

UGANDA / JUDGMENT

Okello v Okello (Miscellaneous Application 32 of 2024) [2024] UGHC 1114 (27 December 2024) [2024] UGHC 1114

COURT

High Court of Uganda

BEFORE

Philip W Mwaka

CASE / FILE NUMBER

Miscellaneous Application 32 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KITGUM

MISCELLANEOUS APPLICATION No. 032/2024

(Arising from HIGH COURT KITGUM - CIVIL APPEAL No. 011/2023)

**5 (Formerly HIGH COURT GULU - CIVIL APPEAL No. 046/2023) (ARISING FROM
CIVIL SUIT No. 29/2019: MAGISTRATE PATONGO) OKELLO JIMMY
(ADMINISTRATOR, ESTATE OF THE LATE
OKELLO MATEO PARAA) APPLICANT**

10 Versus

YASINTO OKELLO RESPONDENT

BEFORE HON. MR. JUSTICE PHILIP W. MWAKA.

RULING.

Introduction and Background.

- 15 [1]. The Applicant seeks Orders from this Court firstly, for leave to file a Memorandum of Appeal out of time (enlargement of time) arising from Civil Suit No. 029/2019 and, secondly, provision for Costs of the Application.
- [2]. The Motion instituting the Application was filed on the 6 th March, 2024 while the Judgment of the Lower (Trial) Court was delivered on the 11th May, 2023 about eleven (10) months after - bearing in mind that such an Appeal should have been instituted within thirty (30) days expiring on the 10th June, 2023.
- [3]. The Application is instituted by way of Notice of Motion under **Section 33 (now S. 37) of the Judicature Act, Cap. 13 (now Cap. 16); Section 98 of the Civil Procedure Act, Cap. 71 (now Cap. 282); Order 51 Rule 6 and 25 Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules, SI 71 - 1.**
- [4]. These citations were revised by the **Law Revision Act, Cap. 3 and Statutory Instrument No. 049/2024: The Law Revision (Commencement of the 7 th Revised Edition) (Principal Laws) Instrument, 2024.**
- [5]. An Affidavit supporting the Application is attached deposed by the Applicant 30 whom is the Intended Appellant and was the Defendant at the Trial in the Lower Court.

The Applicant's Case and Submissions.

- [6]. The Applicant's grounds are set in the Motion and expounded upon in the 35 supporting Affidavit and are: - he was prevented from filing a Memorandum of Appeal because of delays in accessing the Record of Proceedings of the Lower Trial Court; he was unrepresented in the Lower Court and as such he could not understand the Legal and procedural aspects of Appeals because of illiteracy; unless the time within which to file and serve the Memorandum of 40 Appeal is extended and, or enlarged he will be prejudiced as the Respondent has commenced execution of the Orders of the Lower Court against him and the suit land may be disposed of; the Memorandum of Appeal **"to be filed"** should be validated; and lastly, it is just and equitable that the Application is granted.

- 45 [7]. The Court observes that there is no Memorandum of Appeal placed before it or on Court Record to validate. Instead, on Record is a Notice of Appeal filed in the High Court Gulu Circuit on the 23rd May, 2023 designating the matter as **Civil Appeal No. 046/2023**. The file was later transferred to the High Court Kitgum Circuit on the 26th March, 2024 and is designated as **Civil 50 Appeal No. 11/2023**.
- [8]. In his supporting Affidavit the Applicant reiterates the grounds and substantiates that it was not until he sought advice from his current Lawyers that he was advised on the Legal and procedural aspects in regard to pursuit of Appeals and the need to file a Memorandum of Appeal.
- [9]. The Applicant filed Written Submissions on the 4th 55 June, 2024 and submits that the Appellate Court may for good cause admit an Appeal though the period of limitation prescribed by **Section 79 of the Civil Procedure Act** has elapsed also citing **Order 51 Rule 6 of the Civil Procedure Rules** on enlargement of time as well as the inherent powers of the Court under 60 **Section 98 of the Civil Procedure Act**.
- [10]. The Applicant cites, **inter alia**, **Misc. Application No. 8/2014: Tight Security Ltd Vs. Chartis Insurance Co. Ltd & Another** for the proposition that *"good cause"* must relate to and include factors which caused inability to file an Appeal within the prescribed time and the phrase *"good"* 65 *"cause"* is wider and includes other causes than delay such as public importance of an Appeal and the Court shall not restrict the meaning of good cause. Each case should be determined on its fact and circumstances.
- [11]. It is the Applicant's case that the grounds cited including his being illiterate and ignorant of legal processes and procedures as well as delays in accessing 70 the Record of Proceedings from the Lower Court constitute good cause for not filing the Appeal within Thirty (30) days and he should be granted leave to Appeal out of time.
- [12]. It is his contention that he meets the criteria for grant of the Application based on Authorities cited including having an arguable Appeal and desire to 75 prosecute it.

See: Supreme Court Civil Application No. 27/2010: Molly Kyalukinda Turinawe & Others Vs. Engineer Turinawe & Another.

[13]. It is the Applicant's case for grant of the Application that he would suffer injustice and risks losing land on which his family resides and derives its 80 sustenance hence the need for leave to Appeal. On the other, however, he claims that the Respondent will not suffer any prejudice should the Application be granted.

The Respondent's Case and Submissions.

- [14]. The Respondent filed an Affidavit in Reply on the 26 85 th March, 2024 in opposition to the Application indicating that he would raise a preliminary point of Law to the effect that the Application is bad in Law, misconceived, illegal and ought to be struck out and

subsequently averred that he too was unrepresented in the Lower Court and insists that the Lower (Trial) Court 90 explained to both Parties the right to Appeal which was translated in the Acholi language resulting in the Applicant filing the Notice of Appeal. It is his contention that ignorance of the Court's process and procedures does not afford anyone a Defence in Law.

- [15]. The Respondent disputes the Applicant's first ground regarding delays in 95 obtaining the certified Judgment and Proceedings of the Lower Court which he avers that he requested and received the Proceedings from the Lower Court on the 4th August, 2023 which he attaches bearing the same certification date as the Judgment thus showing it was available and the Applicant should have obtained it had he been interested in filing an Appeal.
- 100 [16]. Concerning the suit land, he contests the claims of its likely disposal on the basis that it is family customary land not easily disposed of and insists that the execution process has not commenced and in any case the Applicant is not in possession of the land.
- [17]. In conclusion, the Respondent aver that a Memorandum can only be validated 105 once it's on Record and avers that the Application is an abuse of process, without merit and intended to prejudice his realization of the fruits of litigation and it is just and equitable that it is disallowed.
- [18]. The Respondent filed Written Submissions on the 18th June, 2024 and raised a preliminary objection to the effect that the Application arises from an 110 Appeal not properly before the Court purportedly instituted by Notice of Appeal instead of the proper means by Memorandum of Appeal which is inconsistent with **Order 43 Rules 1 and 2 of the Civil Procedure Rules**.

[19]. It is the Respondent's case that the Application should be struck out for arising from an improperly filed Appeal cited as **No. 046/2024**. It is conceded 115 that the Application could be filed incidental to the suit concluded by the Lower Court.

See: Civil Appeal No. 40/2016: Ogbuonye Gerald Vs. Kawooya John Alex, Misc. Cause No. 63/2016: Bigirwa Moses & Anor Vs. Yoweri Kaguta Museveni and Misc. Cause No. 226/2020: Basile Difasi & 3 120 Others Vs. The National Unity Platform & Others.

- [20]. The second preliminary objection raised citing **Order 6 Rule 2 of the Civil Procedure Rules** is that the supporting affidavit being a Pleading lacks the required summary of evidence, lists of witnesses, documents and authorities to be relied on which are intended to give notice and prevent ambush and 125 miscarriage of Justice. As a consequence, the Application should be dismissed. **See: HCCS No. 978/1996: Richard Mwirivumbi Vs. Jada Ltd**
- .

- [21]. Regarding substantive matters raised in the Application, the Respondent contends that there was inordinate and unexplainable delay beyond the stipulated time with the Judgment delivered on the 11th May, 2023 and this Application filed on the 6th March, 2024 a period of almost a year manifesting indolence with the Applicant not following up the Appeal. The Appeal is an afterthought and abuse of process.
- [22]. The Respondent further contends that grant of this Application would prejudice and delay his enforcement of the Decree and inconvenience him ¹³⁵ and it has not proved that the intended Appeal is arguable not having been provided with a draft Memorandum of Appeal. **See: Misc. Application No. 122/2018: Hosea Sonko & Others Vs. D. K. Banoba.**
- [23]. Regarding the merits of the Application, it is submitted that the Applicant has not provided sufficient grounds for grant with the reasons advanced lacking ¹⁴⁰ in substance. Ignorance of procedure should not always be a scapegoat for late filings.

See: Shanti Vs. Hindocha [1973] EA 207 and Mugo Vs. Wanjiri (1970) EA 481.

[24]. In conclusion, the Respondent prays that the Court finds the Application is ¹⁴⁵ without merit and should be dismissed with costs – though should the Application be granted costs should be awarded to the Respondent.

Rejoinder and Submissions.

- [25]. No Affidavit in Rejoinder was filed. The Applicant filed Submissions in Rejoinder on the 26th July, 2024 reiterating his earlier submissions and in regard to the first preliminary objection on point of Law submitted that it is the Court that assigned the *"tentative"* number **Civil Appeal No. 046/2024** upon him filing of the Notice of Appeal for which he should not be penalized and substantive Justice should be administered.
- ¹⁵⁵ **See: SCCA No. 2/1997: Kasirye, Byaruhanga & Co. Advocates Vs. Uganda Development Bank and SCCA No. 18/2009: Horizon Coaches Vs. Edward Rurangaranga.**
- [26]. Responding to the second objection, he concedes to the requirement for the brief summary and specified lists required and supporting Pleadings under ¹⁶⁰ **Order 6 Rule 2 of the Civil Procedure Rules** to avoid ambush thereby giving due notice but insists that it is a curable irregularity with the Affidavit as an example being evidence on its own without the need for repetition.
- [27]. In conclusion, he prayed that the objections are dismissed.

Representation.

- ¹⁶⁵ [28]. Counsel, Ms. Lakaraber Eunice Latim, represented the Applicant. The Applicant attended the Proceedings.

- [29]. Counsel, Mr. Olet Emmanuel, represented the Respondent. The Respondent attended the Proceedings.

Proceedings of the Court.

[30]. The Court proceedings were on the 3rd September, 2024 and 22 170 nd May, 2024

Issues for Consideration.

[31]. The Issues for consideration to be addressed by the Court are –

Whether the Application is competently before the Court and Whether the Applicant has shown sufficient cause for the Court to Judiciously 175 exercise its discretion to enlarge time or grant leave to Appeal out of time.

Considerations and Determination of the Court.

- [32]. **Section 79(1)(a) of the Civil Procedure Act** prescribes the time within 180 which an Appeal to the High Court from a Lower (Trial) Court may be instituted as Thirty (30) days from the date of the Decree or Order sought to be Appealed against being the date of delivery of the Judgment. The mode of instituting an Appeal is stipulated by **Order 43 Rules 1 and 2 of the Civil Procedure Rules** and it is instituted by presenting a Memorandum of Appeal 185 with grounds arising concisely framed to be duly addressed by the Court.
- [33]. It is now trite and well understood that filing a Notice of Appeal in purporting to institute an Appeal to the High Court from the decision of a Lower (Trial) Court instead of the stipulated Memorandum of Appeal is an error in Law and of no consequence in furthering one's intended Appeal – other than 190 perhaps indicating a request for the certified Judgment and Proceedings of the Lower Court – more especially where there is no follow up with filing the requisite Memorandum of Appeal within the stipulated Thirty (30) days as seems to too often be the case - including in the instant matter.
- [34]. Moreover, it is also now trite and well understood that an Appeal filed 195 belatedly and without leave is generally incompetent. In all these instances, the consequence is that the improperly instituted and offending purported Appeals are struck out.
- [35]. Notwithstanding the long line of Authorities establishing this position which abound, litigants both *Pro Se* and represented by Counsel continue to 200 disregard and, or otherwise offend the provisions of **Order 43 Rule 1 of the Civil Procedure Rules**.
- [36]. As highlighted by the Applicant herein, the Court Registries are often complicit in designating Appeal Numbers to Notices of Appeal often referring to them as *"holding numbers"* – here now given **No. 11/2023 (Kitgum)** 205 and previously **No. 046/2023 (Gulu)** - pending the anticipated timely filing of a Memorandum of Appeal which often lapses even as the Courts conscious of the impropriety continue to strike out the Notices of Appeal with regularity and as a generally mandatory consequence.

- [37]. It goes without saying that the unattended to and incompetent Notices of 210 Appeal designated *"holding numbers"* and not duly followed up not only bloat the perceived number of purported *"registered"* and, or *"pending"* cases but also exaggerate the perception of *"backlog"* cases in the Judiciary system.
- [38]. Moving forward they are best not designated Appeal numbers for being incompetent or otherwise best struck out by the Courts upon the lapse of the 215 time within which the Appeal should be properly instituted.
- [39]. Accordingly, without hesitation, this Court strikes out the Notice of Appeal designated *"holding number"* **Civil Appeal No. 11/2023 (Kitgum)**. It was correctly submitted that an Application for leave to Appeal may originate from the suit itself being the subject of the Appeal.
- 220 [40]. Notwithstanding, regarding the first preliminary point, it does not follow that the Application itself ought to be struck out and as earlier conceded the Application originates from the suit itself of which the Judgment is the subject of the Appeal. The reference in the title to the Application - arising from **Civil Appeal No. 11/2023** is simply superfluous and even when erased the 225 Application remains competently before the Court.
- [41]. Regarding the second preliminary point, on the need to include with the Application the summary of evidence, list of Witnesses, list of Documents and list of Authorities as provided by **Order 6 Rule 2 of the Civil Procedure Rules** and whether omission is fatal, the position is unsettled. While some 230 High Court authorities indicate that it is fatal such as **HCCS No. 819/1998: Kizito Conrad Vs. National Medical Stores** other High Court decisions indicate otherwise such as **Misc. Application No. 74/2007: DFCU Leasing Co. Ltd Vs. Nasolo Faridah** in which the objection was overruled. [42]. The consensus in the decisions is that due notice must be duly given to the 235 other party. To that extent, it is considered in respect of Applications that the Affidavit already contains the evidence, while the witnesses are already apparent from observing the deponents of the Affidavits, the Authorities are already cited in the title as the basis of the Application and any documents to
- be relied on must be duly commissioned and attached to the respective 240 affidavits.
- [43]. The Court finds that litigants filing Applications as in the instant matter must comply with **Order 6 Rule 2 of the Civil Procedure Rules**. However, a lapse may be cured by prompt compliance and is not always fatal. Here, the Court overrules the second objection on the basis of administering substantive 245 Justice.

See: HCMA No. 257/2022: Sanlam General Insurance Ltd. Vs. Quality Milk Dairies Ltd and HCMA No. 656/2005: Samwiri Kibuuka Vs. Eriya Lugeya Lubanga.

[44]. Substantively, it is apparent that the certified Judgment and the certified 250 Record of Proceedings of the Lower Trial Court were available to the parties from as early as the 4th August, 2023 – noting that this Application was filed on the 6th March, 2024 being about Seven (7) months later. Copies are on the Record of the Court certified on 4th August, 2023.

- [45]. This gives credence to the claim that the Applicant was less than diligent in 255 pursuing the Appeal and at the same time puts into question the Applicant's credibility in claiming failure to access it.
- [46]. Had the Applicant obtained the certified Judgment and Proceedings timely, he could simply have filed the Memorandum of Appeal and taken advantage of the provisions adjusting the limitation by taking into account the time taken 260 in preparing the documents required for the Appeal. He failed this.

See: Section 79(2) of the Civil Procedure Act.

- [47]. Thus, the only credible ground which remains is the *"layman"* or *"Ignorantia Juris"* argument wherein the Applicant claims illiteracy as the basis of not being aware that a Memorandum of Appeal was required to be filed within 265 Thirty (30) days to properly and timely institute an Appeal.
- [48]. The Court accepts that the Applicant failed to file a Memorandum of Appeal timely due to not being aware of the requirement to do so. This in the circumstances constitutes sufficient cause. It is significant that he prepared and filed the Notice of Appeal himself without the aid of Counsel.

270 See: Misc. Application No. 140/2023: Obonyo Peter Vs. Otto Alex Atik & 2 Others.

- [49]. In respect of whether the Appeal raises arguable grounds, the Applicant raises Three (3) grounds cited in his Submissions. It would, however, have been best practice to attach to the Application a draft Memorandum of Appeal with the 275 grounds duly framed in the manner provided by the Rules. Notwithstanding, the Court is satisfied that there are grounds to duly address in the Appeal.
- [50]. In the final result, the Applicant has established a ground for grant of the Application and it is in the interests of Justice that he is allowed to present and argue his Appeal. No prejudice is occasioned to the Respondent as he 280 will have the opportunity to respond on the merits.
- [51]. Accordingly, in the final result the Court grants the Application and hereby exercises its discretion to grant the Applicant leave to Appeal out of time.

- [52]. Having carefully given due consideration to the Application with its supporting Affidavit, the responsive Affidavit, the respective Annextures and 285 the respective Submissions and upon consideration of the Law applicable and taking into account all relevant factors and in the circumstances of the case, the Court hereby grants the Application and the Applicant is hereby given leave to Appeal out of time by filing a Memorandum of Appeal within Thirty (30) days of the delivery of this decision.
- 290 [53]. Each party shall bear their own costs.

Orders of the Court.

- [54]. Accordingly, the Court makes the following Orders:
- 1. **Miscellaneous Application No. 032/2024** is hereby granted.
- 295 2. The Applicant is hereby granted leave to Appeal out of time by filing a Memorandum of Appeal within Thirty (30) days of the delivery of this decision.
- 3. Notice of Appeal *vide* **Civil Appeal No. 11/2023** is hereby struck out.
- 4. Each party shall meet bear their own costs.
- 300 It is so Ordered.

Signed and Dated on the 27 th day of December, 2024 at High Court Kitgum

Circuit.

Philip W. Mwaka

Acting Judge of the High Court.

Delivery and Attendance.

- This signed and dated Ruling has on the directions of the Presiding Judge been 310 delivered to the Parties electronically by the Deputy Registrar, High Court Kitgum Circuit.
- 1. Deputy Registrar,
- 2. Counsel for the Applicant
- High Court Kitgum Circuit - Her Worship Suzanne Aisia Musooli.
- 315
- Ms. Eunice Lakaraber.
- 3. The Applicant - Mr. Okello Jimmy.
- 4. Counsel for the Respondent - Mr. Olet Emmanuel.
- 5. The Respondent - Mr. Yasinto Okello.

- 6. Court Clerk and Interpreter: Mr. Atube Michael.
- 7. Interested and Affected Persons and Entities. 320

Philip W. Mwaka

Acting Judge of the High Court.

High Court Kitgum Circuit.

27th day of December, 2024. 325

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