

UGANDA / JUDGMENT

Kakura v Okedongo (Civil Miscellaneous Appeal 10 of 2022) [2024] UGHC 867 (19 July 2024)

[2024] UGHC 867

COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Civil Miscellaneous Appeal 10 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT HOIMA

MISC. CIVIL APPEAL NO. 010 OF 2022 (ARISING FROM MISC. APPLICATION NO. 058 OF 2022) (ARISING FROM CIVIL APPEAL NO. 0067 OF 2015) (ALSO ARISING FROM CIVIL SUIT NO. 014 OF 2004)

KAKURA FRANCIS::::::::::::::::::::::::::::::::

VERSUS

PETER OKEDONGO::::::::::::::::::::::::::::::::

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

RULING

Background

- The Appellant filed Misc. Application No. 058 of 2022 (Arising \$[1]\$ from High Court Civil Appeal No. 067 of 2015) for an order of enlargement of time within which to file memorandum of appeal.
- The Application was dismissed by the Assistant Registrar of the \$[2]\$ High Court on the ground that no sufficient cause was given for grant of time within which to appeal from the decision of the Chief Magistrate's Court of Hoima C. S. No. 14 of 2004 for the Applicant/Appellant was guilty of dilatory conduct.

- The Appellant filed the instant application/appeal under S.33 of §[3] the Judicature Act, 0.50 rr 4, 8, 43 and 0.52 rr 1 & 3 CPR for the following orders:
- The ruling and orders of Assistant Registrar in Misc. 1. Application No. 058 of 2022 dismissing an application for enlargement of time within which to file a memorandum of appeal be discharged/set aside.
- That the dismissal orders of the Assistant Registrar dismissing 2. M. A. No. 058 of 2022 be substituted with the orders for enlargement of time within which to file the memorandum of appeal.
- The execution of the decree in C. S. No. 14 of 2004 of Chief §3. Magistrate's Court of Hoima at Hoima be stayed pending the determination of the appeal.
- The grounds of the application are set out in the affidavit of the §[4] Applicant/Appellant, Kakura Francis briefly as follows;
- The learned Assistant Registrar erred in law and facts when he §(a) held that the Appellant did not show justifiable cause to enlarge time within which to file a memorandum of appeal yet he was sick and could therefore not prosecute his case.
- The learned Assistant Registrar erred in law and fact when he §(b) held that a land matter is not contentious and party not to a suit can depone on an affidavit without any authority thus causing a miscarriage of justice.
- That it is only fair and just that the order dismissing M. A. No. §(c) 058 of 2022 be set aside and time be enlarged within which to file memorandum of appeal.
- In opposition of the application, the Respondent Peter Okedongo §[5] deposed an affidavit in reply justifying the Assistant Registrar's order dismissing the Applicant/Appellant's application enlargement of time within which to file a memorandum of appeal §
\overline{f}\$ or the ground of dilatory conduct on the part of the Applicant/Appellant for the notice of appeal had been filed way back on 15/1/2015 and the Applicant filed Misc. application No. 91 of 2016 for enlargement of time within which to file a memorandum of appeal was filed on 15/11/2016 after a period of approximately 1 year. The application was dismissed for want of prosecution on 11/11/2020 .
- The Applicant/Appellant then on 4/5/2022, after a period of §[6] almost 2 years filed the impugned Misc. Application No. 58/2022

for the same enlargement of time within which to file a memorandum of appeal which the Assistant Registrar once again dismissed on the ground of the Applicant's dilatory conduct.

Lastly, that the impugned application is a mere afterthought and §[7] abuse of court process aimed at deliberately frustrating the Respondent from enjoying the fruits of litigation.

Determination of the application

- This application/appeal is comprised of some of the files that [8] survived fire that gutted the Hoima High Court Registry on 21/10/2023. The entire file though charred, it is complete for adjudication.
- The issues for determination in this application/appeal appear as [9]
- (a) Whether the learned Assistant Registrar erred in law and facts when he held that the Appellant did not show cause to enlarge time within which to file a memorandum of appeal.
- (b) Whether the learned Assistant Registrar erred in law and fact when he held that a land matter is not contentious and party not to a suit can depone an affidavit without any authority thus causing a miscarriage of justice.
- 1. Whether there was a sufficient cause to enlarge time within which to file a memorandum of appeal.
- [10] In his ruling, while dismissing the impugned application, the learned Assistant Registrar found and held as follows:

"On perusing the record, I observe that this matter was instituted in 2004 and judgment entered for the Respondent on 30th of September 2015. The Applicant then filed a notice of appeal on 21st October, 2015. Later, he filed an application for enlargement of time within which to file a

memorandum of appeal more than a year later on 15th November, 2016. From that time, nothing is shown on record to have been done by the Applicant until 11th November, 2020, more than four years later. When the application was dismissed on 11/11/2020..... it again took two years to file the present application to reinstate miscellaneous application No. 91/2016, seven years after the Respondent had been decreed the owner of the suit property. There is no sufficient reason given as to why from 2016 to 2020 when M. A. No. 91/2016 was dismissed, why the Applicant did not have it heard and determined. I find the conduct of the Applicant dilatory in that there was inordinate delay on his part. Litigation should surely come to an end in a matter like this one that has been in court for the last eighteen years..... this application is dismissed and each party to bear its own costs in order to put this old matter at rest."

- [11] Clearly, the learned Assistant Registrar abhorred and was concerned with the injustice that come along with delays and prolonged litigation. I share with him the same sentiments.

- [12] Counsel for the Appellant submitted that the Applicant/Appellant demonstrated in his affidavit in support of the impugned M. A. No. 58 of 2022, that his efforts to have his case heard and determined were futile because of the conduct of his advocates, the court clerk who promised to serve him with a hearing notice and his own sickness and only got to learn about the dismissal of his case without being accorded any right to be heard through the area L. C. I Chairman.

[13] In Muzamil Ayile Vs Rose Tarapke H. C. M. A No. 24/2013 Court

"Enlargement of time is a discretion which must be exercised judicially on proper analysis of the facts and application of the law to the facts. The power to grant leave to file an

appeal out of time is a discretionary one and the party seeking such discretionary orders which are only given on a case to case basis not as a matter of right, must satisfy the court by placing some material before the court upon which discretion such may be exercised. *Applicants* enlargement of time within which to appeal will not be for granted if the delay is excusably long where injustice will be caused to the other party or where there is no reasonable justification."

- [14] Enlargement of time is a discretion which must be exercised upon sufficient cause being shown. It is not a matter of right. "Sufficient cause" has been held to relate to the inability or failure to take necessary step within the prescribed time. It does not relate to taking a wrong decision. If the Applicant is found guilty of dilatory conduct, the time will not be extended, see Hadondi Daniel vs Yolam Egondi, Court of Appeal Civil Appeal No. 67 of 2003.

[15] As was held in Abel Balesesa Vs Yesero Mugenyi, H. C. M. A. No.

" The test is whether the delay is prolonged and, if it is, can justice be done despite the delay. Further is to bother the plaintiff and the defendant; so both parties to a suit must be considered...." Delay per se therefore is not overwhelming the. factor when considering whether terminate a matter for want of prosecution or for that case refuse to reinstate the dismissed case."

[16]In the instant case, though to grant this application would amount to perpetration of delay, I find that the Applicant/Appellant has offered sufficient reason of enlarging him time to file a memorandum of appeal, sickness of the Applicant. The Assistant Registrar was however justified to dismiss the Applicant's application No. 058/2022 for dilatory conduct considering the history of the appeal. However, the discretion of the court being

perfectly free and the words "sufficient cause" not being comparable or synonymous with "special ground" considering the facts of this particular case, this being a land matter, I find that the ends of justice require that the appeal be determined on merit. With regard to whether the Respondent will be prejudiced by grant of this application, I note that true, he may be inconvenienced by the delay which shall be remedied by costs but he will be prejudiced by the late hearing of the case since this is an appeal.

- 2. The learned Assistant Registrar erred in law and fact when he held that a land matter is not contentious and party not to a suit can depone on an affidavit without any authority thus causing a miscarriage of justice.
- [17] In the instant case, the impugned affidavit was deposed by a one Tumusiime Justus, an advocate in the firm that represented the Respondent. The contents of his affidavit in reply were not a land dispute as Counsel for the Applicant/Appellant opined in his submission. Counsel deponed on defecato facts of the case as presented by the Applicant in his affidavit and he thereby was not adducing evidence outside the record for the Respondent which may require him to take a stand as a witness.

[18] As was held in Niko Insurance (U) Ltd Vs Southern Union Insurance Brokers (U) Ltd & 4 Ors H. C. M. A No. 817 of 2015, where Counsel is not deposing an affidavit as an advocate representing the party, then Regulation 9 of the Advocates (professional conduct) Regulations do not bar such an advocate from giving evidence on informal or none contentious matters of facts in any matter in which he or she acts or appears. **Regulation 9** provides thus:

"No advocate may appear before any court or tribunal in ay matter in which he or she has reasons to believe that he or she will be required as a witness to give evidence,..... And if, while appearing in any matter, it becomes apparent that, he or she will be required as a witness to give evidence.....

he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears."

[19] Clearly, the main intention of this regulation is that an advocate should not act as counsel and witness in the same case, see also VDB Vs Kasirye Byaruhanga & Co. Advocates S. C. C. A. No. 35 of 1994: Mbarara Municipal Council Vs Jetha Brothers Ltd H. C. M. A. No. 10 of 2021, court held that:

"....affidavit, can be sworn by anyone to prove a set of facts and an advocate is not an exception. An advocate is therefore not prohibited to swear an affidavit when necessary especially on matters that are well within his or her knowledge"

- [20] In the instant case, Tumusiime Justus, was not counsel for the Respondent and therefore he did not act as counsel and a witness but he is from the firm of the counsel for the Respondent. He deposed on matters well within his knowledge from the record of the case and therefore are non-contentious. As an advocate from the firm which represent the client though not a party to the application, he does not require any authority from the Respondent to depose the affidavit in support of the application. The authority is embedded in the instructions to the firm.

- [21] In conclusion, I find the foregoing objection on ground of appeal without merit. As regards the application, I grant it and set aside the Assistant Registrar's orders dismissing M. A. No.58 of 2022 and accordingly enlarge time for the Applicant to file memorandum of appeal on the following conditions;
- The Applicant/Appellant to file and serve memorandum of \$(a)\$ appeal within 14 days from the date of this ruling.
- The Applicant/Appellant to pay the Respondent taxed costs of \$(b)\$ this application within 60 days from the date of this ruling.
- The Applicant/Appellant to file a record of appeal within 60 \$(c)\$ days from the date of this ruling.
- In default of the above, the appeal shall accordingly be \$(d)\$ dismissed.

Order accordingly.

Dated at Hoima this 19th day of July, 2024.

Byaruhanga Jesse Rugyema JUDGE

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