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**THE REPUBLIC OF UGANDA**

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**IN THE COURT OF APPEAL OF UGANDA**

**AT KAMPALA**

**Miscellaneous Application No. 235 of 2019**

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**Nelson Lukozi ::: Applicant**

**Versus**

**1. Simba Telecom Limited**

**2. Meera Investments Limited } ::::::::::::::::::::::::::::::: Respondents**

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**Coram: Hon. Justice Remmy Kasule, Ag. JA sitting as a single Justice**

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**Ruling of the Court**

The applicant seeks extension of time, under Rules 5, 43 and 44 of this Court, within which to re-file and validate the Notice of Appeal which he had filed in Court on 02.10.2017 and then

30 withdrawn the same on 30.01.2018 and to serve the said Notice of Appeal upon the respondents out of time.

The application is supported by the affidavit of the applicant and opposed by the respondents.

Learned Counsel Mukwaya Kizito Deo appeared for the applicant  
35 and Alex Rezida for both respondents at the hearing.

The background to the application is that on 13.02.2015, the applicant filed in the High Court at Kampala (Commercial Division) Civil Suit No. 72 of 2015 against both respondents as defendants. In the suit the applicant, as plaintiff, sought from the respondents,  
40 as defendants, special and general damages by reason of breach of the contract. On 13.12.2000 the applicant had sold and transferred on 22.01.2001 the ownership of the land property known as "Platinum House" comprised in FRV 4 Folio 2 situate at Plot 19 Market Street, Kampala City, to the 1<sup>st</sup> respondent. The 1<sup>st</sup>  
45 respondent had in turn transferred the same on 22.01.2001 to the 2<sup>nd</sup> respondent, who at the material time, was in occupation and use of the same.

The applicant asserted in the suit that the respondents had acted in breach of the contract of the sale of the suit property as he was never paid in full the agreed upon purchase price.

The 1<sup>st</sup> respondent in defence to the suit asserted that the full purchase price was paid to the applicant, after which the applicant executed a transfer of the ownership of the suit property to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent later transferred the suit property to the 2<sup>nd</sup> respondent and the latter had had no dealings at all with the applicant.

The 2<sup>nd</sup> respondent contended in his defence to the suit that the applicant had no cause of action at all against the 2<sup>nd</sup> respondent.

Through **High Court Miscellaneous Applications Nos. 324 of 2015 and 328 of 2015**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents prayed for orders that the applicant furnishes security for costs to each one of them as defendants in **HCCS No. 72 of 2015**.

On 23.06.2015 the High Court (H/W Olesen Thadeus, Asst. Registrar) allowed the applications for security for costs and made a joint order covering the two applications to the effect that the applicant (plaintiff to the suit) was to deposit in Court, within two months from date of the ruling, a sum of shs. 100,000,000= (one



hundred million shillings only) in cash or, in the alternative, he was to provide a bank guarantee from a reputable bank in the same amount in Court, as Security for costs. The applicant  
70 dissatisfied with this order lodged a Notice of Appeal on 14.01.2015 intending to appeal the same to the Court of Appeal.

The applicant failed to deposit the said amount of money or to provide a bank guarantee to Court within the stipulated period of  
75 two months from 23.06.2015. On 13.10.2015, on the application of both respondents, the High Court (H/W Olesen Thadeus, Asst. Registrar) dismissed with costs **Civil Suit No. 72 of 2015** under 0.26 r. 2(1) of the Civil Procedure Rules.

Pursuant to the dismissal of the suit, the applicant then lodged in  
80 the High Court, Commercial Division, **Miscellaneous Application No. 805 of 2015**, to set aside the order of dismissal of the suit and the orders requiring deposit of security for costs. This application was subsequently dismissed by the same Court. The applicant then also lodged in the same Court a Summary Suit against the  
85 respondents namely **HCCS No. 828 of 2015** to recover the said monies he had claimed in the dismissed **HCCS No. 72 of 2015**. This summary suit was also dismissed with costs by the same Court. In October, 2016 the applicant lodged in the same Court

**Miscellaneous Application No. 998 of 2016** to set aside the  
90 dismissal of the summary suit **HCCS No. 823 of 2015**. This  
application was too dismissed with costs on 26.02.2017.

The same applicant then applied against both respondents to the  
High Court (Commercial Division) through **Miscellaneous  
Application No. 426 of 2017** seeking orders that the High Court  
95 sets aside the dismissal of **HCCS No. 72 of 2015** as well as the  
orders requiring the applicant to deposit in Court security for  
costs.

High Court **Miscellaneous Application No. 426 of 2017** was  
determined by His Lordship David Wangututsi of the High Court,  
100 Commercial Division, and was dismissed with costs to the  
respondents on 20.09.2017.

On 05.10.2017 the applicant, represented by CR Amanya  
Advocates & Solicitors, lodged a Notice of appeal to the High Court,  
Registry, at Mbarara, intending to appeal against the ruling in  
105 **Miscellaneous Application No. 426 of 2017**.

The same applicant, this time represented by another firm of  
Advocates, Messrs. Wamimbi, Advocates & Solicitors, withdrew in  
writing on 23.01.2018, the Notice of Appeal he had filed in Court

on 02.10.2017 on the ground that he, the applicant had lost  
110 interest to pursue the intended appeal against the decision of His  
Lordship Wangutsi, J. in Miscellaneous Application No. 426 of  
2017.

However on 23.10.2018, the applicant re-filed a Notice of Appeal  
against the same decision of His Lordship Wangutsi, J. in  
115 Miscellaneous Application No. 426 of 2017. He followed this with  
lodgement of a Memorandum of Appeal to this Court of Appeal on  
01.04.2019 and the appeal was registered as No. 78 of 2018.

The applicant then lodged this application, the subject of this  
ruling.

120 For the applicant, it is submitted, that this application be allowed,  
because the mistakes that led to the situation necessitating this  
application, were mistakes of the lawyers the applicant had  
engaged to carry out his instructions, and the same ought not to  
be visited upon him to deny him justice.

125 It is the case for the applicant that originally he was being  
represented in his causes by lawyers Messrs. CR Amanyanya  
Advocates and Solicitors, then he switched to Messrs. E. Wamimbi



Advocates and Solicitors, and finally he engaged Messrs. Waiswa & Company, Advocates.

130 Messrs. E. Wamimbi Advocates and Solicitors, had on 28.01.2018 inadvertently withdrawn the Notice of Appeal that had been lodged in Court on 02.10.2017 intending to appeal the Court ruling in **Miscellaneous Application No. 426 of 2017**. They had instead lodged in the High Court, Commercial Division, **Miscellaneous**  
135 **Application No. 60 of 2018** in which the applicant sought to set aside the order dismissing **HCCS No. 72 of 2015** on the ground that no security for costs had been deposited within the time set by Court. The applicant also prayed Court in the same **Application No. 60 of 2018** to accept the ground that he could  
140 not raise the security for costs because he was away from Uganda as he was in Dar-es-salaam, Tanzania, at the material time. The applicant further prayed Court to change the terms of the security for costs, by Court accepting to take a Certificate of Land Title of the land belonging to the applicant's mother, which land had value  
145 above the sum of money ordered to be deposited, instead of the original order of requiring a bank guarantee in that sum.

Both respondents opposed the prayers of the applicant in Miscellaneous Application No. 60 of 2018 on the ground that it was

res judicata, as the very same subject matter had been resolved  
150 upon on 20.09.2017 by the High Court in **Miscellaneous  
Application No. 426 of 2017.**

The Assistant Registrar, High Court, dismissed **Miscellaneous  
Application No. 60 of 2018** on the ground that it was res judicata.

The applicant asserts that after having been advised by now his  
155 new lawyers, Messrs. Waiswa & Company, Advocates, he agrees  
that the conduct and advice given to him by his previous lawyers,  
Messrs. E. Wamimbi Advocates and Solicitors to withdraw the  
Notice of Appeal of 07.10.2017; but instead pursue Miscellaneous  
Application No. 60 of 2018, which in fact was res judicata, was  
160 advice that was negligent and unprofessional. Yet he had  
completely relied on their professional skill and knowledge of the  
law and Court procedures. He thus prays that the mistakes of his  
then lawyers, Messrs. E. Wamimbi, Advocates and Solicitors, be  
not visited upon him.

165 Accordingly the applicant prayed Court to extend the time within  
which to refile the withdrawn Notice of Appeal, re-lodged in Court  
on 23.10.2018, and also extend the time within which to serve the  
said Notice of Appeal unto the respondents.



It was further contended for the applicant that this Court should  
170 appreciate the fact that the applicant's original Civil Suit has never  
been determined on its own merits. This Court should allow this  
application to enable the applicant pursue the possibility of having  
his **Civil Suit No. 72 of 2015** determined on its own merits.

The respondents, through their learned Counsel, opposed the  
175 application. It was contended for them, that the application did not  
have any merit at all and that on 07.06.2019, before this  
application was lodged in this Court on 28.10.2019, the 1<sup>st</sup>  
respondent had already lodged in this Court **Civil Application No.  
174 of 2019**; which is still pending in this Court, to strike our  
180 **Civil Appeal No. 78 of 2018** from which this application arises by  
reason of the said appeal being incompetent in law.

It was further submitted for the respondents that none of them has  
ever been served with any proper Notice of Appeal and/or  
Memorandum of Appeal relating to that **Civil Appeal No. 78 of  
185 2018**.

Finally, it was contended of the respondents, that whatever was  
done in withdrawing the Notice of Appeal filed in this Court on  
02.10.2017; and in lodging and pursuing in the High Court  
**Miscellaneous Application No. 60 of 2018**, was done with full

190 knowledge, understanding, consent and participation of the  
applicant. There was therefore no merit in the applicant asserting  
that whatever was so done was a mistake of his then Counsel and  
the same ought not to be visited upon him.

Rule 5 of the Rules of this Court provides that:

195 **“5. Extension of Time:**

*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 authorised or required by these Rules,  
whether before or after the expiration of that time and whether  
200 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”.*

This Court exercises its judicial discretion in applying this rule to  
the circumstances laid before the Court. In exercising the said  
205 discretion, the Court on the basis of the facts before it, resolves  
whether or not, to allow or disallow the application. The Court  
will only allow the application, if it finds on the facts before it, that  
the applicant has established “sufficient reason” for having failed  
to do what that applicant was supposed to do within the time

210 describe by the law. See: **Supreme Court of Uganda Civil Application No. 09 of 2017: James Bwogi & Another vs Kampala City Council & Another (Nshimye, Ag. JSC) (unreported).**

215 What constitutes “sufficient reason” is again decided upon by the court in the exercise of the stated unfettered discretion vested in the Court. The Court will accept or reject a reason put forward as having prevented the applicant from taking the essential step in time, or other reasons, why time should be extended or not extended, for doing a particular act. An application lodged in  
220 Court promptly is most likely to attract the sympathy of the court than the one brought after unexplained inordinate delay. But even where the application is unduly delayed, the Court may grant an extension of time, if shutting out the appeal may appear to cause an injustice. See: **Supreme Court Civil Application No. 27 of 2007: Boney M. Katatumba vs Waheed Karim (Administrator of late Suleiti Haji’s Estate) (Mulenga, JSC.)(RIP).**  
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It may also be added, that a Court of law, will not exercise its discretion to advance the cause of a party who is committing abuse of Court process in his or her conduct to Court.

230 It is the case of the applicant, that whatever caused the necessity  
for him to make this application for extension of time was due to  
the mistake and/or inadvertence of his then lawyers, Messrs. E.  
Wamimbi and Company, Advocates, and that he should not be  
visited with the consequences of that mistake and/or  
235 inadvertence. For him, he brought his case to Court seeking  
substantial justice, and he prays to this Court to enable him get  
that substantial justice.

The mistake of Counsel, alleged by the applicant, is that the said  
lawyers he had engaged, advised him to withdraw the Notice of  
240 Appeal dated 02.10.2017 which he had lodged in Court, intending  
to appeal the ruling of His Lordship Wangutsi, J delivered on  
20.09.2017 in **Miscellaneous Application No. 426 of 2017**. The  
said lawyers instead advised him to file and pursue in the High  
Court Miscellaneous Application No. 60 of 2018 as the most  
245 appropriate remedy. The said application was however dismissed  
for being res judicata on 23.06.2018. It is after the dismissal of  
that application that the applicant realized that his then Counsel  
had made a mistake in so advising him.

The Supreme Court of Uganda has held in a number of decisions,  
250 that mistakes of counsel should not be visited on the applicant so

as to deny that applicant the right to appeal. This is because of the need for Courts of law to render substantive justice to the parties before those Courts. See: **Horizon Coaches Ltd vs Edward Rurangaranga & Another: Supreme Court Civil Application No. 18 of 2009. Mulwooza & Brothers Limited vs N Shah & Company Limited: Supreme Court Civil Application No. 20 of 2010** and also **Tropical Africa Bank Limited vs Grace Were Muhwana: Supreme Court Civil Application No. 03 of 2012.**

It is however also the law, on the basis of the above quoted case authorities, that before the Court can exercise its discretion, one way or the other, it must be satisfied that the mistake or inadvertence of Counsel is excusable. This is because a mistake as to the provisions of the law, in general, affords one no excuse.

Everyone is presumed to know the law. Accordingly, the Court being prayed to exercise its discretion, so as to hold that the mistake or inadvertence of Counsel, should not be visited upon the client, must furnish plausible grounds to Court, as to why Counsel's conduct in the circumstances, is excusable.

In the case of the applicant in this application, the applicant was properly advised by his counsel to pursue an appeal against the

ruling of His Lordship Wangututsi, J. delivered on 20.09.2017 in High Court Miscellaneous Application No. 426 of 2017. Thus the applicant lodged a Notice of Appeal on 02.10.2017 intending to  
275 appeal.

The applicant however, did not take steps to pursue the intended appeal for a whole four months from 02.10.2017 up to 23.01.2018. He instead changed from his previous lawyers Messrs. C.R. Amanyanya Advocates and Solicitors to new lawyers Messrs. E.  
280 Wamimbi Advocates & Solicitors, who on 23.01.2018 wrote to the Asst. Registrar, High Court, that the applicant, as the intending appellant:

*“..... has instructed us to withdraw his Notice of appeal in the above matter having lost interest to pursue the same.*

285 *Whereof we humbly pray for the same to be withdrawn.”*

The Registrar accordingly withdrew the Notice of Appeal on 30.01.2018.

The applicant does not assert that the letter withdrawing the Notice of Appeal dated 02.10.2017, was written by his then  
290 lawyers, without his instructions or without his consent and knowledge of its contents. The lawyers themselves, Messrs. E.

Wamimbi Advocates & Solicitors have not in any way supported the assertion of the applicant. That being the case, then the applicant has no basis to assert that his then lawyers  
295 “inadvertently withdrew the said Notice of Appeal.....”. The Notice of Appeal was withdrawn by the said lawyers on the instructions and participation of their client, the applicant.

With regard to High Court Miscellaneous Application No. 60 of 2018, the same was lodged in Court on 30.01.2018, the very day  
300 the Notice of Appeal was withdrawn, again on the instructions, support and participation of the applicant. The applicant did all this after he had appreciated the merits of pursuing the said application. The fact that his then lawyers, Messrs. E. Wamimbi, Advocates & Solicitors, advised him as to the merits of this  
305 application cannot be taken to be a mistake of Counsel upon the client. It is not the law that whenever Counsel advises a client on an issue to be adjudicated upon by Court then it becomes a mistake of Counsel, if the Court; decides otherwise than what Counsel advised the client.

310 In High Court **Miscellaneous Application No. 60 of 2018**, the same was lodged in Court on the instructions, support and participation of the applicant, as is exemplified by the pleadings in



the application. The applicant in the affidavit in support of the application, set out the fact that he was in Dar-es-salaam at the  
315 material time, as the cause of his failure to mobilize the funds to deposit in Court, within the time set by the Court, as security for costs in **HCCS No. 72 of 2015**.

The applicant further participated in the application by adducing evidence of powers of Attorney executed by the applicant's mother,  
320 one Namakula, in favour of the applicant allowing him to use the certificate of title of her land, together with the valuation report as to its value, by depositing the same in Court as security for costs, in substitute of the earlier Court Order, requiring the applicant to pay cash as security for costs.

325 Having given the necessary instructions as well as support and participation in the filing and prosecution, up to the very end of High Court **Miscellaneous Application No. 60 of 2018**, the applicant cannot be heard to assert that the lawyers, who represented him in the application, acted negligently and  
330 unprofessionally, and that their alleged so acting, should not be visited upon him.

On the facts before this Court, the High Court determined, on its merits High Court **Miscellaneous Application No. 60 of 018** on



23.06.2018 and the said Court decision, until it is set aside by  
335 appeal or other lawful Court process, is binding upon the applicant  
as a party to that application. The allegation of the applicant that  
the then his Counsel in this application, Messrs. E. Wamimbi  
Advocates & Solicitors, acted negligently and unprofessionally in  
the matter, is no ground for him as the applicant, for not being  
340 bound by the decision made by the Court in that application.

The applicant, on his own choice, resolved not to pursue the appeal  
against the ruling in High Court Miscellaneous Application No. 426  
of 2017 in respect of which he had lodged the Notice of Appeal on  
02.10.2017, which Notice of Appeal the applicant withdrew on  
345 30.01.2018. The applicant, instead opted to pursue High Court  
**Miscellaneous Application No. 60 of 2018** which Court  
conclusively determined on its own merits on 23.06.2018.

This Court finds it an abuse of Court process, that is abuse of legal  
procedure, that the applicant should now, after Miscellaneous  
350 Application No. 60 of 2018 had been decided against him on  
merits, be allowed to revert to an appeal process under the  
purported mistake of his former Counsel. The applicant cannot  
revert to the Notice of Appeal he filed on 02.10.2017, and then  
withdrew from Court on 30.01.2018 so that he can pursue his

355 appeal against the decision of the High Court in Miscellaneous  
Application No. 426 of 2015 made on 20.09.2017, that is three  
years ago to date.

I am unable to find merit in this application. The same stands  
dismissed with costs to the respondents.

360 Dated at Kampala this 13<sup>th</sup> day of July ..... 2020.



365 **Remmy Kasule**  
**Ag. Justice of Appeal**

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