

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPLICATION NO.265 OF 2014**  
**(Arising out of High Court Civil Suit No. 0024 of 2010)**

**KADEBU ERIC.....APPLICANT**

**VERSUS**

**KARUGABA GEORGE & 2 OTHERS.....RESPONDENTS**

**CORAM:-**

**HON.MR.JUSTICE RUBBY AWERI OPIO, JA**

**RULING**

This application was brought by way of Notice of Motion under O.52 r.1, CPR, Section 98 CPA and Under Rule 5 of the Judicature (Court of Appeal) Rules for orders that:-

- (a) Civil Appeal No.176 of 2012 filed on 14<sup>th</sup> December 2012 be validated.
- (b) The applicant be granted leave and time be extended to allow him serve the notice of appeal, memorandum of appeal, letter requesting for record of proceedings and the appeal itself on the respondent.
- (c) Execution of the decree in Civil Suit No.49 of 2009 from which the appeal number 176 of 2012 arises at the High Court in Fort Portal be stayed.
- (d) Costs be provided for.

The grounds upon which this application is premised are elaborated in the supporting affidavit of the applicant-Kadebu Eric, sworn on 4<sup>th</sup> day of June of 2014.

In reply, the respondents deponed three affidavits in opposing this application.

**REPRESENTATION**

At the hearing of this application, Mr. Kafuzi <sup>Jackson</sup>~~Jadison~~ represented the applicant while the respondents were represented by Mr. Mugisha Vincent,

assisted by Ms. Tukahirwa Olivia and Mr. Francis Turyahebwa. Both the applicant and the respondents were present in Court.

## **BRIEF BACKGROUND**

The salient facts forming the background to this application are as follows:-

This case arose in 2002 in Local Council Court III at Katoke. The applicant appealed to Chief Magistrate's Court at Fort Portal and lost the case. Later the applicant went to Grade I Magistrate Court at Kyenjojo and lost the case. He then appealed to the High Court, Fort Portal and lost the same hence the appeal to the Court of Appeal.

## **SUBMISSIONS FOR THE APPLICANT**

Mr. Kafuuzi contended that before the applicant filed **Civil Appeal No.176/2012** and during the hearing of **High Court Civil Appeal No. 049** at Fort Portal High Court, he was partly represented by Mr. Rukidi Mpuga who at some point during the trial was found to have had no practicing certificate and not an enrolled advocate. Therefore, by the time of the judgment the applicant was not represented and with the help of the clerk at Fort Portal, he drafted and filed the Notice of Change of advocates himself and instructed M/s Kaahwa, Kafuzi, Bwiruka & Co. Advocates who wrote a letter requesting for a record of proceedings on 11/5/2012. The applicant having instructed the lawyer to handle the appeal he also requested him to apply for stay of execution. Mr. Bwiruka subsequently filed **CA No.176/2012** but did not serve the letter requesting for proceedings and the memorandum of appeal on the respondent. At all times this was unknown to the appellant until he was served with notice to show cause why execution should not issue and the hearing thereof was slated for 19/5/2014.

Further, at all this time Mr. Bwiruka had insisted that he had filed application for stay of execution on 19/5/2014 and when this application came for hearing, he personally appeared together with the applicant in Court. That day the hearing was adjourned to 26/5/2014. On the 26/5/2014, the applicant informed the court that he was sure that there was an application for stay lodged by his counsel. The Ag. Registrar however perused the file and found that there was no such an application for stay on record. Mr. Bwiruka was summoned being counsel and was asked about the application whereupon he told the Registrar that he had not filed the application for stay of execution.

From then onwards, Counsel contented, the applicant remained at the mercy of court. It was then that the applicant got to know that his counsel had also not served the letter requesting for the record of appeal, notice and memorandum of appeal on the respondent.

The foregoing implies that CA No.176/2012 was incompetent hence the necessity of this application to validate it.

Counsel submitted that at all material times the applicant used his due diligence placing his faith and trust on his lawyer, Counsel Bwiruka who unfortunately did not take the necessary steps to obtain stay of execution and to serve the appeal and its attendant documents on the respondent.

Counsel relied on the case of **Joseph Maluta v. Silverino Katarama** CAA No.2/1999 in which *Kanyeihamba, JSC.*, indicated that all the client needs to show is that failure to take the requisite steps in the proceedings was not attributed to him and that in this type of application court has wide powers and only limited by the words sufficient reason. The principle is that mistake of counsel should not be visited on the litigant as reinstated in the case of **MUGO =VS= WANJIRU (1970) EA 481**. On this premise, counsel prayed to court that CA No.126/2012 be validated by extending time within which to serve the Notice of Appeal, Memorandum and letter requesting for the record of proceedings, execution be stayed and award of costs to the applicant.

## **SUBMISSIONS FOR THE RESPONDENTS**

Mr. Mugisha contended for the respondents that this case arose in 2002 in Local Council Court III at Katoke. Later the applicant went to Grade I Magistrate Court at Kyenjojo and lost the case. He then appealed to the High Court Fort Portal and lost the same hence the appeal in the Court of Appeal. He submitted that as an officer of Court he believes that litigation must come to an end.

He submitted that the complaint that the applicant's lawyer Rukidi had no Practicing Certificate was not raised during trial and the judgment was made on merit. Thus raising that issue now would amount to running away from justice and avoiding costs for filing a baseless case. Mr. Mugisha argued that counsel Bwiruka was actually a partner with the present counsel and they together filed the memorandum of appeal as co-lawyers. Counsel actually knew what was going on since 2012. He submitted that the applicant in law is a principal whereas his advocates are his agents. Therefore telling Court that he did not know what was taking place in court does not amount

to due diligence on his part. This is because at all times the applicant knew that he had not served. He knew that stay of execution had not been filed in court until 2014 when notice was passed into his hands that he started realizing that he needed this stay. This was intended to deny the respondents costs the court had granted them. Counsel contended that the application was brought under O.52 r.1 of CPR, and Section 98 of CPA and Rule 5 CAR because Rule 5 CAR only deals with extension of time and does not talk about validation of appeal or staying of execution neither does it talk about granting leave. Therefore, counsel applying for all these under Rule 5 cannot be entertained. This application is only a delaying tactic should be dismissed with costs.

It was the view of counsel that there was no mistake of counsel because counsel is part and parcel of Bwiruka's law firm. They knew what was taking place and equity aids the vigilant. Counsel averred that this case started in 2002 to date and is thus barred by the doctrine of laches. Counsel further argued that this court should not be seen to keep cases *vis-à-vis* the backlog of cases in this country. Further, Mr. Bwiruka would not tell the applicant that he had obtained stay whereas not because he is an officer of court.

Learned counsel argued that the applicant's affidavit shows that the applicant was following up his case, while counsel Bwiruka was just a mere agent of the applicant. There was nothing to stay since taxation had already been done and demand notice given. That Rule 105 CAR requires security for costs to be paid and there was no evidence of that requirement.

Counsel prayed to court to dismiss the application with costs.

## SUBMISSIONS IN REJOINDER

Mr. Kafuzi maintained that the procedure of filing an appeal is by way of Notice of Motion which must be served on the respondent. When a letter calling for proceedings, notice and memorandum of appeal are filled the same must also be served on the respondent. He submitted that the applicant with the help of clerk drafted and filed notice of appeal which he served on the respondents, page 5 annexure "A" therefore the applicant understood Mr. Bwiruka failed to file and handle the appeal with honesty. Mr. Bwiruka filed a memorandum of appeal on 14/12/2014 which he never served the respondents contrary to the rules of procedure and when CA No.176 /2012 was filed it was not served upon the respondents. That was the reason the applicant filed this application for extension of time to heal the anomalies in order to validate it. This appeal cannot be deemed incompetent.

Lastly Counsel for applicant denied that Bwiruka was the same as himself (course) because Mr. Bwiruka practices in Fort Portal with Kahuma, Kafuzi, Kwimara & Co advocates whereas he (counsel) works with Rwakafuzi & Co advocates. That the other Kafuzi was his elder brother. Counsel concluded the applicant instructed Bwiruka and it was unfair to find that he was not diligent.

### COURT'S FINDINGS

This application was brought by way of Notice of Motion under O.52 r.1, CPR, Section 98 CPA and r.5 of the Judicature (Court of Appeal) Rules.

Rule 5 of the Court of Appeal Rules is to the effect that:-

*"The court may, for sufficient reason extend time limited by these Rules or by any decision of the court or of High Court for 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."*

Rule 5 CAR entitles court to extend time and validate an act that is done or omitted to be done. In the case of **Godfrey Magezi & Anor v. Sudhir Ruperelia** SCCA No. 10 of 2002, court relied on the decision of the East African Court of Appeal in **Shanti v. Hindocha** [1973] EA 207, where court held that:-

*"...we think that when the time for lodging a document is extended, the document is duly lodged within the time so as extended, whether the actual lodging is before or after the order of execution..."*

The legal effect of extending time is to validate or excuse the late filing of documents: see **The Executor of the Estate of Christine Tebajuka =VS= Noel Shalita** Civil Appeal No. 8 of 1988.

In the case of **Hodondi Daniel v. Yolamu Egondi** CA No.67/2003 this court stated that time can only be extended if sufficient cause is shown. The sufficient cause must relate to the inability or failure to take the necessary step within the prescribed time. Court also stated that the acts and omissions of the advocate in the course of representation bind the litigant. However in applying this principle court should take care to avoid abuse of the system.

I must emphasize that it is not always true that mistake of counsel should not be visited on a litigant. It depends on the nature and circumstances of the case. In my view, if for instance the advocate's tardiness was deliberate his conduct should bind the litigant. It appears that the inaction of the advocate did not amount to mistake such as to attract the positive exercise of discretion. It is apparent that the advocate's inaction could have been in the interest of the litigant. Considering the history of the matter arising as from LCIII going to the Chief Magistrates Court then to Grade I and later to the High Court where the applicant lost all through.

For the above reasons I find that the applicant has not given sufficient reason why he believes that the alleged omission was detrimental to him.

In the premises the application is dismissed with costs.

Dated at Kampala this.....<sup>22<sup>nd</sup></sup>.....day of January.....2015

Hon. Justice Rubby Aweri Opio  
Justice of Appeal/Constitutional Court.

22.01.15.

Kafuze Jackson for Applicant


Mugisha Vincent for Respondents

Applicants & Respondents absent

Mr. Kafuze

it is for reading the ruling

CB Ruling delivered in chambers

6. Ruling Before   
A. H. R.  
22/01/15.