

UGANDA / JUDGMENT

Attorney General v Oriental Construction Co. Limited (Civil Application 7 of 1990)

[1991] UGSC 30 (18 April 1991)

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COURT
Supreme Court of Uganda

BEFORE
Platt, JSC

CASE / FILE NUMBER
Civil Application 7 of 1990

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THE REPUBLIC OF UGANDA

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IN THE SUPREME COURT OF UGANDA AT MENDO

CIVIL APPLICATION NO.7/90

THE ATTORNEY GENERAL ::::::::::::::: APPLICANT

V E R S U S

ORIENTAL CONSTRUCTION CO. LTD ::::::::::::::: RESPONDENT

RULING

The Attorney General has applied for leave to lodge a Notice of Appeal out of time, and similarly, the record of appeal. The second part is premature, since I cannot at this stage forecast whether or not the time prescribed of 60 days from the lodgement of the Notice (if time is extended) will be sufficient (See Rule 81 (1) of the Court of Appeal Rules) . I think it was agreed by Mr. Tumwesige, Principal/Attorney representing the Attorney General, that the ruling should concentrate upon deciding whether the Notice of Appeal may be lodged out of time.

I asked for a further affidavit in support when the application first came on for hearing, In an application under Rule 4 of the Court of Appeal Rules, the delay and reason for the delay, must be set out. The Rule says:-

The Court may for sufficient reason \$114.\$ contend the time limited by these Rules or by any decision of the Court or of a Superior Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time as extended."

concentrates upon the time limited by the $\frac{\text{Rules}}{\$}$, and The Rule in the case of lodging a Notice of Appeal, that time is laid down in Rule 74(2)\$ to be fourteen days of the decision against which it is desired to appeal. Further, there must be a sufficient reason to extend time. The heading of the application states

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that it is desired to appeal against the judgment of Mr. Justice Kityo, which was delivered on 29th May, 1989. During the course of the argument Principal State Attorney thought that he should appeal against Kityo's ruling given in December 1989 refusing to review that judgment. But this did not assist him in any way, and he reverted to his original plan of appealing against the judgment. Therefore the judgment impugned having been given on 29th May 1989, the notice ought to have been lodged by 12th June, 1989. The application to extend time is dated 7th August 1990, from which it appears that the applicant . is one year and almost two months late.

When the period of delay is short and the reason for delay is an understandable lapse of human fallibility, the period may be extended. Lord Greene M. R. in a memorable decision in *GATTI SHOOSMITH* (1939) 3 ALL. E. R. 916 at P 920, observed:-VS

> " We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding deposed to on affidavit by the managing clerk of the appellant's solicitors The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time was due entirely to this misunderstanding."

But when the period of delay is great, the Court must scrutinise the facts more carefully, to be sure that a sufficient reason can be given for the extension of time. Where the period of delay is short, the intending appellant is not lightly to be shut out from exercising his statutory right of appeal by some error of procedure; and in this process the successful Respondent cannot unduly protect his vested interest in the judgment awarded him.

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But when time has passed, the successful litigant is not lightly to have his interest defeated. A broad statement of General principle is to be found in *SMAH BHARMAC VS SANTOSH KUMARI* (1961) EA 679, where it was said that;-

" rules are made to be observed, and when. there has apparently been excessive delay the Court requires to be satisfied that there is an adequate excuse for the delay or that Kinkinsky as to require the indulgence of the Court upon such terms as the Court considers forst."

So also in BHAICHAND SHAH VS D. JAMNADAS & CO. LTD. (1959) EA 838, it was stated that the failure by an applicant to explain delay in prosecuting an appeal may lead to an application for an extension of time being refused. Where there has been substantial delay, then the application should be supported by an affidavit explaining the nature of the judgment, and the reasons for the appeal, so that the Court may determine whether refusal of the application would cause injustice. The latter consideration is necessary to avoid undue technicality arising from the need to ascribe a sufficient reason for extending time.

On those considerations I called for a further affidavit. Mr. Tumwesige presented his own affidavit. He has done his best. But he was not a participant in the steps taken in the Attorney General's Chambers at the relevant time since May 29th, 1989. He cannot help the facts which occurred long before the suit was determined. He has dwelt on what happened at the time of the suit and after judgment. But as long ago as December 1988, correspondence was exchanged between the Chambers of the Attorney General and the Inspectorate of Government, outlining the way in which the suit against the Attorney General should be handled. Mr Ruzindana's affidavit has annexed to it, his letter of 28th December 1988 setting out detailed objections to the claim. His further letter of 29th December 1988 reveals the planning of the defence as having been decided on 9th November 1988. It is plain that the Government

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representatives involved knew of the suit coming on for hearing and knew the issues involved. It was known who was conducting the case. The record shows that there was a trial, but that the Government lost the case. One would suppose that with instructions to defend, there would also be instruction of to appeal, if the defence was unsuccessful. It has often been pointed out that Notice of Appeal may be given orally at the conclusion of the trial, and after that, that Notice to Appeal, which costs nothing by way of fees, may be entered within the 14 days, pending final instructions. If no steps are taken it may be struck out under Rule 80. The whole procedure regarding a notice of appeal is so extremely easy and cheap, that it is difficult to see how delay can arise. But it does, and apparently in the very best of circles, namely, the Attorney General's Chambers. It is not so much a question of what happened after judgment, as what happened before judgment. The decision apparently was not taken to include instructions to appeal. I hope I have not judged the situation too harshly, but it appears to me that perhaps there was a difference of opinion between the Inspectorate of the Solicitor General concerning the propriety of the claim against Government, and it seems probable that there was some confusion over which parts of the claim were to be admitted or which parts $\mathcal{A}$ not admitted. These differences of opinion appear to have resulted in the Attorney General not being aware of what had hap-

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of this application because that might have been a sufficient reason to extend time. But Mr. Tumwesige was not prepared to go that far. From what I could gather, it seems that he thought that the trial was not handled properly; that there was negligence; but he was not prepared to say that the Solicitor General of the time, Mr. Daus Bramugisha the State Counsel who appeared in the trial Court, had been guilty of bad faith or fraud. The result is that the decision to appeal was not taken after the trial for obscure and possibly negligent reasons.

In my judgment there are no reasons for this delay which can be entertained by the Court. Mistakes of Counsel may sometimes amount to a sufficient reason, but only if they amount to an error of judgment. Inordinate delay on the part of an advocate is certainly not a sufficient reason, (SHAH BHARMAL's Case supra), her man is neglect to ascertain and observe plain requirements of the law. Unfortunately, this is a case of inordinate delay and not merror of judgment. out

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matter is the interim certificate No.12; it is Government's view that it was an improper certificate. Opportunity ought to have been taken to come to an amicable settlement, or go to expect arbitration.

These views are supported by the affidavits of Mousses Ochan, Kakoza, Kabasti, and Okello. Mr. Ruzindana's affidavit sets out the details of the objectionable claims and the instructions he gave.

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Mr. Nkurunziza, Counsel for the Respondent has put the other side's case succinctly. The fundamental position, he said, was that the State accepted liability to pay the contractor for the work done, but disputed items of the claim as set out in the interim certificate 12. The certificate was issued in Kenya shillings or US\$ exactly as the judgment provided. It is permissible to give judgment in to foreign currency. Certificate 12 was drawn up by the Chief Architect, Design Group & Associates. On 11th July 1990 he wrote to the Secretary for Housing, Ministry of Housing and Urban Development, that the Architect is normally simply advised by the quantity surveyors after studying and analysing the claims and methods used by the Contractor in evaluating them. He could not have prepared the certificate if he knew that the valuation was wrong. The valuation had been the result of several meetings between the contractor and his quantity surveyor from Nairobi, and the Special Technical Committee which was formed by the technical staff of the Ministry of Regional Co-operation, the Consultants and the Ministry of Housing & Urban Development. The Chairman was the Chief Government Quantity Surveyor. According to Mr. Nkuruziza, the architect therefore did not agree that Certificate No.12 was incorrect. Moreover Mr. Philip Kidomba the Quantity Surveyor was cross-examined at length by State Counsel 7 on the basis of Certificate 12. The learned Judge stated that

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Mr... Kidamba was intensively cross-examined by State Counsel and that the witness had explained the whole report item by item. I should state here that the Judge also observed that State Gounsel's final address had drawn attention to Mr. Kidamba's evidence as against that of the defence witness Mr. Musubira and that, left the Court to draw its own conclusions. That was thought to be negligent by Mr. Tumwesige. The learned Judge recorded that Mr. Musubira coproborated the Plaintiff's witnesses in every material respect. He did not dispute any item conspired in the certificate No.12. If that were so, then perhaps there was not much that alton State Gounsel Mr. Byamugisha could do. All the witnessed for both sides agreed that certificate 12 was correct, according to the judgment. Mr. Nkurunziza asserted that that had been the views of the Government officials of the time,

In Mr. Tumwesige's affidavit it is contended that on 17th November 1989. Mr. Kaguma, Design Group & Associates & Mr. Musubira, agreed unanimously with Mr. Kabatsi, and Mr. Byamugisha and Mr. Okello, that the method used to evaluate a number of items in certificate 12 was wrong and that revaluation would certainly reduce the award. It must be said however that the Plaintiffs were not a party to this "unanimous" agreement, and have never agreed with proposals put forward to reduce the award.

To sum up Mr. Nkurumziza's submissions the case prescuted by the Attorney General was he said, unsound, being based on incorrect statements, I should no possibility of success on appeal. All the facts and the issues, upon which certificate No.12 could be challenged had been known before the trial. Nothing new had memerged. What had happened since, was that two key witnessed had died. The public importance of the case was that payment should be made on the decretal seem, a matter which the plaintiff had tried to prove during abortive mandamus proceedings. There was

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no other matter of public importance.

I must first attempt to describe what a matter of public importance is in this context. Both Counsel referred me very helpfully to ESSO STANDARD EASTERN INC VS INCOME TAX (1971) EA from page 140. At p.141, the then Court of Appeal referred to COMMISSIONER for TRANSPORT VS ATTORNEY GENERAL of Uganda (1959) EA.329 or P.335. The principles to be extracted from these two cases may be stated as follows: If the appeal raises a question of public importance, which in the public interest should be decided, that may be considered a sufficient reason to extend time. However, this is a consideration that will be used sparingly, and not in cases where the point to be decided is one of importance only to the parties themselves, to one which may with little difficulty be tested in other proceedings.

The nature of the present case may be described under three heads. First, this is a dispute between the Government of Uganda and builders contracted to erect a building in 1978, the project having been delayed by the liberation war of 1979; then resumed in 1984; then delayed again in 1985. The parties had attempted to accommodate these difficult circumstances by new agreements. The matter was private to themselves. Secondly, no question of general importance arose out of their agreement. An interim certificate, of course, may be challanged. It was, Thirdly, the calculation of the mode of payment was disputed. There will no doubt be cases when delay due to unforeseen circumstances has caused a calculation to arise different from the original agreement. That is a matter which can still be aired. The case put forward that a great deal of Government money may be, as it were, wasted, in a matter related to disturbed contracts. Wars have that effect. They disturb everything. It is not in the courts to go into questions whether a litigant would have emerged better off, if he had presented his case in another way, or with more

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vigour, or had written his contract in clearer terms. Those are all matters private to the parties. No litigant likes to be condemned to pay a large amount of money, State or citizen alike. Indeed the citizen or corporation may be thrust into bankruptcy or winding-up. But what is extraordinary about this case is that all this trouble arises out of the acts of the Government itself and its advisers in agreeing to continue the work on certain terms and drawing up certificate 12. Then another set of Government advisers disagreed with the first set as to the question of payment only. This is not for tile ground for making out a case of public importance in my opinion.

In conclusion therefore it is my opinion that there has been no, or no relevant, explanation of the inordinate delay of almost fourteen months since judgment. It is not possible to find any sufficient reason to excuse the delay on the merits of the case or on grounds of public interest. Consequently though I realise that this is an alleged loss due to the difficulties which have \$ \frac{\text{best}}{\text{base}}\$ Uganda since 1979, I cannot find grounds upon which to extend time which would not set a bad precedent. It also occurs to me that had I been able to extend time, the nature of the appeal would have been problematic. If further evidence is to be adduced, to prove a different basis of calculation, it would be uncertain whether Rule 29 would have permitted additional evidence in the circumstances of this case; and if a retrial were to be proposed, that would be difficult in principle and in view of the death of two witnesses. It seems to me therefore that Government should seek an accommodation if \$\texttt{possible}_{\varphi}\$ with the judgment creditor, and in future agree on the basis of calculation before entering into difficult contracts of this nature.

The application is dismissed with costs. Right of review within 7 days explained.

We wish to apply for Review.

Granted

H. G. PLATT, J. S. C.

PLATT. J. S. C.

Tumwesige:

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