

UGANDA / JUDGMENT

Akidi & Another v Ocii (Miscellaneous Application 25 of 2023) [2024] UGHC 1012 (31 October 2024)

[2024] UGHC 1012

COURT

High Court of Uganda

BEFORE

Mwaka, J

CASE / FILE NUMBER

Miscellaneous Application 25 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KITGUM

MISCELLANEOUS APPLICATION No. 025/2023

(Formerly HIGH COURT GULU – MISC. APPLICATION No. 176/2023)

5 (ARISING FROM CIVIL SUIT No. 06/2017: MAGISTRATE PADER) AKIDI HELLEN

(Through holder of Powers of Attorney,

AKELLO JACKLINE) APPLICANT

Versus

10 OCII ALEX RESPONDENT

BEFORE HON. MR. JUSTICE PHILIP W. MWAKA.

RULING.

Introduction and Background.

- [1]. The Applicant seeks Orders from this Court firstly for leave to Appeal out of 15 time and secondly making provision for Costs of the Application.

- [2]. The Motion instituting the Application was filed on the 24 th October, 2023. The Judgment of the Lower (Trial) Court was delivered on the 23rd December, 2022 by His Worship Ongwee Stanislaus Okello, Magistrate Grade 1, Pader. The time lapse between the Judgment and filing the Application for leave to 20 Appeal out time is a period of about ten (10) months. The Appeal should have been filed within Thirty (30) days ending on the 23rd January, 2023.
- [3]. The Application is instituted by way of Notice of Motion under **Section 79(2) and 98 of the Civil Procedure Act, Cap. 71 (now Cap. 282); Section 33 (now S. 37) of the Judicature Act, Cap. 13 (now Cap. 16); and, Order 52 25 Rules 1, 2 and 3 of the Civil Procedure Rules, SI 71 - 1.**

1 | Page

- [4]. These citations were revised by the **Law Revision Act, Cap. 3 and Statutory Instrument No. 049/2024: The Law Revision (Commencement of the 7 th Revised Edition) (Principal Laws) Instrument, 2024.**
- [5]. An Affidavit supporting the Application is attached deponed by Akello 30 Jackline said to be a holder of Powers of Attorney issued by the Applicant (Donor) on the 22nd March, 2017 being her daughter and the Donee.

The Applicant's Case and Submissions.

- [6]. The Applicant's grounds in the Motion are that Judgment in Civil Suit No. 06/2017 was delivered on the 23 35 rd December, 2023 (the actual year is 2022) and being dissatisfied with the decision of the Lower (Trial) Court she instructed Messrs. Legal Aid Project to lodge an Appeal and as a consequence a Notice of Appeal was lodged on the 11th January, 2023 cited as Civil Appeal No. 03/2023; Civil Appeal No. 03/2023 went for hearing before Court on the 14th 40 July, 2023 and the Notice of Appeal was struck out as there was no (valid) Appeal duly filed by a Memorandum; there is a high likelihood of success if the intended Appeal is heard on its merits; and lastly, it is in the interest of Justice that the Application is granted.
- [7]. In the supporting Affidavit the deponent reiterates the grounds cited substantiating that on the 14th 45 July, 2023 the presiding Court struck out the Notice of Appeal on the basis that there was no Memorandum of Appeal; she then instructed Messrs. Legal Aid Project to file a fresh Appeal; the certified Judgment and Proceedings of the Lower Court were obtained on the 17th July, 2023; upon noting errors therein her Lawyers wrote to the Deputy Registrar on the 20th 50 September, 2023 requesting correction which is pending; on the 23rd October, 2023 she received a letter from her Local Council (LC) 1 Chairperson requiring her to leave the suit land or face demolition of her structures; she was advised that the Lower Court Record was being prepared and advised to apply for extension of time within which to Appeal.

- 55 [8]. It is the Applicant's case that the Appeal has a high likelihood of success and there are sufficient grounds for extension of time within which to Appeal. She attaches a draft Memorandum of Appeal raising five (5) grounds.
 - [9]. The Applicant filed Written Submissions on the 6th June, 2024 and addressed the Issue of – Whether the Court can grant an Order for the Applicant to file 60 an Appeal out of time citing, **inter alia**, **Mugo Vs. Wanjiru [1970] EA 481** for the proposition that sufficient reason must relate to the inability or failure to take a particular step in time to file an Appeal. It was her submission that all an Applicant needs to show is that the failure to take any step in the proceedings was not attributable to them personally and attributed the delay 65 to the time taken in obtaining the certified Judgment and Proceedings of the Trial Court through her Counsel that was originally provided on the 17th July, 2023 and referred back to the Court after pointing out errors in the Record and has not been availed since. It is her case citing, **inter alia**, **Bhatt Vs. Tejwant Singh [1962] EA 497** that on the one hand a vigilant litigant should 70 not be penalized for the dilatory conduct of Counsel and on the other hand she had herself exercised all due diligence in her power to obtain the Record but was prevented in filing by the High Court Civil Registry not availing to her the Record thus it would be a denial of Justice not to extend time. It is on that basis that the Applicant concluded the point by submitting that the delay 75 providing the Record required for Appeal by the High Court Civil Registry constitutes sufficient cause for grant of the Application.
 - [10]. The Applicant further submitted that the Appeal has a likelihood of success citing **National Pharmacy Ltd Vs. Kampala City Council – See: (1979) HCB 132** for the proposition that the affidavit in support should express the 80 desire to appear and the likelihood of success of the Appeal in order to enable the Court determine whether grant or refusal of the Application would cause injustice. The draft Memorandum of Appeal attached with five (5) grounds of Appeal framed constitute her case on Appeal meriting consideration.
- [11]. In concluding, the Applicant prayed that the Application is granted and the 85 Appeal is heard on its merits in the interests of justice and without undue regard to irregularities and with costs being provided for.

The Respondent's Case and Submissions.

- [12]. The Respondent filed an Affidavit in Reply on the 18th January, 2024 90 contesting the Applicant's averments and clarified that Judgment was delivered in his favour on the 23rd December, 2022 and not in 2023; it is his case that the Applicant bears the burden to prove her averments and that the Application lacks grounds for extension of time to Appeal and concludes with the contention that the supporting affidavit is defective and should be struck 95 off with costs.

- [13]. The Respondent filed Written Submissions on the 12th June, 2024 and contends that the Power of Attorney relied on by the Applicant was not attached to her affidavit and in any case the document is defective in as far as a copy obtained by him does not indicate that any stamp duty was paid on it 100 under the **Stamp Duty Act, Cap. 339** in contravention of the Law thus being an illegality brought to the attention of the Court hence the Application is wrongly before the Court and should be struck out.
- [14]. Regarding the merits, he submits that the Applicant should have filed a Memorandum of Appeal timely - and in any case by the 22nd January, 2023 since the Judgment was delivered on the 23 105 rd December, 2022 - under the correct procedure stipulated by **Section 79(1)(a) of the Civil Procedure Act**. Instead she filed a Notice of Appeal which was duly and properly struck out by Court as an abuse of Court process. In any case, she should have written to the Lower Court requesting the Judgment and Proceedings if she sought 110 to have time "arrested" or offset in preparation of the Record.
- [15]. It is his case citing, *inter alia*, **Misc. Application No. 8/2014: Tight Security Ltd Vs. Chartis Uganda Insurance Co. Ltd** that the Applicant has not presented a reasonable explanation for failure to file the Appeal timely and the Application should not simply be granted as a matter of course with the 115 Court required to carefully scrutinize the Application to determine whether it establishes proper grounds for enlargement of time. Further, the Application should not be granted where there is inordinate delay as has happened filing nine (9) months out of time amounting to inexcusable inordinate delay.
- [16]. The Respondent concludes by submitting that sufficient cause has not been 120 made out for grant of the Application which should be dismissed with costs.
- [17]. There are no Rejoinders filed on the Record of the Court.

Representation.

- [18]. Counsel, Ms. Anena Lagoro Clare, represented the Applicant. The Applicant's 125 representative attended Court with the Applicant absent.
- [19]. Counsel, Mr. Ocorobiya Lloyd, represented the Respondent. The Respondent attended Court.

Proceedings of the Court.

[20]. The Court proceedings were on the 30th May, 2024 at which Directions were 130 given for filing Written Submissions.

Issues for Consideration.

[21]. The Issues for consideration to be addressed by the Court are - **Whether the Application is competent and Whether sufficient cause has been 135 provided by the Applicant for the Court to judiciously exercise its discretion to grant leave to Appeal beyond the time prescribed by the**

Law.

Considerations and Determination of the Court.

[22]. A review of the Record of the Court indicates that prior to the instant 140 Application the same matter between the same Parties designated as **Civil Appeal No. 3/2023** based on a Notice of Appeal filed was struck out by the Hon. Justice George Okello on the 14th July, 2023 for being *"non-existent"* which the Court understands to mean that such an Appeal cannot be lawfully instituted by a Notice of Appeal but only by a Memorandum of Appeal as 145 required by **Section 79(1) & (2) of the Civil Procedure Act** and in so doing issued the following order reproduced hereunder **verbatim** –

"The Learned Counsel may take copy of the certified Record and lodge the proper Appeal, within 30 days from the date hereof, as per Section 150 79(1)(a) & (2) of the Civil Procedure Act, Cap. 71."

- [23]. The pragmatic import of the order was in effect the Court granting the Applicant/ intended Appellant enlargement of time by thirty (30) days from the 14th July, 2023 to enable her file a Memorandum of Appeal on or before the 13th August, 2023. The Applicant seems not to have recognised this.
- 155 [24]. An original lawful filing by Lodging the requisite Memorandum of Appeal following the Judgment of the Lower (Trial) Court on the 23rd December, 2022 should have occurred on or before the 23rd January, 2023 – which instead ultimately culminated in the Notice of Appeal being struck out.
- [25]. Clearly, the Applicant did not utilize the window of opportunity availed to her 160 by the Court by duly filing a Memorandum of Appeal ostensibly on the basis that the Proceedings obtained were not sufficiently clear. The window closed.
- [26]. Consequently, the Court finds that by this Application the Applicant seeks to obtain the exact orders already previously given by Court by virtue of the order issued on the 14th July, 2023. Undoubtedly, this would amount to the 165 Applicant having a second bite at the apple which put in perspective would appear that the earlier order enlarging time was given in vain.

6 | Page

- [27]. Apparently and regardless, yet another extension of time is sought by the Applicant. The Courts are entreated and vested with powers to prevent abuse of process by virtue of **Section 98 of the Civil Procedure Act**. A re-issuance 170 of orders already previously given and not acted upon is untenable and would amount to indulging abuse of process thereby diminishing the stature of the Courts. It is trite that orders of Court shall not be made or taken in vain.

- [28]. This Court therefore on that basis alone exercises its inherent powers under **Section 98 of the Civil Procedure Act** to curb and prevent abuse of process 175 and therefore dismisses the Application.
- [29]. The Respondent raised an objection in his Submissions in respect of the claim of Ms. Akello Jackline to hold a Power of Attorney as a basis of her representing the Applicant as her Lawful Attorney. The contention is to the effect that, besides not attaching the Power of Attorney to her Pleadings, it 180 attracted stamp duty and was not duly stamped under the **Stamps Duty Act, Cap. 339** and is therefore inadmissible in evidence, cannot be acted upon or for that matter registered. It is on this basis that the Respondent submits that the Application is wrongly before Court and ought to be struck out. The Applicant did not make any Rejoinder rebutting these contentions raised.
- 185 [30]. The requirement for making due payment of stamp duty is often understated. A review of relevant Statutes indicates that a plethora of measures are in place to enforce the payment of stamp duty even affecting litigation which in any case arises from productive transactional activity. Powers of Attorney seem to be particularly targeted. The scope ranges from the **Stamp Duty Act, Cap. 190 339** stipulating chargeability as well as admissibility in evidence and prohibitions on acting on instruments not duly stamped – with exceptions, the **Registration of Documents Act, Cap. 291** stipulating admissibility of registered documents, the **Registration of Titles Act, Cap. 240** stipulating format, attestation and registration under **Cap. 291** for transactions in land 195 under its operation. The list is not exhaustive.

[31]. In terms of pure litigation, **Order 3 Rule 2 of the Civil Procedure Rules, SI 71-1** provides for recognized agents including holders of Powers of Attorney. The provisions are inescapable. A dragnet. The provisions impact the Courts with criminal matters seeming to be treated with a degree of 200 deference. In regard to litigants, a line of authorities tends to place emphasis on litigants relying on Powers of Attorney to comply with requirements of registration and disclosure. The rationale is that it is material to their **Locus Standi** and to an extent curbs unscrupulous abuse of process by opportunistic at large holders whom may seek to operate incognito as has been observed 205 mushrooming in the corridors on the fringes of the Justice system.

See: HCCS No. 12/1990: Tereza Beatrice Nalumaga Nyaiika Vs. Prince Patrick Olimi Kaboyo; HCCS No. 1212/1998: Nagji Textiles Ltd Vs. A. B. Popat; Messrs. Ayigihugu & Co. Advocates Vs. Munyankindi Mary Muteteri (1988-1990) HCB 161; Others.

210 [32]. The Court observes that the instant Application is presented as a suit by the designated Applicant, Akidi Hellen, through her purported Lawful Attorney, Akello Jackline, said to be her daughter and holder of a Power of Attorney as the Donee with the Applicant said to be her mother as the Donor. There is a Power of Attorney on the Record of the Court dated 22 nd March, 2017 citing 215 the **Land Act** in which the Applicant whom is indicated as ailing grants her said Lawful Attorney specific powers over her land and properties including the authority to **"administer her estate"** with developments thereon for **"generations"**, represent in any

litigation, prevent any interference with administration of the estate and maintain it preventing waste, damage and 220 trespass. There are also prohibitions specified in the Power of Attorney including against disposal, transfer, sale of the property (land) or acts "disobeying the grant" – which the Court understands to mean act undermining the grant of the Power of Attorney and for that matter assets (land).

- [33]. The said Lawful Attorney as previously indicated did not herself present any 225 Power of Attorney as the basis of her deriving authority from the Applicant and beyond her bare claims she has not established *Locus Standi* to pursue the Application. Moreover, the Power of Attorney on the Record of the Court which was not contested is unregistered and thus does not comply with any of the Statutory provisions already cited herein-above, specifically 230 requirements of stamp duty and registration as a document. The exception would be that the land customary in nature does not fall under the operation of the RTA. Otherwise, the Court has no difficulty in reaching the conclusion that the purported Power of Attorney is defective. The Court thus declines to act on it and as such holders of unregistered Powers of Attorney are put on 235 notice to duly comply for such Instruments held. The Application is therefore improperly before Court and on that grounds also is hereby dismissed.
- [34]. In the final result, the Court hereby dismisses the Application without going into its merits. The decision is dispositive of the Application.
- [35]. Having carefully given due consideration to the Application with its 240 supporting Affidavit, the responsive Affidavit, the Written Submissions of both the Applicant and the Respondent and upon consideration of the Law Applicable and taking into account all relevant factors the Court hereby dismisses the Application on the grounds specified herein-above.
- [36]. Each Party shall meet its their costs of the Application.

245

Orders of the Court.

- [37]. Accordingly, the Court makes the following Orders:
- 1. **Miscellaneous Application No. 025/2023** is hereby dismissed.
- 2. Each Party shall meet their own costs of this Application.
- 250 It is so Ordered.

Signed and Dated on the 31 st day of October, 2024 at High Court Kitgum Circuit.

Philip W. Mwaka

255 Acting Judge of the High Court.

Delivery and Attendance.

This signed and dated Ruling has on the directions of the Presiding Judge been delivered to the Parties electronically on **Thursday, the 31 st day of October, 2024**

- 260 by the Deputy Registrar, High Court Kitgum Circuit.
- 1. Deputy Registrar, High Court Kitgum Circuit: - Her Worship Suzanne Aisia Musooli. 2. Counsel for the Applicant: - Ms. Anena Clare Lagoro. 3. Counsel for the Respondent: - Mr. Ocorobiya Lloyd. 265 4. Applicant: - Absent. 5. Applicant's Representative: - Attended Court. 6. Respondent: - Attended Court. 7. Court Clerk and Interpreter: - Mr. Atube Michael. 8. Interested and Affected Persons and Entities.

Philip W. Mwaka

Acting Judge of the High Court.

High Court Kitgum Circuit.

31 st day of October, 2024.

270

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