had signed the Notice of Appeal no other evidence was obtained from court to confirm that the alleged delay was occasioned at the court.

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I uphold the submission of Counsel for the 2<sup>nd</sup> respondent that the purported letter from the Registrar dated 16<sup>th</sup> January 2018 is not part of the affidavit in rejoinder. It is not marked “A” as indicated in the affidavit and the date on which it was annexed is plain blank. This unfortunately demonstrated gross professional carelessness on the part of counsel for the applicant.

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Although the mistake of counsel was not pleaded as submitted by the Counsel for the 2<sup>nd</sup> respondent, when court is considering all the circumstances of the matter, it is not precluded from inferring matters which are otherwise appear obscured.

Court, before exercising its discretion ought to lift the veil to see the party who is likely to suffer most if justice is denied on the ground of fault or error of Counsel.

5 The subject matter according to the evidence on record is a prime property in the city centre, a dispute which cannot be truly and finally resolved without hearing the appeal on merit.

In this case, it is the applicant who would be denied the right to present and prosecute his appeal in the highest court of the land. He would in addition be condemned to pay exorbitant costs an  
10 account of deficiency of Counsel.

I am also alive to the fact that the people in whose name I exercise justice expect me to dispense substantive justice. In consideration of the pecurior circumstances and submission of all counsel. I find that sufficient reason has been established to warrant the grant of the application.

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**Decision and Order:**

Extension of 3 days is granted hence resulting in validation of the Notice of Appeal and the appeal itself.

20 Costs: Costs normally follow the event, however it is in the discretion of court to order who should bear the burden of costs.

Having found shortcomings on the part of Counsel for the applicant as pointed out earlier, I order that the firm of Nambale Nerima, & Advocates for the applicant, to personally pay the costs of this application to counsel for the 2<sup>nd</sup> respondent before fixture and hearing of the main appeal. I  
25 fix and allow the costs at **Shs 2,000,000/= (Two million)** Counsel for the 1<sup>st</sup> respondent did not reply or oppose the application. He will bear his own costs.

**Dated at Kampala this...6th.....day of .....February.....2018**

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A.S. NSHIMYE  
**AG. JUSTICE OF THE SUPREME COURT**