

imprisonment and 2 years imprisonment respectively. All sentences were to run concurrently.

- 3. That Respondent appealed to High Court against both the conviction and sentence of the lower through High Court Appeal No.45 of 2015, which conviction and sentence were upheld by the High Court on the 25th September, 2015.**
- 4. That the Respondent appealed to the Court of Appeal where in its judgement delivered on 11th October 2018 acquitted the Respondent on the 3 counts and further ordered that the property comprised in Kyadondo Block 229, Plot1368 reverts back into the names of the Respondent.**
- 5. That judgement was delivered on the 11th of October 2018 in both the absence of Samali Wakoli (Assistant DPP), the action officer who defended against the appeal and the complainant (Musa Burugeni). The complainant informed us about the judgement only when he got to know that the respondent had brought buyers to inspect the land comprised in Kyadondo Block229, Plot 1368 which belonged to his late mother Nulu Bulya way after the period within which to file notice of appeal had lapsed.**
- 6. That upon going through the judgement of the Court of Appeal, she believed that the applicant's intended appeal raises substantial questions of law which the honourable court has to determine as to whether the lower court was right to rely on the testimony of a witness on the contents of a report which was never tendered in court as an exhibit nor was its author called to testify in court.**
- 7. That the time within which to file a notice of appeal has since lapsed, and this application seeks leave within which to file a notice of appeal.**
- 8. That it is in the interest of justice that this application be granted, than denying the victim in the criminal case justice on mere technicalities where the intended appeal raises substantial questions of law to be determined.**

Affidavit evidence

The application is supported by the affidavit of Joanita Tumwikirize, a State Attorney in the Directorate of Public Prosecutions dated 19th August 2019, who largely repeats what is stated in the grounds of the application.

The respondent opposes this application in his affidavit in reply dated 27th August 2019. Of relevance to this application is paragraph 4 of the affidavit in which he depones:-

“That further, I have discussed with my above mentioned lawyers who informed me and I verily believe it to be true that this application is devoid of any merit and is riddled with excuses that do not in any way justify the grant of the remedy sought, in so far as;

- i. The application has not been shown to have prospect of success.**
- ii. The applicant’s reason for the delay to file a Notice of Appeal within the time prescribed for that purpose are untenable.**
- iii. The applicant has not demonstrated to the court the prospect of success of the intended appeal.”**

Representation:

At the hearing of this application, Mr. Peter Mugisha, State Attorney represented the applicant while Counsel Fredrick Ntende represented the respondent who was also present in court.

Submissions:

Both Counsel at the hearing of the application before this Court made oral submissions.

In his submissions, Counsel for the applicant submitted that the application met the criteria for grant of leave for extension of time as stated in the affidavit of Joanita Tumwikirize already quoted in this ruling.

Counsel relied on the case of **Tushabe Chris vs Cooperative Bank Ltd (in Receivership) Supreme Court Civil Application No.8 of 2018**. He cited a passage in the ruling where Justice Nshimye Ag. JSC observed as follows;

“The law created gates of justice through which people seeking justice pass to reach courts to be redressed. The Gates open and close at given intervals in accordance with rules of procedure. In rare circumstances gate which are closed may be opened to allow in a late entrant. The discretion to open or not open is vested in the court. The application before me is one of such rare cases of late coming.

However, the rule under which the application was brought emphasizes showing “sufficient reason” which has been interpreted by this court and other equivalent courts in the region. Some of such cases have been ably referred to me by both counsel. For example, the case of *Guliano Gariggio vs Claudio Casadio Supreme Court Civil Application(supra)* cited by counsel for the respondent. This court observed that a sufficient reason must relate to the ability or failure to take the particular step in time.”

The application was strongly opposed by counsel for respondent. In his submission he stated that leave to appeal to this court can only be granted after a certificate of importance has been granted by the Court of Appeal. Counsel referred the court to Rule 38(1) (b) of the Rules of this court and contended that lack of certificate of importance by the applicant, makes this application incompetent before this court and it should be dismissed on that basis alone.

In rejoinder, counsel for the applicant submitted that counsel for respondent cited Rule 38(1) (b) of the Rules of this Court out of context as the application before court is to seek leave to file Notice of appeal out of time.

CONSIDERATION OF THE APPLICATION

I have carefully considered the submissions and the authorities cited. It is not in dispute that the judgement of Court of Appeal was delivered on 11th October,2018. The applicant did not file a Notice of Appeal.

Section 28(1) and (6) of Criminal Procedure Code Act provides that:

“Notice of appeal.

- 1) Every appeal shall be commenced by a notice in writing which shall be signed by the appellant or an advocate on his or her behalf, and shall be lodged with the registrar within fourteen days of the date of judgment or order from which the appeal is preferred.**
- 2) ...**
- 3) ...**
- 4) ...**
- 5) ...**
- 6) The appellate court may, for good cause shown, extend the periods mentioned in subsection (1) or (3).”**

Rule 58 of the Judicature (Supreme Court rules) Direction provides that;

“Notice of appeal in acquittals.

(1) Where the Court of Appeal acquits or confirms the acquittal of an accused person, the Director of Public Prosecutions, as empowered by the Act, may give notice of appeal as provided in rule 57(1) and (2) of these Rules.

(2) Where the Director of Public Prosecutions gives notice of appeal as provided in subrule (1) of this rule, notice may be given informally at the time that the decision is given, upon which the accused person shall give his or her address for service of the notice of hearing of the appeal; or, if the Director of Public Prosecutions gives notice of appeal in writing within fourteen days after the decision, the director shall notify the court of

the address of the accused person for service by the registrar of the notice of appeal upon the accused person, and notice of the date of hearing, which notices shall be substantially in the forms prescribed in respect of appeals against conviction.”

The filing of the Notice of Appeal is the first step an intending appellant must do in the process of appealing. Upon expiry of the fourteen days after delivery of the judgement, **Rule 5 Judicature (Supreme Court rules) Direction** allows extension of time.

“5. Extension of time.

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 authorised 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 so extended.” (Underling for emphasis)

The principles governing extension of time under Rule 5 above seem to be well established. Time should be extended only for sufficient cause and the reason for extension must relate to the inability or failure to take the required steps in time. See **Mugo and Others v Wanjiru and Another [1970] EA 481 at 483; Charles Kangemiteto v Uganda, Criminal Application No. 1 of 1978 Court of Appeal of Uganda (unreported) and Clouds 10 Ltd v Standard Chartered Bank (u) Ltd; civil Appeal No. 35 of 1992 Supreme Court (unreported)**

Time will not be extended if the applicant is guilty of dilatory conduct or inordinate delay. In **Shanti v Hindocha and Others [1973] EA 207** it was pointed out by Spry that there may be other reasons and these are all matters of degree. It is not necessary to establish that the appeal will probably succeed although it may be helpful to do so.

These principles have been reechoed by this court in various cases, for example in the case of **Molly Kyalukinda Turinawe & 4 Others vs Turinawe Ephraim & Another (Supreme Court Civil Application. No. 27 of 2010)**, where my sister Lady Justice Dr. Esther Kisaakye stated I quote;

“It is therefore important to consider the following three questions before I can dispose of this application;

- i. Whether the applicants have established sufficient reasons for this court to extend the time in which they may lodge their appeal.**
- ii. Whether the applicants are guilty of dilatory conduct?**
- iii. Whether any injustice would be caused if this application is not granted?**

The basis of the applicant's evidence is to be found in the affidavit evidence of the first applicant...”

I agree with the above criteria and in my view none of them has been met by this application.

In the first place the reason for delay advanced in ground five of the application is a demonstration of sheer negligence on the part of the Directorate of Public Prosecution and it cannot be sustained by this court. I do not understand as to how a judgement delivered in presence of an officer of the Directorate takes this long before the Directorate realizes that there is an error of law.

Secondly, and arising out of the above observation the applicant was guilty of dilatory conduct. An officer who had instructed another officer to receive the judgement should have exercised more vigilance to not only find out the result but also study the judgement to find out if there was an error so that it is appealed against within the time allowed.

Thirdly no injustice would be caused to the applicant if the application is not granted. On the contrary it would be the respondent to suffer an injustice if the case which was resolved more than eight months ago would be re-opened whatever the outcome of the appeal.

In the case of **Charles Kangamiteto vs Uganda, Court of Appeal Criminal Application No.1 of 1978**, The Chief Justice Saied, held that;

“Besides these matters, the learned counsel for the appellant has been unable to put forward a single valid reason why he should have time extended at this late stage except his belief that the appeal has reasonable prospects of succeeding. As has been consistently held by the Court of Appeal, that is a factor for consideration in applications of this nature but the main factor, and the burden is on the applicant in this respect, is that the court must be satisfied that for sufficient reason it was not possible for the appeal to be lodged in the time prescribed. Likewise, it has been held in Mrs. Nyambura Kiso v Wanjiku E.A.C.A. Civil Application No. NAI.7 of 1976 that the question of prejudice does not matter at this stage. It is only after “sufficient reason” has been advanced that a court considers the question prejudice or the possibility of success and such other factors before it exercises its discretion whether to grant or refuse an application for extension.” (Underling for emphasis)

In summary, I don't find the sole reason advanced by the applicant of failure by her agent and Complainant to attend court during the delivery of judgement of Court of Appeal to sufficient to warrant her inordinate delay for over eight months without lodging the Notice of Appeal. Using the analogy of Nshimye, Ag. JSC in the case of Chris Tushabe (supra) the gate which is already closed cannot be reopened on the flimsy grounds advanced by the applicant.

In the result, this application for the extension of time to file Notice of Appeal is accordingly dismissed.

Dated at Kampala the ...**18th**... day of ...**September** ... 2019.
.....

**HON. JUSTICE ELDAD MWANGUSYA, JUSTICE
OF THE SUPREME COURT.**

