REPUBLIC OF UGANDA
SUPREME COURT OF UGANDA
AT MENGO

CORAM: J. W. N. TSEKOOKO, JSC.

Miscellenous Civil Application No.5 of 2000

BETWEEN

ERIAZAFANI MUDDUMBA :::::::::::::::::: Applicant

AND

WILBERFORCE KULUSE :::::::::::::::::: Respondent

RULING: The applicant, Eriazafani Muddumba, instituted this application by notice of motion under the provisions of Rules 4 and 12 of the Rules of the Court. I am unable to see the relevancy of Rule 12. However, his prayers were to allow him to file in this Court an appeal out of time and that costs should abide the result of the intended appeal. After hearing both the applicant and Mr. Liiga, counsel for the respondent, who did not oppose the application, I hesitatingly granted the applicant leave to appeal out of time and I promised to give my reasons later. I now give the reasons.

In the notice of motion, the applicant listed four grounds as the basis for this application namely, that:

1 He first filed in this Court Civil Appeal No. 10 of 1999 on 1/12/1999.

2 that the appeal was struck out by the Court for being incompetent because no requisite certificate for leave to appeal had been granted by the Court of Appeal.

3 On 30/7/2001 he received the requisite certificate of leave to appeal.

4 He had not been guilty of unreasonable delay and he had high chances of success.

To the notice of motion is annexed the applicant's affidavit which curiously was sworn on 11th October, 2001. I say curiously because the notice was filed, apparently without affidavit, in early 2000 and the affidavit was then filed a year later. This is contrary to the provisions of Rule 42 which required formal applications to be supported by one or more affidavits which obviously must accompany the application.

The principal reasons given in the affidavit, in effect, are:

(a) that he had filed the aborted appeal.

(b) That because that appeal was struck out for being incompetent, i.e., for lack of the requisite certificate for leave to appeal, he has now sought and obtained the requite leave from the court below. That leave is incorporated in a certificate which is on the court file.

In my order of 25/4/2002, granting the applicant extension of time, I mentioned that the notice had grave irregularities. I will mention and deal with them as I go along, having already alluded to late filing of supporting affidavit.

The proceedings in this application have had a chequered history. The proceedings are based on a land dispute between the parties. The dispute appears to have germinated in 1950s and resulted in the institution by the applicant of a civil suit in the Nawanyago Court of Magistrate Grade II in 1987. On 18/11/88, the applicant lost the suit there. He appealed to the Jinja Court Chief Magistrate who on 16/2/1990 allowed the appeal and ordered a retrial of the suit before a

Magistrate Grade I. On 30/8/1991, Mr. Badagawa, Magistrate Grade I, dismissed the suit. The applicant was dissatisfied. He appealed to the High Court and lost his appeal there as a result of which he appealed to the Court of Appeal against the decision of the High

Court. Still his appealed to that Court was with leave of that Court because he was out of time and eventually, the Court of Appeal heard the appeal on merit and dismissed it on 9th April, 1999.

Finally the applicant filed a 3rd appeal to this Court. This was done in ignorance of procedural requirements. For some unexplained reason the applicant filed this application in early 2000. Although it not clear when the notice was filed in court the copy of the notice of motion on my file record bears 8/1/2000 as the date fixed for hearing it. That date is before 20/1/2000, the day when this Court struck out, as incompetent, the applicant's original Civil Appeal No.10 of 1999. There is yet a further anomaly on the notice of motion. It has 14/4/2000 as the day when the applicant signed the motion in Court. Furthermore according to the copy of the notice on registry file, that is the same day (14/4/2000) when the Registrar of this Court endorsed on the registry file a date of filing. More confusion was added by the affidavit to which I have already alluded and which was sworn in support of the motion which purports to have been sworn on 11th October, 2001. That is nearly $1^{1/2}$ years after the motion was filed and after the initial appeal (10/99) had been struck out on 20/1/2000. To confound matters, I noticed that whereas the copy of the notice of motion on my court record shows 18/1/2000 as first hearing date, the copy of the notice of motion on the registry file bears on its face 25/4/2000 as the first date fixed for its hearing. When I asked Mr. Manano about this confusion, he suggested that it is possible that the notice without the accompanying affidavit was lodged earlier and the accompanying affidavit was lodged later. When I asked the applicant about the muddle he stated, while pointing to Mr. Manano, that after he obtained leave from the Court of Appeal and when he wanted to file a fresh notice of motion seeking extension of time to appeal, Mr. Mananao told him that he (applicant) need not prepare a fresh notice since there was an old one which could be used. Indeed this explains the situation better. Which is that immediately the old appeal was struck out, the applicant was made, or became, aware of the need to seek extension of time in this Court in order to file an appeal.

I must say that the appellant, and perhaps our registry officials, had the capability or the ability to foretell that the Court of Appeal would grant the applicant the requisite certificate to appeal to this court. And whether this application was in fact filed on 18/1/2000 or on 14/4/2000, the institution of the appeal would still be out of time after

Civil Appeal 10 of 1999 was struck out. However, because of the provisions of Rule 39(1) it would seem to me that if the courts attention had been drawn the same provisions, the need to strike out the appeal might not have been necessary.

Looking through the record of this application, I saw in the notice of motion, para 4 thereof, saying that "a certificate" to appeal was issued on 14/4/2000 by the Registrar of the Court of Appeal. In actual fact, in that certificate, the Registrar of the Court of Appeal certified that the applicant was availed the record of proceedings on that day. This confirms my earlier suspicion that the application seeking extension was filed before the certification to appeal was granted and the grant itself only came on 30/7/2001. That certificate and a copy of the Court of Appeal ruling in which permission was granted were annexed to the notice of motion. The annexing was late and was done without seeking leave of court to file supplementary record. This appear to contravene Rule 42 (2) of this Court. Indeed also manifested is the absence of the judgment of the Court of Appeal against which an appeal is intended to be made. That contravened Rule 42(4) and Mr. Liiga quite properly expressed his concern about this. Annexing a copy of the judgment against which it is desired to appeal is mandatory under Rule 42(4). Moreover the court can only appreciate the contention in the notice that the applicant has high chances of success by reading such a judgment. This is particularly so in an application such as the present one where the supporting affidavit did not contain points which can show that prime facie, the applicant might succeed in the intended appeal. He happens to be a lay person and in a way this exonerates him from being penalised because of deficiencies in the affidavit.

Rule 39(1) states that:

"where application for a certificate or for leave is necessary, it may be made before or after notice of appeal is lodged".

It would appear from this provision that because of this provision and those of Rule 71(4), the notice of appeal in the aborted Appeal could have sufficed and the applicant could have lodged his appeal immediately after the certificate to appeal was granted on 30/7/2001. But since the appeal was not lodged within the prescribed time after 30/7/2001, I think that the louging of the bungled application is proper in principle.

In spite of all the deficiencies in the application, I have the feeling that the registry is to blame for part of the delay. Partly for this reason and partly because the application was not opposed, I was constrained to grant the application which I did.

Delivered at Mengo this 22nd day of May 2002.

J.W.N. TSEKOOKO.
JUSTICE OF THE SUPREME COURT