THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT FORT PORTAL

MISCELLANEOUS CRIMINAL APPLICATION No. 0021 OF 2009

(Arising from Kasese Chief Magistrate's Court Criminal Case No. 0056 of 2008)

CHARLES MWANJA ……. APPLICANT

VERSUS

UGANDA ……..…….. RESPONDENT

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

RULING

The Applicant herein was charged with two counts of abuse of office, and one of causing financial loss, all offences under the Penal Code Act. He was tried by His Worship Charles Sserubuga, Chief Magistrate Kasese, and convicted on the 6th January 2009; and sentenced to pay fine of U shs 2m/= in lieu of custodial sentence of 7 (seven) years, and to refund U. shs. 6,400,000/= to Kasese District. He immediately instructed his lawyer Mr. Henry Kunya, whose professional competence he relied on, to appeal against both conviction and sentence; and then proceeded to his home village.

The Applicant however discovered later that his counsel had not taken any steps whatever to pursue the appeal as instructed; and by then the time for filing the notice of appeal, which is pre–requisite for the filing of an appeal, had elapsed; hence this application for extension of time to do so. The application which was brought under

sections 16 (1), 14(1), of the Judicature Act, and sections 28 and 31 (1) of the Criminal Procedure Code Act, has four grounds; and the essence of which set out the facts pointed out above; and yet he asserts he has good grounds for pursuing the appeal.

He swore an affidavit in support of the application, in which he reiterated and expanded on these grounds at greater length. Therein was contained the proposed grounds of appeal, inclusive of the allegation that the trial Magistrate had not adequately evaluated the evidence on record, had come to findings not supported by evidence, and that the prior consent of the D.P.P. had not been obtained before the trial and therefore the trial had offended against the provision of the law that requires this prior consent; thereby occasioning grave injustice to him.

In a supplementary affidavit, Counsel Joseph Henry Kunya also made a deposition in which he owned up to his failure to follow up the instructions of the Applicant to appeal. The reasons he advanced therein for his failure to do so, as laid down in paragraphs 5 and 6 of his affidavit, which I will have to advert to later in this ruling, are interesting. They are as follows:

"5. That on account of proximity disadvantages coupled with financial constraints and immense family pressures on the part of the Applicant, I was not in position to pursue the intended appeal process within the prescribed time on behalf of the Applicant.

6. That when the Applicant ultimately made contacts with me later on, I advised him that the statutory period within which to file an appeal had long since elapsed and he would only have to seek leave of Court before pursuing the proposed appeal."

Edward Bamwite, who argued the application for the Applicant submitted that the applicant was not himself guilty of any dilatory conduct; hence had shown good cause for his failure to appeal within the time provided for by the law. Counsel invited Court to take cognisance of the fact that it is now settled that the blameworthy conduct of the Counsel upon whom a litigant had placed faith should not be visited on such litigant. He cited the authorities of ***Adura Omuto Ltd. vs. Henry Nyombi [1998] H.C.B. 31*** and ***Andrew Gitta Kimani vs. U.*** (unreported), as good authorities for the proposition in law that mistake of counsel should not be visited on a litigant who had acted sufficiently to pursue his or her or its appeal.

Rogers Kinobe, Counsel for the State, however opposed the application, pointing out that blame for the delay should be apportioned on the Applicant; hence in the circumstance of this case no good cause had been shown for Court to extend the time within which the Applicant could appeal. Counsel referred Court to the case of Martin ***Shimanya vs. U. [1994-95] H.C.B. 12*** in support of his contention.

The circumstances which may warrant Court's exercise of discretion to grant extension of time for the lodgement of an appeal is well settled. In the case of ***Andrew Gitau Kimani vs. U., Crim. Appeal No.7 of 1986*** (unreported), the Court of Appeal exhaustively dealt with this matter; and pointed out that, though each case has to be considered on its own merits, the governing consideration in the exercise of the Court's discretion, is whether the Applicant seeking extension of time in which to appeal has shown sufficient cause to justify his being granted extension of time sought. The Court stated as follows:

"In Charles Kangamiteto vs. U., Cr. App. No 1 of 1978, (unreported), this Court said,

'It is to be noted that the power can only be exercised for sufficient reason which relates to the inability or failure to take the particular step: Mugo v. Wanjiru [1970] E.A. 481, at p. 483. The matter being of discretion it is not possible to lay down an invariable rule but is necessary that time limits should be treated with respect, and in considering whether a time limit shall be extended, one has to have regard to the circumstances of the case and the merits of the excuse put forward for not adhering to the original time in the first instance."'

The Court agreed with Spry V-P., in his statement in the ***Mugo v. Wanjiru*** case (supra) where he clarified that such factors as likelihood that the intended appeal would succeed, the reason for the inability to appeal within time, and the injustice that would result from the refusal to grant the application are all factors that need to be considered together. It also agreed with the statement by Duffus P., that though each case must be decided in its particular circumstance, the general rule is that there must be satisfactory explanation by the Applicant for the delay, coupled with the fact that denial of justice would result if grant of the application refused.

The Court cited the statement by Spry V.P. in the case of ***Shanti v. Hindocha & Ors [1973] E.A. 207*** at 209 as follows:

"The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing 'sufficient cause' why he should be given more time and the most persuasive reason that he can show as in Bhatt's case [1962]E.A. 497 is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case, but his application is likely to be viewed more sympathetically if he can do so and if he fails to comply with the requirement set out above he does so at his own peril."

Finally, the Court pointed out that though the principles referred to above were with regard to matters in the Court of appeal, they were equally applicable to applications made before the High Court under the Criminal Procedure Code Act.

Accordingly then, applying the principles well set out above to the matter before me, I find that the Applicant who duly and promptly instructed his counsel to appeal against the whole of the decision of the trial Court had done all that an aggrieved party in the circumstance could have. Here was a convict who had placed faith in learned counsel to pursue the appeal. He could not be expected to know the procedural intricacies of notice of appeal and so on. He had put his fate in the professional hands of counsel. Such a person could never be accused of any form of dilatory conduct whatever.

Second, he has raised a point of law which the appellate Court would be interested to look into; namely that he had been prosecuted without the sanction of the Director of Public Prosecutions as provided for by law. I find that the Applicant has advanced sufficient reasons for seeking extension of time within which to appeal. The Civil Procedure Code Act provides in section 28(1), (3), and (6), for either extension of time for lodgement of notice of appeal or of grounds of appeal. In my view there is no need for extension of time to file notice of appeal; instead what I grant is for the Applicant to file his grounds of appeal within 7 (seven) days hereof.

Chigamoy Owiny – Dollo

JUDGE

26 – 03 – 2010

Per Curiam:

It is quite apparent from the supplementary affidavit deposed to by the Applicant's former counsel, in support of the application, despite his attempt to subtly veil it, that his failure to file the notice of appeal pursuant to the Applicant's instructions to appeal, was due to the Applicant's failure to first pay counsel his instruction fee. Unfortunately, counsel has not come out to state that he had made such payment a precondition for his taking up the instructions; for which he would then have blamed the Applicant for failing to meet such terms.

I am constrained to point out that while counsel was unquestionably entitled to charge professional fee, in a situation such as this one where he was faced with the statutory limitation of time within which to carry out an important preliminary act such as filing a notice of appeal, which in any case would be a one paragraph document, professional prudence certainly demanded that he first beat the period of limitation and then pursue the matter of his entitlement to the fee charged.

Members of the legal profession are not merchants; and therefore ought not to place money above the pursuit of the cause of justice. It is the nobleness of the pursuit of the cause of justice that distinguishes the learned fellow from a down–town trader; and is the reason why counsels are not issued with trading licences, but practising certificates as primarily officers of the Court of justice. Had counsel kept the honour of his profession above all else, this application would not have been necessary at all. I hope this observation offers guidance to lawyers, if not professionals generally, in the conduct of their professional duties.

Chigamoy Owiny – Dollo

JUDGE

26 – 03 – 2010