THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL MISC. APPLICATION NO. 04 OF 2012

BETWEEN

1. **JOEL KATO**
2. **MARGARET KATO ::::::::::::::::::::::::::::APPELLANT**

VERSUS

NUULU NALWOGA :::::::::::::::::::::::::::::: RESPONDENT

RULING OF THE COURT

This application is brought by way of notice of motion under Rules 2(2), 5, 42(1) & (2) 43(1) and 50 of the Rules of this court praying for orders that -

(a)The time within which to serve the notice of Appeal upon the respondent be extended or that the service of the Notice of Appeal upon the respondent out of time be validated.

(b) The costs of the application be provided for.

The main grounds for this application are that-

a) The applicants were prevented by sufficient cause from serving the Notice of Motion upon the respondent in time.

b) The failure to serve the Notice of Appeal was a result of inadvertent omission of the applicants' former counsel and the same should not be visited upon the innocent applicants.

c) The application was brought without inordinate delay.

d) The court has the discretion to extend time within which to serve the notice of appeal on the respondent or alternatively validate the service of the same out of time

e) That it is only fair, just and equitable and in the interest of justice that the application be allowed.

The application is supported by an affidavit sworn on 9th March, 2012, by Ssempenja Peter Prevato, who avers, among other things, that the two applicants are currently out of the country and that they gave him a Power of Attorney with instructions to prosecute the appeal in this court on their behalf. He avers that the applicants informed him that they instructed their former lawyers to appeal against the decision of the Court of Appeal in Civil Appeal No. 79 of 2009; that the said lawyers lodged a Notice of Appeal in the Court of Appeal on 28th March 2011 and also applied to the Court of Appeal for the typed record of proceedings. That the applicants inquired of their lawyers about the progress of the appeal and that their lawyers advised them that they would be notified when the appeal itself is lodged and fixed for hearing. That being eager to prosecute their appeal, the applicants requested the deponent, Ssempenja, to cross-check with the Supreme Court Registry and confirm the

information. That when he inquired from the Supreme Court Registry he was told that the Memorandum and Record of Appeal had not been filed yet but that the respondent's lawyers had filed an application to strike out the applicants' Notice of Appeal. That he called the applicants and informed them of his findings and the applicants asked him to look for other lawyers to handle the appeal. That he contacted the applicants' present lawyers M/ S Kyazze & Co. Advocates, who advised him that the Notice of Appeal had been served on the respondent's counsel out of time which would render the Notice of Appeal liable to be struck out and that it was therefore necessary to file an application for extension of time to serve a Notice of Appeal or to validate the late service. That when he informed the applicants about the counsel's advice, they gave him a Power of Attorney to appear and prosecute the appeal for them and to instruct M/ S Kyazze & Co Advocates to file an application for extension of time. That the new lawyers informed him that the Notice of Appeal should have been served before 4th April 2011 but it was instead served on 6th May 2011, about 33 days after the expiry of the time of service. That the failure to serve the Notice of Appeal within time was the omission and lapse of the applicants' former lawyers, the applicants having instructed them well within time.

Nuulu Nalwoga, the respondent, filed an affidavit in reply. In this affidavit she avers that she has been advised by her lawyers, which advice she believes, that the application is improperly before the

court as it should have been filed in the Court of Appeal first under Rule 41(1) of the Judicature (Supreme Court Rules) Directions Sl 13-11. That the same lawyers advised her that the affidavit deponed by Ssempenja Peter Prevato offends the rules of the court as it is full of hearsay and should not be relied upon by the court. That the Applicants are not vigilant in prosecuting their appeal as it has been a year now since they applied for the record of proceedings from the Court of Appeal and no evidence has been produced to show that they are diligently pursuing the matter. That the applicants' purported conduct of checking on their former lawyers only twice a year as averred in paragraph 7 and 8 of Ssempenja's affidavit in support is not indicative of litigants who are eagerly pursuing the matter.

Submissions of counsel

Both counsel for the applicants and counsel for the respondent opted to file written submissions. In their written submissions *MIS* Kyazze & Co. Advocates, counsel for the applicants, basically reiterated what Ssempenja Peter had stated in his affidavit in support of the application. He submitted that the applicants were prevented by sufficient cause from having the Notice of Appeal served upon the respondent in time because of the omission or mistake of their former lawyer. He further submitted that the applicants were not guilty of any dilatory conduct and had brought this application a few days after being advised by their new lawyers of the need for the application.

Counsel for the applicants submitted that this application was properly before the court as this court has unfettered and unlimited discretion under rules 5 and 2(2) of the rules of this court to grant extension of time. Counsel cited **Mulowooza & Bros Ltd vs. N. Shah & Co. Ltd** SCCA No. 20 of 2010 to support this view. There is no concurrent jurisdiction in applications for extension of time as is the case for applications for leave or stay of execution, counsel argued.

On whether the applicants had shown sufficient cause warranting the grant of the orders sought counsel for the applicants repeated for their submissions what Ssempenja Peter had stated in his affidavit in support of the applicants' application for extension of time.

Counsel for the applicants further stated that there was a delay of only 33 days in serving the Notice of Appeal and that this court had previously considered such number of days as not being too inordinate. They further submitted that the omission to serve a Notice of Appeal within time was a mistake on the part of the applicants' former lawyers and that this was sufficient cause to grant extension of time as this court has held in **Mulowooza & Bros vs. N. Shah & Co. Ltd** (supra) and **AG. Vs AKPM Lutaaya** SCCA No. 12 of 2007 that a litigant's interests should not be defeated by mistakes and lapses of his counsel.

Applicants' counsel concluded by submitting that the subject matter of the intended appeal is customary land holding worth millions of shillings and that it is in the interests of justice to allow the applicants to exhaust their legal rights and not be closed from the seat of justice.

Ms Dorothy Kabugo, counsel for the respondents, on the other hand also reiterated what the respondent had averred in her affidavit in reply. Learned counsel submitted that the application was improperly before the court as it should have been brought in the Court of Appeal first. To support her argument she cited rule 41 (1) of the rules of this court and **Florah Rwamarungu vs. DFCU Leasing Vo. Ltd** SCC Application No. 11 of 2009 and **Margaret Kato & Joel Kato vs. Nuulu Nalwoga** SCC Application No. 12 of 2011.

Learned counsel argued that the applicants had not shown sufficient cause why this court should exercise its discretion and grant the orders sought. She argued further that while it was agreed in principle that a litigant should not be made to suffer for the lapses of his counsel, this court has held on diverse occasions that in addition, it must be shown that the litigant is vigilant and has not in any way contributed to the delay. She cited the cases of **F.L Radarbhai & Anor vs. Sharusherali M. Zaver Virji & 2 ors**

SCC Application No. 20 of 2008 and **Joseph Muluta vs. Sylvano Katama** No.2 of 1999 to support this view.

She argued that the Applicants were not vigilant and they contributed to the delay. That instead of pursuing the case with this court they resorted to subjecting the decision of court in SCCA No. 12 of 2012 to scrutiny by the public on radio. Learned counsel argued further that the affidavit in support is full of hearsay evidence and offends rule 43(1) of the rules of the Supreme Court and therefore, it should not be relied upon by this court. In her view the affidavit ought to have been limited to only those facts within the knowledge of the deponent. She argued that paragraphs 4, 5, 6, 7, 15, and 19 of Ssempenja Peter's affidavit extend to information outside the agent's knowledge. She cited the case of **Eric Tibebaga vs. Fr. Narsensio Begumisa & ors.** SCC Application No. 18 of 2002 for the holding that a person swearing an affidavit in support of an application must have knowledge of the facts involved and failure to uphold the rule cannot be cured merely by stating the source of information.

Consideration of Objections raised by the respondent

The respondent's affidavit and her counsel Ms Dorothy Kabugo's submissions raised two objections which I will deal with first.

The first objection is that the application is improperly before the court as it should have been filed in the Court of Appeal first.

Counsel relied on Rule 41 (1) of the rules of the court and the cases of **Florah Rwamarungu vs. DFCU Leasing Vo. Ltd** (supra) and **Margaret Kato & Joel Kato vs. Nuulu Nalwoga** (supra) for her objection.

Counsel for the applicant however, countered this objection by saying that this court has unfettered and unlimited discretion derived from rules 5 and 2(2) of the rules of this court to grant extension of time within which an essential step should be taken. They relied on **Mulowooza & Bros Ltd vs. N. Shah & Co. Ltd** (supra) for their view.

Rule 5 of the rules of this court provides: **"The court** "may **for sufficient reason, extend the time prescribed by these rules or by any decision of the court or of the Court of Appeal for the doing of any act authorized or required by these rules, whether before or after the doing of the act and any reference in these rules to any such time shall be construed as reference to the time extended."**

Rule 3(g) of the rules of this court provides that **"court"** means the Supreme Court of Uganda established under Article 129 of the Constitution. Clearly under Rule 5 of the rules of this court, the court has unfettered discretion to extend time for sufficient reason and as counsel for the applicant correctly argued, there is no concurrent jurisdiction with the Court of Appeal in applications for

extension of time. Therefore, the respondent's objection on this ground fails.

Counsel for the respondent's second objection is that the affidavit of Ssempenja Peter in support of the application is full of hearsay evidence and it should not be relied upon. She argued that paragraphs 4, 5, 6, 7, 15, and 19 of Mr. Ssempenja's affidavit extend to information outside the agent's knowledge. She cited the case of **Eric Tibebaga vs. Fr. Narsensio Begumisa and others** SCC Application No. 18 of 2002 for the view that a person swearing an affidavit in support of an application of this nature must have knowledge of the facts involved and failure to uphold the rule cannot be cured merely by stating the source of the information.

The applicants did not file an affidavit in rejoinder to answer this objection nor did their counsel submit on it in their written submissions.

Rule 43(1) of the rules of this court provides that **"every formal application to the court shall be supported by one or more affidavits of the applicant or some other persons having knowledge of the facts."** The case of **Eric Tibebaga vs. Fr. Narsensio Begumisa** (supra) cited by learned counsel for the respondent clearly explains the application of this rule. The rule on hearsay evidence in court equally applies to affidavits. The question,

however, is whether the impugned paragraphs in Ssempenja's affidavit mentioned by counsel for the respondent are indeed hearsay evidence. The paragraphs objected to read thus:

Paragraph 4

"That I am reliably informed by the applicants whose information of typed proceedings file a Notice of Appeal and further institute and prosecute the appeal in the Supreme Court". (sic!)
I find this ground unintelligible. It is difficult to understand what it says. I am surprised counsel for the applicants could prepare such a bungled paragraph in the affidavit. **I,** therefore, cannot rule whether or not it contains hearsay evidence.

Paragraphs 5 and 6

"5. That I am informed by the applicants whose information I verily believe to be true that the said lawyers duly lodged the Notice of Appeal to the Court of Appeal on the 28th day of March 2011 and waited for the same to be transmitted to the Supreme Court by the registrar as required by law, *A photocopy of the Notice of Appeal is hereto attached and marked as annexture «B"."*

"6. That I am informed by the applicants whose information I verily believe to be true that the applicants' said former lawyers also applied for the typed record of proceedings in the Court of Appeal, and served it on the respondent's counsel, though the proceedings

are yet to be availed. *A copy* of *the letter requesting for the proceedings is attached hereto marked annexture ((C".)*

I do not find paragraphs 5 and 6 to be hearsay evidence because the documents referred to in both paragraphs i.e. a photocopy of the Notice of Appeal and a photocopy of the letter requesting for the record of proceedings were filed in the court file by the registrar Supreme Court and their authenticity has not been challenged. The mere inclusion of the words "I was informed by the applicants" in the two paragraphs alone does not make the paragraphs hearsay.

Paragraphs 7, 8 and 15

"7. That I am further informed by the applicants whose information I verily believe to be true that in late June 2011, they inquired from their said lawyers, about the progress of the appeal process in the Supreme Court, whereof they were assured that everything was okay and that the said lawyers were waiting for completion of the typing and availability of the record of proceedings from the Court of Appeal to enable them lodge the memorandum and record of Appeal in the Supreme Court, which information the applicants believed to be true and correct."

"8. That the applicants further informed me, which information I verily believe to be true, that in December 2011, they once again inquired from their former lawyers about the progress of the appeal process, as they were interested in having it disposed of as quickly

as possible and were advised that they would be notified when the appeal itself is lodged and fixed for hearing."

"15. That the applicants informed me, which information I verily believe to be true, that they later consulted their former advocates, who claimed to be ignorant about the application and expressed surprise, upon which the applicants asked me to look for other lawyers to handle the appeal."

The above paragraphs (7, 8, and 15) contain matters which are not of the deponent's personal knowledge except the last part of paragraph 15 which says that "the applicants asked me to look for other lawyers to handle the appeal." They are hearsay and they do not fall under the exception to the hearsay rule. The said 3 paragraphs are therefore inadmissible evidence and I will not rely on them in considering this application.

"19. That I am informed by the applicants whose information I verily believe to be true, that they have at all material times been believing their former lawyers to have exercised due diligence in handling their appeal only to discover that by virtue of former counsel's inadvertent omission to serve the Notice of Appeal out of time, their intended appeal would unjustly be struck out, hence this application."

I do not find this paragraph to be hearsay evidence. It is not what someone told the applicants but what the applicants told the deponent. It is a necessary explanation to the deponent why this application had to be filed. It is not in dispute that the Notice of Appeal was served out of time by the applicants' former lawyers resulting in filing this application for extension of time.

While my View is that paragraphs 7, 8 and 15 contain hearsay evidence, this alone cannot result in the whole affidavit being discarded. I will, therefore, take the position adopted by Tsekooko, JSC, in **Rdt. Col' Kizza Besigye vs. Yoweri Kaguta Museveni & the Electoral Commission** SC Presidential Election Petition No.1 of 2006 where he stated: **"Even if some paragraphs [in the affidavit] might contain hearsay matters and even if the deponent did not specify the source of certain information contained in the affidavit, those were not sufficient grounds for a whole affidavit [to be declared] a nullity."**

Consideration of the applicants' grounds

The issue in this application is whether the applicants have shown sufficient reason to warrant extension of time within which to serve the Notice of Appeal on the respondent or to validate the late

It is not in dispute that failure to serve the Notice of Appeal on the respondent was due to the mistake or lapse of the applicants'

former lawyers. I accept the evidence contained in Ssempenja's affidavit that the applicants' former lawyers lodged the Notice of Appeal in the Court of Appeal on 28th March 2011 and wrote to the Registrar Court of Appeal on the same day requesting for a typed record of proceedings and the judgment to enable the applicants lodge the appeal. I also accept the evidence that the Notice of Appeal was served by the applicants' former lawyers on the respondent on 6th May 2011 about 33 days after the expiry of the time of service.

This court has in several cases held that inadvertence of counsel can constitute sufficient reason to extend time. In **Kaderbhai & Anor vs. Shamsherali & ors** (supra) Okello, JSC, held that the inadvertent failure of counsel to serve a Notice of Appeal and to copy to and serve the letter requesting for record of proceedings constituted the necessary sufficient cause.

In **AG vs. AKPM Lutaaya** (supra) Katureebe, JSC, held that the litigant's interests should not be defeated by the mistakes and lapses of his counsel. And in **Godfrey Mageze & Brian Mbazira vs. Sudhir Ruparelia** SCC Application No. 10 of 2002 Karokora, JSC, held that the omission, mistake or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of his appeal there by denying him justice. See also **Mulowooza & Bros Ltd vs. N. Shah & Co. Ltd** (supra).

However, it has been held by this court that where a litigant's counsel is guilty of mistake or lapse in serving a Notice of Appeal in time, the court may not grant extension of time if the applicant was not vigilant. In **Boney Katatumba vs. Waheed Karim** SCC Application No. 27 of 2007, for example, an application for extension of time was rejected because the applicant was found not to have been vigilant in following up the progress of his appeal. Leaned counsel for the respondent also cited the cases of **F.L Kaderbhai & Anor vs. Shamsherali & ors** (supra) and **Joseph Muluta vs. Sylvana Katama** (supra) on this point.

In her submissions counsel for the respondent contended that the applicants were not vigilant and contributed to the delay in the prosecution of the appeal. I do not agree. Notice of Appeal was lodged in the Court of Appeal within time by the applicants' former lawyers. The applicants' former lawyers also wrote to the Registrar Court of Appeal requesting for the typed record of proceedings and judgment and served a copy of the letter on the respondent's counsel. The inadvertence on the part of the applicants' former lawyers was their omission to serve the Notice of Appeal on the respondent's counsel within time. The same lawyers sought to rectify the situation by serving the Notice of Appeal on 6th May 2011 but they were 33 days late. Clearly this was failure on the part of the applicants' former lawyers to comply with the court's procedures and the applicants should not be blamed for it.

There is evidence that the applicants were concerned about the delay in fixing and hearing of the appeal in the Supreme Court. That is why they requested Ssempenja to go to the court and find out what was happening to the appeal. When the applicants were told why the prosecution of the appeal had stalled and about the application to strike out the appeal, they immediately instructed Ssempenja Peter to instruct new lawyers to file an application for extension of time. In my view there is no basis for blaming the applicants for dilatory conduct in this regard.

I t would also appear that to date the record of proceedings and judgment of the Court of appeal have not been availed to the applicants' counsel and counsel for the respondent seems to put the blame on the applicants for it or to suggest that they contributed to it.

I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the applicants found it necessary to engage new lawyers to deal with them.

I am convinced that this is an appropriate case for this court to exercise its discretion and extend time for service of the Notice of Appeal. I order that the Notice of Appeal be served anew on the

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respondent or her counsel within 7 days from the date of this ruling.

I order that the costs in this application be met by the applicants.

Delivered at Kampala this .....26th.... day of June 2012.

Jotham Tumwesigye

JUSTICE OF THE SUPREME COURT