THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: JUSTICE G. M. OKELLO, JSC.)

CIVIL APPLICATION NO. 20 OF 2008

B E T W E E N

1. F. L. KADERBHAI:

2. N. H. VALIJI ::::::::: APPLICANTS

AND

(1) SHAMSHERALI M. ZAVER VIRJI}
(2) G. R. KAPACEE } ::::::::: RESPONDENTS
(3) SHABEER KAPACEE }

{Application for extension of time for instituting appeal against the decision of the Court of Appeal,(Mpagi-Bahigeine, Kitumba and Byamugisha, JJA,) at Kampala in Civil Appeal No. 81 of 2004, delivered on 12th November, 2007}.

RULING:

This is an application by Notice of Motion, brought under rules 2(1), 2(2), 5, 42 and 50, of the Rules of the Supreme Court. It seeks extension of time for instituting an appeal against the decision of the Court of Appeal in Civil Appeal No. 81 of 2004 delivered on the 12th November, 2007.

The background facts leading to this application are briefly that dissatisfied with the said judgment of the Court of Appeal, the applicants promptly instructed M/s.

Godfrey Lule, SC and A. F. Mpanga Advocates to prefer an appeal against the judgment. Acting on that instruction, the advocates filed Notice of Appeal on 15th November 2007, and followed with a letter on 30th November, 2007, requesting for certified copy of the proceedings. However, the lawyers inadvertently failed to serve the Notice of Appeal to the opposite party within the time prescribed by rule 74(1) of the Rules of this Court. They also inadvertently failed to copy and serve the letter requesting for the certified copy of the proceedings on the opposite party as required by rule 79 (2) and (3) of the Rules of this Court.

On 29th April, 2008, when the Registrar, Court of Appeal in a letter to the counsel for another intended appellant, but copied to the applicant's counsel, advised the availability of the record of proceedings, the time for filing the appeal had long elapsed. Counsel for the applicant stated that due to communication difficulty between them as the applicants who live in the United Kingdom had changed their e-mail address, they could not contact the applicants until early July, 2008. Until then, they had no way to obtain professional and disbursement fees necessary to file the appeal and thereby obtain instructions to proceed in the matter. The application was not filed until 16-09-2008, after the current counsel for the applicants perused application No. 07 of 2008 which seeks to strike out the Notice of Appeal.

The grounds on which the application is based, as appear in the Notice of Motion, may be summarised as follows:

(1) ***That the Notice of Appeal and the letter requesting for record of the proceedings were lodged and written within time but that the former counsel for the applicants inadvertently failed to serve them on the opposite party.***

(2) ***That by the 29th April 2008, when the Registrar, Court of Appeal notified the parties of the availability of the record of proceedings, there was communication problem between the applicants and their lawyers, as the applicants, who live in the United Kingdom, had changed their e-mail address making counsel unable to contact them to obtain professional and disbursement fees and instructions to proceed in the matter.***

(3) ***That when the applicants eventually made contact with their counsel, in early July 2008, the time to file the appeal had long lapsed.***

(4) ***That at stake is the ownership of the subject matter of the case, a commercial building comprised in Plot No. 25 - Nassar Road and that the applicants would be greatly prejudiced if their rights to the property are lost without their appeal being heard on merits.***

(5) ***That the applicants concede to costs by reason of their default in appealing in time."***

The application is supported by two affidavits: one of ***Christopher Luwaga,*** sworn on 16th September 2008, and another of ***Fakrudin Kaderbhai***, the first applicant, sworn on 23rd September, 2008.

Daniel Byaruhanga and Geoffrey Otim both care of Muyanja & Associates, Advocates, Solicitors and Legal Consultants representing the 2nd and 3rd respondents filed affidavits in reply.

The first respondent opposed the application and relied on the affidavit evidence sworn by Joy Ntambirweki, an advocate from M/s. Ntambirweki Kandeebe & Co. Advocates, representing the first respondent.

At the hearing, the affidavits in reply sworn by Daniel Byaruhanga and Geoffrey Otim were by consent struck off the record.

Mr. Masembe-Kanyerezi, learned counsel for the applicants, submitted that the former counsel for the applicants had lodged the Notice of Appeal and written the letter requesting for copy of the proceedings within the prescribed time but inadvertently failed either to serve the Notice of Appeal or to copy and serve the letter requesting for the record of the proceedings on the opposite party as required by the rules of this court. He added that the reason for these failures was inadvertence. He pointed out that by reason of the failure to copy and serve the letter requesting for the proceedings on the opposite party, the applicants could not take advantage of rule 79(2) and therefore, the period certified by the Registrar, Court of Appeal as having been taken in preparing the record could not be deducted when computing the 60 days within which to file the appeal. Consequently, the period within which the applicants' appeal should have been filed elapsed on 15-01-08, by which time even the record of the proceedings had not yet been made available until 29-04-2008.

He asserted that these mistakes had not been realised until the application to strike out the Notice of Appeal was served on them hence the late filing of this application.

He pointed out that the applicants, as laymen, did not know the requirement to serve a copy of the letter requesting for the proceedings on the opposite party and retain evidence of such service. In his view, the applicants had all along been interested in having their appeal heard and decided on the merits since at stake is the ownership of the property, the subject matter of the case, which is of great importance to them and their families. They would suffer great loss if their rights to the property were lost without their appeal being heard and decided on the merits. He urged that negligence of counsel should not be visited on his client.

Counsel stated that the record of proceedings and the memorandum of appeal were ready and could be filed within 48 hours if the application was allowed. He concedes to costs of the application since the applicants were at false.

Mr. Kandeebe, learned counsel for the first respondent, opposed the application. He contended that the application was brought merely to buy time to deny the first respondent justice since justice delayed is justice denied.

Citing ***Boney M Katatumba - vs - Waheed Kerrim, Civil Application No. 27 of 2007, (SCU),*** learned counsel submitted that for an application for extension to succeed, sufficient reason must be shown and that the applicant must be vigilant.

He stated that in the instant case, the delay in instituting the application had been inordinate. The applicants and their counsel had both been guilty of dilatory conduct. They were availed opportunity to take the necessary steps in time but they just sat back. The Registrar, Court of Appeal by a letter dated 29-04-2008, notified all counsel of the availability of typed proceedings. The letter was served on all counsel on 07-05-08. Despite that information, counsel for the applicants took no action to collect the record. They woke up only when the Registrar of the Supreme Court by a letter dated 22nd August 2008, invited them to appear at the pre-hearing conference scheduled for 29-08-08.

He stated that there is no former counsel for the applicant. The letter inviting counsel for the applicants for the pre-hearing conference was served on M/s. A. F. Mpanga Advocates, a firm which jointly with MMaks Advocates still represent the applicants. They jointly drew this application No. 20/2008 for extension.
Learned counsel rejected the claim in Mr. Luwaga's affidavit that on receipt of the letter of the Registrar, Court of Appeal, dated 29-04-2008, they could not contact their clients who live in the United Kingdom as the clients had changed their e-mail address. He submitted that e-mail is not a recognised mode of service of legal documents in Uganda.

He stated that the claim that the clients had changed their e-mail address is not true. It is simply another falsehood because the first applicant **Mr. Kaderbhai**, who swore an affidavit, did not state that he had changed his e-mail address. He merely stated that he went on holidays between May and June 2008, though he did not disclose where he had been for the holiday.

Counsel asserted that a lot of falsehood has been told in this court regarding this case. For instance, on 29-0808, Mr. Masembe-Kanyerezi told falsehood to court that application for extension of time was pending when in fact it had not even been filed yet. He thereby misled court to fix for hearing a non-existent application for extension. Counsel pointed out that paragraphs 11 - 24 of the affidavit of Joy Ntambirweki dated 06-10-08, give the chronology of the events leading to the filing of this application. He that no sufficient reason has been shown to justify grant of the application. He prayed that the application be dismissed with costs.

Mr. Muyanja, learned counsel for the 2nd and 3rd respondents, had no comments to make.

Rule 5 of the Supreme Court Rules empowers this court, for sufficient reason, to extend the time prescribed by these Rules. In ***Boney M. Katatumba - vs - Waheed Karim, Civil Application No. 27 of 2007,*** to which I was referred by Mr. Kandeebe, my learned brother Justice Mulenga, JSC, said:

> ***"Under r 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 un explained 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."

I respectfully agree with that interpretation of rule 5 of the Rules of this court. The question at stake is whether sufficient reason has been shown by the applicants in the instant case to justify grant of the application?

Mr. Masembe-Kanyerezi, learned counsel for the applicant, stated that the former counsel for the applicant had lodged the Notice of appeal and written the letter requesting for a copy of the proceedings within the prescribed time but inadvertently failed to serve the Notice of Appeal, and to copy to and serve the letter requesting for record of the proceedings on the opposite party as required by the rule of this court. The reason for the failures was stated to be inadvertence.

I must point out at this juncture that in ***Delia Almaida - vs - Or Carmo Rui Almaida, Civil Application No. 15 of 1990, (SCU),*** the delay in filing an appeal in time was due to the inadvertent failure of counsel for the applicant to copy to and serve the letter requesting for record of the proceedings on the opposite party.

After looking at all the facts to see where the just weight of the case laid, the court held that inadvertence of counsel constituted ***"sufficient reason"*** and the application for extension was granted.

In ***Boney Katatumba*** (supra), the delay in instituting the application for extension was not only found to be inordinate but the applicant was also found not to have been vigilant in following up the progress of his appeal and did not show how he would suffer if the application was not granted. The application for extension was dismissed.

I find that case distinguishable from the instant case, in that the applicants in the case before me have shown in the affidavit Fakrudin, first applicant, that they have all along been interested in having their appeal heard and decided on the merits because at stake is the ownership of the property, the subject matter of the case which is of great importance not only to them but also to their whole families.

It would, in my view, be a grave injustice to deny an applicant such as this one, to pursue his rights of appeal simply because of the negligence of his lawyers when it is fairly well settled now, that an error of counsel should not necessarily be visited on his client. See ***Zam Nalumansi - vs - Suleman Lule, Civil Application No. 02 of 1999, (SCU),*** (unreported).

Considering all the facts of this case, I find that the justice of the case tilts towards granting the application. Inadvertence of counsel constituted the necessary sufficient reason to justify grant of the application.

Mr. Kandeebe complained very strongly about the conduct of Mr. Masembe-Kanyerezi regarding the statement Mr. Masembe-Kanyerezi made about the existence of this application on 29-08-2008. I think that Mr. Kandeebe's concern was well founded but I am not prepared to comment further on the matter because an administrative step has already been taken in that regard. Suffices it to

say that this court does not in any way condone impropriety much less acts of dishonesty in the court process.

Having said that, I allow this application, I however order with costs in favour of the respondent as conceded by the applicants. The applicants shall file the record and memorandum of appeal within one week from the date hereof.

Dated at Mengo this 17th day of October 2008.

G. M. OKELLO
JUSTICE OF THE SUPREME COURT