THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

CIVIL APPLICATION NO. 18/2009

B E T W E E N

HORIZON COACHES LTD :::::::::::::::::::::::::::: APPLICANT

AND

EDWARD RURANGARANGA
MBARARA MUNICUPAL COUNCIL ::::::::::::::::: RESPONDENTS

RULING OF THE COURT

The applicant, Horizon Coaches Ltd, has applied for extension of time within which to serve a Notice of Appeal to all parties directly affected by the appeal. The directly affected parties are ***EDWARD RURANGARANGA***, ***MBARARA MUNICIPAL COUNCIL***, ***THE ATTORNEY GENERAL, WAISWA MOSES and MUKWANO ENTERPRISES LTD.*** The application is supported by the affidavit of Charles Muhangi, the Managing Director of the applicant company. In reply, the respondents filed two affidavits by one STRATUS MUSHABE, Deputy Town Clerk of the 2nd respondent, and EDWARD RURANGARANGA the 1st respondent. Both opposed application and refuted the averments in Muhangi's affidavit.

The grounds upon which this application is brought are stated to be contained in the affidavit of MUHANGI CHARLES. However the body of the Notice of Motion "briefly" gives the following grounds.

> ***" (i) The applicant's counsel inadvertently forge to serve the parties who were to be affected by the appeal"***

“ (ii) No prejudice will be caused to the respondent and to the affected persons to be served as no appeal has been heard

“ (iii) That the applicant has brought this application without undue delay”

At the hearing of the application, Mr. Matovu, counsel for the applicant, recounted the background to the application, and to which Mr. Byaruhanga, counsel for the respondents concurred, as follows:

The applicant filed a Notice of Appeal in this Court on 12 August 2008 and served the 1st and 2nd respondents in the Court of Appeal. Initially, in the High Court the 1st and 2nd respondents filed a suit against 4 parties, i.e the Attorney General, Waiswa Moses, Mukwano Enterprises Ltd and Horizon Coaches Ltd, the present applicant, for fraud. The High Court found that there was fraud committed by the officers of the Attorney General and the present applicant. The Court cancelled the title of the applicant and ordered that the title revert to the 2nd respondent, Mbarara Municipal Counsel. The Court also ordered the costs of the suit against Mukwano Enterprises to be paid by the applicant. The applicant was dissatisfied with that decision and sought to appeal to the Court of Appeal against the whole decision.

Initially that appeal was filed against only the 1st and 2nd respondents. Later the present applicant had to apply for extension of time to serve all the parties, after the Respondents had applied to strike out the appeal on the grounds that all the parties affected by the appeal had not been served with the Notice of Appeal. The Court allowed the extension of time, and all the
affected parties were served. Those parties did not appear or file any paper in the Court of Appeal. So the appeal proceeded with the two respondents. In its decision, the Court of Appeal confirmed the decision of the High Court.

The applicant subsequently filed a Notice of Appeal in this Court and served only the 1st and 2nd respondents. The respondents then filed an application in this Court, No 21 of 2008, to strike out the Notice of Appeal on the grounds that the necessary steps of serving all the parties affected by the appeal had not been taken contrary to Rule 74(1) of the Judicature (Supreme Court Rules) Directions (herein referred to as Supreme Court Rules).

We heard that application as a full Court, and on 5th August 2009, this Court upheld the submission of the respondents and struck out the Notice of Appeal. Hence this application.

At the hearing of the application, Mr. Matovu decided to drop the first ground upon which the application was based. He stated that it was not true that he had forgotten to serve the parties, and therefore the ground had to be abandoned. He now sought to rely on grounds which he stated were contained in paragraph 7, 8, 9 and 10 of the supporting affidavit of Mr. Muhangi.

Counsel argued that the grounds were that the applicant was a victim of an error of Judgment by his counsel who had honestly believed that there was no need to serve the other affected parties since they had not participated in the proceedings before the Court of Appeal. In his view since the court had ruled that this was a wrong interpretation of the law by the learned counsel, that error or mistake should not be visited on the applicant. He submitted that on that ground alone, this Court should allow extension of time within which to file and serve a notice of appeal on the parties affected by the appeal. He cited the case ***ALMEIDA –Vs- RUI ALMEIDA Supreme Court Civil Application No. 15 of 1990 Platt, JSC,*** in support of his submission that an error of judgment by counsel may be found to be sufficient reason to allow extension of time.

Counsel argued further that as per paragraphs 8 and 9 of Muhangi's affidavit, the failure to serve Notice of Appeal on the affected parties was not prejudicial to the respondents because they had already been served by the applicant. He contended that the only people who would be prejudiced by non-service were the other parties affected by the appeal. Counsel further contended that the delay to finalize the appeal had been caused by the respondents as they are the ones who had raised the technicalities to strike out the Notice of Appeal.

Counsel raised a further ground for the application, namely, that the nature of the Judgment of the High Court was that the Judge therein made an order that is contrary to the provisions of the Constitution and the Land Act. This amounted to an illegality which was being raised in the Supreme Court, although it had not been raised in the Court of Appeal. In that regard he cited paragraph 10 of the affidavit of Muhangi. This

was a matter of law and public importance, counsel argued, which this court had to inquire into and determine. He cited the case of ***THE ATTORNEY GENERAL –Vs-ORIENTAL CONSTRUCTION CO. LTD. – (SUPREME COURT CIVIL APPLICATION N0. 7/90)*** to support his contention that extension of time may be allowed where there is a point of great public importance.

Counsel also argued that the application had been filed within six days of the Ruling of this Court to strike out the Notice and there had therefore, been no inordinate delay in filing this application. He invited this Court to invoke Article 126(2)(e) which enjoins Courts to administer substantive justice without undue regard to technicalities.

Mr. Byaruhanga, counsel for the respondents vehemently opposed the application contending that the applicant had not shown sufficient cause for this court to grant the extension of time. He contended further that the part of Notice of Motion requesting for time to "***and serve it on all the practices"*** was misconceived. To him, once the Notice of Appeal is filed it is not the concern of this court what the applicant does with it. He further submitted that by dropping the first ground given in the Notice of Motion, counsel for the applicant had left the application without explanation as to why the Notice of Appeal was not served. He contended that for a ground to be sufficient, it must point to the reason why the particular step was not taken. In his view, without the first ground, then the second and third grounds could not be sufficient to show why the necessary step was not taken. Prejudice and lack of delay do not explain why the step was not taken, i.e. why all the parties affected by the appeal were not served with the notice of appeal.

Counsel cited Rule 43(2) of the Rules of this Court which is mandatory and requires that the Notice of Motion must be in the form of Form A which requires that the grounds must be in the body of the Notice of Motion, not in the supporting affidavit. The supporting affidavit, according to Rule 43(1) is restricted to facts from a person who has knowledge of them. Counsel therefore submitted that the application is not based on any ground and should be dismissed.

In the alternative, counsel argued that even if this court were to follow what is averred to in paragraph 7, 8, 9 and 10 of Muhangi's affidavit, the averments therein are not averments of fact and are therefore not supportive of the Notice of Motion. Counsel

further submitted that since a similar application to strike out the Notice of Appeal had been made on similar grounds in the Court of Appeal namely the inadvertence of Counsel, who was different from the one considering the case on appeal, now that it was the same Counsel for the applicant in both the Court of Appeal and this Court, Counsel was appraised of the law and knew what to do. The Court of Appeal had allowed extension of time to serve all the parties affected by the appeal and this was within the knowledge of the applicant's present counsel.

Counsel further invited Court not to rely on the affidavit of Muhangi. The deponent had sworn on affidavit in reply to the application by the respondents (civil application No. 21 of 2008) to the effect that the reason why the affected parties had not been served was so as to save on the costs of litigation. This now would be contradicted by the averments in paragraph 7, 8, 9 and 10 of his affidavit in this application. They are a mere afterthought.

In counsel's view, the applicant should have sought extension as soon as the respondents filed the application to strike out the appeal, but instead the applicant preferred to argue the matter and seek to justify their misreading of the law. This amounted to dilatory conduct on the part of both counsel and the applicant, and the court should not grant the extension. Counsel sought to distinguish the Almeida case from this. In that case, the mistake was not realized until after the application to strike out was made. In this case, the applicant first sought to justify his failure to serve the affected parties and it took the Ruling of this Court before he filed the present application.

On the matter of prejudice, Counsel contended that the respondents had held the decree of the High Court since 8th December 2006. This was an adversarial litigation. They have an advantage which should not be lightly taken away from them. The decretal sums were not bearing interest nor had they been deposited in court. Any further delay in realizing the judgment is prejudicial to the respondents.

On the issue of whether the appeal raises a constitutional matter, counsel referred to the Decrees of both the High Court and the Court of Appeal, annexed to the affidavit of Mushabe. In his view, these did not contain any matter touching on the Constitution. In his view counsel for the applicant was misrepresenting the facts in the judgment. To

him the order in item 3 of the Decree of the High Court was that the Plots 32-40 were to revert to the 2nd respondent as owner and not as controlling authority. This is how the point had been argued in the High Court and Court of Appeal. To counsel, therefore,there was no element of a constitutional nature or any matter of Public importance. Counsel also dismissed the argument that the appeal had any likelihood of success, pointing out that this court would be dealing with concurring decisions of two lower courts. Counsel cited a number of authorities in support of his submissions which I will deal with in this ruling.

In reply, Mr. Matovu reiterated his earlier submissions. On the issue of Rule 42(2) he contended that that Rule merely provided a format which the applicant had substantially complied with. He argued that once the substance of the application is found in the affidavit, the Notice of Motion has to be read with it.

On the issue of the Constitution and public importance, he asserted that since the 2nd respondent had brought the suit as a statutory lessee, a constitutional issue arose because statutory leases had cancelled by the 1995 constitution.

In dealing with this matter, it is important to start with the Rules governing this application. I wish to start with a general principle stated in ***SHAH BHARMAL –Vs- SANTOSH KUMARI (1961) EA 679*** and cited with approval in this court in the case of The ***ATTORNEY GENERAL –Vs- ORIENTAL CONSTRUCTION CO. LTD*** (Supra):

> ***"Rules are made to be observed, and when there has apparently been excessive delay the court requires to be satisfied that there is an adequate excuse for the delay or that the interest of justice are such as to require the indulgence of the court upon such terms as the court considers just".***

Also the case of KITARIKO –Vs- TWINO KATAMA (1982) HCB 97 (cited by counsel for the respondents) is instructive where the Court of Appeal held that ***" rules of Court must Prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would***

defect the purpose of the rules which is to provide a time table for the conduct of litigation."

The first Rule I will consider is Rule 42 cited by Counsel for the respondents. Rule 42(1) requires that a Notice of Motion must state the grounds upon which the application is made. It states:

> ***42(1) "Subject to sub rule (3) of this rule and to any other rule allowing informal application, all applications to the court shall be by motion, which shall state the grounds of the application."*** (emphasis added).

Rule 43(1) requires that every formal application must be ***"supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts."*** It is important to note that while the head note to Rule 42 is ***"Form of application to court",*** that to Rule 43 is "supporting documents."

To my mind, the import of these two Rules is that when one files a formal application to Court, i.e. Notice of Motion, the grounds for that application must be stated in the body of that motion. The affidavit is evidence of facts that support the grounds that have been stated in the Notice of Motion. It is wrong for an applicant to direct this court that the grounds for his application are to be found in the supporting affidavit.

In this case, the Notice of Motion states that the grounds of this application are contained in the affidavit of Muhangi Charles, but then proceeds to state "briefly" what the grounds are. Those are the three grounds laid out earlier in this Ruling.

In my view the grounds stated in the Notice of Motion are the grounds that the applicant seeks to rely on. The affidavit of its Managing Director is one by a person who knows the facts giving rise to the grounds. The affidavit is evidence. Therefore when Mr. Matovu informed the Court that he was abandoning the first ground, he in effect amended the affidavit of Mr. Muhangi who stated in paragraph 3 of his affidavit thus:

> ***"That my advocates M/s Matovu $ Advocates who represented the applicant company in civil appeal No. 34 of 2007 inadvertently omitted to serve the said Notice of Appeal on all the parties directly affected by the appeal."***

In absence of a supplementary affidavit by Muhangi, this evidence remains on record. An affidavit is evidence, but Counsel's submissions from the Bar are not. Left as it is, the affidavit supporting the application contains a falsehood. I think counsel should have been more careful in the preparation of this application and the documents supporting it.

The above notwithstanding, I am of the view that in the interests of justice and taking into account that the Notice of Motion states, albeit irregularly, that the grounds are to be found in the affidavits, I shall consider the new ground he has argued as contained in paragraphs 7, 8, 9 and 10 of Muhangi's affidavit.

Under Rule 5, Court may extend time if sufficient reason is proved to the Court as to why the necessary step was not taken within the time allowed by the Rules. There are a member of authorities on this point cited by counsel for the respondents i.e. ***CLOUDS 10 Ltd –Vs- STANDARD CHARTERED BANK (U) Ltd, III KALR I, NATIONAL PHARMACY Ltd –Vs- KAMPALA CITY COUNCIL***. The question is whether the averments in paragraphs 7, 8, 9 and 10 of that affidavit amounts to sufficient cause. Paragraph 7 states:

> ***"That the applicant failed to served the notice of appeal on the other parties as a result of relying on the professional judgment of its lawyers M/s Matovu & Matovu Advocates who did not deem it necessary to serve the Notice of Appeal on the said parties since the parties did not take part in the proceedings in the Court of Appeal."***

It is to be noted that when the respondents filed civil application No. 21 of 2008, to strike out the Notice of Appeal, the applicant filed an affidavit in reply stating that the reason why the parties affected by the appeal had not been served was to save costs of litigation. In court, however, counsel argued that the application was misconceived as it was not necessary to serve those parties, since they had not participated in the proceeding of the Court of Appeal, an argument that this Court rejected in one ruling dated 5th August, 2009.

Counsel has argued that his failed argument amounted to a mistake or error of Judgment on his part. He cited the case of ***THE ATTORNEY GENERAL –Vs- ORIENTAL CONSTRUCTION CO. Ltd*** (supra) in support. In that case, this Court,

Platt, JSC, stated thus; ***"Mistakes of Counsel may sometimes amount to a sufficient reason, but only if they amount to an error of judgment. Inordinate delay on the part of an advocate is certainly not a sufficient reason."***

Having listened to the arguments of both counsel and studied both the affidavit of Muhangi in support and the affidavits in reply by Mushabe and Rurangaranga, it is clear to me that counsel for the applicant made serious mistakes in their handling of the matter. This is apparent in the Notice of Motion, and affidavits they filed. They were not consistent in the grounds the sought to rely on. Whereas counsel could argue that he believed it was not necessary to serve all the parties, the applicant swore an affidavit prepared by the same counsel that the reason why the parties were not served was because they wanted to save costs to litigation. This was brought to an end by the ruling of this Court on 5th August 2009. In my view, and in the particular circumstances of this case, the mistakes by counsel amounted to errors of judgment which should not be visited on the applicant. In that regard the case of ***ALMEIDA –Vs- RUI ALMEIDA*** (supra) is instructive. In the National Pharmacy case (supra) the court held (Ssekandi, JA) that the expression "sufficient reason" must relate to the inability or failure to take the particular steps in time although other considerations may be invoked. In this case, counsel was of the mistaken view that the parties having failed to participate in the Court of Appeal proceedings they did not need to be served in a subsequent appeal to this court, and he so argued in this court. In my view this was an error of judgment.

Turning to the ground of prejudice, there is no doubt that the respondents as Decree holders are prejudiced for everyday that they do not realize the fruits of the decree. But it is also important that this litigation be finally and conclusively determined. From the arguments and submissions of both counsel, and looking at the affidavits, and the Memorandum of Appeal that has been filed in this court and annexed to the Notice of Motion (Annexture 'B') it appears to me that there is involved here a point of law that is of public importance which should be conclusively determined by this court, the highest court in the Country.

Article 126 (2)(e) of the Constitution enjoins Courts to endeavour 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 technicality may have the effect of denying a party substantive justice, the Court should

endeavour to invoke that provision of the Constitution. In this matter it is my view that it would be an injustice to deny the applicant an opportunity to have the matters of contention between the parties on a matter of law finally disposed of by this court because of errors by his counsel.

In the circumstances I would allow the application with an order that the Notice of Appeal be filed and served on all the parties affected by the appeal within 10 days from the date hereof. Because the applicant and its counsel were responsible for the delay, I award costs of this application to the respondents.

Dated at Mengo this **10th** day of **September 2009.**

Bart M. Katureebe
Justice of the Supreme Court