

Tibyambwenu v Byarugaba
(Miscellaneous Application 30 of 2022)
[2024] UGHC 837 (5 September 2024)
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BEFORE: HON. JUSTICE SAMUEL EMOKOR

RULING

The Applicant brings this application by Notice of Motion under **Order 51 Rule 6** of the **Civil Procedure Rules** and **Section 98** of the **Civil Procedure Act** seeking 20 orders for grant of leave to appeal out of time and that provision be made for

The grounds upon which this application is premised is that the Applicant was prevented from appealing by substantial cause as he was in prison at the time the judgment was delivered and that the subject matter is land which is a crucial 25 matter in Kabale that requires a further step of litigation and the Appeal has a high chance of success in if this application is granted. The application is supported by the affidavit of the Applicant who avers that he was the Defendant in land claim No. 0094 of 2016 and lost the case. That the judgment was delivered when he was in Prison under a charge of Defilement and that was why he did not 30 appeal in time. That upon his release from jail he endeavored to have the lower Court record and when he obtained it he got the services of a lawyer. That the Applicant was arrested on 17/02/2021 and released on 10/01/2022 from Ndoorwa

5 Prisons by the Regional State Attorney who came to Prison and gave the Applicant a document to sign and after signing he was told to go home that he had no case to answer.

The Respondent filed an affidavit in reply to the application in which he avers that the Applicant and his Counsel were not desirous of executing their appeal 10 since the copy of the Judgment was ready and delivered to all parties on 20/05/2021. That Prison does not deter a litigant who is diligent from taking the necessary steps to lodge an appeal. That the appeal has limited chances of success since the Applicant is determined to deter the Respondent from enjoying the fruits of his Judgment and quiet possession of his land and extension of time shall be 15 prejudicial to the Respondent.

Representation.

The Applicant was represented by Messrs Bikangiso & Co. Advocates while the Respondent was represented by the Legal Aid Project of the Uganda Law Society. The parties proceeded by way of Written Submissions.

20 I have carefully perused the submissions of Counsel and studied the authorities that they have made reference to. I do not find it necessary to reproduce the same verbatim since it is a part of the Court record.

Section 79(1)(a) of the **Civil Procedure Act** provides that an appeal to the High Court shall be within 30 days of the date of the decree or order of the Court. The 25 same Section however also gives the Appellate Court the discretion where good cause is shown to admit an appeal though the period of limitation prescribed by the law has elapsed.

- 5 It is generally trite law that applications of this nature for an order of enlargement of time to file an appeal should ordinarily be granted unless the Applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court and has not presented a reasonable explanation of his failure to file the appeal within the time prescribed by law or where the extension will be prejudicial to the
- 10 Respondent or the Court is otherwise satisfied that the intended appeal is not an arguable one.

In Tigt Security Ltd versus Chartis Uganda Insurance Company Ltd and Another HCMA No. 0008 of 2014 it was held that for an application of this nature to be allowed the Applicant must show good cause.

15 In the instant case Judgment in land case No. 0094 of 2016 was delivered on 20/05/2021 and the instant application was filed on 30/03/2022. This is about 10 months after delivery of Judgment and 9 months after the 30 days limit provided by statute.

The reason for this failure to file the appeal in time advanced by the Applicant 20 was that he was incarcerated at Ndorwa Prison from 17/02/2021 to 10/01/2022 on charges of defilement.

This would mean that on the 20/05/2021 at the time Judgment was being delivered the Applicant was already under detention.

I have perused the Judgment in land claim No. 0094 of 2016 together with the 25 record. The same is silent on when Judgment was delivered and the presence of parties. The Judgment itself is dated 20/05/2021 but this in itself may not amount to the date of delivery. The inability of the record to answer the vital questions to

5 whether any of the parties were present in Court at the time of delivery of the Judgment lends credibility to the averments of the Applicant that he was not present in Court.

The instant Applicant has not taken the effort to present proof of his detention at Ndorwa Government Prison and I take issue with this. The application basically 10 contains the affidavit of the Applicant as the only accompanying evidence.

There is no charge sheet, release order or even certified record of the Court releasing the Applicant.

The Applicant interestingly avers that he was released by the Regional State Attorney on the 10/01/2021 from Ndorwa Prison. This is obviously not true. No 15 Prison authority in this country will release a prisoner on capital charges in such

a manner.

I find it strange that Counsel who ought to know better would allow such a scandalous statement to appear on such a serious document in a matter like this. Counsel for the Applicant does his client no favours when he attaches to his 20 Written Submissions a charge sheet as annexure "A" that reflects the particulars of his client the Applicant on charges of Aggravated defilement and also attaches as annexure "C" the intended Memorandum of appeal. The Respondents' Counsel was critical of this procedure and accused the Applicants Counsel of attempting to smuggle evidence onto the Court record and that the conduct of Counsel 25 amounts to giving evidence from the bar. I would not agree more. The procedure adopted by the Applicants Counsel was obviously an afterthought and he was attempting to fill the gap in his application.

5 This kind of procedure is alien to the law and practice that cannot be allowed to fester. This is clearly the short coming of Counsel and unfortunately for his client the Applicant, these documents cannot be admitted in such a manner.

The above position notwithstanding I am persuaded by the averments of the Applicant that he was unavailable when Judgment was delivered on the 10 20/05/2021 and the Court record does not as already reflected cast any doubt on this averment.

The Applicant in this application does not attempt to demonstrate that there are serious issues to be tried in the appeal and centres on the fact that land in Kabale is a scarce commodity and there is need for his case to be heard.

15 I will credit the Applicant with at least obtaining a certified copy of the lower record. This would mean that if this application is granted it will take a short time frame for the Applicant to lodge his appeal.

It is my finding that the Applicant has sufficiently proved that he was prevented by sufficient cause from filing his appeal within the timeline allowed by the law.

20 The instant application is therefore hereby allowed and the Applicant is granted 14 days within which to file and serve the Memorandum of appeal. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

Before me

25 Samuel Emokor Judge 05/09/2024

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