

UGANDA / JUDGMENT

Kinaho v Kamukama

(Miscellaneous Application 6 of 2023) [2024] UGHC 135 (5 April 2024)

[2024] UGHC 135

COURT

High Court of Uganda

BEFORE

Allan Nshimye, J

CASE / FILE NUMBER

Miscellaneous Application 6 of 2023

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-MA-06-2023 5 (ARISING FROM HCT-05-CV-CA-0103-2022) (ALL ARISING
OUT OF CIVIL SUIT NO.0073 OF 2018)**

KINAHU MARGRET ----- APPLICANT

10 VERSUS

KAMUKAMA ALON ----- RESPONDENT

BEFORE: Hon. Justice Nshimye Allan Paul M.

RULING**REPRESENTATION**

The Applicant was represented by M/s Ngaruye Ruhindi, Spencer & Co. 20 Advocates, while the Respondent was represented by M/s Mwesigwa Rukutana & Co Advocates.

BACKGROUND

The applicant herein was a successful party in HCMA 253 of 2021, whereby the 25 High Court granted her application to enlarge time to file an Appeal. She was ordered among others, to file an appeal within 15 days of the ruling in HCMA 253 of 2021 delivered on 14th October 2022. The applicant did not file the appeal as ordered, which has prompted the filling of this application.

- 30 This Application was brought by way of a Notice of Motion under Section 98 of the Civil Procedure Act Cap 71 and Order 51 Rules 1,3 and 6 of the Civil Procedure Rules (CPR) SI 71-1 seeking orders that;
- 1. The Applicant's appeal *vide* Civil Appeal No.103 of 2022 be validated.
- 2. The costs of this Application be in the main cause.

The Application is supported by an affidavit deposed by the Applicant and was opposed through an affidavit deposed by the Respondent.

5 GROUNDS

The grounds as stated in the notice of motion are;

- 1. The Applicant was sued by the respondent in Civil Suit No.0073 of 2018.
- 2. That the Applicant filed an application for leave to appeal out of time before this Honourable Court.
- 10 3. That the application was granted and the Applicant ordered to file an appeal within 15 days from the date of the order.
- 4. That however the appeal was not filed within the said 15 days due to a mistake of counsel.
- 5. That the Applicant's appeal has merit.
- 15 6. That there is sufficient reason to validate the Appeal.
- 7. That the time to appeal has already expired.
- 8. The justice of this case warrants the grant of extension of time to appeal.
- 9. The Applicant has sufficient cause for not filing the appeal in time.
- 10. That the Applicant is interested in appealing against the judgment and the
- 20 orders issued by the Court.
- 11. It is just, equitable and in the interest of justice that this Application is allowed.

SUBMISSIONS

25 Both parties filed written submissions. The Applicant filed her submissions on 15th May, 2023, while the Respondent filed her submissions on 25th May, 2023.

Applicant's submissions

It was submitted for the Applicant that it was the fault of her former lawyers 30 who did not inform her that this Court had authorized her to file an appeal out of time within 15 days, nor did they file the appeal within the stated time; and that the lawyer's fault should not be visited on the her (see **BANCO ARABE EPANOL VS BANK OF UGANDA SCCA NO.8 OF 1998** and **ENGINEERING TRADE LINKS LTD VS DFCU BANK LTD MISC APPLICATION NO.593 OF 2012**). Counsel

35 prayed for the application to be granted.

Respondent's submissions

Counsel for the respondent raised a preliminary objection that the Application was served out of time without seeking extension of time by the Court, thereby

- 5 making it incurably defective (see **FREDERICK JAMES JJUNJU AND ANOTHER VS MADHIVANI GROUP LTD & ANOTHER MISC APPLICATION NO.688 OF 2015**). Regarding merits of the application, counsel argued that the Applicant failed to show sufficient reason why she did not file the appeal within time. Counsel contended that this application is meant to deny the Respondent the fruit of
- 10 finality of litigation. Counsel prayed for the application to be dismissed with costs.

The Applicant did not rejoin.

15 DETERMINATION

I will first consider the preliminary objection raised by the Respondent's counsel. He contended that the Application was served out of time without seeking extension of time by the Court, thereby making it incurably defective.

20 In principle Notices of Motion have to be served in accordance with the provisions of Order 5 CPR as stipulated in Order 49 Rule 2 CPR.

Order 5 Rule 1 (2) of the CPR provides that;

- *"Service of summons issued under subrule (1) of this rule shall be affected* 25 *within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension".*
- 30 Order 49 rule 2 of the CPR provides that;

"Orders and notices how served. All orders, notices and documents required by the Act to be given to or served on any person shall be served in the manner provided for the service 35 *of summons."*

This means that a Notice of Motion by implication of Order 49 Rule 2 of the CPR ought to be served within 21 days stated in Order 5 Rule 1 (2) of the CPR.

The evidence on court record shows that HCMA was endorsed by the Deputy 5 Registrar ready for service on 13th January 2023. The affidavit of service of Kamukama Saturday states that he served the respondent's lawyers on 15th March 2023. This was beyond the 21 days stipulated in the law. This shows that the respondent was served outside the time stipulated in the law as is stated in Order 5 Rule 2 CPR. I therefore find that HCMA 06 of 20203 is subject to 10 summary dismissal under Order 5 Rule 3 CPR.

On the merits of the Application, it is noteworthy that despite the applicant herein having been a successful party in HCMA 253 of 2021, whereby the High Court granted her application to enlarge time to file an appeal. She was ordered 15 among others to file an appeal within 15 days of the ruling in HCMA 253 of 2021 delivered on 14th October 2022, she did not file the appeal as directed by court within the 15 days. The Applicant's current lawyer's M/s Ngaruye Ruhindi, Spencer & Co. Advocates filed a memorandum of appeal *vide* Civil Appeal No.103 of 2022 on 9th December, 2022 and was endorsed by the learned Deputy Registrar on 12th 20 December, 2022. It is this memorandum that the Applicant seeks to validate.

I am of the considered opinion that where a party does not carry out orders as ordered by court, the remedy is to seek an extension of time to comply as is 25 provided in Order 51 Rule 6 of the CPR. In this case, the applicant was ordered to file an appeal within 15 days vide HCMA 253 of 2021. This was not complied with by the applicant.

- I have studied the notice of Motion as filed in this court and note that the 30 applicant did not seek any order to extend time to file an appeal, instead sought an order to validate an appeal vide Civil Appeal 103 of 2022. I believe that without extension of time, no validation can be done. There is no law that refers to validation, but there is a law that refers to extension of time in Order 51 Rule 6 of the CPR. An application filed under Order 51 Rule 6 of the CPR allows court
- 35 consider the law and the conditions required in the analysis of such application, which would include determination whether sufficient cause is shown.

I find that this application is bad in law as it was not served as prescribed in order 5 of the CPR, secondly, I note that the application is frivolous since it is not seeking any extension of time as required in Order 51 Rule 6 of the CPR, and thirdly the documents filed in Civil Appeal no 103 of 2022 were filed illegally,

without legal sanction of court.

I therefore order that

- 1. This application is dismissed.
- 2. The High Court Civil Appeal no 103 of 2022 is struck out.

- 3. The Applicant shall pay the Respondent's costs of this application.

writers

NSHIMYE ALLAN PAUL M. JUDGE 05-04-2024

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