THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

[CORAM: TSEKOOKO, TUMWESIGYE AND KISAAKYE, JJSC]

CIVIL APPLICATION (REFERNCE) NO. 04 OF 2009

BETWEEN

HOPE BAHIMBISOMWE :: APPLICANT

AND

JULIUS RWABINUBI :: RESPONDENT

[**Reference arising from decision of a Single Judge (Okello, JSC) dated 6th August 2009 in Civil Application No. 14 of 2009**]

RULING OF THE COURT

This is a reference by Hope Bahimbisomwe, the applicant, from a ruling of Okello, JSC, who, as a single judge of this Court granted leave to Julius Rwabinubi, the respondent, to file an appeal out of time.

The parties to these proceedings were husband and wife. In 2004, the applicant filed a divorce cause in the High Court for dissolution of the marriage. The High Court granted the divorce and decreed, inter alia, that the parties should share the matrimonial property in certain proportions. The trial Judge made an additional order that if it was not possible to share the real property, the respondent (husband) should pay a certain amount of money to the applicant (wife). The

respondent was not happy with the decision of the trial judge. He appealed to the Court of Appeal which confirmed the decision of the High Court. The respondent filed a notice of appeal intending to appeal to this Court against that decision but he did not institute the appeal itself within the prescribed time. After sometime, the Respondent instituted an application in this Court for extension of time to enable him lodge the appeal.

The matter came up before Okello, JSC, for hearing on 23rd of July 2009 but at the instance of Mrs Murangira, counsel for the present applicant (who was the respondent then), sought adjournment of the hearing for a week. The hearing was adjourned with her consent to the 31st of July 2009. The application was heard on that day by G. M. Okello, JSC, as a single Judge. He delivered his ruling on 5th August 2009 and allowed the present respondent to file the appeal. The applicant who was dissatisfied with the ruling made a reference which is now the subject of this ruling.

The reference is based on five grounds some of which are repetitive.

Mrs Murangira Kasande, counsel for the applicant, filed and relied on a written statement of her arguments. The complaint in the first ground is that the single Judge erred in law and in fact when he heard the application from which these proceedings arise during court vacation without a certificate of urgency as required by Rule 46 of the Rules of this Court. According to learned counsel, if this ground succeeds the reference should be allowed. On the other hand, Mr. Walukagga counsel for the respondent contended that by virtue of Rule 21 (2) of the Rules of this Court, court can deliver judgments and orders and hear applications during court vacation.

The argument by learned counsel for the applicant is interesting. As we have stated already, the application was initially fixed for hearing on 23rd July 2009

which was a Thursday and before vacation for this Court began. On that day Mrs Murangira herself applied for a short adjournment to the following week to enable her file an affidavit in reply to that of the applicant. Mr. Walukagga opposed that application for adjournment mainly on the basis that the matter to be argued in the application for extension of time, was a question of law. In rejoinder Mrs. Murangira asserted that she needed the adjournment so as to consult her client and it was on that account that the learned single Judge adjourned the hearing in the presence of both counsel to 31st July 2009.

On 31st July 2009, both Mr. Walukagga and Mrs Murangira appeared and argued the application. The former started his submission with the observation that although he had just been served that morning with the affidavit in reply, he would argue the application which he did. Mrs Murangira who appears to have vehemently opposed the application did not on that day raise any objection to the hearing of the application on the ground that by then it was court vacation and therefore a certificate of urgency was required. The learned Judge delivered his ruling on the afternoon of 5th August 2009 in the presence of both Counsel. There is no indication anywhere on the record that Mrs Murangira who apparently arrived earlier than Mr. Walukagga objected to delivering the ruling during "court vacation".

In the circumstances we think that Mrs Murangira wittingly or unwittingly waived the need for a certificate of urgency, if one was required under Rule 46.

Be that as it may, Mr. Walukagga contended that under Rule 21 (2) hearing of applications during vacation does not require a certificate of urgency. The sub rule reads:-

> ***"No business will be conducted during vacation unless the Chief Justice, otherwise directs, except the delivery of judgments and***

orders, when the matter is shown to be one of urgency, the hearing of applications and the taxation of bills".

We think that although this sub rule is somewhat vague, it permits inter alia, the delivering of judgments and orders and apparently in case of urgent matters the hearing of applications. In the case of hearing applications Rule 46 clarifies the position by stating that a certificate of urgency is required.

We note, however, that sub rule (2) of Rule 21 does not indicate what would be the consequences of violation of the rule by hearing a case during vacation.

In our view, the sub rule is directory and not mandatory and it appears to us that its purpose is essentially to allow time to courts to do house clearing without normal busy activities. Anybody familiar with daily court operations knows how busy courts are generally. Therefore a recess is necessary.

In addition, apart from production of the Registrar's "Calendar of Business for 2009" which shows the schedule of activities for the Supreme Court during 2009, the applicant has not produced the authority or direction of the Chief Justice showing that the Chief Justice had determined the period of vacation for the Supreme Court to be on 31st July 2009 or 5th August 2009. This ground must fail.

The second ground is worded thus:

That learned trial Judge erred in law and fact when he heard Civil Application No. 14 of 2009 brought under a defective Notice of Motion and Affidavit.

Counsel relied on contents in paragraphs 16, 17, 18 and 23 of her client's affidavit filed in opposition to the Notice of Motion giving rise to this reference. Mr. Walukagga contended, correctly in our opinion, that if the notice and accompanying affidavit were defective, objection to them should have been raised

during the hearing but not now. We have looked at the said paragraphs of the affidavit. Except paragraph 23, the others do not point out any defects in the motion and the accompanying affidavit. Even paragraph 23 merely asserts that ***"the applicant's affidavit is incurably defective as it does not distinguish matters which are with (sic) the applicant's knowledge, belief and/or information".***

The affidavit referred to was sworn by the present respondent as a party to all the previous proceedings from which the motion emanated. In the opening paragraph he deponed that he was conversant with the matters deponed to and he mentioned some sources of the matters to which he deponed.

Further the learned counsel for the applicant does not appear to have pointed out the so called defects during the hearing of the notice of Motion before the single Judge. So she cannot properly fault the Judge.

In the circumstances we find no merit in ground two which must fail.

The third ground states that:

The learned trial Judge erred in law and fact when he failed to consider the affidavit of the applicant (respondent in Civil Application No. 14 of 2009) and arrived at a wrong decision.

In a way submissions on this ground are repetitions of the 2nd ground. We think that this ground has no merit.

At the hearing before the single Judge Counsel for both parties made submissions on the basis of the affidavits of their respective clients. At page 5 of his ruling, the learned single Judge referred to the affidavit of the present applicant upon which her counsel relied to make submissions. We do not therefore, with respect, agree that the Judge did not consider the affidavit. In any case, it has not been

shown that such omission, if any, has caused any injustice. At least this is not the contention of counsel for the present applicant.

Learned counsel urged us to re-evaluate evidence on record and make our own inferences and she referred to the case of **Motor Mart Ltd Vs Yona Kanyomozi** (Supreme Court Civil Application No. 6 of 1999).

The application before the single Judge was not a complicated one. The learned Judge was satisfied that basically the previous lawyers for the then applicant had been negligent and he saw no basis for not allowing extension of time for the filing of memorandum and record of appeal. The learned Judge was of the view that it would cause injustice to the applicant if extension of time was denied. The principal issue at stake in the whole case appears to be the mode of sharing matrimonial property. That matter requires consideration by this Court. No injustice would be caused to the present applicant because of the order to extend time. This ground fails.

The complaint in the fourth ground is couched as follows:

That the learned trial Judge erred in law and fact when he based his decision in Civil Application No. 14 of 2009 on matters that were not in the Notice of Motion and its supportive affidavit.

This is based on the passage at page 7 of the ruling that; "*I am informed from the Bar that the applicant entered into that settlement while he was in a Civil prison in execution of that decree*".

Mrs Murangira contends that the learned judge erred when he based his decision on unpleased matters. Mr. Walukagga contended that at the hearing both sides alluded to that matter in passing and argued that in any case this was not the basis for the grant of the application.

We have perused the record and noted that apparently the single Judge did not make a note of this point in his record of proceedings. We think that this was an error on the part of the learned Judge. However this omission does not affect his decision. The Judge did not base his decision on extraneous matter. The ground must fail.

We may point out though that from the record of the proceedings before the Registrar of the Court of Appeal that by 9th April 2009 the respondent had in fact been arrested in execution of the decree and was detained in prison until 27th April, 2009 when the Registrar ordered for his release.

According to the fifth ground:

The learned trial Judge erred in law and fact when he awarded costs against the applicant (respondent) in Civil Application No. 14 of 2009.

Normally in these types of applications where an application for extension of time essentially arises from the fault of an applicant and or his/her lawyer, the applicant pays the costs whether he/she succeeds or not or, the costs should abide the final determination of the appeal by this Court. See: **M. R. Karia & Another Vs Attorney General & 2 others – Supreme Court Civil Application No. 1 of 2003**.

This ground is therefore well founded and must succeed. We accordingly set aside the order that the respondent was to pay costs before the learned single Judge. Instead we order that the costs before the single Judge be paid by the applicant to the respondent there.

The application substantially fails. We confirm the order of the single Judge granting extension of time.

As the applicant has succeeded on only one ground, she will get one third ($^1/_3$) of the costs of this application.

Delivered at Mengo this 28th **day of January 2010**.

5

_____
J. W. N. Tsekooko
JUSTICE OF THE SUPREME COURT

10

_____
J. Tumwesigye
JUSTICE OF THE SUPREME COURT

15

_____
E. M. Kisaakye
JUSTICE OF THE SUPREME COURT