

UGANDA / JUDGMENT

Tindyebwa v Mugarura and Another
(Miscellaneous Application 558 of 2023)
[2024] UGHC 954 (11 October 2024)
[2024] UGHC 954

COURT
High Court of Uganda

BEFORE
Allan Nshimye, J

CASE / FILE NUMBER
Miscellaneous Application 558 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-MA-0558-2023 5 (ARISING FROM HCT-05-CV-0056-2014)

| | VERONICA TINDYEBWA -----
APPLICANT |

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(Administratrix of the estate of the late Katambara Francisco)

10 VERSUS

1. JANE MUGARURA

2. MARY DORIS MUGARURA ----- RESPONDENTS
(Administrators of the Estate of the late Myres Mugarura)

15 BEFORE: Hon. Justice Nshimye Allan Paul M.

RULING

REPRESENTATION

The Applicant was represented by M/s Verus Advocates, while the Respondents 20 were represented by Advocate Agaba Benon from M/s Twinamatsiko & Agaba Advocates.

BACKGROUND

This application was brought under Sections 96 & 98 of the Civil Procedure Act

- 25 Cap 71, Rules 5 & 76 of the Judicature Court of Appeal Rules (Directions) SI 13- 10 and Order 52 Rules 1 & 3 of the Civil Procedure Rules SI 71-1 and all other enabling laws seeking orders that;
- 1. That the time within which to appeal be extended.
- 2. The time within which to file the Notice of Appeal be extended.
- 30 3. Costs of the application be provided for.

The application is supported by an affidavit deponed by the Applicant, and is opposed through an affidavit deponed by the 2nd Respondent with authorisation from the 1st Respondent.

5 GROUNDS

The grounds of the application as stated in the notice of motion are;

- i. That shortly before and after delivery of the judgment, the Applicant was very ill and in hospital.
- ii. That the Applicant's counsel did not inform her in time that there is a 10 limited period within which to file a notice of appeal.
- iii. That it is just and equitable that this application is allowed.

SUBMISSIONS

The parties filed by written submissions. The Applicant filed her submissions on 23rd April, 2024, and the Respondent replied on 13 15 th May, 2024. The Applicant rejoined on 30th May, 2024.

Applicant's submissions

It was submitted that time should be extended only for sufficient cause and the 20 reason for extension must relate to inability or failure to take the requires steps in time (**see: MUGO AND OTHERS VS WANJIRU AND ANOTHER [1970] EA 481 at 483**). Counsel submitted that shortly before judgment in the main suit was delivered, the Applicant was admitted in hospital at Mirembe Medical Center Katwe – Kampala. She attached hospital medical documents as annexure B to 25 the affidavit reply.

She was unable to make sound judgement due to the effects of the illness that comprised of unstable blood pressure. That when she got better, she advised her lawyer to appeal. That her lawyer declined to represent her on appeal which saw 30 the Applicant hire another law firm which informed her that she was out of time to file a notice of appeal hence this application. Counsel added that the Applicant's former lawyer did not inform her about the timelines relating to the appeal process.

Counsel cited **SABIITI KACHOPE AND 3 OTHERS VS MARGARET KAMUJE SC CIVIL APPLICATION No.31 of 1997 [1999] KLR 238** where the applicant successfully accounted for a two-year delay. He also relied on **BANCO ARABE ESPANOL VS BANK OF UGANDA [1992] 2 EA 22** for the holding that the administration of 5 justice requires the substance of all disputes to be investigated and decided on their merits and that errors should not necessarily debar a litigant from the pursuit of his rights unless a lack of adherence to rules renders the appeal process difficult and inoperative. Counsel prayed for the application to be allowed.

Respondent's submissions

Counsel submitted that Section 96 of the Civil Procedure Act Cap 71 gives Court discretion to enlarge time and cited **MUZAMIL VS TARAPKE & 6 OTHERS MISC APPLICATION No.24 of 2013** where it was held that an applicant has a right to 15 apply for enlargement of time to file a notice of appeal and such an order should be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his failure to file the notice of appeal within time.

- 20 Counsel argued that according to the Applicant's evidence, she was discharged from hospital on 23rd October, 2023 – two days after delivery of judgment by Court. That the Applicant was within time to file a notice of appeal and sat on her rights. Counsel further noted that this Court ordered the parties to survey Portion 1 and create new certificates of tiles for that area, and that the Applicant
- 25 together with her daughter and lawyer attended the boundary opening process and erection of a fence. That the Respondents have since acquired a new certificate of title (**see Annexure D and D1 to the affidavit in reply**) without any protests from the Applicant, and thereby, that this application has been overtaken by events and it is instituted with inordinate delay. Counsel contended
- 30 that the Applicant is only using this application to waste Court's time and delay justice from being done on the part of the Respondents.

Applicant's submission in rejoinder

Counsel reiterated his earlier submissions and added that the applicant denied 35 any knowledge of the survey and boundary openings and that the Respondents did so illegally. Counsel argued that the Applicant should not be subject to security for costs because this Court ordered all parties to bear their own costs in the judgment. Counsel prayed for the application to be allowed unconditionally.

DETERMINATION

In principle an appeal of decrees of the High Court shall lie to the Court of Appeal as is stipulated in **SECTION 66 OF THE CIVIL PROCEDURE ACT CAP 282**.

A party that is dissatisfied by a Judgment of the High Court ought to lodge a 10 notice of appeal within 14 days as is provided by the law in **Rule 76(1) and (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10** provide as follows;

> **"(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court.***

15 ***(2) Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal."(emphasis mine).***

A party appealing to the Court of Appeal is required as a rule to lodge a 20 memorandum and record of appeal within sixty days after lodgement of the notice of appeal. **Rule 83 of the Judicature (Court of Appeal Rules) Directions SI 13-10** is instructive on this matter, it provides that;

"83. Institution of appeals

25 ***(1) Subject to rule 113 of these Rules, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged—***

> ***(a) a memorandum of appeal, in six copies, or as the registrar shall direct;***

30 ***(b) the record of appeal, in six copies, or as the registrar shall direct; (c) the prescribed fee; and***

(d) security for the costs of the appeal.

(2) Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision* *against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that

5 *copy.*

(3) An appellant shall not be entitled to rely on subrule (2) of this rule, unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service." (emphasis mine)

The evidence on court record in paragraph 11 and 12 of the affidavit in support shows that the applicant herein failed to file a notice of appeal in HCT-05-CV-0056-2014 within 14 days, as is stipulated in Rule 76(1) and (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10. This is what has led to this 15 application.

Having laid down the provisions of **Rule 76(1), (2) and 83 of the Judicature (Court of Appeal Rules) Directions SI 13-10** that govern appeals from the High Court to the Court of Appeal. There is need to determine whether this Court has 20 jurisdiction to entertain this application for extension of time to appeal.

Rule 5 of the Judicature (Court of Appeal Rules) Directions SI 13-10 provide as follows;

25 *"5. Extension of time*

The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; 30 *and any reference in these Rules to any such time shall be construed as a reference to the time as extended"(emphasis mine)*

Rule 3 of the Judicature (Court of Appeal Rules) Directions SI 13-10 provides that

"3. Interpretation In these Rules, unless the context otherwise requires— "court" means the Court of Appeal of Uganda established under article 5 *129 of the Constitution, and includes any division of the court and a single judge exercising any power vested in him or her sitting alone;" (emphasis mine)*

My interpretation of Rules 3 and 5 of the Judicature (Court of Appeal Rules) Directions SI 13-10 is that the application for extension of time ought to be made

10 to the court that is referred to in the Judicature (Court of Appeal Rules) Directions SI 13-10, which is the Court of Appeal as set forth in Rule 3 of the Judicature (Court of Appeal Rules) Directions SI 13-10.

I am fortified in the thought that this application ought to have been made to the Court of Appeal by the decision in **THE MATTER OF RANCH ON THE LAKE**

15 **LIMITED (IN RECEIVERSHIP) HCT-00-CC-MA-0537-2005** where Hon Justice Egonda Ntende J as he then was held that

"It is for the appellate court to grant extension of time for filing an appeal in respect of those appeals that are governed by Section 80 of the Civil Procedure Act, and these are appeals as of right without leave of the court* 20 *of first instance. It is not for the court of first instance to make this decision."*

In the case of **UGANDA REVENUE AUTHORITY V URGENT CARGO HANDLING LIMITED & ANOTHER COURT OF APPEAL MISCELLANEOUS APPLICATION 234 OF 2017** (arising from Mbale High Court civil suit 26 of 2012), the Court of appeal 25 entertained an application for extension of time to file an appeal against a decision of the High Court. This is a clear example of an application made directly to the appellate court.

The applicant and respondent's counsel, both relied on Section 96 of the Civil Procedure Act as a provision mandating extension of time. I respectfully don't 30 believe Section 96 of the Civil Procedure Act applies to a case like this where the application is seeking extension of time to appeal as of right to the Court of Appeal against a decree of the High Court.

Section 96 of the Civil Procedure Act cap 282 provides that;

"96. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time 5 *to time, enlarge that period, even though the period originally fixed or granted may have expired."(emphasis mine)*

My interpretation of Section 96 of the Civil Procedure Act CAP 282 is that it applies to extension of time that is specified in the Civil Procedure Act cap 282, for example appeals to the High court from decisions of Magistrates court or 10 Registrars a guided by the time lines set out in Section 79 of the Civil Procedure Act cap 282, which implies that those timelines would be subject to extension of time by applying to the High Court under Section 96 of the Civil Procedure Act cap 282.

The case at hand is an application for extension of time to appeal to the Court of 15 Appeal. The time lines dictating the times (days) within which to file a notice of appeal and memorandum of appeal are in **RULE 76(1), (2) AND 83 OF THE JUDICATURE (COURT OF APPEAL RULES) DIRECTIONS SI 13-10** and not in the **CIVIL PROCEDURE ACT CAP 282** , it is therefore my opinion that Section 96 of the Civil Procedure Act CAP 282 relied upon in the application doesn't apply in 20 this case where the applicant is seeking for extension of time to appeal to the Court of Appeal. The operative provisions that the applicant ought to have followed by making this application to the Court of Appeal are Rules 3 and 5 of the Judicature (Court of Appeal Rules) Directions SI 13-10.

It is important to note that where an aggrieved party had a right of appeal 25 against a High Court decree , and upon expiry of the time to appeal to the Court of appeal desires to seek for extension of time, the application for extension of time to appeal has to be made to the Court of Appeal as is provided in **RULE 5 OF THE JUDICATURE (COURT OF APPEAL RULES) DIRECTIONS SI 13-10**, on the contrary an application seeking for stay of execution of a decree of the High 30 Court pending

appeal to the Court of Appeal, can be made to the High Court or Court of Appeal, but ought to first be made to the High Court as is stipulated in **ORDER 43 RULE 4 (1) & 2 OF THE CIVIL PROCEDURE RULES** read hand in hand

with RULE 42 (1) OF THE JUDICATURE (COURT OF APPEAL RULES) DIRECTIONS SI 13-10.

The applicant is advised to file an application seeking for extension of time to appeal in the Court of Appeal. It will be the appellant court to determine whether she has provided sufficient reason to justify that court to exercise its discretion to extend the time within which to appeal.

In conclusion, I order that the application is dismissed with costs.

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NSHIMYE ALLAN PAUL M. JUDGE 11-10-2024

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