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THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 24 OF 2015

10 (Arising from Court of Appeal Civil Appeal No. 49 of 2012 and
HCCS NO. 180 of 2005)

*[Coram: Katureebe, CJ, Nshimye, Mwangusya, Mwondha,
Tibatemwa-Ekirikubinza, JJSC].*

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BETWEEN

KASULE SAMUEL APPLICANT

AND

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1. MUBEEZI JAMES
2. NTUNGIRE STEVEN
3. MISAKI KAVIIGI } RESPONDENTS

RULING OF COURT

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5 This is an application for an order to strike out the Notice of Appeal filed by the respondents for having been served on the applicant out of the prescribed time without leave of court.

The application was brought under the provisions of **Rules 5, 41(2) and 42 (1) of the Supreme Court Rules** on the following grounds:

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1. That the Notice of Appeal was served outside the prescribed time.
 2. No appeal lies.
 3. The respondents' intended appeal is an abuse of court process.

Appearances

15 At the hearing of the application, Mr. Muhwezi Eric appeared for the applicant.

Mr. Deus Nsengiyunva appeared for the 1st and 2nd respondents while Mr. Denis Atwijukire appeared for the 3rd respondent.

20 Whereas the applicant, the 2nd and 3rd respondents were in court, the 1st respondent was not.

All counsel adopted their filed written submissions which we have considered in resolving the application.

The above grounds are expounded in the Applicant's affidavit in support of the Notice of Motion.

25 Background

The facts leading to this application are as follows:-

30 The applicant is the legal representative of his late father's estate- Christopher Kasula. Christopher Kasula together with Jerosom Rwakishaya, Zekeri Lubeinika and the 1st respondent (James Mubeezi) were registered proprietors as tenants in common of the suit land comprised in Bulemezi Block 981 plot 4.

5 Due to the 1982 bush war, the applicant's father fled the land and subsequently died. The 1st respondent was the survivor of all the other tenants in common.

10 It was alleged that the applicant's father— Christopher Kasula had sold part of the land to the 2nd and the 3rd respondents, Ntungire Steven and Misaki Kaviigi respectively. The 2nd and 3rd respondents went ahead and registered their separate interests in 1988.

15 The applicant also alleged that upon acquiring Letters of Administration in 1999, he discovered from the sale agreement filed in the land registry that the said sale of land to the 2nd and 3rd respondents was fraudulent. That the sale agreement did not show that the 1st respondent- James Mubeezi was a proprietor and seller and that by 1988 when the alleged sale to the 2nd and 3rd respondents took place, the tenants in common had already died.

20 This is what prompted the applicant to sue the 1st, 2nd and 3rd respondents in the High Court for a claim of recovery of land in which he was successful.

25 Having won the claim, the applicant applied for execution of the decree of the High Court. The respondents opposed the execution process by filing an application for stay of execution. The application for stay of execution was granted on condition that the 2nd and 3rd respondents deposited the suit land Certificates of Title with the court.

30 However, the 2nd and 3rd respondents did not honour the court order; instead they filed objector proceedings in which they claimed that the suit land had been purchased by a third party way before the matter was brought to court.

On 11th November 2014, the Court of Appeal delivered its decision in which the findings and orders of the High Court were upheld.

35 On 18th November 2014, the respondents lodged a Notice of Appeal against the Court of Appeal decision but did not serve the said Notice of Appeal on the applicant's counsel in time, hence this application.

5 **Applicant's submission**

10 The applicant deponed that on the 18th November 2014, the respondents filed a Notice of Appeal which was served on his lawyers on the 8th day of December, 2014 - this was 13 days outside the prescribed period of 7 days from the date of filing the Notice of Appeal in court. The applicant's counsel submitted that this contravened **Rule 74 (1)** of the **Supreme Court Rules** which rule is mandatory. In support of this argument, counsel relied on the authority of **Miriam Kuteesa vs. Edith Nantumbwe & 3 Others; Supreme Court Miscellaneous Application N0.20 of 2014** in which the Court struck out a Notice of Appeal filed by the respondents for not having been served on the persons directly affected by the appeal. Counsel also relied on the authority of **Kasibante Moses vs. Electoral Commission; Election Petition N0. 7 of 2012** wherein the Court of Appeal emphasized the principle that it was the duty of the respondent, as the intending appellant, to actively take the necessary steps to prosecute the intended appeal and the burden is upon the respondent to satisfy court that the Notice of Appeal was served upon the applicant in time.

25 The applicant also contended that there was no application on record to show that the respondents applied for extension of time to enable them serve the Notice of Appeal out of time. Counsel for the applicant argued that since there was an 'invalid' Notice of Appeal, then the appeal itself could not stand. He also argued that on 19th October 2015 when he filed this application in this Court, the respondent had not yet filed the appeal. That the appeal was filed on 14th December 2015 supported by an 'invalid' Notice of Appeal.

35 In elaborating ground 3 in the Notice of Motion, the applicant submitted that the respondents' refusal to deposit the Certificate of Title and filing of objector proceedings was aimed at hiding their ownership of the suit land - which was an abuse of court process, contempt of court and thwarting the course of justice. That consequently, the respondents were not entitled to get the aid of court in their favour in the instant application.

5 **1st and 2nd Respondents' submission**

The 1st and 2nd respondents in their affidavits and written submissions filed in this Court stated that the late service of Notice of Appeal on the applicant was not deliberate. That it was a mistake of counsel that could not be visited on the litigant. They further argued that the applicant did not demonstrate that the late service had prejudiced him in anyway.

The respondents thus prayed that the appeal be heard since substantive justice must be administered without undue regard to technicalities.

15 **3rd respondent's submission**

The 3rd respondent relied on **Rules 5 and 2 (2)** of the **Supreme Court Rules** and argued that this Court had unfettered and unlimited discretion to validate anything that has not been properly done including service out of time even when there was no application made for extension of time.

20 That the delay in serving the Notice of Appeal was only 20 days which was not too inordinate. That the omission to serve a Notice of Appeal on the applicant's lawyers within time was a mistake on the part of the respondent's former lawyers- Turinawe, Kamba & Co. Advocates. That extension of time could be granted by this Court to remedy the mistake.

25 Further, that the subject matter of the appeal being land, it was in the interest of justice to allow the respondents to exhaust their legal rights and not to be closed from the seat of justice as this was the last appellate court.

30 Also that the applicant was not in any way prejudiced by the late service of the Notice of Appeal since the Memorandum of Appeal and Record of Appeal were filed well within time and served onto the respondents.

In regard to the applicant's argument that the respondent's refusal to deposit the Certificate of Title amounted to contempt of court, the 3rd respondent argued that this ground could not be used as a basis to dismiss the respondent's appeal.

5 He prayed that the application be dismissed with costs.

Rejoinder

10 In regard to the late service due to “counsel’s inadvertence”, the applicant argued that the respondent did not give any reason why their former lawyers did not serve the Notice of Appeal in time. Further that, it is nowhere on record shown that the 3rd respondent’s former lawyers were Turinawe, Kamba & Co. Advocates.

Analysis of Court

15 The bone of contention in the instant application is the effect of the alleged failure by the respondents to comply with **Rule 74 (1) of the Supreme Court Rules**. The Rule prescribes the time within which a Notice of Appeal ought to be served.

Rule 74 (1) of the Supreme Court Rules provides:

Service of notice of appeal on persons affected.

20 (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may on application, which may be made ex parte, direct that service need not be effected on a person who took no part in the proceedings in the High Court or Court of Appeal.

25 (2) Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him or her at that address notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal. (Emphasis of Court)

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5 The record indicates that on 18th November 2014 the Notice of Appeal was lodged in the Court of Appeal by the respondents' counsel. The same was served on the applicant's lawyer on 8th December 2014. This was 13 days beyond the 7 days period stipulated in Rule 74 above.

10 What then was the legal effect of the respondent serving the Notice of Appeal beyond the prescribed time?

The applicant submitted that no appeal lay because the respondent served the Notice of Appeal outside the prescribed period of time and that the respondent had not applied to court for extension of time to validate the late service of the Notice of Appeal.

15 The 3rd respondent submitted that the failure to serve the Notice of Appeal was due to the mistake of their former lawyers-Turinawe, Kamba & Co. Advocates which failure was discovered late. That it was not until the appeal was cause listed that the respondents learnt of the failure by the former lawyers to serve the Notice of Appeal in time. That upon learning of this failure, new lawyers were instructed viz M/S Bakiza & Co. Advocates. Counsel for the 3rd respondent argued that this amounted to sufficient cause warranting extension of time by this Court.

20 We note that **Rule 74 (1) (supra)** is couched in mandatory language implying that the service of the Notice of Appeal on the opposite party is a mandatory and essential procedure in lodging an appeal.

25 In **Francis Nansio Micah vs. Nuwa Walakira; Supreme Court Civil Appeal N0. 24 of 1994** Tsekooko JSC, in considering the necessity of service of a Notice of Appeal on a litigant who had been a party to the litigation in the court below held that, *Rule 76 (1)* [now Rule 74 (1) (supra)] *appears to be mandatory* and

5 therefore an appellant should serve the Notice of Appeal on persons affected by the appeal.

More recently, in **Edward Rurangaranga & Mbarara Municipal Council vs. Horizon Coaches Ltd Supreme Court Civil Application N0.21 of 2008**, this Court has emphatically held that:

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... failure to serve copies of the Notice of Appeal ... amounted to failure to take an essential step in the appeal process and a violation of Rule 74 (1) of the Rules of this Court. The provisions of the rule are couched in mandatory terms and their requirement constitutes an essential step in an appeal.

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Be that as it may, the power to strike out a Notice of Appeal on account of failure by an appellant to follow the rules of procedure needs to be exercised carefully so as not to deny an intending appellant justice. However, in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules, then court will not hold in favour of sustaining the appeal.

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It was the 3rd respondent's argument and submission that the failure to serve the Notice of Appeal was an error of counsel which should not be visited on the litigant. Indeed this Court has over and over again held that a lawyer's inadvertence should not be visited on an innocent litigant. [See for example: **Godfrey Magezi and another vs. Sudhir Ruparelia SCCA No.10 of 2002** and **Molly Kyalukinda Turinawe vs. Engineer Ephraim Turinawe and another SCCA No. 27 of 2010**].

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However, the above principle is not absolute. Although it is a settled principle of law that a lawyer's mistakes cannot be visited on an innocent litigant, there are exceptions to this principle. Where an applicant does not establish sufficient reason, then she/he cannot rely on the principle. Court notes that the function of

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5 this principle is to serve as an instrument to advance the ends of justice. Where the principle is not used to serve its proper function, then it cannot be used as a shield in abuse of the court process and of justice. A litigant cannot use the principle as a shield to conceal his dilatory conduct.

10 We also note that the 3rd respondent relied on **Rules 5 and 2 (2)** of the **Supreme Court Rules** and argued that this Court has unfettered and unlimited discretion to validate anything that has not been properly done including service out of time even when there was no application made for extension of time. However, it must be emphasized that Rule 5 which the
15 respondent relies on has inherent restrictions. The Rule provides thus: **“The court may, for sufficient reason, extend the time prescribed by these Rules ... for the doing of any act authorized or required by these rules,”** (Emphasis of Court)

20 What constitutes sufficient reason is a matter that is left to the discretion of Court. [See for example: **Boney M. Katatumba vs. Waheed Kevrim Civil Application No.27 of 2007 (SCU), Horizon Coaches Ltd vs. Edward Rurangaranga and Mbarara Municipal Council , Supreme Court Civil Application No. 18 of 2009**].

25 In the present matter, the respondents stated that they only got to know of the lawyers’ inadvertence of not serving the Notice of Appeal in time when the matter was cause listed in the Supreme Court.

30 The applicant in his rejoinder submitted that the respondents did not adduce any evidence to show that Turinawe, Kamba & Co. Advocates were their former lawyers. That at all material times, the 1st and 2nd respondents were represented by M/S Ayigihugu & Co. Advocates- the present lawyers in this application. Further, that the respondents did not show any evidence as to the
35 change of advocates from M/S Turinawe, Kamba & Co. Advocates to Bakiza & Co. Advocates.

5 We have studied the record carefully. We are in agreement with the applicant's submission that no evidence was adduced by the 3rd respondent to show change of advocates from of M/S Turinawe, Kamba & Co. Advocates to Bakiza & Co. Advocates.

10 Court also takes note of the fact that in the High Court and the Court of Appeal, it was Ayigihugu & Co. Advocates that represented the 1st and 2nd respondents. The 3rd respondent deposed that he had instructed his former lawyers to work hand in hand with Ayigihugu & Co. Advocates.

15 It is on record that Ayigihugu & Co. Advocates was the firm of lawyers that drafted and filed the 'impugned' Notice of Appeal in Court. This was the same Notice of Appeal served on the applicant's lawyer by the said firm out of the prescribed time.

20 In view of these facts, this court is disinclined to believe the respondents' argument that because of the change in lawyers, the Notice of Appeal was not served in time. This court further notes that even with the alleged change of advocates, no application for extension of time to serve the Notice of Appeal was ever made.

25 In light of the above, we find that there is no plausible explanation given by the respondents in not serving the Notice of Appeal on the applicant's lawyers within the prescribed time. Furthermore, the respondents did not apply for extension of time to remedy the late service of the Notice of Appeal. In such circumstances, we find that the respondents have not shown
30 sufficient cause to warrant the dismissal of this application.

In the result, we allow the application to strike out the Notice of Appeal lodged by the respondents.

The Civil Appeal is also struck out accordingly.

Costs of this application will be borne by the respondents.

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Dated at Kampala this *8th* day of *June* 2017.

Bart Katureebe

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BART KATUREEBE
CHIEF JUSTICE

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Augstine Nshimye

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HON. JUSTICE AUGSTINE NSHIMYE
JUSTICE OF THE SUPREME COURT

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Eldad Mwangusya

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HON. JUSTICE ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT

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Mwondha

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Lillian Tibatemwa-Ekirikubinza

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HON. JUSTICE PROF. LILLIAN TIBATEMWA-
EKIRIKUBINZA.
JUSTICE OF THE SUPREME COURT

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