

UGANDA / JUDGMENT

Mburabwikyo v Kiiza Balamu

(Miscellaneous Application 44 of 2022) [2024] UGHC 468 (31 May 2024)

[2024] UGHC 468

COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Miscellaneous Application 44 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT HOIMA****MISC. APPLICATION NO. 044 OF 2022 (Arising from Hoima Land Civil Suit No. 068 of 2011)****ERASTO MBURABWIKYO::: APPLICANT****VERSUS****BALAMU KIIZA::: RESPONDENT*****BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA* RULING**

- [1] This application is brought under **O.51 r 6, O.52 rr 1 & 3 CPR, Ss 96 & 98 CPA** for leave to be granted to the Applicant to enlarge time within which to file an appeal against the judgment and orders of the Grade I Magistrate, Hoima.
- [2] The Application is supported by the affidavit in support deposed by **Mwesigwa Dan**, the lawful attorney of the Applicant herein and is opposed by **Balamu Kiiza**, the Respondent.

Background:

- [3] In 2011, the Respondent instituted **C. S. No. 68 of 2011** in Hoima Chief Magistrate's Court for trespass to land against the Applicant and the same was determined in his favour. The Applicant dissatisfied with the judgment instructed his former lawyers, **Alibankoha & Co. Advocates** to file an appeal against the decision and orders of the learned trial Magistrate. The appeal was dismissed for non-attendance.
- [4] The Applicant then filed an application for reinstatement of the appeal through another firm, **M/S Musinguzi & Co. Advocates** which was also dismissed on the grounds that the appeal the Applicant was seeking to reinstate had been filed out of time hence incompetent and secondly, that the memorandum of appeal had not been served upon the Respondent within the stipulated time of 21 days.
 - [5] It is upon this background that the present application was filed seeking for leave to enlarge time within which to file the appeal on the following grounds: -
 - (a) The appeal has high chances of succeeding but that the Applicant was let down by his former lawyer to file the appeal in time.
 - (b) The application is brought without unreasonable delay.
 - (c) The Applicant is bound to suffer general damages, if this application is not granted.
 - (d) It is in the interest of justice that this application be granted.
 - [6] On the other hand, the Respondent opposed the application on the ground that the application does not disclose any sufficient reasons for the grant of this application.
 - [7] The Applicant was represented by **Ms. Zemei Suzan** while the Respondent was represented by **Mr. Hatega Robert**. Both Counsel filed their respective submissions for consideration in the determination of this application.
 - [8] Relying on the case of **Banco Arabe Espanol Vs Bank of Uganda S. C. C. A No. 8 of 1998**, Counsel for the Applicant submitted that the Applicant was delayed in filing the Appeal as pleaded in a series of applications he presented for determination by his former Counsel who he instructed to file the Appeal, trusting their professional services in the legal realm but was let him down. The learned Counsel argued that it is trite law that a vigilant Applicant should not be penalised for the fault of his Counsel on whose actions she has no control. She implored this court not to penalise the Applicant for the mistakes of Counsel who filed a memorandum of Appeal in the name of the Applicant out of time.
 - [9] Counsel for the Respondent on the other hand submitted that the Applicant has kept the Respondent in court for a long time since 2011. He failed to pay the costs and damages entered against him by lower court. That the interest of the Applicant is only to disturb the Respondent by continuing to file frivolous and vexatious applications and therefore, granting this application shall be to the detriment and an injustice to the Respondent. Lastly,

that the Applicant is not being truthful when he attributes the delay to file the Appeal in time to his former lawyers because there is no evidence that any lawyer was instructed by the Applicant to file an appeal. That all the appeal documents on record; the notice and memorandum of appeal were filed by the Applicant in his personal capacity.

- **Issue: Whether the Applicant has established sufficient reasons for the court to extend the time in which to lodge the Appeal:**
- [10] In **Muga & Ors Vs Wanjiru & Anor** [1970] E. A 481 at 484, **Duff P.** observed thus:

"Each application must be decided in the particular circumstances of each case both as a general rule, the Applicant must satisfactorily explain the reason for delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application".

- [11] In the instant case, the main reason that the Applicant has advanced as a ground or reason for allowing this application is that the appeal has high chances of succeeding but the Applicant was let down by his former lawyer who did not file the appeal in time.
- [12] As rightly submitted by Counsel for the Respondent, this is a disturbing case where the Applicant has kept the Respondent in court for long since 2011. This has definitely had an effect on the Respondent for a lot of costs have been incurred as a result of the Applicant's conduct. However, under **O.51 r.6 CPR** and **Ss 96 & 98 CPA**, this court has a wide discretion, from time to time, to enlarge time for the doing on any act prescribed or allowed by the Act.
- [13] The Applicant has in this case persistently filed one application after the other trying to pursue his right of appeal against the decision of the Chief Magistrate's Court in **C. S No. 68 of 2011**. In my view, this is evidence that the intention of the Applicant from the date the lower court delivered judgment, was to appeal against the decision but has suffered a series of unfortunate events of dismissal of his applications.
- [14] As was held in: **H. C. MISC. Application No. 126 of 2019: Abel Balemesa Vs Mugenyi**:

".... Courts should strive to sustain rather than dismiss suit especially where justice would still be done and a fair trial had.....".

- [15] In the peculiar circumstances of this case, in the interests of justice and in a bid not to shut out the appeal, I am inclined to grant this application. I however note that in **first** instance, the Applicant has never paid the costs and damages awarded to the Respondent in the lower court. **Secondly**, on 16/5/2017, the Applicant's appeal was dismissed with costs for non-attendance. **Thirdly**, the Applicant's **M. A No. 51 of 2017** for reinstatement of appeal was also dismissed with costs in favour of the Respondent. Whereas it is understandable as to why the Applicant never paid the costs and damages awarded to the Respondent in the lower court since he was interested in appealing against the decision, the demands of justice will require that the subsequent costs arising from his applications against the Respondent are first recovered by the Respondent before the Applicant is granted leave to file an appeal

against the decision in **C. S. No. 68 of 2011**.

- [16] This application is in the premises, therefore granted on the following terms and conditions: -
- (a) Costs of this application are awarded to the Respondent.
- (b) The Respondent to prepare and file his bill of costs for this Application, in **H. C Civil Appeal No. 60 of 2015** and **H. C. M. A No. 51 of 2017** within 30 days from the date of the delivery of this ruling for taxation by the Registrar of this Court.
- (c) The Applicant is granted leave to file an appeal against the judgment and orders in **C. S No. 68 of 2011** upon payment of costs in "a" & "b" within 30 days from the date of taxation of the Respondent's bill of costs above.
- (d) In default of the above terms and conditions, the Registrar of this Court to immediately thereafter forward the lower court file to the Chief Magistrate's Court for its final conclusion.

Order accordingly.

Dated at Hoima this 31st day of May, 2024.

..... **Byaruhanga Jesse Rugyema JUDGE**

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