

UGANDA / JUDGMENT

Emorut (suing through alawful Attorney) v Anyango and Others (Miscellaneous Application 78 of 2023) [2023] UGHCCD 307 (5 October 2023) [2023] UGHCCD 307

COURT

HC: Civil Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

Miscellaneous Application 78 of 2023

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The Republic of Uganda In the High Court of Uganda Holden at Soroti Miscellaneous Application
No. 78 of 2023 (Arising from Civil Appeal No. 43 of 2023) (Arising from Civil Suit No. 14 of 2019)

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Emorut Vincent *(Suing through a lawful attorney)* ::::::::::::::::::::::::::::::::::

Versus

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- 1. Anyango Dinnah
- 2. Odeke Charles
- 3. Moko Naklet
- 4. Asolo Stephen
- 5. Ojilong Michael

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling on Application for leave to appeal out of time:

- 1. Introduction:
- 25 This application was brought by way of a Notice of Motion under Sections 96 and 98 of the Civil Procedure Act, Cap 71 (CPA) and Order 52 Rules 1,2 and 3 of the

Civil Procedure Rules SI 71-1 for orders that

- a) The applicant be granted leave to appeal out of time against the judgment and orders of Her Worship Margaret Aanyu vide Civil Suit No. 14 of 2019 of the Chief Magistrates Court of Soroti at Soroti delivered on 30th August 2022.
- b) The costs of this application be provided for.

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2. Grounds: \$\mathsf{S}\$

The grounds of this instant application are set out in the application and anchored in the supporting affidavit deposed by Lochoto Kevin, a legal assistant at M/s Menya & Co. Advocates, but for brevity they are that

- a) The respondents filed Civil Suit No. 14 of 2019 in the Chief Magistrate's
- Court of Soroti at Soroti against the applicant, and the judgement was delivered in favour of the respondents on 30 August 2022.
- b) After delivery of the said judgement, the applicant requested a copy of the same, but the trial Magistrate informed us that the same was yet to be typed and corrected.
- c) That after waiting for over three months to no avail, the applicant's lawyers made a formal request for a certified copy of the judgement and record of the proceedings on 11 November 2022. (Annexure A)
- d) Even after the formal request was made, the court took another three months to serve us with both copies of the Judgement and the Record of proceedings on 28 February 2023. (Annexure B)
- e) When the copies were received, the applicant was not reachable at the material time, and later, we were informed that he was back at School in Entebbe Aviation School and was unable to give us instructions to proceed and appeal.
- f) A memorandum of appeal was filed out of time in this Honourable Court vide Civil Appeal No. 43 of 2023.
- g) The applicant's intended appeal has merit with the likelihood of success.
- h) This application has been brought without inordinate delay.
- i) The court has the discretion to extend the time within which to file an appeal out of time.
- j) The respondents shall not suffer any prejudice if this application is granted in the interest of justice.
- k) It is just and equitable that this application be granted.

- 3. Objection:

On the other hand, the 1st respondent, with the written authority of the 2nd/^{3rd}, 4th and 5th respondents, on her own and on behalf of the other respondents, deposed an affidavit in reply opposing the application. Here below are the opposing grounds in brief: that,

- a) The applicant has not furnished any proof of having made any request for the certified copies of the Judgement and the Record of Proceedings.
- b) It was three months after the delivery of the Judgment that the request for the certified judgment and the Record of Proceedings was made, which makes the application an afterthought and bad in law.
- c) The conduct of the applicant being unreachable is a demonstration that this application is meant to delay justice.
- d) The memorandum of appeal should be struck off the record for being filed out of time.
- e) The intended appeal lacks merit, and the respondents pray that this Honourable Court dismisses this instant application with costs.

- 4. Representation:

- According to the pleadings, the applicant is represented by M/s Menya & Co., 25 Advocates, whereas the respondents are represented by M/s Asire & Co., Advocates.

- 5. Submissions:

The parties argued the instant application by way of written submissions, which the court has had the benefit to study, analyse and consider concurrently with 30 the pleadings and annexures thereto and for brevity, the court shall refer to the

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submissions as and when necessary, but the court is thankful to each counsel for S the submissions.

6. Issues:

- a) Whether there is a proper case for the applicant to be granted leave to file an appeal against the Judgement and Orders of the trial Magistrate, vide

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Civil Suit No. 14 of 2019 of the Chief Magistrate's Court of Soroti at Soroti delivered against the applicant on 30 August 2022 or the Court to validate Civil Appeal No. 43 of 2023 filed in this Honourable Court arising out of Civil Suit No. 14 of 2019?

- b) What are the remedies available to the parties in the circumstances?

7. Resolution: 15

> This application was brought under Section 96 of the Civil Procedure Act, Cap 71 (CPA), which empowers this Court with the discretion from time to time to enlarge any period fixed or granted by the court for the doing of any act prescribed or allowed by the Act, even though the period originally fixed or granted may have expired and also Section 98 of the CPA, which enjoins this court with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

> It is also my considered view that Section 79(2) of the CPA, which enjoins the court to exclude from computation of the period of limitation the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded, is applicable.

8. Burden and Standard of Proof:

Section 101 of the Evidence Act, Cap 6, provides that;

- 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 of the Evidence Act states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Also, Section 103 of the Evidence Act provides that the burden of proof as to the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

This being a civil application arising from a civil suit, the burden of proof lies with the applicant (sections 101 and 102 of the Evidence Act, Cap 6).

It is, therefore, trite law that the standard of proof in civil cases is on a balance of probabilities. See: *Nsubuga vs Kawuma [1978] HCB 307.*

The main issue for determination in this matter is;

Whether there is a proper case for the applicant to be granted leave to file an appeal against the Judgement and Orders of the trial Magistrate, vide *Civil Suit No. 14 of 2019 of the Chief Magistrate's Court of Soroti at Soroti* delivered against the applicant on 30 August 2022 or the Court to validate Civil Appeal No. 43 of 2023 in this Honourable Court arising from Civil Suit No. 14 of 2019?

The deponent states in his affidavit in support of this application that despite the fact that judgement and orders vide Civil Suit No. 14 of 2019 in the Chief Magistrate's Court of Soroti at Soroti was delivered against the applicant on 30th August 2022 and a formal request for the certified judgement and record of proceedings (Annexure A) on 11 November 2022, three months after the three

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months of the request of the same had not been availed by the trial court to \$\mathsf{S}\$ which prevented the applicant to file an appeal in time.

The deponent also contends that when the copies of the judgement and the record of proceedings were received, the applicant was not reachable at the material time to instruct his lawyers to file the appeal because he was back at

10 School in Entebbe Aviation School.

> The deponent further contends that the application has been brought without inordinate delay, that the appeal has merit with a likelihood of success, that it is just and equitable to allow it and that the respondents shall not be prejudiced if the application is allowed

- On the other hand, the respondents, through their authorised deponent, 15 opposed the application, contending that the applicant has not furnished any proof of having made any request for the certified copies of the judgement and the record of proceedings, which was only made three months after the delivery of the Judgment making the instant application an afterthought and bad in law
- and that the conduct of the applicant being unreachable is a demonstration that 20 this application is meant to delay justice.

The respondents thus prayed that the memorandum of appeal be struck off the record for being filed out of time because the intended appeal lacks merit and that this Honourable Court dismisses this instant application with costs.

9. Analysis: 25

What is discernible from the affidavit evidence provided as proof for not filing the intended appeal within thirty days as provided under Section 79(1)(a) of the CPA is Annexure A which is a letter received by the Court on 11th November 2022 from the applicant's counsel requesting the record of proceedings and the certified judgement made two months after the judgement was delivered on 30 August 2022 as the cause for not abiding with the timelines.

After the perusal of the lower court file, I have observed that there is a sign of acknowledgement of receipt of the judgment and the record of proceedings by Francis dated 28th February, 2023 which date is also reflected on the lawyer's receipt in Annexure B. I.

Section 79(2) of the CPA provides that in computing the period of limitation prescribed by this section 79, the time taken by the court or the registrar in 15 making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

prescribed. (see: *Delvi v Diamond Concrete Company [1974] EA 493*). 20 Normally, sufficient reason for an extension of time must relate to the inability or failure to take a particular step. (see: Mugo and others v Wanjiru [1970] EA 481) In the case of Mulindwa George William versus Kisubika Joseph SCCA No. 12 of 2014, the Supreme Court observed that;

justice may be defeated if there is laxity. Factors to be considered *in an application for an extension of time are:*

- *The degree of prejudice to the other party.* iv. *Once a delay is not accounted for, it does not matter the length* of the delay. There must always be an explanation for the period of delay."

In the instant matter, the applicant has averred that the delay in filing an appeal on time was caused by his failure to obtain certified court proceedings and the 15 judgement of the lower court in time as he did so on 28th February, 2023 and he avers that the applicant has provided good cause to enable this court to grant the necessary leave.

On the other hand, counsel for the respondent avers that Annexure A of the applicant, which was received by the court on 11th November 2022, was written 20 three months after the time within which an appeal would have been made. To that end, counsel for the respondents contends that even if the proceedings are delayed, the letter asking for them by the applicant is delayed beyond the time allowed for an appeal.

I have carefully perused Annexure A which I note was received by the court on 25 11th November 2022. It was requesting for the record of proceedings and judgement as per the lower court file.

However, the record of proceedings and judgement as per the lower court file and Annexure B where the lawyers of the applicant acknowledged receipt of the proceedings was on 28th February 2023. That is a period of over five months

beyond the time within which are reserved for lodging an appeal.

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It is trite that once a trial court has delivered judgment, a certified copy must be $\$S\%$ availed to the parties immediately, which evidently did not happen in the instant facts.

In the instant matter, the copy of the record of proceedings and judgement was made available to the applicant on 28th February 2023.

Certified proceedings and judgement are obligatory for one to formulate grounds 10 of appeal and so by the operation of Section 79(2) of the CPA, when such are not provided within the required time reserved for appeal, such time taken in making the record of proceedings ready and available to the applicant, is automatically excluded from the computation of the thirty days within which one is required to

appeal. 15

In this respect of this matter, the delayed provisions by the lower trial to the applicant its certified record of proceedings and judgement was beyond the control of the applicant who clearly requested for the same on 11th November 2022 which was two months and 12 days from the day the judgement was delivered and one month beyond the time within which to make an appeal.

Still there is no contrary evidence on the lower court file or otherwise that that record of proceedings had been availed earlier than 28th February 2023 and that to me was an act beyond the control of the applicant.

Accordingly, even if there was a delay by the applicant in requesting for the record of proceedings and judgement, such request, even if it was made in time 25 would not have enabled the applicant to take appropriate action for it was only on 28th February 2023 that the said record of proceedings and judgement was availed.

Proper administration of Justice does require and demand that courts do have readily available, typed and certified records proceedings as soon as a matter is 30

completed. Administrative inefficiencies or ineptitude of the courts thus cannot S be visited upon litigants.

Accordingly, in respect of this matter, I am persuaded that the applicant has demonstrated that he had sufficient cause for his failure to file an appeal on time based on the fact that even when he made a delayed application for the typed

and certified records proceedings there was indeed delay in receiving the record 10 of proceedings and the judgement which delay prevented the applicant from taking the step of filing the appeal within the prescribed time.

That the delay in obtaining certified record of court proceedings is a ground for an extension of time as was pointed out in the case of **Delia Almeida vs C Almeida**

SCCA No. 15 of 1990 (UR) which emphasises the provisions of section 79(2) of the 15 CPA earlier quoted herein.

It should be noted that it is the duty of the court to generate court proceedings and not a litigant.

Since that is the case, I am inclined to exercise the mercy of this court as a court of justice and extends amnesty to the applicant by invoking the discretionary 20 powers of this court provided for under Sections 96 and 98 of the Civil Procedure Act and grant an extension of time in order for the applicant to file an appeal out of time.

However, since an appeal styled as Civil Appeal No. 43 of 2023 is already on file, I hereby validate it and order that the respondent be served with the 25 Memorandum of Appeal within 15 days from the date of today such that the appeal is fixed for hearing and determined on its own merits.

With the foregoing reasons, I need not delve into other issues raised by counsel for the applicant such as the likelihood of success of the appeal because as per

Section 79(2) of the CPA, the delay in receipt of the record of proceedings suffices 30 to allow this application since the affidavit evidence was sufficient for the court

to consider and then grant or not grant this application which I have fortunately S found merits in it and granted.

Consequently, for the reasons above given, this application for leave to appeal out of time against the judgment and orders of Her Worship Margaret Aanyu vide Civil Suit No. 14 of 2019 of the Chief Magistrate's Court of Soroti at Soroti delivered on 30th August 2022, is allowed.

However, because the applicant/appellant had already filed Civil Appeal No. 43

of 2023 as a consequence of the allowed application, that appeal is validated.

The second order sought by the applicant was for the costs of this instant application; however, as denoted from the foregoing, the reason for the delay in

filing the appeal was not evidently orchestrated by the respondent but by the 15 lower court.

Because of that, the justice of the case demands that each party bears its costs. The application is, therefore, allowed with no order as to costs.

The applicant has thus fifteen days within to serve the Memorandum of Appeal

vide Civil Appeal No. 43 of 2023 upon the respondent in accordance with the Civil 20 Procedure Rules.

I so order

Hon. Justice Dr Henry Peter Adonyo

Judge 5th October, 2023

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Prepared on 13 October 2026 · Esheria