

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL REFERENCE NO.125 OF 2013
(ARISING FROM MISC. APPLICATION NO.202 OF 2012)
5 **(ARISING FROM CIVIL APPEAL NO. 068 OF 2012)**
LUBEGA FRANCIS.....APPLICANT
VERSUS
NANYONGA KELEMENTINA.....RESPONDENT

10 **CORAM: HON.JUSTICE S.B.K.KAVUMA, AG.DCJ**

RULING OF THE COURT

Introduction

15 This is a Reference from the decision of Her Worship SSali Harriet Nalukwago, the then learned Assistant Registrar of the Court of Appeal delivered on 3rd October 2012 in Miscellaneous Application No.202 of 2012.

Background

20 The background to this Reference is that Mr. Lubega Francis, the applicant, filed Civil Appeal No.068 of 2012 against the decision of the High Court of Uganda at Nakawa, (*Faith Mwonda, J*) delivered on 28th March 2011. He consequently filed Miscellaneous Application No. 202 of 2012 under Rule 4 of the Court of Appeal Rules for extension of time within which to serve the Notice of Appeal and file the Memorandum of
25 Appeal. The Assistant Registrar dismissed the application, hence this Reference.

Grounds of Reference

The grounds of the Reference were laid out in the Memorandum of Reference as follows:

5 **“1. The learned trial Assistant Registrar erred in law and fact when she failed to properly evaluate the evidence on record and thus came to a wrong conclusion.**

2. The learned trial Assistant Registrar erred in law and fact when she applied wrong principles of law in dismissing the application and thus came to a wrong
10 **conclusion.**

3. The learned Assistant Registrar erred in law and fact when in the exercise of her discretion and in the circumstances of the case came to a wrong conclusion that effectively terminates Appeal No.068 of 2012”

15 **Representation**

At the hearing of the application, the applicant was represented by Mr. Chris Bakiza, (counsel for the applicant), while the respondent was represented by Ms. Namutebi Alziik, (counsel for the respondent).

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The case for the applicant

Counsel for the applicant argued ground 1 alone and grounds 2 and 3 together.

Ground 1

5 Counsel submitted that the principles of evaluation of evidence were well-settled. Counsel pointed out that the learned Assistant Registrar found that the Notice of Appeal was filed 70 days after the Notice of Appeal contrary to Rule 83 of the Court of Appeal Rules and the application for extension of time was made 55 days after the filing of the
10 Memorandum of Appeal which she found incompetent.

Counsel contended that a simple calculation showed that from 6th April 2011 to 12th June 2012 when the Memorandum of Appeal was filed, it was only 66 days and not 70 as stated by the learned Assistant Registrar. Counsel argued that when considering matters of time, 4 days'
15 miscalculation is bad enough to call for court's intervention.

He further submitted that the other misevaluation was around the issue of the application for extension being brought after 55 days. He argued that this was neither canvassed in the pleadings nor in the submissions by either counsel. To him, it was erroneous for the learned Assistant
20 Registrar to pronounce herself on a matter that was not addressed. He submitted that this was prejudicial to the applicant.

Counsel submitted that the framers of the Rules of Court knew that mistakes are made which was why they provided for the exercise of court's discretion in granting an application for extension of time. Counsel argued that instead of premising herself on sufficiency of reason, the learned Assistant Registrar premised her decision on the expiry of time under Rule 83(1) of the Court of Appeal Rules and by doing that, she erred.

He further submitted that the learned Assistant Registrar did not address the question of proper service of the Notice of Appeal yet this was one of the issues that had been advanced by counsel for the applicant. He contended that evidence had been adduced to show that the Notice of Appeal had been filed in, but only served, out of time. It was counsel's view that the learned Assistant Registrar's evaluation of the evidence in its totality left pertinent issues hanging and improperly resolved which called for intervention by this court.

Grounds 2 and 3

Counsel argued that the learned Assistant Registrar in finding that the appeal was incompetent based on the late filing of the Memorandum of Appeal which she noted was filed 10 days late, was not true and that it was instead filed after 6 days. He noted that in the case of **Kabogerere Coffee Factory Ltd & Anor v Hajji Twaibu Kigongo Supreme Court Civil Application No. 10 of 1993**, the court observed that it had been

established by a long line of decisions that an application for extension of time for sufficient reason can be entertained during the pendency of an appeal.

Counsel submitted that there was a pending appeal, the applicant having properly filed a Notice of Appeal. It was his view that the said defect of non-service of the Notice of Appeal in time could be regularized. It was his submission that court should not send away a party who comes to it for justice.

He stated that the principles followed under Rule 5 are expounded in the case of **Godfrey Magezi & Brian Mbaziira v Sudhir Rupaleria Supreme Court Civil Application No. 10 of 2002** where court observed that the rule envisaged four scenarios in which extension of time for the doing of an act so authorized or required as:

- 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.”**

Counsel thus submitted that in this case, (b) and (d) above were relevant since the applicant applied for extension of time and also applied for the filing of the Memorandum of Appeal long after the expiry of time. To counsel, if the learned Assistant Registrar had exercised her discretion judiciously, the service would have been regularized by the grant of

extension. Counsel noted that the right of appeal should not be easily washed away without sufficient reason. He stated that the matter from which the appeal arises is land which is so valuable to all concerned that to be sent away unheard can cause chaos.

5 Counsel prayed court to find that it was in the best interests of justice to allow the reference, set aside the ruling and orders of the Registrar and allow costs to the applicant.

The case for the respondent

10 Counsel for the respondent submitted that an order for extension of time could not be made granting the applicant the right to file a Memorandum of Appeal in the absence of a competent appeal. He observed that the case of **Kabogerere** (supra) is very clear. To him, what counsel for the applicant cited to court were the arguments and not the decision of court in that case. He stated that court declined to grant the order for extension
15 of time for a fresh appeal when the old appeal was still in existence.

Counsel submitted that the learned Assistant Registrar could not be faulted for terminating the appeal under ground 3 of the Reference, which appeal counsel for the applicant had insisted did not exist. It was his argument that asking for an order of court to allow service of a
20 Memorandum of Appeal before seeking leave to amend the one already in Court, in Civil Appeal No. 202 of 2012, amounted to fresh service and not service out of time.

On the evaluation of evidence and particularly the applicant's submission that the dates were wrong, counsel contended that the mix up of the dates by the learned Assistant Registrar was nothing fatal. The fact remained that the Memorandum of Appeal was filed on 12th June 5 2012 way out of time. He noted that simple calculation brought that to a year and a half after the filing of the Notice of Appeal. He observed that the discrepancies in the dates could be easily cleared when court re-evaluated the evidence on record.

On the contention that the learned Assistant Registrar dismissed the 10 application on wrong principles, counsel submitted that the application was for extension of time premised on the ground of a mistake of counsel. Counsel stated that the alleged mistake had not been sufficiently explained by the applicant. He argued that in all the cases which the applicant sought to rely on the ground of mistake of counsel, 15 this was sufficiently explained and the mistake proved.

Counsel submitted that the flow of events showed that the applicant failed to pursue his right of appeal. The applicant claimed that he only learnt of the court orders and the decree late when he instructed counsel Kunya to file only a Notice of Appeal but counsel did not. Counsel 20 observed that the applicant alleged that he was not aware of the High Court decision since the counsel who filed the Notice of Appeal was not the same one who had represented him at the High Court. The counsel who filed the Notice of Appeal, according to counsel for the respondent,

was retained in good time but he did not serve it. He only instructed counsel Bakiza in September 2011 and then served the Notice of Appeal in January 2012.

5 It was counsel's contention that the applicant wanted court to believe that he did not have knowledge of the judgment until August 2011 when he received the order to visit the locus. Counsel contended further that the arguments of mistake of counsel were only a shield by counsel seeking sympathy from the court.

10 Counsel submitted that the reference is misconceived and he prayed that it be dismissed and Civil Appeal No. 068 of 2012 be struck out and both with costs.

Reply

15 In reply, counsel for the applicant submitted that in the case of **Kabogerere** (supra), there was good cause for the refusal of the extension of time. He noted that there were numerous errors on the Notice of Appeal and in the Memorandum of Appeal and contended that in the instant case, counsel for the respondent had not identified such numerous defects as were in **Kabogerere** (supra). He stated that the only defect was non-service on counsel in time.

20 Counsel argued that even if there were defects, all those were curable under Rule 5 and they were not fatal since they did not go to the root of the right of appeal. He noted that at worst, the Memorandum could be

struck out with consequential orders to file a fresh one in the interest of justice to the applicant.

On sufficiency of reason, counsel submitted that the applicant started with counsel Onyango, then after getting the file from him, he filed the Notice of Appeal but did not serve it. He noted that the next counsel, Mr. Bakiza, came in and went ahead and served it but late. He argued that the issues of when the applicant came to know of the judgment and when he instructed counsel were minor. To him, what was important was that the rights of a party on appeal were not washed away and that he relied on **Article 126 (2) (e)**. He further emphasized that the mistakes of the applicant's previous counsel should not be visited on the applicant. He reiterated his earlier prayers.

Court's consideration of the Reference

This court derives the jurisdiction to hear cases of this nature from Rule 5 of the Judicature (Court of Appeal Rules) Directions S.1.13-10. It provides:

“The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any

such time shall be construed as a reference to the time as extended.”

Counsel for the applicant argued that the learned Assistant Registrar made some mathematical errors in calculating how late the Notice of Appeal was filed and how long it took to file the application for extension of time.

From the record, it is evident that the Judgment in the High Court was delivered on 28/3/2011. On 6/4/2011, a Notice of Appeal was filed for the applicant. On 12/6/2012, a Memorandum of Appeal was filed. Clearly, the Memorandum of Appeal violated Rule 83 of the Judicature (Court of Appeal Rules) Directions S.I.13-10.

I am not persuaded by the arguments of counsel for the respondent that in Miscellaneous Application No. 202 of 2011, the application for extension of time was in effect a filing of a fresh Memorandum of Appeal yet there was already one that had been filed on 28/8/2012.

Rule 5 of the rules of this Court is to the effect that the court may extend the time whether before or after the expiration of that time or whether before or after the doing of the act. This was illustrated in the case of **Godfrey Magezi & anor** (supra). In that case, court observed:

“We think that it is obvious that the contended effect is to bring an act within the time as so extended. There would

have been no reason to include that scenario in the rule if an act done out of time was an incurable nullity...”

In the instant case, the applicant filed a Memorandum of Appeal out of the time stipulated under Rule 83 of the COA Rules. It was for that late
5 filing and the need to also comply with the requirement to serve the opposite party with a copy of the Notice of Appeal within a specified time that they now sought an extension of time to correct that failure. This much is not contested.

Counsel for the applicant contended that the failure to comply with the
10 law was due to the inadvertence of the applicant’s previous counsel who took the applicant’s instructions but failed to ensure proper preparation and service of the pleadings.

It can be deciphered from the pleadings that when the applicant found
out about the High Court decree, he approached counsel Onyango and
15 later counsel Kunya to prepare the Notice of Appeal before he finally settled with counsel Bakiza, who is now on record as his counsel. From that time, the applicant zealously followed up the appeal to preserve his right of appeal.

The law on the inadvertence of counsel not being visited on a client has
20 been well- illustrated in numerous authorities. In the case of **Shabir Din v Ram Parkshanand (1955)22 EACA 48 at 51**, court stated:

“...in particular, mistake or misunderstanding of the appellant’s legal advisors, even though negligent, may be accepted as a proper ground for granting relief, but whether it will so be accepted depends on the facts of the particular case.”

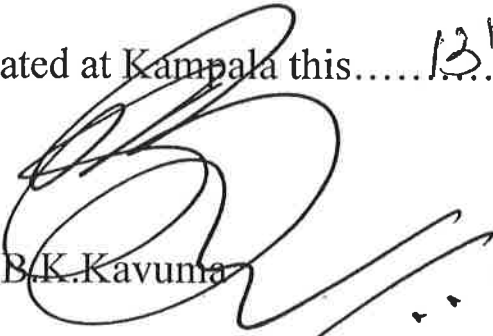
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I am satisfied that the applicant in the instant case did his best to pursue his case but was only let down by counsel who did not do what they knew the law required.

On this ground alone, I find this case one in which the court should exercise its discretion by granting the applicant the relief sought. Further, considering all the circumstances of the instant application, I find that this is a case where the provisions of Article 126 (2) (e) of the Constitution would be properly invoked.

This reference is, therefore, allowed and the service of the Notice of Appeal and the Memorandum of Appeal are hereby validated. Costs in this matter to abide the outcome of the appeal.


Dated at Kampala this.....13th.....day of.....February.....2015



S.B.K. Kavuma

20 Acting Deputy Chief Justice

13.2.15.
Namulebi Alziik together with Muro Mambirige for respondent
Parties above
Ct Ruling delivered in
12 chambers.


13/2/15 Act Reg.