

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
[CORAM: R. BUTEERA, JSC.]
CRIMINAL APPLICATION NO. 17 OF 2018

BETWEEN

KATO BUMALI :.....APPLICANT

AND

UGANDA:..... RESPONDENT

*(An Application arising from Court of Appeal Criminal Appeal No.793 of
2014)*

RULING OF BUTEERA, JSC

The applicant instituted this application by Notice of Motion seeking for orders that;

- a) Time within which to lodge an application for a Certificate of importance be extended and/or the application for a certificate of importance to this Honourable Court be validated.
- b) A Certificate of importance be granted to the Applicant to appeal to the Supreme Court of Uganda against the Judgment of the Court of Appeal delivered on the 8th day of April, 2016.
- c) Any other reliefs as Court may deem appropriate.

This application was brought under the provisions of **section 5(5) of the Judicature Act and Rules 2(2), 5, 38(1) (a) (b) and 43 of the Judicature (Supreme Court) Rules.**

The application is supported by an affidavit sworn by the applicant, Kato Bumali on 8th November 2018. It is opposed by Joanita Tumwikirize, a State Attorney attached to the Directorate of Public Prosecutions, who swore an affidavit in reply dated, 17th December 2019.

Grounds

The grounds in support of the Application are contained in the affidavit of support of the application deponed by the applicant. The grounds for the application are stated as follows:

- i) "That the applicant was charged and convicted of the offence of obtaining money by false pretence by the Chief Magistrates Court at Buganda Road Vide Criminal Case No.05 of 2012.*
- ii) That on the 24th of April, 2014, the Applicant was sentenced by the Court to 3 years imprisonment and also ordered to pay compensation of USD 20,000/= (United States Dollars Twenty thousand Only) to the Complainant.*
- iii) That at the trial preceding the Judgment, conviction and the subsequent sentencing of the applicant, the following happened:*
 - a) The charge sheet was amended at the time of submissions and the same was not read to the accused and nor was he allowed to plead to the same.*
 - b) The trial Court on its own motion ordered for the attendance of bank officials of KCB Kampala Branch to give evidence as a prosecution witness for proper evaluation of the case but they never turned up.*
- iv) That in its Judgment, the trial Court found that:*
 - a) On the 16th September, 2011 the complainant Mugerwa Zirimanya received emails from PW2 Rev. Fr. Mugerwa Paul L. Tamale which prompted him to wire USD 20,800 for the purchase of Land in Uganda. Later it was discovered that Rev. Fr. Mugerwa Paul L' Tamale was never the author of the emails.*
 - b) The Applicant/Accused received the said USD 20,800 on the account held in Equity Bank in the names of M/s. Nettex Trading Company Limited as consideration for the purchase of the land comprised in Busiro Block 410 Plot 88 by Rev. Fr. Mugerwa Paul L. Tamale.*

- c) That at the time, there was a pending civil suit in the High Court regarding the aforementioned land.*
- d) On the 3rd day of October, 2011 the Applicant/Accused refunded the money to John Kelly and Yokosefati Mosh and executed Exhibit D1 which Court found as incurably defective.*
- v) The Applicant appealed to the High Court of Uganda and subsequently to the Court of Appeal of Uganda however both appeals were unsuccessful.*
- vi) That the Applicant has lodged a Notice of Appeal in the Supreme Court of Uganda against the decision of the Court of Appeal.*
- vii) That there are questions of great public or general importance that need to be adjudicated upon in the appellants intended Appeal as stated hereunder:*
 - a) The effect of not taking a plea on an Amended Charge sheet that was introduced after all parties had adduced their evidence.*
 - b) What is the offence of obtaining money by false pretences in the context of the electronic transactions environment without any of the physical asportation and/or movement of items?*
 - c) The propriety of an order for compensation where the subject matter is known to have been taken by third parties not subject of prosecution.*
 - d) The effect of the Court ordering for the appearance of a witness as a crucial witness who never appears and judgment is however delivered convicting the accused.*
- viii) That the Applicant was prevented by sufficient reason/cause from applying for a Certificate of importance within time to enable him to make the Appeal to this Court in as far as he lacked legal Counsel.*

ix) That the intended Appeal raises matters which will be proper for the Supreme Court to review in order for the ends of justice to be met.”

Representation

At the hearing of the application, the applicant was represented by learned counsel, Mr. Mbabazi Muhamed while the respondent was represented by learned counsel, Mr. Mugisha Peter, a State Attorney. The applicant was present in Court.

Both counsel adopted their written submissions.

Submissions of Counsel for the Applicant.

In his submissions, counsel for the applicant raised the following three issues:

1. Whether the time within which to lodge an application for a certificate of importance can be extended and/or the application for certificate of importance to this Court be validated?
2. Whether the applicant has shown sufficient grounds for the grant of a certificate of importance?
3. What other relief/remedies are available for the parties?

On issue no.1, counsel submitted that the application meets the criteria for the grant of leave for extension of time as stated in the grounds of this application. He submitted that **Rule 5** of the Rules of this Court gives this Court the discretion to grant extension of time within which to lodge an application for a certificate of importance and /or the application for a certificate of importance be validated where there is sufficient reason.

He referred Court to the case of *Tushabe Chris vs. Cooperative Bank Ltd (In receivership)*, *Supreme Court Civil Application No.08 of 2018*, which stated: *“The principles governing extension of time under Rule 5 above seem to be well*

established. Time should be extended only for sufficient cause and extension must relate to the inability or failure to take the required steps in time.

Time will not be extended if the applicant is guilty of dilatory conduct or inordinate delay. In Shanti v. Hindocha and others [1973] EA 207 it was pointed out by Spry that there may be other reasons and these are all matters of degree. It is not necessary to establish that the appeal will probably succeed although it may be helpful to do so. The principles have been re-echoed by this Court in various cases, for example in the case of Molly Kyalukinda Turinawe & 4 others vs. Turinawe Ephriam & another (Supreme Court Civil Application No.27 of 2010), where my sister Lady Justice Dr. Esther Kisaakye stated I quote;

“It is therefore important to consider the following three questions before I can dispose of this application;

- I. Whether the applicants have established sufficient reasons for this Court to extend the time in which they may lodge their appeal.*
- II. Whether the applicants are guilty of dilatory conduct?*
- III. Whether any injustice would be caused if this application is not granted?”*

According to counsel, the applicant has been diligent and as such he is not guilty of dilatory conduct. He submitted that the Court of Appeal decision to which the applicant seeks to appeal against was delivered on the **8th day of April, 2016** and at that time, the applicant was serving his sentence in prison. He added that despite the applicant’s incarceration, he filed his Notice of Appeal on the **1st day of April, 2016** and upon release from prison on the **5th day of May 2016**, a request for typed proceedings of the appeal in the Court of Appeal was made through his lawyers at the time, M/s. Kusiima & Co. Advocates.

Counsel further submitted that the applicant filed an application for leave to apply for a certificate of importance out of time vide Court of Appeal Miscellaneous Application No.08 of 2017 which was filed in January, 2017 and the same was denied on the 21st day of December, 2017. Counsel noted that **Rule 38(1) (b)** of the Rules of this Court provides that an application of this nature, must be lodged within fourteen days after the refusal to grant the certificate by the Court of Appeal. He contended that the Applicant filed Supreme Court Criminal Application No.2 of 2018 on the 11th day of January, 2018 which he drafted himself and was subsequently withdrawn in favour of filing the instant application.

Counsel prayed that Court takes into consideration the fact that the delay to bring this application was mainly caused by the applicants incarceration which made him impoverished and unable to retain counsel until he settled and was able to get lawyers who filed the instant application.

He further prayed Court to find that the applicant proved to the satisfaction of Court that he was always diligent and thus not guilty of dilatory conduct.

On issue no.2 counsel submitted that under **section 6 (2) of the Judicature Act**, this Court can grant leave, if it considers, in its overall duty to see that justice is done, that the appeal should be heard. He relied on this Court's decision in the case of *Namuddu Christine vs. Uganda, Supreme Court Application No.3 of 1999*, where Wanbuzi, CJ observed: *“Under subsection (5) of section 6, this Court will grant leave if the Court, in its overall duty to see that just is done, considers that the appeal should be heard. In other words this Court is not bound by the restrictions placed on the Court of Appeal, when that Court is considering an application for a certificate. The Court of Appeal grants a certificate where it is satisfied: (a) that the matter raises a question or questions of law of great public importance; or (b) that the matter raises a question or questions of law of general importance.*

On the other hand, this Court will grant leave if it considers that in order to do justice the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance. It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal. We have power to consider other matters.”

Counsel submitted that there are questions of great public or general importance that need to be adjudicated upon in the appellants intended Appeal as raised in ground 7 of the application. The questions of great public or general importance raised by counsel in ground 7 are the following:

- (a). The effect of not taking a plea on an Amended Charge sheet that was introduced after all parties had adduced their evidence.
- (b) What is the offence of obtaining money by false pretences in the context of the electronic transactions environment without any of the physical asportation and/or movement of items?
- (c) The propriety of an order for compensation where the subject matter is known to have been taken by third parties not subject of prosecution.
- (d) The effect of the Court ordering for the appearance of a witness as a crucial witness who never appears and judgment is however delivered convicting the accused.

Counsel submitted that if the above questions are not resolved, the decision of the Court of Appeal will remain binding on the lower Courts.

He prayed Court to find that the applicant has fulfilled the grounds for issuance of a certificate of importance to appeal.

Submissions of counsel for the respondent.

Counsel submitted that there are preliminary points of law which if determined may dispose of the application without going into consideration of its merits.

Counsel contended that the instant application raises two omnibus applications joined into one application without leave of Court to have the two consolidated. He argued that application on one hand seeks leave for extension of time within which to file an application for a certificate of importance out of time, which application can be handled by a single Justice of the Court, and at the same time the application seeks leave for grant of a certificate of importance which application can be handled and determined by a panel of not less than three Justices of the Court. He submitted that this misjoinder of applications is in contravention of **Rule 50 (1), (2) (a)** of the Rules of this Court.

Counsel further submitted that this application is improperly before this Court. He argued that under **section 5 (5) of the Judicature Act** and **Rule 38 (1) (a)** of the Rules of this Court, a certificate of importance for third appeals to the Supreme Court can be applied for in the Court of Appeal. He added that the application for grant of a certificate of importance can only be properly before this Court where the Court of Appeal has refused to grant it under **Rule 38 (1) (b)** of the Rules of this Court.

He submitted that this application be dismissed on the basis of the raised preliminary objections for being brought before this Court inappropriately.

Counsel further submitted that the application for extension of time suffers from inordinate delay as it was filed by the applicant about 2 years and 8 months from the date of the Judgment on 8th April 2016. The filing of this application was on 19th December 2018. This was long after the 7 days statutory period provided for in such applications for certificate of importance.

According to counsel, the inordinate delay was evidence of dilatory conduct of the applicant. He submitted that in paragraph 12(a) of the affidavit in support, the applicant confirmed that he had already served his sentence of 3 years imprisonment.

Counsel submitted that there was no justification advanced by the applicant to demonstrate sufficient cause for the delay in filing his application for a certificate of importance in time. There was a delay of a period of over 2 years and 8 months when the applicant was no longer incarcerated and this was after the date of the Court of Appeal's decision. He added that this inordinate delay was evidence of his dilatory conduct. The applicant only remembered to apply for leave to appeal when the complainant started the process to recover his compensation.

He accordingly prayed that this application be dismissed.

Consideration of the preliminary points of law.

In his submissions, counsel for the respondent raised two preliminary objections on points of law.

I find it appropriate to start by considering the second preliminary point of objection first. Counsel for the respondent submitted that the application is improperly before this Court. According to counsel, under **section 5 (5) of the Judicature Act** and **Rule 38 (1) (a)** of the Rules of this Court, a certificate of importance for third appeals to the Supreme Court was to be applied for in the Court of Appeal first. The application for grant of a certificate of importance could then only be properly before this Court where the Court of Appeal has refused to grant it under **Rule 38 (1) (b)** of the Rules of this Court.

Counsel for the applicant on the other hand submitted that the applicant filed an application for leave to apply for a certificate of importance out of time in the Court of Appeal vide **Miscellaneous Application No.08 of 2017** which was filed

in January, 2017. The application was denied on the 21st day of December, 2017. According to counsel, the applicant himself then drafted and filed **Supreme Court Criminal Application No.2 of 2018** on the 11th day of January, 2018 which was subsequently withdrawn in favour of filing the instant application with help from legal counsel.

Rule 38 of the Rules of this Court provides:

“38. Application for certificate of importance or leave to appeal in criminal matters.

(1) In criminal matters—

(a) ...

(b) if the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of this sub rule, an application may be lodged by notice of motion in the Court within fourteen days after the refusal to grant the certificate by the Court of Appeal, for leave to appeal on the ground that the intended appeal raises one or more matters of great public or general importance which would be proper for the Court to review in order to see that justice is done. (Underlining is mine for emphasis)

In the instant case, the record shows that the Court of Appeal decision to which the applicant seeks to appeal against was delivered on the 8th day of April, 2016. The applicant filed his Notice of Appeal on the 19th day of April, 2016 although counsel for the applicant, in his submissions stated that it was filed on the 1st of April 2016. I believe this was done in error as it couldn't have been filed before the Court of Appeal Judgment was delivered.

The applicant first sought for the certificate of importance from the Court of Appeal vide **Miscellaneous Application No.08 of 2017** which was filed in

January 2017. The Court of Appeal Justices refused to grant it on the 21st day of December 2017. According to counsel, the Applicant without legal counsel thus drafted and filed **Supreme Court Criminal Application No.2 of 2018** on the 11th day of January, 2018 which according to counsel was withdrawn in favour of filing the instant application with help from legal counsel.

There is no evidence on record that **Supreme Court Criminal Application No.2 of 2018** was indeed filed and withdrawn as contended by counsel for the applicant.

As a single Justice, I have the jurisdiction to determine this preliminary point but my finding in the first preliminary point of objection has a bearing on this one. I shall therefore proceed to handle the first preliminary point of objection and resolve both at the end.

On the first preliminary objection, counsel for the respondent submitted that the instant application raises two omnibus applications joined into one application without leave of Court for the two to be consolidated. He argued that the application on one hand seeks leave for extension of time within which to file an application for a certificate of importance out of time. This application can be handled by a single Justice of the Court. He added that at the same time the application seeks leave for grant of a certificate of importance which application can be heard and determined by a panel of not less than three Justices of the Court.

I reproduce **Rule 50 (1), (2) (a)** of the Rules of this Court which provides:

“50. Hearing of applications.

1). Every application, other than an application included in subrule (2) of this rule, shall be heard by a single judge of the Court; except that the application may be adjourned by the judge for determination by the Court.

2). This rule shall not apply to the following—

(a)an application for leave to appeal, or for a certificate that a question or questions of great public or general importance arise;”

(b)an application for a stay of execution, injunction or stay of proceedings;

(c)an application to strike out a notice of appeal or an appeal; or

(d)an application made as ancillary to an application under paragraph (a) or (b) of this subrule or made informally in the course of the hearing, including an application for leave or to extend time if the proceedings are found to be deficient in those matters in the course of the hearing.”

(Underlining is mine for emphasis)

Rule 50 (1), (2) (a) above precludes a single Judge from hearing of an application for a certificate of importance.

The instant application seeks for orders for extension of time within which to lodge an application for a certificate of importance. This part of application can be handled by a single Justice of the Court. The application at the same time seeks for orders that the application for a certificate of importance be granted to the applicant to appeal to this Court. As a single Justice, I do not have jurisdiction to hear this part of the application under **Rule 50 (1), (2) (a)** of the Rules of this Court.

The application before me is one that seeks two different orders. I have the jurisdiction as, a single Justice, in respect of one whilst in respect of the other, I have no jurisdiction. Since the application is one, I would not consider and determine one part of the application and not consider the other for lack of jurisdiction. I hold, therefore, that I lack jurisdiction ~~to~~ entertain the whole

application. The application would appropriately be handled by Court in accordance with **Rule 50 (1), (2) (a)** of the Rules of this Court.

I, for that reason, hereby adjourn this application for determination on its merits by the Court. The Registrar of this Court is directed to fix the application for hearing by the Court at the next convenient session.

The costs of this adjournment shall abide the outcome of the application.

Dated at Kampala... *This 28th day of June*2020

Richard Buteera

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RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT