

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO 12 OF 2014**

(Coram: Tumwesigye, Kisaakye, Arach-Amoko, Opiio-Aweri, Tibatemwa-Ekirikubinza, JJSC.)

MULINDWA GEORGE WILLIAM:::APPELLANT

VERSUS

KISUBIKA JOSEPH::: RESPONDENT

*(An appeal from the decision of the Court of Appeal (Mwangusya, Mwendha, Kakuru) in Civil Reference No. 67 of 2013 delivered on 20<sup>th</sup> February 2014).*

**JUDGMENT OF THE COURT**

This is an appeal from the decision of the full Coram of the Justices of the Court of Appeal that upheld the Ruling of a single Justice of Appeal (Kavuma JA, as he then was) dated 18<sup>th</sup> April 2013, in Civil Reference No. 38 of 2009.

Background:

The background to the appeal is long and checkered, but from what can be gathered from the scanty record of proceedings, is briefly as follows:

In 1991, the appellant filed Civil Suit No. 689 of 1991 in the High Court against the respondent seeking among others, a declaration that he and the respondent were partners in the business called

Makerere High School and that he was entitled to a share in the assets of the said business. The respondent counterclaimed. The suit was heard inter- parties by Berko J who dismissed it on the 20<sup>th</sup> of June, 1995 and entered judgment on the counterclaim in favour of the respondent.

He applied for extension of time within which to appeal to the Supreme Court, the appellate court then, but the application was dismissed by Oder, JSC. He then applied for review of the judgment but that is application was also dismissed by Mukanza J, for want of prosecution on the 27<sup>th</sup> August, 1998.

Six years later, the appellant filed HCCS No. 827 of 2004 against the respondent, raising the very same facts as those he had pleaded in HCCS No. 689 of 1991 which Berko J, had dismissed. The only addition was the allegation that the respondent had acted fraudulently when he discontinued the appellant's services as Bursar while HCCS No. 689 of 1991 was still pending hearing.

Before the fresh suit could be heard, counsel for the respondent applied for security for costs. The learned High Court Registrar, Her Worship Flavia Anglin,( as she then was), who heard the application granted it and in her Ruling dated 8<sup>th</sup> November, 2005, ordered the appellant to deposit the sum of shs. 2,500,000 (two million and five hundred thousand shillings only) as security for costs within 30 days from that date or HCCS No. 827 of 2004 would be dismissed. He did not pay as ordered and the suit was dismissed in January 2006.

The appellant engaged the learned Registrar to review that order but she declined on account that she had no jurisdiction to do so. She in turn referred the matter to Bamwine J, as he then was. On the 29<sup>th</sup> September 2008, the learned Judge dismissed the Reference as well for lack of merit.

Aggrieved by the decision of the learned Judge, the appellant then filed Civil Application No. 10 of 2009 in the Court of Appeal for extension of time to appeal against the order of dismissal and

tendered a Medical Form from Divine Clinic and Laboratory Services at Kanyanya dated 28<sup>th</sup> September 2008, to show that he was medically attended to in the said clinic on that date. That is why he had failed to lodge the appeal within the time prescribed by law. However, the learned Registrar of the Court of Appeal His Worship Asaph Ruhinda, (as he then was), who heard the application was not convinced that the said medical form could account for all the delay. Consequently, he dismissed the application for lack of merit on the 2<sup>nd</sup> June, 2009.

The appellant was aggrieved by that Ruling and appealed against it under Civil Reference No. 38 of 2009 before a single Justice of the Court of Appeal, the Hon. Kavuma JA, (as he then was). Likewise, the learned Justice found that the appellant had failed to furnish court with sufficient reasons to enable the court to exercise its discretion to grant the order sought. He dismissed that application with costs on the 18<sup>th</sup> April, 2013.

The appellant was dissatisfied with that Ruling and filed Civil Appeal No. 67 of 2003 to the full bench of three Justices of the Court of Appeal named herein. In their Ruling delivered on the 20<sup>th</sup> February, 2014, their Lordships upheld the decision by the single Justice and dismissed the Reference with costs as well. He was aggrieved still by the decision of the full bench and filed the instant appeal seeking orders that this Court reverses the decision. He also prayed for costs of the appeal.

#### Grounds of Appeal:

The grounds of appeal are set out in the Memorandum of Appeal filed in this Court on the 22<sup>nd</sup> July, 2014 where the appellant set out 29 grounds of appeal and an Additional Memorandum of Appeal dated 3<sup>rd</sup> August 2013 where he raised 16 grounds of appeal. Essentially, both documents contain submissions mixed up with what the appellant considers as grounds of

appeal. This obviously offends Rule 82(1) of the Supreme Court Rules which provides that:

***“(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make.”***

The appeal would actually be struck out for this reason. However we have considered the fact that the appellant is not only a lay person who is unrepresented by counsel but he is also of advanced age. Besides, he strongly believes that the manner in which the courts below have treated him has been in total disregard of the Constitutional command under Article 126 and has led to grave injustice to him. That is why he has come to this Court for the final decision. Consequently, we have refrained from exercising that power and tried our level best to discern from the two Memoranda of Appeal what the actual complaint of the appellant is. As far as we are able to discern from the above mentioned documents and the appellant’s submissions on record, however, it is clear to us that the main ground of appeal is contained in paragraph 18 of the original Memorandum of Appeal, namely that:

***“18. The Court of Appeal Coram comprising of the Honorable Mr. Justice Eld ad Mwangusya JA, Honourable Lady Justice Faith E.K Mwendha JA and Honourable Mr. Justice Kenneth Kakuru JA defied Article 126 (2) (a) (b) (c) and (e) of the Constitution of Uganda by declining to grant the Reference but upheld the Ruling of the single Justice and thereby dismissed the Reference with costs without having administered substantive justice.”***

His prayer is for orders that:

- a) The dismissal of Application No.67 of 2013 is set aside.
  - b) Costs of the appeal be provided for.
- Representation:

The appellant represented himself while Mr. Geoffrey Mutaawe represented the respondent.

Submissions:

Both parties filed written submissions and court allowed them to make brief highlights at the hearing of the appeal.

The appellant made very lengthy submissions literally repeating the arguments contained in his Memoranda of Appeal and addressed the grounds of appeal generally. The gist of his complaint is that the learned Justices of the Court of Appeal relied on technicalities to dismiss his application for extension of time to file a Notice of Appeal. This was contrary to:

1. Article 126 (2) (a) (b) (c) (d) (e) which orders courts to ensure that justice is done to all irrespective of their social or economic status and that substantive justice shall be administered without undue regard to technicalities.
2. Article 2(1) which states that the Constitution is the Supreme law of Uganda which has a binding force on all persons and authorities in Uganda and Article 2(2) which declares that any law or custom that is inconsistent with any of the provisions of the Constitution is void and the Constitution must prevail.
3. Article 274 (1) of the Constitution that states that all existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.

He reiterated his prayer that:

- a) The dismissal order be set aside with costs in this court and the courts below; and
- b) Articles 126 and 274(1) of the Constitution be followed.

Mr. Mutaawe supported the decision of the courts below. He gave a detailed history of the case beginning from 1991 when the appellant filed HCCS NO.869 OF 1991 up to the time of this appeal and his contention is that the appellant is wasting the Court's time with his endless pursuit to overturn the Decree in HCCS No.689 of 1991 where his claims against the respondent were conclusively determined in 1995 by Berko J. According to Mr. Mutaawe, granting the appellant time to engage the Courts in his frivolous, speculative and vexatious cases would therefore only end in wasting more time and resources on what counsel described as "still - born" matters. His position is that there ought to be an end to litigation. He accordingly prayed that the appeal be dismissed with costs to the respondent in this Court and in the Courts below.

Consideration of the appeal by Court.

As summarised above, the main complaint by the appellant is that the Justices of the Court of Appeal dismissed his appeal against the decision of the single Justice on the basis of technicalities and not substantive justice and this contravened Articles 126, 2 and 274 of the Constitution. Counsel for the respondent on his part submitted that the appeal lacks merit. The Court of Appeal rightly upheld the decision of the single Justice that dismissed his application for extension of time to file a Notice of Appeal against the decision of the High Court.

The issue for resolution by this court is whether the learned Justices of the Court of Appeal dismissed the appellant's Reference on the basis of mere technicality as alleged.

We have carefully perused the record of proceedings and the judgment of the Court of Appeal that is the subject of the instant appeal. We find that in dealing with the appellant's Reference, the learned Justices based their decision on Rule 5 of the Court of Appeal Rules which provides that:

*“Court may for sufficient reason, extend the time limited by these Rules by any decision of the Court or High Court for the doing of any act authorized or required by the 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 such time shall be construed as a Reference to the time as extended.”*

The learned Justices then stated the settled law that the expression “SUFFICIENT CAUSE” QOQS to the justification of the reason given to the party’s inability to comply with the time limits settled by law. They referred to the Court of Appeal decision in the case of Hondon Daniel vs. Yolamu Egondi, Court of Appeal Civil Application No. 67 of 2003 (unreported) where it was specifically held that:

*“...the sufficient cause must relate to the inability or failure to take the necessary step within the prescribed time... if the applicant is found to be of dilatory conduct, the time will not be extended... it is not necessary for the applicant to establish that the appeal has good chances of success, but where the fact is established, the Court will normally take it into account. ”*

The learned Justices of Appeal then went on to observe as follows:

*“ We patiently and attentively listened to the appellant’s address to Court, there is virtually nothing as recorded above which was near to justification for having failed to take the necessary step of filing the appeal in time.*

*It was evident from his address that the memorandum of Reference was different from his submissions.*

*In his submissions he attributes that delay to Court Clerks. He did not raise it anywhere in his memorandum of Reference. The matter started as far back as 1991 and judgment was given in 1996. He sought review which was not successful. He filed a suit similar to what he filed in 1991 which was to be heard on condition that he deposited security for costs of shs. 2,500,000/=. He refused to pay security for costs. He alleged bad faith on the learned single Justice. The alleged document to prove ill health from Divine Clinic and Laboratory Services Kanyanya was found not competent by both the learned Registrar of the Court of Appeal and the single Justice, which prevented him to file the appeal in time. In short, his submissions were not connected to the Reference before Court.*

*According to the Ruling of the single Justice which is on record, the appellant took five months from the date of the Ruling before taking any action. The single Justice found that this was inordinate delay. The appellant had argued that since the*

*Courts are custodians of justice, substantive justice had to be administered without undue regard to technicalities, i.e. Article 126 (2) (e) of the Constitution.*

*We are persuaded and agree with the decision in the case of Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank, SC Civil Application No. 2/97 where it was held that:*

*'...a litigant who relies on the provisions of Article 126 (2) (e) of the Constitution must satisfy the Court that in the circumstances of a particular case before the Court it was not desirable to pay undue*

*regard to the relevant technicality. Article 126 (2) (e) is not a magic wand in the hands of defaulting litigants.”*

The learned Justices of the Court of Appeal then considered whether the five months delay as opposed to seven days under the Rules was inordinate delay given the fact that the appellant had told Court that he had got the Ruling from the Court late. They further took note of the fact that the appellant was a lay man who may not have been aware of Rule of the Court of Appeal Rules which provides for computation of time.

Nonetheless, they observed that even as a lay man, he did not tell Court when he got the Ruling as it would have enabled the Court to know or is compute exactly when he received the certified proceedings. However, bearing in mind the checkered background of the case, particularly the fact that the appellant had refused to deposit security for costs ordered by Court with no plausible explanation, they formed the view that the chances of him succeeding on appeal even if the Court were to grant the Reference were very limited to say the least.

Consequently, the learned Justices upheld the finding by the Registrar and the single Justice of the Court of Appeal that 5 months was inordinate delay and dismissed the Reference with costs.

As pointed out earlier in this judgment, in the instant appeal, it is clear that the appellant does not complain that the Justices of the Court of Appeal exercised their discretion wrongly or as a result of any misdirection. He does not even dispute the finding of fact by the two courts that the reason he gave for the delay was insufficient to justify the grant of the order sought. His contention is that the Rules of procedure that the courts applied to dismiss his case are mere technicalities that Article 126 has done away with.

This contention is, in our opinion, erroneous and unsupported by the pronouncements of the Supreme Court in several cases involving the application of Article 126 of the Constitution by the courts. According to these authorities, the settled position is that Article 126 (2) (e) has not done away with the requirement that litigants must comply with the Rules of procedure in litigation. The Article merely

gives Constitutional force to the well settled common law principle that rules of procedure act as handmaidens of justice. The framers of the Constitution were alive to this fact. That is why they provided that the principles in Article 126 including administering substantive justice without undue regard to technicalities, must be applied **“SUBJECT TO THE LAW.”** Such laws include the Rules of procedure.

A host of cases such as Utex Industries Ltd vs. Attorney General, SCCA No. 52 of 1997; Kasirye & Byaruhanga and Co. Advocates vs. Uganda Development Bank, SCCA No.2 of 1997 and Horizon Coaches vs. Edward Rurangaranga, SCCA No. 18 of 2009 drove this point home.

In Utex Industries Ltd, (supra) the Court had this to say:

*“... we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of courts by enacting Articles 126 (2) (e). Paragraph (e) contains a caution against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaidens to justice - meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case Article 126 (2) (e) or Mabosi case can assist the respondent who sat on his rights since 18/8/95 without seeking leave to appeal out of time... Thus to avoid delays rules of court provide a time table within which certain steps ought to be taken.” (the underlining is for emphasis).*

In Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank

(supra), the appellant had complied with all the rules except serving the Letter Requesting for the Record of Proceedings on the respondent. Counsel for the appellant had even conceded to the lack of service of the written request but in support of his submissions, he sought to rely **20** on Article 126 (2) (e) contending that that was a mere technicality and no injustice had been occasioned to the respondent. The Supreme Court proceeded to uphold the preliminary objection and to quote Article 126 (2) (e), underlining the words **“SUBJECT TO THE LAW”**. *IT NOTABLY SAID:*

***“We have underlined the words ‘subject to the law’. This means that clause (2) is no license for ignoring existing law. A litigant who relies on the provisions of Article 126 (2) (e) must satisfy the Court that in the***

circumstances of the particular case before the Court it

was not desirable to pay undue regard to a relevant technicality.

Article 126 (2) (e) is not a magic wand in the hands of defaulting litigants.”

In a similar application in Horizon Coaches vs. Edward Rurangaranga and Mbarara Municipal Council SCCA No. 18/2009 (unreported), Katureebe JSC, as he then was, held as follows:

*“Article 126 (2) (e) of the Constitution enjoins Courts to do substantive justice without undue regard to technicalities. This does not mean that courts should not have regard to technicalities. But where the effect of adherence to technicalities may have the effect of denying a party substantive justice, the Court should endeavor to invoke that provision of the Constitution.”*

According to the full bench of the Court of Appeal, the issue for determination in the appeal before that Court was:

“Whether the appellant had showed sufficient reason to warrant the grant for extension of time to file an appeal.”

From the record of proceedings and as detailed above, it is clear to us that in reaching their decision, the learned Justices of the Court of Appeal thoroughly reviewed the background and circumstances of the appeal and considered the checkered history of the case. The facts remain the same.

The matter started way back in 1991. The appellant's claim was that he was a partner in the business of Makerere High School. When the partnership was dissolved after the death of two of its members in the 1988 Uganda Airline plane crash in Rome, the proceeds were shared among the widows of the deceased partners and the respondent. The appellant was not given anything. He sued the respondent as stated above vide HCCS No.689 of 1991 where he prayed for a declaration that he was a partner and was thus entitled to the shares of the business after dissolution.

The respondent denied the claim and contended that the appellant was is not a partner but was employed as a bursar of the school. He was thus not entitled to the shares as alleged. The suit was heard inter parties by Berko J. He found in favour of the respondent and dismissed the suit with costs in 1995.

The appellant's efforts to overturn that judgment were unsuccessful. The respondent still holds that Decree since 1995. The appellant has conveniently ignored that decree to the prejudice of the respondent who cannot enjoy the fruits of the said judgment to date.

The appellant has instead instituted a fresh suit against the respondent on the same facts which he is now vigorously pursuing. The respondent raised the defence of *RES JUDICATA* in his response to the second suit and successfully applied for security for costs on the basis that the appellant would be constraining him to defend a frivolous and vexatious suit and making him to incur further costs even after failing to pay the costs of the earlier suit.

The Registrar of the High Court agreed with the respondent and ordered the appellant to pay 2,500,000/= shillings as security for costs, otherwise his case would be dismissed. The reasons for the issuance of the order for security for costs are set out in the Ruling of the learned Registrar of the High Court as follows:

- 1) *The plaintiff had filed an earlier suit against the defendant on the same facts as of the present case (save for the addition stated above). The plaintiff lost the case and was ordered to pay costs.*

*Bringing another case on the same facts was likely to put the defendant to undue expenses. It appeared that the suit was frivolous and vexatious.*

2) *The defendant had put the defence of res judicata which was likely to succeed.*

3) *While the poverty of the plaintiff would not by itself be a ground for ordering security for costs, the plaintiff had lost an earlier case based on the same facts and having failed to pay costs in the earlier suit as the court by Berko J had decided, he would perhaps not be able to pay costs in the second suit based on the same facts.*”

The appellant refused to deposit security for costs and the suit was as a result dismissed. His efforts to reverse that decision have been unsuccessful in the High Court and in the Court of Appeal.

The Court of Appeal applied the Rules of that court and was alive to the principles applicable for the grant of the order sought by the appellant. **10** Rule 4 of the Court of Appeal Rules provides for computation of time. Rule 5 provides for extension of time for sufficient reason that must be given by the applicant who seeks such extension.

“Sufficient reason” is not defined by the Rules of court. However, this Court has in the past considered what amounts to sufficient reason in a number of cases including; F. L. Kaderbhai & Anor vs. Shamsherali M. Zaver Virji & 2 Others, SCCA No. 20 of 2008, and recently in Kananura Andrew Kansiime vs. Richard Henry Kaijuka, Civil Reference No. 15 of 2016 (SC), where this Court relied on a quotation from the Judgment of Mulenga JSC, in Boney Katatumba vs. Waheed Karim, Civil Application SCCA No. 27 of 2007 (supra) where he held that:

*“Under Rule 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.”*

The settled principle in the above authorities is as follows:

The applicant seeking for extension of time has the burden of proving to the Court’s satisfaction that for sufficient reasons it was not possible to lodge the appeal in the prescribed time. Sufficient reason must relate to the inability or failure to take a particular step in the proceedings.

Each application must be viewed by reference to the criterion of justice and it is important to bear in mind that time limits are there to be observed, and justice may be defeated if there is laxity. Factors to be considered in an application for extension of time are:

- i. The length of delay;
- ii. The reason for delay;
- iii. The possibility or chances of success;
- iv. The degree of prejudice to the other party.

Once a delay is not accounted for, it does not matter the length of delay. There must always be an explanation for the period of delay.

The discretion to grant an extension of time can be exercised in order for the appeal to be heard on its merits so that the dispute can be settled. The discretion must, however, be exercised judicially on proper analysis of the facts and the proper application of the law to the facts. In the case of the appellant, the learned Justices of the Court of Appeal found that the appellant had not furnished sufficient reason for the delay in appealing against the decision of the High Court that dismissed his second suit.

The learned Justices of the Court of Appeal also found that the suit did not have any possibility of success since it was based on the same facts and issues that had been raised in the earlier suit that Berko, J had dismissed with costs to the respondent.

Most importantly in our view, the learned Justices of the Court of Appeal further found that the continuation of the proceedings in question would greatly prejudice the respondent who was holding a Decree from the High Court since 1995 which Decree the appellant has stubbornly refused to satisfy to date.

In our view, the above findings were valid reasons to justify the denial by the learned Justices of the Court of Appeal of the order sought by the appellant.

We are also mindful of the fact that the appellant is a lay person and as such, he is not expected to comprehend and strictly follow the complex rules of civil litigation. Nonetheless, we believe that there must be a limit beyond which the courts can bend backwards to accommodate the unrepresented litigant without compromising the rights of the opposite party. The respondent has been dragged to court for over ten years by the appellant and is being made to incur costs of litigation that the appellant is by his own admission which is on the record, incapable of paying or reimbursing. Justice must be administered according to the law, not on the basis of sympathy. There must also be an end to litigation as stated by Newbold P in *Lakhashmi Brothers Ltd v R. Raja & Sons* [1966] E.A 313, 314 in the

following words:

*“There is a principle which is of very greatest importance in the administration of Justice and that principle is this: It is in the interest of all interested persons that there should be an end to litigation”,*

This was followed in a recent case of Obote William v Uganda, Criminal Application No. 1 of 2017 (SC) where the applicant had applied for **20** review of the Court’s judgment. The Court found that the said application was actually a disguised appeal against its judgment and dismissed it accordingly.

In conclusion, we find no reason to interfere with the discretion of the learned Justices of the Court of Appeal. We accordingly uphold the decision of the Court of Appeal and dismiss this appeal with costs against the appellant.

Dated at Kampala this 2<sup>nd</sup> Day of August 2018

HON. JUSTICE JOTHAM TUMWESIGYE

**JUSTICE OF THE SUPREME COURT**

HON. JUSTICE DR. ESTHER KISAAKYE

**JUSTICE OF THE SUPREME COURT**

HON. JUSTICE STELLA ARACH-AMOKO

**JUSTICE OF THE SUPREME COURT**

HON. JUSTICE RUBBY OPIO-AWERI

**JUSTICE OF THE SUPREME COURT**

HON. JUSTICE LILLIAN TIBATEMWA-EKIRIKUBINZA

**JUSTICE OF THE SUPREME COURT**