

UGANDA / JUDGMENT

Oryema v Okole (Miscellaneous Application 27 of 2021) [2024]

UGHC 448 (13 June 2024)

[2024] UGHC 448

COURT

High Court of Uganda

BEFORE

Phillip Odoki, J

CASE / FILE NUMBER

Miscellaneous Application 27 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

MISCELLANEOUS APPLICATION NO. 27 OF 2021

(Arising from Gulu Chief Magistrates Court Civil Suit No. 51 of 2018)

ORYEMA SAM BAKER

(Suing as Administrator of the estate of the late Okot Santo)=====APPLICANT

VERSUS

OKOLE ISMAIL=====RESPONDENT

BEFORE HON. MR. JUSTICE PHILLIP ODOKI RULING

- [1] The Applicant filed this application, by Notice of Motion, pursuant to Section 98 of the Civil Procedure Act and Order 52 rules 1, 2 & 3 of The Civil Procedure Rules, seeking for leave of this Court to allow him file an appeal out of time against the decision of the Magistrate Grade 1 of Gulu (His Worship Kwizera Vian) dated 7th November 2019 wherein he dismissed Civil Suit No. 51 of 2018 under Order 17 rule 4 of the Civil Procedure Rules.

The Applicant's case:

[2] The grounds of this application are contained in the Notice of Motion, supported by the affidavit of the Applicant sworn on the 18th March, 2021 and another affidavit sworn on the 26th October 2021. The gist of the Applicant's case is that he filed Civil Suit No. 51 of 2018 through his lawyers, M/s Odongo & Co. Advocates. The case progressed up to the point where the parties filed Witness Statements. On the 19th June 2019 when the case came up for cross-examination of witnesses, the trial Magistrate (Her Worship Selsa Biwaga) had been transferred and no clear date for the next hearing was given to the parties. He travelled back to

Southern Sudan where he does business, with the hope that his lawyers would inform him of the new hearing date. He never heard from his lawyer on the progress of his case despite his telephone calls to them for an update on the case. When he came back to Uganda, in 2021, after the easing of movement that had been restricted due to COVID 19 pandemic, he went to his lawyers with the view to instruct them to fix the suit for hearing. He was shocked to learn from his lawyers that Civil Suit No. 51 of 2018 had been dismissed on the 27th November 2019 for his failure to produce witnesses under Order 17 rule 4 of the Civil Procedure Rules. He made an application before the trial Court, vide Misc. Application No. 1 of 2021, seeking to set aside the dismissal and to reinstate Civil Suit No. 51 of 2018. He later decided to withdraw the application with costs to the Respondent. He contends that the period for appealing against the decision of the trial court to dismiss his suit has elapsed. He filed this application for leave to file his appeal out of time. He further contends that there is likelihood of success of the appeal.

The Respondent's case:

[3] The Respondent filed an affidavit in reply opposing the application. The gist of his case is that the suit appeared in court on the 28th January 2019, 6th February 2019 and 25th April 2019, but on each of those days, the Applicant's counsel kept on seeking an adjournment. On the 10th October 2019 the suit was given the last adjournment, for the 7th November 2019. On the 7th November 2019 the suit was dismissed for failure by the Applicant to adduce evidence. A decree was extracted to that effect. The Applicant applied, vide Misc. Application No. 1 of 2021, seeking to set aside the dismissal and to reinstate Civil Suit No. 51 of 2018. When the application came up for hearing, the Applicant opted to withdraw the application. The Respondent contends that when the Applicant opted to apply to set aside the dismissal, he lost the right of appeal by operation of the law.

Legal representation and submissions:

[4] The Applicant was represented by Ms Alice Latigo of M/s Latigo & Co Advocates while the Respondent was represented by Mr. Okot Micheal of M/s Omara & Co. Advocates. The Court directed both counsel to file written submissions. Counsel for the Applicant filed her submissions. Counsel for the Respondent did not file any submissions.

- [5] In her written submissions, counsel for the Applicant raised a preliminary objection that the affidavit in reply by the Respondent was filed outside the 15 days allowed by law. On the merit of the application, she submitted that Civil Suit No. 51 of 2018 is a land matter and the Applicant has interest in pursuing it. She argued that the mistake of counsel for the Applicant should not be visited on him.

Analysis and determination of the Court:

- [6] On the preliminary objection by counsel for the Applicant that the Respondent filed his affidavit in reply outside the 15 days allowed by law. There is generally no timeline for filing affidavits in reply in applications of this nature. However, any affidavit in reply has to be filed within reasonable time to enable the opposite party a fair opportunity to respond. In **Dr. Lam-Lagoro James versus Muni University HCMC No. 0007 of 2016** where the affidavit in reply was filed nearly 5 months after the respondent had been served with the Notice of Motion, counsel for the applicant raised a similar objection that the affidavit in reply was filed out of time. In that case, my Learned brother Judge Mubiru made reference to the case of **Springwood Capital Partners Limited v. Twed Consulting Company Limited, High Court Misc. Application No. 746 of 2014**, where the court expressed the view that the same time lines for filing a written statement of defense, within 15 days after service of the summons, should apply to all interlocutory applications such that a reply to an application has to be filed within 15 days and failure to file within the 15 days puts the affidavit in reply out of the time prescribed by the rules. My Learned brother Judge Mubiru however disagreed with that view. In his view, unlike a written statement of defence which serves only one purpose of disclosing the case a defendant proposes to put forward or serving as a means of disclosing the facts which support particular issues raised by each party, an affidavit can be used in a number of important ways, most often as containing evidence to support or oppose an application. The affidavit becomes evidence in the case. In his view, this is illustrated by Order 52 rules 3 and 7 of **The Civil Procedure Rules** which indicate that the filing an affidavit alongside a motion or chamber summons is optional, only when evidence is required in support of the application. Whereas a written statement of defence presents allegations of facts the defendant will rely on, an affidavit in reply presents evidence on oath. Affidavits are a way of giving evidence to the court other than by giving oral evidence. They are intended to allow a case to run more quickly and efficiently as all parties know what evidence is before the Court. Consequently, time constraints applied to defences may be misplaced when applied to affidavits. He further expressed the view that had the rules committee considered it necessary to specify time limits for the filing of affidavits in reply, it would have stated so. The fact that the Rules Committee did not generally specify time limits for the filing of affidavits in reply is indicative of the flexibility with which it intended courts to deal with them. He concluded that;

"An affidavit in reply, being evidence rather than a pleading in stricto sensu, should be filed and served on the adverse party, within a reasonable time before the date fixed for hearing, time sufficient to allow that adverse party a fair opportunity to respond. For that reason, an affidavit in reply filed and served in circumstances which necessitate an adjournment to enable the adverse party a fair opportunity to respond,* *should not be disregarded or struck off but rather the guilty party ought to be penalized in costs for the consequential adjournment."*

[7] I agree with the reasoning of my Learned brother Judge Mubiru in the above cited case as the proper proposition of the law on the timeline for filing affidavits in reply in applications of this nature.

[8] In the instant case, the Respondent was served with the application on the 4th May 2021. The Respondent filed his affidavit in reply on the 13th October 2021. On the 14th October 2021 when this application came up for hearing, the Court allowed the Respondent to serve the Applicant with their affidavit in reply, which was done. The Applicant thereafter filed an affidavit in rejoinder on the 26th October 2021. The Applicant was therefore given a fair opportunity to respond to the affidavit in reply. I therefore find that the preliminary objection of counsel for the Applicant without any merit.

[9] On the merit of this application, Section 79(1) of the *Civil Procedure Act, Cap 71* provides that;

(1) Except as otherwise specifically provided in any other law, every appeal shall be entered—

(a) within thirty days of the date of the decree or order of the court; or (b) within seven days of the date of the order of a registrar, as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed." Underlined for emphasis.

[10] The above Section gives this Court discretion to enlarge time within which to admit an appeal. However, the discretion has to be exercised judicially. The Applicant must satisfy the court, by adducing evidence, that there was good cause which prevented the filing the appeal within the 30 days provided for by the law. What constitutes good cause or sufficient cause will naturally depend on the circumstances of each case. Enlargement of time will not be granted if the delay is inexcusably long, where injustice will be caused to the other party or where there is no reasonable justification.

[11] In the instant case, the Applicant advanced the reason that he was out of the country, in South Sudan, he made all effort to contact his counsel for an update of his case but in vein. He was only able to get information about the dismissal of his application when he returned to the country after the time to appeal against the decision had elapsed. The Respondent has not adduced any evidence to rebut the averment of the Applicant that he indeed was out of the country and was not able to get in touch with his counsel or that any injustice will be caused to him if the application is granted.

[12] In **Andrew Bamanya v Shamsherali Zaver, S. C. Civil Application. No. 70 of 2001**, where there was a delay of 2 ½ years in filing the application for leave to appeal out of time and the delay was caused by the Applicant's lawyers, the Supreme Court held that the mistakes, faults / lapses or dilatory conduct of counsel should not be visited on the litigant. The Court also held that the other principle governing applications for extension of time is that the administration of justice requires that all substances of disputes should be heard and decided on merit.

[12] I have considered the merits of this application; I am of the considered view that the Applicant has satisfied the Court that he was prevented from filing his appeal out of time by the dilatory conduct of his lawyers who did not inform him in time of the trial Court. I find it to be a good cause for this Court to extend the time within which he should file his appeal to this Court. This application is accordingly granted. The Applicant to file the Memorandum of Appeal within 14 days from today. The costs of this application shall abide the outcome of the appeal.

I so order.

Dated and delivered by email this 13th day of June 2024

Phillip Odoki

Judge.

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