THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: B. M. Katureebe, JSC).

CIVIL APPLICATION NO. 03 OF 2012

BETWEEN

TROPICAL AFRICA BANNK LTD ::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

GRACE WERE MUHWANA::RESPONDENT

RULING

This is an application by Notice of Motion filed under Rules 2(1), 5 42 and 50 of the Supreme Rules.

The applicant seeks orders that the time within which to serve the Applicant's letter requesting for proceedings from the Court of Appeal upon the respondent be extended, and that costs abide the outcome of the appeal. There are four grounds for the application, namely:-

1. *That the letter of the applicant requesting for proceedings from the Court of Appeal was not served on the respondent owing to inadvertence of counsel for the applicant, although the letter was itself filed in the Court of Appeal in time.*

2. *That the inadvertence of counsel for the applicant ought not to be visited on the party i.e. the applicant so as to extinguish his right of appeal.*

3. *That the application discloses sufficient reason for the court to exercise its discretion and extend time within which the letter should be served so that substantive justice is served.*

4. *That the applicant is not guilty of dilatory conduct in bringing this application/ and there had been no inordinate delay.*

The application is supported by the affidavit of SIRAJ ALI, sworn at Kampala on 14th February 2012, the same day that the application was filed in court.

The major reasons given in the affidavit, and which were relied upon by

counsel for the applicant while arguing this application, in effect are

1. *The decision of the Court of Appeal against which it was intended to file an appeal was delivered on 2dh August, 2010.*

2. *The applicant filed a Notice of Appeal and a letter requesting for proceedings in the Court of Appeal on 25h August, 2010, but only served the respondent's counsel, with the Notice of Appeal and inadvertently or by mistake failed to serve on the said counsel a copy of the letter requesting for proceedings.*

3. *On 27th July 2011 the Registrar of the Court of Appeal notified the applicant by letter (Annexture "C' that the proceedings and judgment requested for were ready for collection. The applicants counsel then collected the proceedings and judgment and subsequently filed the appeal in this court on 27th September 2011 which they served on counsel for the respondent.*

4. *It was not until 2nd February 2012 when counsel attended the Supreme Court Registry to inquire as to when the appeal would be fixed for hearing that he discovered that the respondent had through his advocates, on 24h August 2011 filed an application in this court for orders, inter alia, that the Notice of Appeal filed by the Applicant be struck out for failure to serve upon them the letter requesting for proceedings.*

5. *Subsequent attempts by the applicant's counsel to persuade the advocates for the respondent to accept late service of the letter requesting for proceedings were unsuccessful.*

The respondent filed an affidavit in reply sworn by ***ROSCOE SOZI on*** 20th February 2012. The said Roscoe Sozi is the same counsel who appeared before this court representing the respondent.

The gist of Mr. Sozi's affidavit is as follows:-

1. *The Applicants Notice of Appeal filed in court on 25th August 2010 was indeed served on him on 27th August, 2010.*

2. *The applicant failed to file the appeal in this court within sixty (60) days from the date of filing the Notice of Appeal and that no letter requesting for proceedings was ever served on the respondent or his counsel.*

3. *The appeal filed by the applicant was out of time and without leave of the court and therefore null and void.*

4. *The delay by the applicant to apply for to the court for extension of time within which to file the appeal was dilatory and inordinate and without reasonable excuse.*

5. *The application was incompetent and purposeless and did not cure the appeal filed.*

At the hearing of the application, the applicant was represented by Mr. BRIAN KABAIZA, while Mr. ROSCOE SOZI represented the respondent. In his submission, Mr. Kabaiza relied on the affidavit of SIRAJ ALI, particularly paragraphs 7, 10, 11, 15, 16 and 17. However, he now seemed to argue that the appeal filed in this court had been filed out of time and therefore needed extension of time within which to serve the letter requesting for proceedings so that the applicant could rely on Rule 79(2) which, in terms of Rule 79(3), he would not be entitled to do since the letter requesting for proceedings had not been served on the respondent. Here he seemed to be reacting to the affidavit in reply which had averred in paragraph 7 thereof that the applicant's appeal had been filed out of time. When it was pointed out to him that the affidavit of SIRAJ ALI, upon which he relied in support of his argument,

had in paragraph 9 thereof averred that the appeal had been filed *"well within the requisite 60 day period set out under the Supreme Court Rules"* he quickly changed and submitted that the appeal had indeed been filed within the time. I will return to this later.

Counsel submitted that the failure to serve the letter requesting proceedings upon the respondent had been through inadvertence of counsel. Upon realization of that mistake, counsel had *moved* quickly to rectify the problem by seeking out counsel for the respondent and requesting him to accept late service of the letter. When that did not work, counsel had *moved* quickly and filed this application. He therefore submitted that counsel was not guilty of dilatory conduct or inordinate delay. He submitted further that mistakes of counsel should not be visited on the applicant so as to deny it the right of appeal. There was need to render substantive justice. He cited the following authorities in support his assertion that mistakes of counsel should not be visited upon the applicant. i.e.

1, HORIZON COACHES LTD -Vs- EDWARD RURAANGRANZA & ANOTHER, Supreme Court Civil Application No. 18 of 2009

2, MULOWOOZA & BROTHERS LTD -Vs- N. SHAH & Co. LTD, S.C. CIV. APP. NO. 20 OF 2010

Counsel prayed that the application be allowed and that costs abide the outcome of the appeal.

Mr. Sozi opposed the application, relying on his own affidavit in reply. He gave three grounds for his opposition to the application.

First, he argued that before the court can exercise its discretion, the mistake or inadvertence of counsel should be excusable. In this case, he argued, there was no evidence to show that anyone had been instructed to serve the letter requesting for proceedings upon the respondent. This was, to him, inexcusable.

Secondly, he argued that even where counsel had failed to serve the letter, the relief available to him in the law was provided for under Rule 79(2). No certification had been brought to the attention of the court either by affidavit or otherwise, the appeal had not been filed within 60 days whether or not there was a letter of request for proceedings.

Thirdly, counsel submitted that on the face of the application itself, the application itself does not cure the appeal. The application is not for extension of time within which to file the appeal, which it should be, but for extension of time within which to serve the letter requesting proceedings upon the respondent. To counsel, Rule 79(1) prescribes the time frame within which to file the appeal, but does not prescribe the time within which to serve the letter. The letter could have been served any time before the lodging of the appeal.

Counsel contended that the application was in vain and does not serve the purpose for which this court may exercise a discretion. He therefore prayed that the application be dismissed with costs.

In a short reply, Mr. Kabaiza maintained that the appeal had been filed in time. He pointed to the letter from the Registrar dated 27th July 2011. (Annexture *"C")* advising counsel for the applicant that the proceedings and judgment were ready for collection. He pointed to the annotation on that letter indicating that the letter was received on 27th July 2011, but the certified copied of proceedings were received on 29th July 2011. Since the appeal was filed on 27th September 2011, it was within 60 days from the date of receipt of the proceedings. He claimed that the two days between receipt of the letter and receipt of the proceedings was the time necessary to make payments under the new systems of paying through the bank before proceedings could be collected. He invited court to take notice of the new payment procedures as the High Court had done in KADDU SSOZI MUKASA -Vs. THE ELECTORAL COMMISSION, ELECTION PETITION NO. 43 of 2011.

On the matter of what is excusable conduct, counsel maintained that mistaken belief that the letter had been served was itself inadvertence and excusable so as not to deny the applicant justice.

I think it is necessary to establish the facts in the case. There is no doubt that the Notice of Appeal was filed within time and served on the respondent's counsel. There is no doubt that a letter requesting for proceedings was written and delivered to the Registrar of the Court of Appeal within the time of 30 days from the date the decision was given by the Court of Appeal. It is clear that the respondent or his counsel were not served with a copy of that letter. From the affidavit of Siraj AIi, it is evident that the Registrar notified the applicant's counsel that

the proceedings and judgment were ready on 2i[h] July 2011. This would mean that the Registrar took almost a whole year to prepare the proceedings and judgment. This is the fault of the court and cannot be visited on the applicant. From (Annexture "e") to AIi's affidavit and the annotations thereon, I am satisfied that the copy of the proceedings and the judgment were received by counsel for the applicant on 29[th] July 2011. I accept the explanation of counsel that they had to pay the necessary fees, and that two days are usually necessary to complete the payment procedures before one can collect, a copy of the proceedings. In that regard I agree with the observation of Musoke Kibuuka, J, in the Kaddu & Sozi Mukasa case (supra) when he observed as follows:-

> *"Court has, as well, to take judicial notice of the changes*
>
> *that have since taken place in the payment procedures*
>
> *with regard to court fees. It is no longer possible to*
>
> *present cash to the registrar as it was the case in 1995.*
>
> *To-day, court fees are only payable to URA and directly in may not be completed in one day. "*

I do also accept that an appeal was filed in this court on 27th September 2011 as averred in paragraph 9 of AIi's affidavit. This is not contested by counsel for the respondent. His only problem seems to be that the appeal is filed out of time and, cannot be cured by this application. To him, counsel for respondent, the applicant ought to apply for extension of time within which to file the appeal.

The law applicable to this application is the Supreme Court Rules. Rule 79(1) provides that an appeal must be instituted in the court ***"within sixty days after the date when Notice of Appeal was lodged."*** In this case, the sixty days would have started to run from 25th August 2010 when the Notice of Appeal was filed. As observed above the appeal was filed on 27th September, 2011, more than a year late. On the face of it, clearly the appeal was filed out of time permitted under Rule 79(1). But the appeal could not have been filed without a copy of the record of proceedings and the judgment.

However, Rule 79(2) does anticipate a situation where delay in filing an appeal may be caused by the late preparation of the record of proceedings by the court itself. In that case, the Registrar of the Court of Appeal is required to certify the time it took to prepare and deliver a copy of the proceedings to the appellant, provided the application for the proceedings was made within thirty days after the date of the decision. In this case, as earlier observed, the decision of the Court of Appeal was delivered on the 20th August 2010. The letter requesting for proceedings was filed together with the Notice of Appeal on 25th August, 2010, well within the 30 days stipulated in Rule 79(2).

However there is no certificate of the Registrar of the Court of Appeal certifying the number of days that were required to prepare and deliver the copy of the proceedings. What we have on record is the letter of the Registrar of the Court of Appeal dated 2ih July, 2011 addressed to the counsel for the applicant which states:-

"M/S Muwema & Mugerwa Advocates

PROCEEDINGS IN CIVIL APPEAL NO. 39 OF 2007 TROPICAL

BANK LTD -Vs.- GRACE WERE MUHWANA

The proceedings and judgment you requested for in the above Matter are ready for collection subject to payment for the same.

Registrar/COURT OF APPEAL."

The letter is copied to counsel for the respondent.

Although the Registrar has not certified how many days it was found necessary to prepare the proceedings, his letter must be taken as informing the parties that the proceedings had not been prepared any earlier, and were only ready as of the date of that letter. In my view, that no certification was formally done by the Registrar cannot be visited on the applicant or his counsel. It would probably have been another waste of time for counsel to write back to the Registrar asking for such certification when he already had a letter informing him that the proceedings were ready for collection. In any case, the preparation of the proceedings had taken about eleven months, much longer than the 60 days envisaged under Rule 79(1). Counsel therefore started computing the 60 days from the date that they received the copy of the record of proceedings and judgment i.e. 29th July! 2011. In terms of Rule 4(1), the day of receipt was excluded from the computation so that time started to run from the 30th July 2011.

However, Rule 79(3) provides that the applicant could "not be entitled" to rely on Rule 79(2) ***"unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service."*** It is noteworthy that the words used in Rule 79(3) do not prohibit reliance on Rule 79(2). It states that the appellant would not be entitled to rely on 79(2), i.e. he has no automatic have right. But presumably the appellant may seek court intervention under Rule 5. It is this provision that has prompted this application.

As has been set out above, it is common ground that the letter requesting for proceedings, although filed in court, was never served upon the respondent or his counsel. It follows that the applicant, unless allowed to serve late the letter requesting proceedings, by virtue of Rule 79(3), cannot file his appeal at all. He could not have filed his appeal within the 60 days stipulated in Rule 79(1). Yet the failure to file within the 60 days was the fault of the Court of Appeal which failed to prepare and deliver the copy of the proceedings. The applicant could not have filed the appeal without the copy of proceedings and judgment. This would leave the applicant totally denied of his right to have his appeal heard and substantively determined by this court.

I believe that the applicant was correct to apply to this court to be allowed to belatedly serve upon the respondent the copy of the letter requesting for proceedings so that he is able to rely on Rule (79(2). Counsel for the respondent, Mr. Sozi, argued that there was no time prescribed for the service of the letter. I then wonder why he did not

accept late service when counsel for the applicant sought his indulgence. It appears to me that the time for service of that letter would be the time when it was filed in court. The purpose, in my view is that the respondent is kept informed of developments in the case. It is noteworthy that the letter of the Registrar advising that the proceedings were ready is copied to *M/S* Bossa, Tumwesigye & Sozi Co. Advocates, who were in fact the lawyers for the respondent. From this one can assume that the letter requesting for proceedings had been copied to the same lawyers - hence the copy of the reply being sent to them by the Registrar.

This court has laid down in a long line of cases, that mistakes or inadvertence by counsel should not be visited on the litigants themselves who come to court seeking substantive justice. I fully concur with the decisions in the cited cases of ***HORIZONE COACHES and MULOWOOZA & BROTHERS*** (supra). In the earlier case of ***GODFREY MAGEZI AND BRIAN MBAZIRA -VS- SUDHIR RUPALERIA,*** Karokora, JSC (as he then was) reviewed a number of authorities on the interpretation of Rule 5, and on the matter of the effect of mistakes of counsel on appeals of litigants. The learned Justice quoted, in extenso, the decision of this court in ***CRANE FINANCE Co. Ltd -Vs- MAKERERE PROPERTIES, S.C.C.A*** No. 1 of 2001 on the application of Rule 5 (then Rule 4).

> ***"The rule envisages .....scenarios in which extension of time for the doing of an act so authorized or required may be granted, namely:-***
>
> ***(a) Before expiration of the limited time; (b) After expiration of the limited time;***

(c) Before the act is done;

(d) After the act is done. "

The case also lays down the principle that a matter filed out of time is not an incurable nullity. It can be validated by court.

On the issue of mistakes or inadvertence of counsel, the learned Justice states:-

> ***"It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on to the litigant, leading to the striking out of his appeal thereby denying him justice. There are many decisions from this court and other jurisdictions in which it has been held that an application for extension of time, such as this one, where mistake or error or misunderstanding of the*** *applicants' legal* ***advisor, even though negligent have been accepted as a proper ground for granting relief under rules equivalent to Rule 4 (read 5) of the Rules of this court, which is the rule under which this application was*** *Brought……..*
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> ***Further, errors / mistakes of court officials have been held to be sufficient grounds for granting extension of time to the applicant to file his or her appeal out of time. "***

I am satisfied that this is one case where this court ought to exercise its discretion to allow the applicant to serve late the letter requesting for proceedings upon the respondent or his counsel so that the applicant may then rely on Rule 79(2) in computing the time within which the appeal should have been filed. As pointed out earlier, an appeal was filed in this court on 2i^{h} September 2011. I am satisfied that the copy of the proceedings were received by counsel for the applicant on the 29th July 2011, and time ought to start running on the 30th July 2011. It appears to me that the appeal was filed within 60 days after receipt of the proceedings and judgment.

No doubt counsel were negligent in not making sure that all documents, particularly the letter seeking proceedings, were served on time on all the parties concerned. I also find that the failure to produce the record of proceedings in time or certify as to the period required for its preparation, was a failure on the part of court officials. It would be wrong for this court to visit these mistakes, omissions or failures on the applicant who is only yearning for justice which he can only get by having his appeal heard and determined by this court.

In the circumstances I allow the application. Counsel for the applicant must serve a copy of the letter requesting for proceedings on the respondent or his counsel immediately, in any case not later than 3 days from the date hereof. The effect of this is that the appeal already filed in this court will be validated.

With regard to costs/ I am of the view that counsel who are negligent in handling a client's work should not be allowed to come to court and confess to such negligence, mistake or omission, and then leave the costs to be borne by the client. Courts should not look kindly on such advocates, and, in future, courts should seriously consider asking the advocate whose conduct led to this type of application why he/she should not pay the costs of the application.

Since this was not expressed to the parties and counsel before, I hereby order that costs abide the outcome of the appeal.

Delivered at Kampala this... , 6.th ..... day of.... March 2012.

B. M. Katureebe
Justice of the Supreme Court