THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[CORAM: TSEKOOKO, JSC – SINGLE JSC]

Civil Application No. 24 of 2010

KASAALA GROWERS ***BETWEEN***

CO-OPERATIVE SOCIETY :::::::::::::::::::::::::::::::::: APPELLANT

AND

1. KAKOOZA

1.JONATHAN

2.KALEMERA EDSON :::::::::::::::::::::::::::::::::: RESPONDENTS

{Application Arising From Supreme Court Civil Appeal No. 14 of 2010 and Judgment of Court of

Appeal in Civil Appeal No. 19 of 2007 dated 6th February, 2009}

Civil Application-Leave to file memorandum and record of Appeal out of time

RULING OF TSEKOOKO, JSC

NOTICE OF MOTION

By notice of motion the applicant seeks for leave to file its memorandum and record of appeal out of time. This matter has an interesting background. Kakooza Jonathan (1st Respondent) and Kalemera Edson (2nd Respondent) unsuccessfully sued Kasaala Growers Cooperative Society (Applicant) in the High Court. The Court of Appeal on 06th February, 2009, allowed the appeal against the decision of the High Court. The Applicants lodged a notice of appeal on

16th February, 2009 intending to appeal against that decision of the Court of Appeal. That notice was lodged by the applicant itself through its agent. The notice of appeal was apparently lodged in the Court in the manner prescribed by the Rules of this Court.

1ST ADVOCATES' ROLE

Subsequently, the applicant engaged Messrs. Tibaijuka & Co. Advocates, who also lodged another notice of Appeal in the same Court of Appeal on 20th February, 2009 on the assumption that no other notice had been lodged. Thereafter, there seems to have been a misunderstanding between the applicant and the said advocates who did not take any further steps to institute the intended appeal. Mr. Tibaijuka, an advocate in the firm, has explained in his affidavit in some detail why he drew the second notice of appeal. He did not institute the intended appeal basically because the applicant did not pay his fees.

CIVIL APPEAL NO. 14 OF 2010 AND CIVIL APPLICATION NO. 19 OF 2010

It is apparent that by early September, 2009, the applicant had failed to persuade Mr. Tibaijuka to pursue its appeal. Consequently, the applicant engaged another firm of advocates; Ambrose Tebyasa & Co. advocates, to take steps to institute the appeal. So on 3rd and 7th September, 2009, the applicant paid that firm of the new advocates Shs.1,000,000/= and Shs.500,000/=. Receipts for the payments were issued. They are now Annexture "F" to Mumbakali Sande's affidavit in support of this application. Meantime on 7th September, 2009, the respondent instituted in this Court Civil Application No. 24 of 2009 seeking to have the notice of appeal filed by the applicant struck out. Even then Ambrose Tebyasa took no action despite the payments.

It is apparently clear that Mumbakali Sande had some staff in the Civil Registry who informed him on what was happening about the cases. Thus when Civil Application No. 24 of 2009 was fixed for mention during prehearing conference on 04/02/2010, according to his affidavit, he was informed of the same. He was unable to get Ambrose Tebyasa to attend Court but Mumbakali himself attended Court on 04/02/2010 on behalf of the applicant. The Court record of that day, shows that Okello, JSC., noted that *"Mr. Tibaijuka Ateenyi no longer has instructions to represent the respondents"* (i.e., present applicant). The same record shows that Mr. Mumbakali Sande sought adjournment which was granted *"to enable the respondents to engage the services of another lawyer."*

The next thing to note is that the applicant itself filed Civil Appeal No. 14 of 2010 which was obviously out of time. Realising that the appeal was filed out of time, during August, 2010, the applicant instituted Civil Application No. 19 of 2010. It is apparent from the ruling of the court in that application, that the applicant did not use the services of advocates. I do not want to speculate about what took place but I would not be surprised if the application was prepared by some staff in our Civil Registry for the applicant.

Be that as it may, the said Civil Application No. 19 of 2010 sought leave of the Court to extend time within which to file a memorandum and the record of appeal. In effect the application sought for an order to validate the existence of Civil Appeal No. 14 of 2010. Unfortunately, the affidavit in support of the application and which was drawn by a lay person was defective and so Okello, JSC., who heard the application struck it out on 28th September, 2010, because, according to the learned Justice of the Supreme Court, the application was **"without the requisite supporting affidavit"**

THE PRESENT APPLICATION

On 04th October, 2010, the applicant instructed Messrs. Kyazze & Co., Advocates, to file a fresh application. Accordingly, the advocates filed the present application on 05th October, 2010 under Rules 2, 5 and 50 of the Rules of this Court seeking leave for the applicant to file its memorandum and record of Appeal in the aforementioned appeal out of time. Obviously, in effect, the applicant seeks for an order of this Court to validate the appeal in as much as an appeal has already been instituted albeit out of time. The notice of motion is supported by an affidavit sworn on 04th October, 2010 by Mumbakali Sande, an agent of the applicant. He had its Powers of Attorney. On 20th October, 2010, the 2nd Respondent swore an affidavit in reply opposing the application and Mr. Tibaijuka K. Atenyi swore another affidavit, alluded to earlier, challenging some averments of Mumbakali's affidavit as well as explaining circumstances why he did not carry out the instructions of the applicant to institute the appeal. At the hearing, Mr. Kyazze appeared for the applicant while Mrs. Murangira Kasande represented the Respondents.

PRELIMINARY OBJECTION

In his affidavit opposing the application, the 2nd respondent challenged the competence of Mumbakali's affidavit and intimated that an objection would be raised at the hearing.

Consequently at the commencement of the hearing, Mrs. Murangira Kasande attempted to raise, as indicated in 2nd respondents affidavit, preliminary objections to the effect that the ruling of my learned brother, Okello, JSC., rendered the matter (of extension of time) res judicata and that Civil Appeal No. 14 of 2010 was filed by an illiterate and was incompetent. When I intimated to learned counsel that in my view the ruling of Okello, JSC., did not constitute res judicata, learned counsel quite properly abandoned her preliminary objection. I ought perhaps to briefly explain.

First, Justice Okello's ruling was that because the affidavit supporting the application before him was incurably defective, there was no affidavit evidence to support the application as required by rule 43 of the Rules of the this Court. Therefore, that application was struck out on a technical point and not on the merits of the application. It was not decided on the issue between the parties as to extension of time. That alone would show that the substance of the decision could not constitute res judicata as envisaged by the rules which govern the doctrine of Res judicata.

Secondly, I am not aware of any rule of law which prevents an illiterate from filing an appeal. Learned counsel did not elaborate beyond what appears in the affidavit in reply.

ARGUMENTS ON MERITS OF THE APPLICATION

On the merits of the application, Mr. Kyazze contended in effect that the applicant instructed two advocates in succession namely first Mr. Tibaijuka Ateenyi and later Mr. Tebyasa to institute the appeal but the lawyers let the applicant down. He relied on rules 2 and 5 for the proposition that if an applicant gives sufficient cause for not taking an essential step, leave to file appeal out of time ought to be granted. He cited ***Kadebhai V$_s$ Shamerabi & Another (2008 HCB 16)*** for the proposition that the omission or negligence of the two advocates should not be visited on the applicant. He contended that the respondents would not suffer prejudice if the application is granted. He suggested that the applicant should not be shut out of the seat of justice and cited ***G. Magezi V$_s$ S. Rupelia – Supreme Court Application No. 06 of 2003*** in support. He submitted that the respondents could be compensated by costs.

For the respondents, Mrs. Murangira Kasande vehemently opposed the application and relied on the affidavits of the 2nd respondent and that of Mr. Tibaijuka Ateenyi contending that the two affidavits raised the question of competence of the application. Learned counsel opined that Mr. Kyazze was instructed after the application had been filed. (I do not think that belated instructions affect the application.) She submitted in effect that there was no challenge to the respondents' affidavits as there was no rejoinder thereto.

Learned Counsel contended that in his affidavit Mr. Tibaijuka shows that he was not negligent. Rather it was Mumbakali Sande who handled the appeal and that the latter's affidavit contains falsehoods. She argued that no sufficient cause has been shown by the applicant to justify grant of extension of time. Curiously she contended that the two receipts (Annexture "F" to Bumbakali's affidavit) purporting to have been issued by the firm of Ambrose Tebyasa as evidence of payment of fees by the applicants, was concocted.

Learned counsel submitted that the applicant woke up to file Civil Appeal No. 14 of 2010 after a prehearing conference was held by Okello, JSC., in February, 2010 during which conference the respondents' Civil Application No. 24 of 2009 was mentioned. She also faulted this Court because it postponed determination of Civil Application No. 24 of 2009 in order to dispose of this application first. She relied on Article 126 (2) and (6) of the Constitution for the view that justice should not be delayed. She prayed that the application should be dismissed.

In rejoinder Mr. Kyazze contended that as there is no affidavit from Tebyasa disputing Mumbakali Sande's arguments in this affidavit about Tebyasa's failure to file the appeal, Mumbakali's explanation in his affidavit should be accepted.

CONSIDERATION

One matter which I must dispose of straight away is the curious suggestion by Mrs. Murangra Kasande that Annexture "F" is a concoction. I do not understand what she meant by the word "concoction." The Advanced Learners English Dictionary (7th Edition) defines concoction this way—

> '*a strange or unusual mixture of things, especially drinks or medicine'.*

I have looked at Annexures "F". The two receipts purport to be receipts from the chambers of **"Ambrose Tebyasa & Co Advocates"** for Shs.500,000/= and for Shs.1,000,000/= and they bear the physical, postal as well as email address of the advocates. *Prima facie*, these appear to be genuine receipts until evidence is adduced to show the contrary. I therefore accept the contention by the applicant that in September, 2009, probably after failure to persuade Mr. Tibaijuka to institute the appeal, it instructed Ambrose Tebyasa to apply for extension of time and paid a total of Shs.1,500,000/= as fees for the job. This is evidence that the applicant desired to pursue its right of appeal.

I have considered the affidavits and arguments of both sides. The contention of the applicant is really that it wanted to appeal against the decision of the Court of Appeal. On the face of it, initially it demonstrated its intension to appeal by filling a Notice of Appeal on 17/02/2009, which is eleven days after the Court of Appeal had handed down its decision, having first applied on 16/02/2009 for a record of proceedings of Court of Appeal. It demonstrated the same intention by instructing Mr. Tibaijuka. The applicant had a period of sixty days within which to institute the intended appeal after the notice of appeal had been lodged. The period expired in latter part of April, 2009.

According to the affidavit in support of the application, the applicant instructed Messrs Tibaijuka & Co., Advocates on 20/02/2009 to take over the matter of instituting the intended appeal. In paragraph 4 of his affidavit Mr. Tibaijuka Ateenyi admits that much, namely that he was requested to handle the intended appeal. He however appears to assert that Annexure "C", "D" and "E" to the applicant's affidavit may not be genuine because they were not shown to him at the time he was instructed or subsequently. That is why he filed a fresh notice of appeal on the assumption that none had been filed before since Mumbakali Sande never showed to him a copy of the notice filed on 17/02/2009. That after filing the new notice of appeal, applicant's representative did not go back to Mr. Tibaijuka as he had been advised, to discuss payment of the advocate's fees. That explained why Mr. Tibaijuka did not take further steps. There can be no doubt at all that the failure and omission by the applicant's agent or representative to return and pay professional fees to Mr. Tibaijuka hurt him. That is why he decided to withdraw from instituting the appeal. In paragraphs 16 and 17 of his affidavit, Mr. Tibaikjuka averred thus—

*[16]**THAT** it was as a result of what is averred in the foregoing paragraphs, and in spite of incessant pleas from the applicant's representatives, that I decided to withdraw from the conduct of the Applicant's intended appeal and advised her to look for another advocate; and it is insincere and false for the Applicant to claim that she is the one who withdrew instructions from me.*

*[17] **THAT** I do repeat Paragraphs (sic) all my averments hereinabove, particularly Para **7** and **15,** and further aver that I have never received any proceedings or judgment from any of the applicant's representatives as alleged, or jeopardised the Applicant's intended appeal, wilfully or otherwise.*

In much of the rest of the affidavit, Mr. Tibaijuka explains how the applicant, through Mumbakali, instructed him, the drawing of the notice of appeal and that the applicant's agent did not strictly follow his advice. In short he asserts that applicant's agents are not correct in what they state.

I should point out that Mumbakali's averments about most of the steps taken by the applicant to appeal remain unchallenged. I believe that disputes (including appeals) in courts must be disposed of as expeditiously as possible. Clearly there was a failure by the applicant's agent to follow the advice of Mr. Tibaijuka Ateenyi. Does this affect the right of the applicant to seek remedy in a Court? Can a Court of law bar a party from pursuing its rights of appeal because of possible erratic conduct of its agent? Well, it will always depend on the facts of each case. Certainly, where the conduct is so grave as to adversely affect the legal rights of the opposite party, such conduct will adversely affect the principal. That does not appear to be the case here, in my considered opinion.

In Paragraphs 5 to 9 of his affidavit, the 2nd respondent stated—

*'[5]**THAT** in specific reply to grounds 4, 7, 8 and 9 of the application and paragraphs 5, 6, 7, 14, 15, 18, 19, 20, 21, and 22 of the affidavit in support of the application, that I have read the affidavit in support of the respondents' case sworn by Tibaijuka K. Ateenyi which is filed in this Court, that the applicant was negligent or refused or / and failed to take necessary steps to appeal in time.*

*[6]**THAT** with the affidavit evidence of Mr. Tibaijuka K. Ateenyi, whatever was done by M/s Tebyasa & Co. Advocates and the current advocate, M/s Kyazze & Co. Advocates in relation to the intended appeal are inconsequential in this application. That everything is out of time.*

*[7]**THAT** Bumbakali Sande, the deponent of the affidavit in support of the application did not swear this affidavit before the **Commissioner for Oaths.** That to that extent the said affidavit is incurably defective. And that the application is not supported by any affidavit.*

*[8]**THAT** this application was filed in this court on 05th October, 2010 by M/s Kyazze & Co. Advocates **without instructions.** Hereto attached is the Notice of instructions marked **"B."** That the application is incompetent before this court..*

*[9]**THAT** the applicant is not interested in appealing against the judgment of the lower court. That it is only Bumbakali Sanda who is confusing the applicant's executive members. That there is no **applicant's resolution** to file an appeal against the judgment of the Court of Appeal attached to this application.'*

With respect I do not understand what the deponent meant in Para 6 by averring that whatever was done by the two advocates is inconsequential. I think that the steps demonstrate that the applicant wanted or intended to appeal.

Regarding Para 7 of the 2nd Respondents affidavit, I should point out that Mumbakali's affidavit bears emborsement of Mr. Andrew Lumonya, a commissioner for Oaths and a signature of that very Commissioner. Below, there is a statutory explanation that the contents of the affidavits were explained to the deponent by the Commissioner for Oaths and were understood by the deponent. This was done because the deponent was considered illiterate in English.

Again I do not appreciate at all the essence of paragraph 8 whose contents were part of Mrs. Murangira's address to Court. Annex "B" was signed by Mr. Kyazze on 04th October, 2010. Similarly, the notice of motion which instituted this application is dated 04th October, 2010 the same date and bears Mr. Kyazze's signature. This surely shows that the advocate had instructions at least by 04/10/2010. Further I wonder as to why paragraph 9 was included. In

his ruling in Civil Application No. 19 of 2010, the same argument was properly rejected by Okello, JSC. I was not shown authority suggesting that in this matter such a resolution is necessary. Paragraph 4 of the Powers of Attorney appears to grant Mr. Bumbakali Sande the necessary authority to do what he did on behalf of the applicant. That paragraph state as follows—

"*On behalf of the society to institute and defend any suit, instruct any* ***pleader or pleaders****, attend any court or tribunal,* ***file any pleadings and*** *do such other legal act as he may deem fit, for the purpose of furthering the interests of the society."*

This provision of the power of attorney given to Bumbakali authorizes him to, *inter alia*, institute the court proceedings, which according to my understanding includes instituting applications and appeals.

Learned counsel criticised the court for postponing disposal of Civil Application No. 24 of 2009 between the same parties to enable this application to be determined first.

During the course of hearing on 15/10/2010 by full Court of the said application No. 24 of 2009 which was seeking orders of the full court to strike out the applicant's notice of appeal, the court was informed of the existence of the present application. Court decided that **"it was in the best interest of justice"** first to dispose of this application before hearing application No. 25 of 2009. It actually helps in expediting disposal of applications arising from such appeals. This is not delaying justice and I do not, with the respect, think that this violates Article 126 as suggested by learned counsel for the respondents

Mr. Tibaijuka's affidavit shows, inter alia, that there were incessant pleas from the applicant's representative for the advocates to advance the intended appeal. Much as there must have been a failure of communication between him and the agent of the applicant, the applicant all along wanted to appeal. I think that in land cases it is proper to allow parties to exhaust their proper legal rights of appeal. Naturally no court should condone lack of diligence by a party seeking a remedy from court. In this particular case I am not persuaded that this application should be dismissed because of Bumbakali's apparent naivety and or his failure to return to Mr. Tibaijuka to pay his fees.

In the circumstances, I exercise my discretion in granting this application. However, because of the manner in which the applicant's agent handled the matter I order that the applicant must meet the respondents' costs in this application.

I direct that the applicant must serve the record of appeal to the respondents within seven days from date of this ruling.

Delivered at Kampala this **7th** day of **January** 2011.

JWN Tsekooko
Justice of the Supreme Court