

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC. APPLICATION NO. 221 OF 2014**

**NICKSON ASEGA :::::::::::::::::::::::::::::::::::::::  
APPLICANT**

**VERSUS**

**JOHN KITYO LUKYAMUZI  
Through WASSWA GEOFFREY :::::::::::::::::::::::  
RESPONDENT**

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

**RULING**

This Application is brought under Section 98 CPA, Section 33 Judicature Act and Order 52 rr.1-3 CPR.

It seeks orders that:

1. The Applicant be allowed to file an appeal out of time.

2. The Applicant be availed with the lower Court's record to enable him prosecute the appeal in the High Court.
3. The execution of the orders of the lower Court be stayed.
4. That in the absence of the entire lower Court file, the suit be tried de-novo.

The background to this Application is that the Respondent - John Kityo Lukyamuzi through his Attorney - Wasswa Geoffrey sued the Applicant Nickson Asega over a land dispute. Judgment was passed in favour of the Plaintiff, and the land was decreed to him, and the Defendant was declared a trespasser thereon.

A permanent Injunction was issued against the Defendant who was also declared a trespasser thereon.

A permanent Injunction was issued against the Defendant who was also ordered to pay General damages and costs.

The Defendant subsequently filed a Notice of Appeal in this court and an Application for stay of execution. The

Application was withdrawn when the Registrar of this Court ruled that there was no appeal filed as Order 44 r.3 CPR had not been complied with.

The Notice of Appeal was later on struck out for the same reasons.

The grounds of the instant Application are that:

1. The Applicant has never been availed with copies of the record of proceedings and Judgment of the lower Court.
2. The High Court called for the lower Court record which has never been delivered to Jinja High Court.

As a result, the Applicant was unable to file a substantive appeal. This resulted in the Notice of appeal being struck out for being incompetent.

3. That the Applicant has been denied access to the original record of the lower Court.

In the affidavit in support of the Application, the Applicant deposes that his Notice of appeal was struck out after the

original file was called for by the Registrar, but the file was never remitted to the High Court.

That he has been served with a Warrant of execution when the issuing Court has no original file and hence the warrant is irregular.

He also avers that he is unable to persue justice in the absence of Court files over which he has no control and no explanation is given.

The Respondent filed an affidavit in reply which in effect claims the application is defective, an abuse of process and is full of falsehoods.

It is averred that earlier attempts to file an appeal were dismissed for being defective ( HCCA. No. 105/2010). Further that the Applicant has since 2010 deliberately abused and disobeyed Court orders and was even convicted over the same.

He was also convicted for Malicious Damage to property and is currently on bail pending appeal from that said conviction.

It is further averred that the record of proceedings was duly certified but the Applicant has never collected the copies thereof.

The file has never gone missing and has even been forwarded to the High Court Jinja on two previous occasions.

The above averments are supported by relevant Annextures showing the various events and the existence of the original record.

It has been submitted for the Applicant that the Applicant filed a Notice of Appeal and has never been availed with a copy of the proceedings. Execution was initiated and he was put in Civil Prison and was unable to get in touch with his lawyers to prosecute his appeal in time.

Reference was made to the case of **Matovu Vrs. Ben Kiwanuka SCCA 12/91**. Therein it was held that the Court has discretion to determine what is sufficient cause and matters arising out of professional mistakes of the

Lawyers should not interfere with the determination of the case.

It was submitted that the mistakes of the Lawyers should not be visited on the client.

For the Respondent, it was submitted that first the lower Court file has never gone missing.

The Notice of Appeal was struck out after 3 years.

The Applicant has not come to Court with clean hands, having been convicted for abusing and disobeying the lower Court Orders.

It was also submitted that the Applicant applied for the record on 19/10/2010 and never followed up thereafter.

That there is even no evidence of professional negligence by his Lawyers.

The Applicant has only run to file this Application to frustrate implementation of the lower court orders which

convicted him of the criminal offences arising out of the original suit.

It is also submitted that the Applicant is guilty of dilatory conduct by failing to file the Appeal in time and instead keeps frustrating the Court orders.

It is also submitted that the Applicant has failed to invoke the specific provisions of Law in respect of this Application and that the Application is omnibus.

In any case the prayers in No. 2, 3 and 4 can only be relevant when there is an appeal under the provisions of Order 43 CPR. Reference was made to the case of **Sobetra (U) Ltd Georgio Pentarageh Vrs. Heads Insurance Ltd**, where it was held that an Applicant seeking leave must show that the intended appeal has reasonable chances of success or that he has arguable ground of appeal and has not been guilty of dilatory conduct. The same views were expressed in **Sango Bay Estates Ltd & Anor. Vrs. Dresdner Bank (1971) EA 17.**

In rejoinder, Counsel for the Applicant tries to invoke Article 126 (2) (e) of the Constitution that requires administering justice without undue regard to technicalities.

I will first start with this last point.

I find it in bad taste for Counsel to run and hide behind the above Article when he fails to apply the relevant Laws.

Application for extension of time are specifically provided for **under Section 96 CPA** and **Order 51 r. 6 CPR**.

This was not done. I suspect this could have been deliberate to avoid a possibility of being ordered to deposit security for costs **under Order 22 r. 23 CPR** since he is also applying for stay of execution.

I find that everything is wrong with this Application. The allegations that the original file has been missing are unsupported as the file is before this Court with a copy of the Judgment duly certified on 1/8/2012.



Secondly, the authorities cited by Counsel for the Respondent on showing that there are arguable grounds requiring Judicial decision are very instructive.

On top of filing this Application, it should have had as an attachment - a draft of the proposed Memorandum of Appeal, so that Court is in position to determine whether there are any triable issues raised and hence justifying extension of the time to file the said Memorandum of Appeal.

Thirdly, I refuse to buy the arguments that there was professional negligence by the Lawyers explaining the delay. The first Application for Stay of execution was struck out in 2011 by the Registrar on grounds that since Order 43 CPR had not been complied with then there was no appeal.

The Applicant however took no action and the offending Notice of Appeal remained on record until late 2013 when it was struck out.

In the meantime, the Applicant was content to pursue activities that in my view were in utter contempt of the Orders of the lower Court.

For his contemptuous actions he was convicted on two separate occasions. The record is clear for all to see.

In short he has not come to this Court with clean hands and he has been deliberately guilty of dilatory conduct.

Addressing the prayers in the Application, it is clear that prayers No. 2-4 can only be relevant when prayer No. 1 has been granted and there is an Appeal on record.

I find that this Application lacks merit, is brought in bad faith and is only intended to frustrate the orders of the trial Court.

It is dismissed with costs to the Respondents.

**Godfrey Namundi**  
**JUDGE**

**19/12/2014**