

Kisomose v Kkantana Investment Limited
(Miscellaneous Application 822 of 2024)
[2025] UGHCLD 34 (21 February 2025)
 [2025] UGHCLD 34

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- i) Leave to appeal out of time be granted to the applicant against the decision of Her Worship Birungi Phionah.

- ii) Stay of execution of judgement of her worship Birungi Phionah be granted pending the hearing and determination of the intended appeal.
- iii) The eviction vide Exec. Application No. 046 of 2023 arising from Civil Suit No. 050 of 2021 be stayed until the determination of the intended appeal.

iv) Costs of the application be provided for.

Applicant's evidence;

- 2. The application is supported by an affidavit deponed by the applicant which briefly states as follows;
- i) That I filed Misc. Application No. 020 of 2022 before the Chief Magistrate Court of Kajjansi to set aside the default judgement and exparte proceedings in Civil Suit No.50 of 2021 wherein Her Worship Birungi Phionah dismissed the said application with costs.
- ii) That I know the case was determined without giving me a fair hearing and my efforts to mediate with the respondent did not yield anything.
- iii) That I have valid grounds upon which my appeal shall lie with likelihood of success.
- iv) That there is a serious threat of eviction scheduled to take place on the 28th of April 2024 before the intended appeal in the High Court is filed.

Respondent's evidence;

- 3. The application is responded to by an affidavit in reply deponed by Mr. Kwizera Bernald, the director at the respondent company which briefly states as follows;
- i) That I filed Civil Suit No. 050 of 2021 on behalf of the respondent as its managing director and it is true the summons was not served on the applicant.
- ii) That the respondent followed up the case and ensured that summons was issued and served onto the applicant on the 15th of June 2022 through his wife Nakiyemba Amina whom the applicant gave permission to receive them on his behalf.
- iii) That after the applicant was served with summons to file a defence, he did not file his defence and on the 07th of July

2022 the respondent applied for an interlocutory judgement which the court granted.

- iv) That the respondent served the application for interlocutory judgement and the interlocutory judgement onto the applicant.
- v) That the respondent served the applicant with locus notices which he acknowledged.
- vi) The applicant was given an opportunity to file an application to set aside the default judgement through his lawyers and he filed the same vide Misc. Application No. 020 of 2022 which was heard and dismissed with costs.
- vii) That the applicant's counsel attended the locus visit and fully represented the applicant on the 13th April 2023.
- viii) That on the 24th of August 2023 the trial magistrate delivered her judgement and both parties were present.
- ix) That it is my humble prayer that the instant application be dismissed.

Representation;

4. The applicant was represented by Counsel Muwanguzi Fredrick of M/S Nshemereirwe, Arigye & Co. Advocates whereas the respondent was not represented but Mr. Kwizera Bernald the Managing Director of the respondent company was present. Both parties filed written submissions which I have considered in the determination of this application.

Issues for determination;

Whether the applicant should be granted leave to appeal out of time against the decision of her Worship Birungi Phionah.

Whether the orders vide Civil Suit No.050 of 2021 can be stayed pending the hearing of the intended appeal.

Resolution and determination of the issues;

Issue 1; Whether the applicant should be granted leave to appeal out of time against the decision of her Worship Birungi Phionah

5. Counsel for the applicant raised a preliminary objection in his submissions in support filed on the 17th of December 2024 to the effect that the affidavit in reply was filed out of the statutory timelines as provided for in the Civil Procedure Rules.
- 6. Counsel for the applicant states that the application was served on the respondent on the 24th October 2024 and he filed a reply to the same on the 9th of December 2024 and served the same on the applicant on the 10th of December 2024 without any application to enlarge time within which to file an affidavit in reply.
- 7. Counsel for the applicant further stated that the affidavit in reply is incompetent as the deponent lacks the authority to represent the company and prayed the same to be struck

out.

- 8. As to whether the said affidavit in reply was filed out of time or not?
- 9. The decision in **Stop and See(U) Ltd Vs Tropical Bank Ltd HCMA No.333 Of 2010** where Justice Christpoher Madrama held that interlocutory applications follow the same timelines as that of a plaint and written statement of defence, failure to file an affidavit in reply within the 15 days would put the defence or affidavit in reply out of the prescribed time lines and once a party is out of time they ought to seek leave of court.
- 10. In the instant application it is the evidence of the applicant that the respondent was served with the application on the 24th of October 2024 as per the affidavit of service and the respondent

does not dispute the same. The respondent responded to the same on the 9th of December 2024 which is way beyond the 15 days timeline provided for without any application for leave or extension of time to file the same.

- 11. Being guided by the different decisions of court and the provisions of the civil procedure rules, I hereby struck out the respondent's affidavit in reply for being filed out of the prescribed time.
- 12. I do not find it necessary to resolve the second preliminary objection, this court will proceed to the merits of the application.
- 13. Counsel for the applicant submits that the civil procedure act under Section 96 states that any period fixed or granted by court for doing a prescribed act can be enlarged even though the said period may have expired.
- 14. Counsel for the applicant drew reference to Section 79(1)b of the civil procedure act and the decision in **Andrew Bamanya Vs Shamsherali Zaver** by the Supreme Court **Civil Application No. 70 of 2011** where court held that mistake of counsel should not be vested on the litigant.
- 15. Counsel for the applicant further submitted that the applicant was not aware of what to do next after the judgement was delivered and the lawyer that represented him then never explained to him what steps to take in case of dissatisfaction with the said judgement hence the delay. The intended appeal raises serious points of law that merit judicial consideration on appeal.
- 16. An order granting leave to file an appeal is discretionary in nature and the applicant ought to know that at one moment litigation has to come to an end.

- 17. Court in **Across African clearing and forwarding Co. Ltd v Uganda Revenue Authority & Anor** MA. No. 0003 of 2012 citing the authority of **Degeya trading stores (U) ltd v Uganda Revenue Authority CACA No.16 of 1996**, their Lordships of the Court of Appeal observed that an applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct.
- 18. In the instant application, counsel for the applicant submitted that not being able to file the appeal within the prescribed time

was due to the negligence of his former counsel who never informed him of what to do next and the delays in having the instant application fixed was because the judge in personal conduct had gone on leave and the application had to be reallocated to another judge.

- 19. The said judgement by the trial magistrate was delivered on the 24th of August 2023 and the instant application filed on the 4th of April 2024, counsel for the applicant alleges that the delay was caused by the negligence of the applicant's lawyers which should not be vested on the applicant.
- 20. Parties should take note that while determining applications of such a nature, courts do not consider the merits of the case but rather ascertain whether the applicant is not guilty of dilatory conduct or he has arguable grounds of appeal.
- 21. Being guided by the supreme court position in the decision of **Andrew Bamanya vs Shamsherali Zaver**(supra) where an application for leave to file an appeal was granted where there was a delay of 2 and half years to file the same.
- 22. This court is of the finding that the applicant has shown a good cause as to why the appeal was not filed within time and he cannot be faulted for dilatory conduct because negligence of counsel cannot be vested on the client.
- 23. Therefore, the applicant is hereby granted leave to file the said appeal out of time

Issue 2; Whether the orders vide Civil Suit No.050 of 2021 can be stayed pending the hearing of the intended appeal.

- 24. Counsel for the applicant submitted that the execution proceedings should be stayed pending an appeal to the High Court. The first condition to be met in an application for stay of execution pending appeal is that there should be an appeal in before court. Appeals to the high court as per the provisions of order 43 rule 1 is to the effect that every appeal to the high court shall be preferred in a form of memorandum of appeal signed by the appellant and presented to court.
- 25. The memorandum of appeal attached onto the instant application is a draft and the same has never been presented to court. Further the applicant just applied to court in the instant

application to file his appeal out of time, all the above averments take me to a finding that there exists no appeal at the moment before court.

- 26. In the result, I find that the applicant's prayer of having execution stayed pending appeal when there is no appeal before court to be premature and misplaced.
- 27. Therefore, the instant application partially succeeds with the following orders;
- i) The applicant is hereby granted leave to file an appeal against the decision of Her worship Birungi Phionah vide Civil Suit No.50 of 2021 out of time.
- ii) The eviction vide Execution Misc. Application No. 046 of 2023 arising from Civil Suit No. 050 of 2021 is hereby not stayed by this court.
- iii) No orders as to costs.

I SO ORDER.

NALUZZE AISHA BATALA

Ag. JUDGE

21st/02/2025

Delivered Electronically via ECCMIS on the 21st day of February 2025.

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