

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: G. M. OKELLO, J.A.

CIVIL APPLICATION NO. 34/97

BETWEEN

ERIASAFANI MUDUMBA

.....

APPLICANT

AND

WILBERFORCE KULUSE

.....

RESPONDENT

(Appeal from appellate Judgment of High Court  
(C.M. Katu, J) dated 1/7/93 (at Jinja  
Appeal No. 4 of 1991)

RULING OF G.M. OKELLO, J.A.:

This is an application by the applicant brought under rule 4 of the Court of Appeal Rules directions 1996 whereby the Applicant seeks an order of this court to extend the time within which to file an appeal against the appellate Judgment of the High Court passed at Jinja on 1/7/93.

The undisputed background to the application is as follows :-

The Applicant had sued the present Respondent in the Court of a Magistrate Grade II of Nawonyabo in Kamuli District in<sup>a</sup> Kibanja dispute. In that court, the Applicant lost the case and he appealed to the Chief Magistrates court of Jinja where his appeal was allowed and a retrial was ordered before a Magistrate Grade I of Kamuli. The court of the Magistrate Grade I which heard the case again ruled against the Applicant who promptly appealed to the High Court. The appeal was heard by my brother Justice C.M. Katu as he then was. He dismissed the appeal on 1/7/93.

The Applicant who was not satisfied with that decision of the High Court lodged a Notice of Appeal in the Supreme Court on 14/7/93. This was within the prescribed period. He also made a written request for a copy of the proceedings from the High Court on 15/7/93. It was copied to the Respondent.

This request too was made within the requisite thirty days from the date of the impugned decision. Unfortunately the copy of the proceedings from the High Court was not availed to the Applicant until on 28/5/96. This was a delay of about 3 years.

In July 1996 when the Applicant went to the Supreme Court to file the record of his appeal, he was advised to file the appeal in the Court of Appeal which had then been established when the constitution of Uganda 1995 was promulgated on 8/10/95. In October 1996 when he went to the Court of Appeal Registry to file this appeal, the Applicant was told that his appeal was out of time. Hence this application.

The application set five grounds which may be summarised as :-

- (1) delay by the court to prepare and deliver the copy of the proceedings to the Applicant.
- (2) Poverty.
- (3) delay caused by the lawyer one Olubwe who was assigned by the Legal Aid Project to handle the applicant's application.

The affidavit sworn by the applicant in support of the application deponed on the delay caused by the court in preparing and delivering the copy of the proceedings to the applicant, on poverty which forced the applicant to seek assistance from the Legal Aid Project and the subsequent delay caused by the lawyer who was assigned to him by the Project.

The Respondent opposed the application as being devoid of merits. He filed an affidavit in Reply. The Respondent further filed another affidavit which was deponed to by one Magellan F. Olubwe an Advocate who was instructed earlier by the Legal Aid project to handle the applicant's application for leave to appeal out of time. Both affidavits averred that the Applicant's affidavit sworn in support of this application is false. Mr. Liiga learned counsel for the Respondent on his part challenged the applicant's affidavit as being defective and false and prayed for it to be struck out. He submitted that it is trite law that false and defective affidavit cannot be acted upon.

Rule 4 of the Rules of this court under which this application was brought empowers this court for sufficient reason, "to 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 before or after the doing of the act"

The key words in the above provision of the rule are sufficient reasons. That expression had judicial consideration in a number of cases before. It is therefore appropriate to consider some of these earlier cases to determine the scope of the expression, the rationale behind it and what constitutes sufficient reason within the context of these rules.

In National Pharmacy Ltd vs. KCC (1979) HCB 133, Ssekandi J A as he then was while considering a similar application under rule 4 of the court of Appeal Rules (1972) which rule is almost similar to rule 4 of the court of Appeal Rules directions 1996, held on the scope of the expression "sufficient reason" in rule 4 that it "must relate to the inability or failure to take the particular steps in time although other considerations may be invoked". That echoed the view which was expressed earlier by Spry VP in Mugo and others vs Wanjiru and Another (1970) EA 481 at 483. In that case Spry VP was considering rule 9 of the East Africa Court of Appeal Rules 1954 which is almost similar to our rule 4 of the Court of Appeal Rules Directions 1996. On the scope of the expression "sufficient reason" in that rule the learned VP said,

"Normally I think sufficient reason must relate to the inability or failure to take the particular step in time but I am not prepared to say that no other considerations may be invoked."

It is clear therefore that while other considerations may be invoked, the expression "sufficient reason" in rule 4 of the rules of this court must relate to the inability or failure to take the particular steps in time.

The rationale behind that expression "sufficient reason" in rule 4 of the rules of this court was succinctly summed up by Sir Owen Corrie Ag J A in B B Shah vs. D. Jammadas Co. Ltd (1959) EA 338 at page 840 when he said,

"The object of including rule 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under rule 9 should support his application by a sufficient statement of the nature of the judgment and his reasons for desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause injustice"

In UCB vs. Severino Oryeda Civil Application No. 3 of 1986 (Court of Appeal) unreported, where the applicant had sought inter alia an extension of time within which to lodge an appeal, Lubogo Ag J.A. as he then was considered what amounts to "sufficient reason" for the purpose of rule 4 of the East Africa Court of Appeal Rules 1972. In that case the facts were almost the same with the facts of the instant case. The applicant had lodged the Notice of Appeal within time and made a written request for a copy of record of the proceedings also within time but there was inordinate delay by the high Court in availing the record to the applicant. For the applicant it was contended that the delay by court to provide the record applied for constituted sufficient reason. That contention was contested by the Respondent who argued that no sufficient reason was shown.

Lubogo Ag J.A. as he then was held that the delay by court in supplying the record applied for constituted sufficient reason to justify grant of extension of time. In coming to that conclusion the late learned judge relied on an earlier case of Mugo and other vs Wanjiru and anor. above where Duffus P remarked on Page 485 that, "in the case of Bhatt vs Tejwant Singh (1962) E A 497, this court decided that there was sufficient reason where the delay had been attributed entirely to the court and did not consider the merits of the case".

Delay caused by court to prepare and deliver the copy of the proceedings applied for therefore constitutes a sufficient reason if the applicant did not contribute to the delay.

In the instant case the affidavit of the Applicant revealed that the applicant had applied for a copy of the proceedings from the High Court on 15/7/93 within the requisite thirty days from the date of the impugned decision but that the proceedings were not availed the applicant until 28/5/96. That was a delay of about 3 years.

Mr. Liiga learned counsel for the Respondent submitted that the applicant partly contributed to the delay of the court when on 1/9/93, two months after his appeal in the High Court had been dismissed, the applicant described himself to the Registrar Supreme Court as "Basafu" as shown in Annexures C D and E of the applicant's affidavit. The learned counsel contended that that misinformed the Registry and therefore caused a delay.

Mr. Kafuko-Ntuyo counsel for the applicant replied that the request for copy of the proceedings was in the right name.

The applicant is known as Eriasafani Mudumba. The written request for copy of the proceeding is annexed to the applicant's affidavit as annexure "A". It was authored by one "Kela Safu Mudumba". the first name surely differs from the applicant's first name but the serial number of the case whose copy of the proceedings was



requested, the date when it was decided and the name of the judge who decided it were stated clearly. The District Registrar in his certificate Annexure "B" to the applicant's affidavit did not indicate that the change of name contributed to the delay of the court. I do not therefore agree that the applicant contributed to the court's delay in preparing and delivering of the copy of the record of the proceedings to the applicant. A delay of nearly 3 years is deplorable.

The second reason for the delay canvassed by the applicant was poverty. He deponed in his affidavit that when he was told by the Supreme Court to file his appeal in the Court of Appeal which had then on the promulgation of the Constitution of Uganda 1995 been established he had run out of money and eventually contacted the Legal Aid Project which assigned him a lawyer a Mr. Olubwe.

Counsel for both parties concurred that poverty does not constitute sufficient reason or excuse for failure to take a particular step in the court proceedings. I agree. Rules of procedure for instance R. 110 of the Rules of this court make provision for waiver of court fees. O.41 r 1 + 2 of the CPR also caters for Pauper Appeal. Deserving litigants can take advantage of these. These provisions rebuts the myth that court is only assessible to by the rich.

The third reason advanced by the applicant for the delay was that the delay was partly caused by a Mr. Olubwe that lawyer who was assigned by the Legal Aid Project to handle the applicant's case. The applicant deponed that the said, Mr. Olubwe delayed between October 1996 and January 1997 and never made the applicant's application. Then the Project assigned to the applicant another lawyer one Mr. Kafuko-Ntuyo in March 1997. But that even then the said, Mr. Olubwe did not readily release the relevant documents to Mr. Kafuko-Ntuyo thus causing a further delay. Mr. Kafuko-Ntuyo told court from the Bar that he received the relevant documents in August 1997. He submitted that the applicant had diligently done all he could in his power to take

in time the step to file his appeal and that the delay was without the applicant's fault. He cited Bakitara Transport Bus Co. Ltd vs Birabonwa (1979) HCB 92.

Mr. Liiga counsel for the respondent responded that the applicant had refused to pay the fees to file the application and thereby caused the delay. For this the learned counsel relied on Mr. Olubwe's affidavit. The learned counsel however conceded that he was himself not sure of the Legal Aid Project Policy on court fees. But he argued that the delay between March 1997 when Mr. Kafuko-Ntuyo was instructed by the Legal aid Project to handle the applicant's case and September 1997 when this application was filed had not been accounted for yet that was a delay of nearly six months. He also challenged the delay between 25/5/96 when the applicant received copy of the proceedings and March 1997 when the Legal aid Project assigned Mr. Kafuko-Ntuyo to handle the applicant's case. The learned counsel contended that that delay could not be blamed on poverty.

In B.N. Bhatt vs Tijwant Singh and Anor above, Sir T. Gould Ag VP said at page 498 that,

"If the intending appellant has exercised all due diligence and done all in his power to obtain the necessary copies of documents in time but has been prevented from doing so because the Supreme Court has not been able to supply them, it would in the absence of other special circumstances be a denial of Justice not to extend the specified period".

That meant that if an appellant/applicant has exercised due diligence and done all in his power to take the particular step in time but was prevented by no fault of his own, it would in the absence of special circumstance be a denial of justice not to extend the specified time. In the instant case the affidavit deponed by the applicant in support of the application

showed that the applicant had given Notice of his appeal in time and made a written request for copies of the proceedings in time. The inordinate delay of about 3 years by the court to supply the copies of the proceedings was entirely on the court. The applicant did not contribute to him. When he was told to file his appeal in the new Court of Appeal, he went but was told that his appeal was out of time. Then he contracted the legal Aid Project. He could not be blamed for the delay caused by the lawyer assigned to him by the Legal Aid Project. The argument that he caused a delay by refusing to pay the court fees for the application is untenable. The applicant had declared his impecuniousness and to demand that he pays court fees defeats the very purpose of his seeking assistance from the Legal Aid Project. Failure of the lawyer - one Olubwe to handover the relevant documents to Mr. Kafuko-Ntuyo could not be attributed to the applicant. In my view the applicant had exercised due diligence and had done all that was within his powers to have his appeal filed within time.

The respondent had attacked the applicant's affidavit as being false. Mr. Liiga singled out paragraphs 3,8,9,12 and 13 of the said affidavit.

Paragraph 3 is on whether the applicants appeal in the High Court was dismissed in the absence of the applicant and without notice. The respondent averred that the applicant and his lawyer were present on the date of the judgment. I think the correct answer to that question lay in the availability of a certified copy of the minute of the proceedings on the day of Judgment. Only then can one accurately state what transpired on that day. The respondent himself did not avail such evidence. I would not therefore say that the applicant's affidavit is false on this.

Paragraph 8 refers to the applicant's abortive attempt to file his appeal in the Supreme Court because the new court of Appeal had already been established by July 1996.



Paragraph 9 is about the applicant's failure to file his appeal in the new court of Appeal because he was in October 1996 already out of time. Mr. Liiga submitted that these paragraphs are false because the applicant is an educated person. I find no merits in that submission because the mere fact that the applicant is an educated person did not mean that he did not go to file his appeal in those two courts and bounced for the reason he gave. There is no evidence that the applicant did not attempt to file his appeal in these two courts.

Paragraph 12 of the applicant's affidavit deponed to how Mr. Kafuko-Ntuyo was assigned by the Legal Aid Project on the applicant's complaint to handle the applicant's case in place of Mr. Olubwe. Paragraph 13 complained of how Mr. Olubwe delayed to handover the relevant documents in respect of the applicant's case to Mr. Kafuko-Ntuyo.

Mr. Liiga submitted that since Mr. Kafuko-Ntuyo was briefed by the Legal Aid Project in March 1997, to handle the applicant's case, the application was filed in September 1997 giving an inordinate delay of about 6 months and that that rendered paragraphs 12 and 13 of the applicant's affidavit false. I think that delay had been explained to be attributable to Mr. Olubwe who took up to August 1997 to handover the relevant documents in respect of the applicant's case to Mr. Kafuko-Ntuyo. Without those documents Mr. Kafuko-Ntuyo could not possibly file the applicants' application. This only reinforces the contents of paragraph 13 of the applicant's affidavit. In the end I do not find that the applicant's affidavit is false.

Mr. Liiga further challenged the applicant's affidavit as being defective for failure to distinguish between facts sworn on the deponent's knowledge from those deponed on his belief.

The relevant affidavit concludes in paragraph 16 thus,

"That what is stated hereinabove is true and correct to the best of my knowledge and belief."

the instant case there was no complaint of failure to disclose the ground for belief. The complaint was only against failure to distinguish the paragraphs deponed on knowledge from those deponed on belief. The underlying principle of administration of justice as set out in Article 126(2)(e) of the Uganda Constitution 1995 is that

"Substantive justice shall be administered without undue regards to technicalities."

This is intended that procedural technicalities shall not be allowed to thwart the course of justice.

In the instant case, the applicant had exercised all due diligence to file his Appeal in time but was prevented due to no fault of his own. In the absence of special circumstance therefore justice demands that the specified time must be extended. Failure to state which paragraphs were deponed on knowledge and which ones were deponed on belief at the end of the affidavit when the grounds of belief are stated does not amount to special circumstance to justify refusing extension. For the reasons given above, I allow the application. Applicant is accordingly given 30 days within which to file his appeal.

Cost of this application shall be cost in the court.

Dated at Kampala this 1st day of October, 1997.

Sgd: G. M. OKELLO

JUSTICE OF APPEAL.

Delivered in the presence of Mr. Ntende Fredrick holding brief  
for Mr. Kafuko - Ntuyo for the Applicant.

The Respondent in person  
Mr. Nduhuura Court Clerk.

Sgd: G. M. OKELLO

JUSTICE OF APPEAL.

1/10/1997.

I certify that this is a true copy of the original.

  
J. MURANGIRA

REGISTRAR COURT OF APPEAL.