

UGANDA / JUDGMENT

Eriga v Vuzzi & 2 Ors (MISCELLANEOUS CIVIL APPLICATION No. 0009 OF 2017) [2017] UGHCCD 41 (27 April 2017)

[2017] UGHCCD 41

COURT

HC: Civil Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

MISCELLANEOUS CIVIL APPLICATION No. 0009 OF
2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0009 OF 2017

(Arising from High Court Civil Appeal No. 09 of 2009 and Moyo Civil Suit No. 015 of 2004)

ERIGA JOS PERINO APPLICANT

VERSUS

1. VUZZI AZZA VICTOR }
2. VUNZI INNOCENT } RESPONDENTS
3. AUDI VEN }

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for enlargement of time for lodgement of an appeal. It is made under the provisions of section 79 (1) (a) and 98 of *The Civil Procedure Act*, Order 51 rules (1) and (3), Order 52 rules (1) and (3) of *The Civil Procedure Rules*, and section 33 of *The Judicature Act.* It is by notice of motion dated 13th January 2017 and supported by the affidavit of the applicant sworn on the same date. The grounds of the application are mainly that; following the judgment of the Grade One Magistrate at Moyo delivered on 19th February 2009, the applicant instructed counsel, M/s Akile, Olok and Company Advocates within time to lodge an appeal against the decision. The advocates only filed a notice of appeal on 25th February 2009 but neglected to file a

memorandum of appeal. The firm of advocates subsequently dissolved, after one of the partners joined the judiciary and the other secured employment with the African Union, without updating the applicant on the status of the intended appeal, which they had all along assured him they had filed. The notice of appeal was subsequently struck out on 19th February 2012 for failure to file a memorandum of appeal. By the appeal sought, the applicant intends to challenge findings of the court below regarding his interest in the disputed land which he claims to own under customary tenure. For that reason, he contends that it is in the best interests of justice that the extension of time sought be granted.

The respondents oppose the application and in an affidavit in reply sworn by the first respondent, contend that whereas the judgment was delivered on 19th February 2009, the applicant filed only a notice of appeal and failed to file a memorandum of appeal. The notice of appeal was therefore struck out on 19th February 2012. The application now before court has been filed after an inordinate delay. The applicant too is guilty of dilatory conduct by his failure to take up the matter himself after learning of the dissolution of the law firm which had represented him during the trial and which he had instructed to file the appeal. They therefore prayed that the application be dismissed with costs.

When the application came up for hearing on 12th April 2017, Counsel for the applicant Mr. Madira Jimmy argued that the delay was basically by the applicant's former advocates. The applicant instructed them to file an appeal immediately after the judgment, which they did. The judgment was delivered on 19th February 2009 and the notice of appeal was filed on 26th of February 2009. The firm later closed and the applicant was not informed. The advocates were not honest they continued communicating with him even after they had dissolved the firm assuring him that the appeal had been filed. There was no reason for him to follow up the appeal personally since he was represented by a firm of advocates. He believed what the advocates told him. Counsel prayed that the application be allowed.

In response, counsel for the respondents Mr. Samuel Ondoma submitted that there was dilatory conduct by the applicant. Although he was informed that there was an appeal by his former advocates, he never followed it up himself with the court nor with his advocates. The notice was struck off on 19th December 2012 and still he never took any action. If the applicant was vigilant he would have followed the notice appeal to court. He was served on 30th November 2016 with notice to show cause why execution should not be made and that is when he thought of making the current application. He got to know about his lawyers' dissolution of the firm in 2015 but he did not take any step. He shares the blame. Counsel prayed that the application be dismissed.

Section 220 (1) (a) of *The Magistrates' Courts Act*, provides for appeals as of right, from the decrees or any part of the decrees and from the orders of a magistrate's court presided over by a Magistrate Grade One in the exercise of its original civil jurisdiction, to the High Court.

According to section 79 (1) (a) of the *Civil Procedure Act*, every appeal should be filed within thirty days of the date of the decree or order of the court, except where it is otherwise specifically provided in any other law. These time specifications are designed to avoid delays. The provisions dictate a time schedule within which certain steps ought to be taken. For any delay to be excused,

it must be explained satisfactorily (see **Njagi v. Munyiri [1975] EA 179**).

Although the applicant has a right of appeal, he now can only exercise it after providing a sufficient explanation as to what prevented him from exercising that right within the thirty days. An order for enlargement of time to file the appeal should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his failure to file the appeal within the time prescribed by Act, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that the intended appeal is not an arguable one. It would be wrong to shut an applicant out of court and deny him or her the right of appeal unless it can fairly be said that his or her action was in the circumstances inexcusable and his or her opponent was prejudiced by it. In an application of this nature, the court must balance considerations of access to justice on the one hand and the desire to have finality to litigation on the other.

Under section 79 (1) (b) of the **Civil Procedure Act**, an appellate court may for “good cause” admit an appeal though the period of limitation prescribed by the section (30 days) has elapsed. Therefore, when an application is made for enlargement of time, it should not be granted as a matter of course. Grant of extension of time is discretionary and depends on proof of “good cause” showing that the justice of the matter warrants such an extension. The court is required to carefully scrutinize the application to determine whether it presents proper grounds justifying the grant of such enlargement. The evidence in support of the application ought to be very carefully scrutinized, and if that evidence does not make it quite clear that the applicant comes within the terms of the established considerations, then the order ought to be refused. It is only if that evidence makes it absolutely plain that the applicant is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the respondent of a very valuable right to finality of litigation.

This requirement was re-echoed in **Tight Security Ltd v. Chartis Uganda Insurance Company Limited and another H. C. Misc Application No 8 of 2014** where it was held that for an application of this kind to be allowed, the applicant must show good cause. “Good cause” that justifies the grant of applications of this nature has been the subject of several decisions of courts and the examples include; **Mugo v. Wanjiri [1970] EA 481** and **Pinnacle Projects Limited v. Business In Motion Consultants Limited, H. C. Misc. Appl. No 362 of 2010,** where it was held that the sufficient reason must relate to the inability or failure to take a particular step in time; **Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S. C. Civil Appeal No. 9 of 1993** in which it was decided that a mistake by an advocate, though negligent, may be accepted as a sufficient cause, ignorance of procedure by an unrepresented defendant may amount to sufficient cause, illness by a party may also constitute sufficient cause, but failure to instruct an advocate is not sufficient cause, which principle was further stated in **Andrew Bamanya v. Shamsherali Zaver, C. A Civil Application No. 70 of 2001** that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and further that where there are serious issues to be tried, the court ought to grant the application (see **Sango Bay Estates Ltd v. Dresdner Bank [1971] EA 17** and **G M Combined (U) Limited v. A. K. Detergents (U) Limited S. C*

Civil Appeal No. 34 of 1995*). However, the application will not be granted if there is inordinate delay in filing it (see for example *Rossette Kizito v. Administrator General and others, S. C. Civil Application No. 9 of 1986 [1993]5 KALR 4*).

What constitutes “sufficient reason” will naturally depend on the circumstances of each case. It was held in *Shanti v. Hindocha and others [1973] EA 207,* that;

The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reason (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part. But there are other reasons and these are all matters of degree. (Emphasis added).

Although such circumstances ordinarily relate to the inability or failure to take the particular step within the prescribed time which is considered to be the most persuasive reason, it is not the only acceptable reason. The reasons may not necessarily be restricted to explaining the delay. An applicant who has been indolent, has not furnished grounds to show that the intended appeal is meritorious may in a particular case yet succeed because of the nature of the subject matter of the dispute, absence of any significant prejudice likely to be caused to the respondent and the Court’s constitutional obligation to administer substantive justice without undue regard to technicalities. I am persuaded in this point of view by the principle in *National Enterprises Corporation v. Mukisa Foods, C. A. Civil Appeal No. 42 of 1997* where the Court of Appeal held that denying a subject a hearing should be the last resort of court.

The considerations which guide courts in arriving at the appropriate decision were outlined in the case of *Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001*, where it was held that;

- (a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.
- (b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.
- (c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.
- (d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.

- (e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ...".

Similarly in ***Phillip Keipto Chemwolo and another v. Augustine Kubende [1986] KLR 495*** the Kenya Court of Appeal held that:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

Furthermore In ***Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22*** by the Supreme Court of Uganda that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

In the instant application, the judgment intended to be appealed was delivered on 19th February 2009. The notice of appeal was filed one week later on 26th of February 2009. The notice of appeal was struck out on 19th February 2012. This application was not filed until 24th January 2017, a period nearly eight years after the judgment. The applicant attributes the delay to two factors; unexplained error by his advocates in failing to file a memorandum of appeal within time and thereafter misinformation by the said advocates about the status of his appeal and their subsequent dissolution of the firm.

I have considered the explanation advanced for the delay. He instructed the advocates on time and indeed they filed a notice of appeal expeditiously. There is no explanation as to what prevented the advocates from filing the memorandum of appeal within time but I have not found any evidence to suggest that the applicant had a hand in causing that failure. It appears to me that the blame is wholly attributable to the advocates for whose mistake, fault, lapse or dilatory conduct the applicant cannot be penalised. The applicant may be criticized for having taken too long to realise thereafter that his advocates were misadvising him about the status of his appeal. Indeed had he been more vigilant, he would have discovered that his advocates had not filed the necessary memorandum of appeal. However, I am hesitant to hold him culpable for inaction on this account considering that clients ordinarily expect their advocates to act in their best interests once they instruct them and are therefore entitled to repose trust and confidence in their advocates and to believe information coming from them, unless it is glaringly false. In paragraph 11 of the affidavit in support of the motion, he avers that his advocates did not inform him of the dissolution of the firm. I have not been furnished with evidence establishing the date on which the firm was dissolved. In the circumstances, in absence of proof of knowledge on the applicant's

part of any fact which should have triggered distrust of his advocates' advice, holding him culpable would be tantamount to penalising him for reposing "too much" trust and confidence in his advocates, which is a very subjective assessment.

According to paragraph 13 of the affidavit in support of the motion, the applicant did not realise that the notice of appeal filed by his advocates had been struck out until 30th December 2016 when he received a notice to vacate the land which prompted him to file the instant application on 24th January 2017 (within a month after notification). I have referred, for comparison, to the case of **Andrew Bamanya v. Shamsherali Zaver, S. C. Civil Appln. No. 70 of 2001**, where the Supreme Court decided that the mistakes, faults / lapses or dilatory conduct of Counsel should not be visited on the litigant. The Court also held that the other principle governing applications for extension of time is that the administration of justice requires that all substances of disputes should be heard and decided on merit. In that case there was a delay of 2 ½ years in filing the application for leave to appeal out of time. The delay was caused by the Applicant's lawyers. In that case the court found that it would be a denial of justice considering the circumstances of the case to shut the Applicant out from exercising his rights. The Supreme Court decided that it had inherent powers under its own rules to administer substantive justice.

Similarly in **Sabiiti Kachope and three others v. Margaret Kamuje, S. C Civil Appln. No. 31 of 1997 [1999] KLR 238**, an application for leave to extend time within which to appeal was filed after two years and five months from the date the judgment was passed. The applicant accounted for the delay. The court held that the applicant had shown good cause for the extension of time.

In the two cases above cited, enlargement of time was granted despite the relatively longer delay in comparison to the application before me because the delay was sufficiently explained. Regarding the possibility of prejudice to the respondent, I am of the view that allowing the applicant to appeal out of time will in the circumstances inconvenience the respondent, whose enforcement of the decree will be delayed, but is unlikely to occasion him any significant prejudice. From a different perspective, the respondent will be more secure in his ownership over the disputed land if his rights are vindicated by an even higher court, in the event that the decision on appeal is in his favour. Finality of litigation at the highest possible judicial level will settle the dispute for good.

In the application before me, the applicant has furnished convincing explanations for the delay, and in addition the court is hesitant to block the doors of justice in his face considering that the underlying subject matter is a dispute over land. The right of appeal is one of the cornerstones of the rule of law. To deny the applicant that right in the circumstances of this application, would in essence be denying him access to justice and a fair hearing both of which are guaranteed by the Constitution. It has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicant be accorded an opportunity to ventilate his grievances on appeal, he being aggrieved by the decision of the court below. I believe that justice can still be done despite the relatively short delay found in the instant case in pursuing this remedy. But because the delay has been sufficiently justified, the applicant will not be penalized in costs.

I accordingly grant the applicant enlargement of time. The applicant should file the memorandum of appeal within fourteen days from today. In order to mitigate any inconvenience this extension may occasion to the respondents, the applicant should thereafter have the appeal fixed for hearing on a date within three months of this order, failure of which the appeal will be liable for dismissal. The costs of this application will abide the result of the appeal.

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Stephen Mubiru

Judge

27th April 2017.

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