

**IN THE SUPREME COURT OF UGANDA**

**HOLDEN AT MENG0**

**(BEFORE: J.N. MULENGA, J.S.C.)**

**CIVIL APPLICATION NO. 8/89**

**BETWEEN**

YONA KANYOMOZI:.....:APPLICANT

AND

MOTOR MART (U) LTD:.....:RESPONDENT

RULING:

By Notice of Motion dated 29.10.98, the Applicant for an order granting him “leave to file application for restoration of Civil Appeal No. 15/95 out of time” Civil Appeal No. 15/95 was dismissed on 19.2.97.

The following is the background to the application,. In 1993 the Applicant filed in the High Court a suit against the Respondent and two others for breach of contract in respect of repair of his motor vehicle. He claimed special damages, in the sum of Shs. 75,515.650/=. Together with general damages interest and costs. The suit was dismissed on 19.1.95 and the Applicant promptly instituted in the Supreme Court Civil Appeal No. 15/95. The appeal was listed for hearing on 7.5.96 and again on 20.11.96, and each time it was adjourned by consent. When it came up the third time, on 19.2.97, both parties and their advocates were absent but Mr. Kusiima, an advocate appeared holding brief for Mr. Mulira. Counsel for the Appellant. He applied for adjournment on the ground that Mr. Mulira was appearing in the Constitutional Court. The applicant was refused. As Mr. Kusiima’s brief was limited to applying for adjournment, he could not proceed with hearing. Consequently the appeal was dismissed for want of prosecution. On 5.9.97 the Applicant filed in this Court, Civil Application No 26/97 praying for the appeal to be restored. That application came up for hearing on 1.6.98. counsel for

the respondent raised objection that the application was incompetent having been filed outside the period of 30 days prescribed by r 95(5) of the Rules of this Court. Counsel for the Applicant conceded the blunder and thereupon withdrew that application. This application was filed on 29.10.98. it is stated to be brought under r.4 and r. 1(3) of the Supreme Rules 1996.

Rule 4 provides in part

*“4. The court, for sufficient reason extent the time prescribed by these Rules.....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 that act.....”*

This rule is adequate for purposes of the instant application. I do not have to resort to r. 1(3) for the inherent powers of the court.

The application is supported by an Affidavit sworn by Peter Mulira on 29.10.98. Paragraph 5 to 9 contain irrelevant and/or misleading averments which I was inclined to ignore but for the insistence of Counsel for the Applicant that they be considered. The five paragraphs read as follows:-

*“5. That Counsel for the Applicant instructed M/S Kateera & Kagumire Advocates to handle the appeal and more particularly to pursue its reinstatement (see copy of notice of charge of Advocates marked”A”)*

*6. That M/S Kateera & Kagumire Advocates then withdrew their conduct of the appeal (see copy of letter dated 20<sup>th</sup> November, 1996 marked “B”)*

*7. That at the time of dismissal of the appeal M/S Mulira & Co. Advocates, Counsel for the Applicant had merged with M/S Sebalu, lule & Co Advocates, Counsel for the Respondents.*

*8. That Counsel for the Applicant could no longer effectively handle appeal.*

*9. That Counsel for the Applicant exercised all due diligence and did all in his power to obtain another counsel to handle the matter.” (emphasis is added)*

In an affidavit sworn by Paul Sebalu on 9.12.98 it is categorically averred that paragraphs 5,7 and 8 of Peter Mulira's Affidavit are not true. In reply to that, on 10.12.98. N Kabuye Charity of Messrs Mulira & Co., swore an Affidavit on information from Peter Mulira which is conspicuous for lack of any reference to the categorical accusation.

It appears true that while Civil Appeal No. 15/95 was pending, the two legal firms acting in the case, namely Mulira & Co. for the Appellant, and Sebalu & Lule for the Respondent, merged, and because of that, another firm, Kateera & Kagumire, Advocates, were briefed to represent the Appellant. They accordingly issued Notice of change of Advocates dated 19.11.96. No sooner had they done that, however, than they realized that they could not represent the Applicant. On the following day, 20.11.96 they wrote to Sebalu, Lule, Mulira & Co., returning the brief and explaining why they could not act for the Appellant. They undertook to only apply for adjournment of the appeal which was listed for hearing on that same day. There is no evidence that Kateera & Kagumira, or any other legal firm had anything to do with that appeal thereafter. Meanwhile the merger between the two firms was dissolved on 31.1.97. a fact deponed to by both Paul Sebalu and Nakabuye Charity in their respective Affidavits. At the time the appeal was dismissed, on 19.2.97, it was back in the hands of Mulira & Co. that is why Mr. Kusiima appeared in court holding brief for Mr. Mulira. The allegations in Peter Mulira's Affidavit that when the appeal was dismissed M/S Kateera & Kagumire had instructions to pursue the reinstatement of the appeal; and that Mulira & Co. could not effectively handle the appeal because of the merger are false. What is more even if they had been true, the allegations do not explain why, after the appeal was dismissed, no application for its restoration was made within the prescribed period. I am therefore surprised that these allegations were put forward as supportive of this application. Equally surprising is that the said Affidavit of Nakabuye Charity, in reply to that of Paul Sebalu, virtually exclusively deals with proving that Peter Mulira had instructions to appear in the Constitutional Court on the day the appeal was dismissed. That fact too does not explain the failure thereafter to apply for restoration of the appeal within time.

Be that as it may, I have to consider whether any sufficient reason has been disclosed why this court should exercise its discretion under r.4 to grant extension of time. I am not persuaded by the submission by Counsel for the Respondent that I should discard Peter Mulira's Affidavit because of the said false averments in it. I would have readily done so. If I thought that the

disclosed falsity rendered the credibility of the rest of the averments doubtful. I think it does not. The two grounds on which the application is based are:-

- (i) That the mistake (or) oversight on the part of Counsel should not bar the application from pursuit of his rights. And
- (ii) That the appeal has a great likelihood of success.

It appears to me however that what is stated to be the first ground is an argument in support of the real ground why extension of time is sought. The reason must be counsel's mistake which prevented the filing of the application for restoration of the appeal in time. It is put in perspective in paragraphs 2 and 3 of Peter Mulira's Affidavit as follows:-

“2. That due to innocent but honest belief on my part that Constitutional Court took precedence over all courts, Civil Appeal No. 15/95 was dismissed.

3. That through an oversight on part of counsel for the Applicant an application for reinstatement of the appeal was not filed in time.”

Does that alone or together with the second ground constitute “*sufficient reason*” within the meaning of r. 4 to justify the court granting to the Applicant the extension of time?

At the hearing of the application, Ms Nakabuye, Counsel for the Applicant submitted that it does. She stressed that a litigant who entrusts his case to a professional advocate, over whom he does not exercise any control, should not be made to suffer for the mistakes of the advocate. She maintained that in the instant case the Applicant stands to lose a large sum of money if his appeal is not restored. In support of her submission Ms Nakabuye referred me to the decision of the High Court of Tanzania in *Essaji Vs Ssolanki* (1968) EA 218 and that of the Supreme Court of Uganda in *Haji Nurdin Matovu Vs Ben Kiwanuka* Civil Application No. 12/91 (unreported)

Mr. Mukasa, Counsel for the Respondent on the other hand, submitted that oversight on the part of counsel is not sufficient reason for extending time. He argued that “sufficient reason” must be a reason which prevented the applicant from adhering to the time limit, and therefore must relate to inability to take the particular step in question. Secondly he argued that if the court was inclined to treat the oversight by counsel as sufficient reason, it should reject the application on the account of the inordinate delay of about 22 months in bringing this application. Thirdly he

submitted that it was incumbent on an applicant for extension of time to show that delay was not caused by his dilatory conduct; and argued that in the instant case the Applicant had not shown by affidavit, or otherwise, that non-compliance had not been caused by his dilatory conduct. Finally he submitted that since Counsel for the Applicant admits blame for failure to apply for restoration of the appeal in time, the Applicant is not without remedy. In support of his submission he cited: **Mugo Vs Wabkiru** (1970) EA 481; **Shanti Vs Handocha & Others** (1973) EA 207; and **Executrix of the Estate of Namatovu Vs Noel G. Shalita** (unreported)

It cannot be again said that the delay in making this application was inordinate. First, nearly seven months elapsed, after the appeal was dismissed, without any step being taken to restore it. Then as if in ignorance of the prescribed time, an application was filed without seeking extension of the time, and the mistake was not realized until nine months later when the preliminary objection was raised and the application need not have been withdrawn since the court could under r. 4. Extend the time for filing the application for restoration of the appeal “before or after” filing that application. However, having decided to withdraw the application for extension of time was finally filed. To crown it all, the only explanation given for all that delay is simply that there was “oversight on the part of the Applicant’s Counsel.”

It has been held in a line of cases that error on part of counsel is not necessarily a bar to getting extension of time. See among others **N.A.S. Airport Services Limited Vs. Attorney-General of Kenya** (1959) EA53; **Ngoni-Matengo Co-op Union Vs Alimahomed Osman** (1959) EA 577; **Bhaichand Shah Vs Jamnadas & Co. Ltd.** (1959) EA 838; **Mugo Vs Wanjiru** (1970) EA 481; **Shanti Vs Hichonda & Others** (1973) EA 207; **Haji Nurdin Matovu Vs Ben Kiwanuka** Civil Application No. 12/91(unreported); and Shiv Construction Co. Ltd Vs Endesha Enterprises Ltd., Civil Application No. 15/92 (unreported). This Court also, in a similar application declined to be influenced by the consideration that a litigant whose advocate had erred had remedy against the advocate. After observing that in dealing with Rule 4 of the Court’s rules, the Court had a free discretion; and that if an advocate makes a blunder it is important not to visit that blunder on an innocent litigant, the Supreme Court in a reference from a single judge in **Haji Nurdin Vs Ben Kiwanuka** (supra) said:-

*“We would entirely agree with the learned judge with respect that damages is not usually a sufficient remedy. If one were to put oneself in the position of a litigant and was told:*

*“well, your advocate has made a blunder, and now you will be unable to appeal, but of course you may always sue the advocate for damages.”*

*We think one would appreciate the angry reaction which must follow. Instead of finishing one piece of litigation, a litigant must embark on a second one suing his advocate. It is true that one has to bear in mind the delay that has been forced upon the successful party and indeed must weigh up all these circumstances. But damages can rarely be a satisfactory answer.”*

However not in every involving counsel’s error is extension granted. In *The Commissioner of Transport Vs Attorney General of Uganda (1959) EA 325*, the Court of Appeal for East Africa refused to extend time for filing an appeal. One of the grounds that had been put forward on application for the extension, was that owing to counsel’s error of judgment no decree was extracted before filing the record of appeal. In holding that the error was not sufficient reason for purposes of the rule empowering the court to extend time, the court observed that the rule requiring that a decree be extracted and be filed with the record of appeal is too plain to admit of either a misinterpretation or an error of judgment by an advocate. An error of judgment on the part of counsel is viewed more sympathetically than an error resulting from lack of diligence. That distinction however, does not provide a test applicable to every case. Thus, while it is correct, as submitted by Mr. Mukasa, that a sufficient reason for purposes of r.4 should be such a reason as is shown to have prevented the applicant from doing what he had to do within the prescribed time, other factors unconnected with the applicant’s inability to comply may constitute the sufficient reason. An example is the case of **N.A.S. Airport Service Ltd. Vs Attorney General of Kenya** (supra) where an appellant who filed an appeal out of time was granted extension of time in order that the Respondent who had filed a cross-appeal may not be deprived of the right of cross-appeal through no fault of his own. Another is the case of **Mugo Vs Wanjiru** (Supra) where, notwithstanding that there had however, having regard to the nature of the judgment, I am inclined to the view that this is a case where injustice will appear to be caused if the appeal is not heard on its merits.

I must say that it is with considerable difficulty that I have come to the conclusion that despite the unexplained inordinate delay in bringing this application, I should exercise my discretion, albeit reluctantly, to allow the application. In so doing, I have also taken into consideration the

fact that if he is enabled to make a fresh application for restoration of appeal, the applicant is likely to find less difficulty in view of the explanation for non-appearance when the appeal was called on for hearing. In the result I allow the application. The time within which application to restore Civil Appeal No. 15/95 is extended to 21 days from the date of this ruling Costs of the application however will be to the Respondent as the proceedings were necessitated by the Applicant's default.

DATED at Mengo the 12<sup>th</sup> day of February 1999.

J.N. MULENGA,

JUSTICE OF THE SUPREME COURT.