IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Misc. Civil Application No. 0057 of 2019

In the matter between

OYWELO YASINTO **APPLLICANT**

And

ONYING VERONICA **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 23 July, 2020.

Civil Procedure *— Appeals — Enlargement of time— An application made for enlargement of time should not be granted as a matter of course. Grant of extension of time is discretionary and depends on proof of "good cause" showing that the justice of the matter warrants such an extension. — What constitutes "sufficient reason" will naturally depend on the circumstances of each case. — An order for enlargement of time to file the appeal where the subject matter of the dispute is land should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his or her failure to file the appeal within the time prescribed by Act, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that the intended appeal is not an arguable one. — In an application of this nature, the court must balance considerations of access to justice on the one hand and the desire to have finality to litigation on the other.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application under the provisions of section 98 of *The Civil procedure Act* and Order 51 rule 6 and Order 52 rules 1 and 2 of *The Civil Procedure Rules*, seeking leave to appeal out of time. The application is premised on grounds that the applicant's counsel filed a timely appeal but erroneously entitled it "tentative memorandum of appeal" by reason whereof it was struck out on 12th April, 2019. The appellant contends that the intended appeal has a likelihood of success, he filed the current application without undue delay and it is in the interests of justice that the application be allowed. The respondent did not file an affidavit in reply.

[2] The background to the application is that the respondent sued the applicant in the underlying suit involving a dispute over land. Judgment was delivered in the respondent's favour. The applicant instructed counsel who indeed filed "an appeal" but erroneously entitled it "tentative memorandum of appeal" by reason whereof it was struck out on 12th April, 2019, hence this application filed on 12th April, 2019. It is argued by counsel for the applicant, M/s Donge and Co. Advocates that prefixing the title to the memorandum of appeal with the word "tentative" was a typing error attributable to counsel, that ought not to be visited onto the litigant. The application was filed without undue delay and it concerns land that constitutes the source of sustenance for the applicant and his family.

[3] In their submissions, counsel for the applicant, argued that it was out of inadvertence that they entitled the memorandum of appeal "tentative." Their mistake or error should not be visited upon their client. The instant application was filed without delay upon the court's identification of that error and the subject matter of the dispute is even acres of land occupied by the applicant and from which he derives his sustenance. There is no likelihood of injustice that may be occasioned to the respondent since he will have opportunity to present his arguments on appeal and costs could atone for any delay. The respondent did not file submissions in response.

Enlargement of time.

[4] An application made for enlargement of time should not be granted as a matter of course. Grant of extension of time is discretionary and depends on proof of "good cause" showing that the justice of the matter warrants such an extension. The court is required to carefully scrutinise the application to determine whether it presents proper grounds justifying the grant of such enlargement. The evidence in support of the application ought to be very carefully scrutinised, and if that evidence does not make it quite clear that the applicant comes within the terms of the established considerations, then the order ought to be refused. It is only if that evidence makes it absolutely plain that the applicant is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the respondent of a very valuable right to finality of litigation.

[5] This requirement was re-echoed in *Tight Security Ltd v. Chartis Uganda Insurance Company Limited and another H.C. Misc Application No 8 of 2014* where it was held that for an application of this kind to be allowed, the applicant must show good cause. "Good cause" that justifies the grant of applications of this nature has been the subject of several decisions of courts and the examples include; *Mugo v. Wanjiri [1970] EA 481* and *Pinnacle Projects Limited v. Business In Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010,* where it was held that the sufficient reason must relate to the inability or failure to take a particular step in time; *Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993* in which it was decided that a mistake by an advocate, though negligent, may be accepted as a sufficient cause, ignorance of procedure by an unrepresented defendant may amount to sufficient cause, illness by a party may also constitute sufficient cause, but failure to instruct an advocate is not sufficient cause, which principle was further stated in *Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001* that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on

the litigant; and further that where there are serious issues to be tried, the court ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank [1971] EA 17* and *G M Combined (U) Limited v. A. K. Detergents (U) Limited S.C Civil Appeal No. 34 of 1995*). However, the application will not be granted if there is inordinate delay in filing it (see for example *Rossette Kizito v. Administrator General and others, S.C. Civil Application No. 9 of 1986 [1993]5 KALR 4*).

[6] What constitutes "sufficient reason" will naturally depend on the circumstances of each case. It was held in *Shanti v. Hindocha and others [1973] EA 207,* that;

> 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 reason (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part. But there are other reasons and these are all matters of degree. (Emphasis added).

[7] Although such circumstances ordinarily relate to the inability or failure to take the particular step within the prescribed time which is considered to be the most persuasive reason, it is not the only acceptable reason. The reasons may not necessarily be restricted to explaining the delay. An applicant who has been indolent, has not furnished grounds to show that the intended appeal is meritous may in a particular case yet succeed because of the nature of the subject matter of the dispute, absence of any significant prejudice likely to be caused to the respondent and the Court's constitutional obligation to administer substantive justice without undue regard to technicalities. I am persuaded in this point of view by the principle in *National Enterprises Corporation v. Mukisa Foods, C.A. Civil Appeal No. 42 of 1997* where the Court of Appeal held that denying a subject a hearing should be the last resort of court.

[8] The considerations which guide courts in arriving at the appropriate decision were outlined in the case of *Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001*, where it was held that;

> (a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.
>
> (b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.
>
> (c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.
>
> (d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.
>
> (e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors …".

[9] Similarly in *Phillip Keipto Chemwolo and another v. Augustine Kubende [1986] KLR 495* the Kenya Court of Appeal held that:

> Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

[10] Furthermore In *Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22* by the Supreme Court of Uganda that:

> The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

[11] An order for enlargement of time to file the appeal where the subject matter of the dispute is land should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his or her failure to file the appeal within the time prescribed by Act, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that the intended appeal is not an arguable one. It would be wrong to shut an applicant out of court and deny him or her, the right of appeal unless it can fairly be said that his or her action was in the circumstances inexcusable and his or her opponent was prejudiced by it. In an application of this nature, the court must balance considerations of access to justice on the one hand and the desire to have finality to litigation on the other.

[12] In the instant application, the applicant instructed the advocates on time and indeed they filed “an appeal” but erroneously entitled it “tentative memorandum of appeal” by reason whereof it was struck out on 12th April, 2019. I have not found any evidence to suggest that the applicant had a hand in causing that lapse. It appears to me that the blame is wholly attributable to the advocates for whose mistake, fault, lapse or dilatory conduct the applicant cannot be penalised.

[13] Indeed it is now trite that the mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant (see the Supreme Court decisions in *Andrew Bamanya v. Shamsherali Zaver, S.C. Civil Appln. No. 70 of 2001*; *Ggoloba Godfrey v. Harriet Kizito S.C. Civil Appeal No.7 of 2006*; and *Zam Nalumansi v. Sulaiman Bale, S.C. Civil Application No. 2 of 1999)*. I have not

found any unjustifiable inconvenience that will be suffered by the respondent in the event of allowing this application, yet a determination of the dispute on merits on appeal, would be in the best interests of both parties. It is for that reason that the application is allowed.

Order:

[14] In the final result, the applicant is granted leave to file the appeal within fourteen days of delivery of this ruling. The costs of the application shall abide the results of that appeal.

Delivered electronically this 23rd day of July, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicant : M/s Donge and Co. Advocates.

For the respondent :