

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO.158 OF 2014

5 **MUTABA BARISA KWETERANA LTD.....APPLICANT**

V E R S U S

BAZIRAKYE YEREMIYA & ANOTHER.....RESPONDENT

10 **CORAM: HON. MR. JUSTICE RICHARD BUTEERA, JA**
(A SINGLE JUSTICE)

R U L I N G:

15 This is an application by Notice of Motion under rr.5 and 43 of the
Judicature (Court of Appeal) Rules. The applicant is applying to be
granted leave to appeal out of time against the decision of the High
Court in Civil Appeal No.043 of 2008.

20 The application is supported by an affidavit of the applicant
Rwanyiziire Benedicta.

25 The background facts are that the applicant sued the respondent in
the Chief Magistrates Court at Kabale. Judgment was given in his

favour. The respondent appealed to the High Court and the appeal was decided in his favour. The applicant was dissatisfied with the decision of the High Court. He instructed counsel M/s Murumba and Co. Advocates to appeal the High Court decision to this Court and the advocates filed a Notice of Appeal.

The said advocates did not request for a record of proceedings and failed to cause the transmission of a copy of the Notice of Appeal to the Court of Appeal.

The applicant was dissatisfied with the conduct of Murumba and Co. Advocates and he instructed new lawyers who are responsible for filling and pursued this application.

At the hearing of this application learned counsel, Lawrence Tumwesigye represented the applicant. The respondent was represented by learned counsel, Mr. Reverand Ezra Bikangiso.

Counsel for the applicant submitted that the application for leave to appeal out of time be granted and the civil appeal filed out of time be validated. According to counsel, the applicant had instructed his lawyers to appeal against the decision of the High Court which was

delivered on 03/08/2011 and the advocates filed a Notice of Appeal on 10/08/2011. The advocates did not even ask for a record of proceedings which the applicant only found out when he personally went and checked with the High Court Registry at Kabale.

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He contended that the delay to file the appeal was a result of negligence by their earlier advocates. When the applicant discovered the advocates negligence, he instructed the current advocates who have now filed the instant application. He further
10 contended that the negligence of counsel should not be visited on the applicant and he should be granted the leave to appeal out of time.

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Counsel for the respondent opposed the application. He contended that for such an application to be allowed it ought to have been made promptly and good cause must be showed for the entire period of delay. No sufficient reason or cause has been shown for the delay in this case. The applicant here has not account for the delay of 3 years.

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In the instant case, counsel argued that if the pervious lawyer was negligent, it's not shown what the applicant did himself. He



submitted that the Notice of Appeal that was filed was never served on the respondent which is a requirement of the law.

5 Counsel further contended that there was even no evidence that Murumba and Company Advocates were fully instructed by the applicant as there are no receipts for instruction fees as proof that the lawyers were ever instructed to handle the appeal. Counsel submitted that the applicant needed to have applied for a Certificate of General importance on matter of law or public importance as this
10 was a third appeal.

He also submitted that the application should not be allowed because there should be an end to litigation as the limitation act was not enacted in vain.

15 I have carefully considered the useful submissions of both counsel and studied the court record for resolution of the application. The critical issue for resolution of this application is whether on the facts of the case as stated above this is an application that satisfies the
20 conditions for leave to be granted to allow the appeal to be filed out of time.



The appellant stated that he wished to file the appeal in time and he gave instructions to Murumba and Co. Advocates. According to the applicants the said advocates filed a Notice of Appeal but told him they had difficulties getting the record of proceedings. He got fed up and personally checked with the registry and that is when he discovered that the said advocates had even never applied for the records of the lower court. He then instructed the current advocates.

Counsel for the respondent was of the position that the respondent may never have instructed Murumba and Co. Advocates.

I do find that if Murumba and Company Advocates had never received any instructions then they would never have filed the Notice of Appeal as they would not have had any instructions to file the same.

The issue of mistakes or inadvertence of counsel had been handled by the Supreme Court and this Court in numerous case.



Justice B.M. Katureebe in Civil Application No.03 of 2012, Tropical Africa Bank Ltd vs. Grace Were Muhuwana referred to the cases with approval and held as below:-

5 **“This court has laid down in a long line of cases, that mistakes or inadvertence by counsel should not be visited on the litigants themselves who come to court seeking substantive justice, I fully concur with the decisions in the cited case of Horizone Coaches and Mulwooza & Brothers (supra). In the earlier case of**
10 **Godfrey Magezi and Brian Mbazira vs. Sudhir Rupaleria, Karokora JSC (as he then was) reviewed a number of authorities on the interpretation of Rule 5, and on the matter of the effect of mistakes of counsel on appeals of litigants. The learned Justice quoted, in extenso, the decision of this Court in Crane**
15 **Finance Co. Ltd vs. Makerere Properties, S.C.C.A. No.1 of 2001 on the application of Rule 5 (then Rule 4).**

‘The rule envisages.....scenarios in which extension of time for the doing of an act so authorized or required may be granted, namely:-

20 ***(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.

5 The case also lays down the principle that a matter filed out of time is not an incurable nullity. It can be validated by court.

On these issues of mistakes or inadvertence of counsel, the learned Justice states:-

10 'It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on to the litigant, leading to the striking out of his appeal thereby denying him justice. There are many decisions from this court and other jurisdictions in which it has been held that an application
15 for extension of time, such as this one, where mistake or error or misunderstanding of the applicants' legal advisor, even though negligent have been accepted as a proper ground for granting relief under rules equivalent to Rule 4 (read 5) of the Rules of this Court, which is the rule under
20 which this application was brought.'



Further, error mistakes of court officials have been held to be sufficient grounds for granting extension of time to the applicant to file his or her appeal out of time.”

5 Hon Justice Tsekooko in Kasaala Growers Co-operative Society vs. Jonathan & Another when considering a matter on the issue of leave to appeal out of time held as below:-

10 “Much as there must have been a failure of communication between him and the agent of the applicant, the applicant all along wanted to appeal. I think that in land cases it is proper to allow parties to exhaust their proper legal rights of appeal. Naturally no court should condone lack of diligence by a party seeking a remedy from court. In this particular case I am not
15 persuaded that this application should be dismissed because of Bumbakali’s apparent naivety and or his failure to return to Mr. Tibaijuka to pay his fees.”

20 In view of the above authorities, I am satisfied that on the facts of the instant application, sufficient reason does exist for granting extension of time to the applicants to appeal out of time.

The applicant in this case has already filed the appeal.

The effect of that was discussed by Hon. Justice Karokora in Supreme Court Civil Application No.10 of 2012, Godfrey Magezi and Brian
5 Mbazira vs. Sudhir Rupaleria, Karokora JSC when held:-

10 “The legal effect of extending time to file an appeal out of time when the appeal had already been duly filed albeit out of time is to validate that appeal or to excuse the late filing of that appeal.”

The late filing of the appeal in the instant application and the payment of a deposit for security for costs are validated.

15 This application has been allowed on the principle that it would be wrong for this Court to visit mistakes, omissions or failures of counsel on the applicant who is yearning for justice. It is the lawyer who is currently not in court that was responsible for the delay and not his client.

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The Agent's (Advocate) misconduct, however, caused the delay. I order that the applicant must meet the respondent's costs for this application.

5 Dated this day.....10th.....of.....March.....2014.

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL.