

UGANDA / JUDGMENT

Tushabe v Co-operative Bank Ltd (Civil Application 8 of 2018)

[2018] UGSC 34 (16 July 2018)

[2018] UGSC 34

COURT

Supreme Court of Uganda

BEFORE

Nshimye, JSC

CASE / FILE NUMBER

Civil Application 8 of 2018

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THE REPUBLIC OF UGANDA**IN THE SUPREME COURT OF UGANDA****AT KAMPALA****[CORAM: NSHIMYE, A. G. J. S. C.] CIVIL APPLICATION NO 08 OF 2018**

TUSHABE CRIS :::::::::::::::::::: 15

VERSUS**CO-OPERATIVE BANK LTD (IN RECEIVERSHIP/STATUTORY
LIQUIDATION:::::::::::::::::: 20****RULING OF A. S NSHIMYE AG. ISC**

- The applicant Tushabe Chris made an application to this court 25 before a single justice, seeking for enlargement time with in which he should have filed his Notice of Appeal against the decision of the Court of Appeal of 2nd February, 2018 in Court of Appeal No.75 of 2005.
- It was by Notice of Motion brought under Rules 2(2) 5, 30 40(1) & 41(2) of the rules of this court and other enabling laws. He prayed for orders that:

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- 1. The time for filing the Notice of Appeal in Court of Appeal No 75 of 2005 be a bridged.
- 2. The Notice of Appeal filed in this court be validated.
- 3. Leave be granted to the applicant to file and serve the Notice of Appeal out of time
- 4. The costs of and/or incidental there to be granted to.

The application was supported by the applicant's affidavit filed in this court on 11th April 2018 and two subsequent affidavits in rejoinder, one by himself and another by Advocate Ivan Ojakol of M/s Karuhanga Tabaro & Co. Advocates.

The applicant's evidence:

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The supporting evidence was summarized in the body of the Motion as follows:

- 1. The Court of Appeal made a decision against the applicant 20 in his absence on 2nd February, 2018 when he was ill and on medication.
- 2. The time within which to file the Notice of Appeal expired without the applicant filing a Notice of Appeal.

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- 3. Due to hospitalization, the applicant was not in touch with his lawyers, who upon service received the judgment without notifying the applicant.
- 4. The applicant being aggrieved, is desirous of appealing against the Court of Appeal decision to the Supreme Court of Uganda.
- 5. The applicant has sufficient cause for not having been able to bring the appeal within time.
- 6. Owing to illness, the applicant was not aware that judgment was delivered and was not in position to instruct his lawyers on the next step.
- 7. The applicant upon feeling better, telephoned his lawyers who told him that the judgment had been delivered and he embarked on looking for resources against him to come to Kampala to attend to the matter.
- 8. The applicant's appeal has a high likelihood of success.
- 9. The appeal involves a matter of respondent's breach of

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banking contract obligations leading to Applicant's fraudulent transactions on his accounts resulting into the illegal deprivation and sale of applicant's property.

10. The applicant will numerate several grounds of his intended appeal to justify his belief that his appeal has high chances for success.
11. The applicant promptly brought this application for extension of time for filing his Notice of Appeal and for leave to file and serve the Notice of Appeal.
- 12. The applicant has since filed a Notice of Appeal on record of Court.
- 13. The Respondents will not be prejudiced in any way if the time is extended and the applicant's Notice of Appeal is filed out of time.
- 14. It was just and equitable that the substance of the grievances of the applicant be heard and decided on their merit.

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The Respondent's opposition evidence:

The respondent opposed the application.

In his affidavit in reply, David Ssemakula Mukibi an advocate of the respondent bank in liquidation stated the background of the case and submitted and in his view the application for validation of a Notice of Appeal filed out of time was an absolute abuse of court process and gave reasons that:-

- 1. It was not true that there was sufficient cause to validate the Notice of Appeal filed by the applicant out of time as the applicant was at all times been represented by the both M/s Akampumuza & Co. Advocates & M/s Tabaro & Co. Advocates:
- 2. There was no affidavit from the lawyers of M/s Tabaro & Co. Advocates confirming that the applicant was never notified of the judgment and his right to appeal.
- 3. The letters speaking about the applicant's sickness were obtained to specifically create reason for extension of time. The dates of the letters from hospital were faraway after the judgment of the Court of Appeal. The said

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judgment was delivered as mentioned above on 2nd 02.18 and there was no scintilla of proof that on that date, the applicant was admitted and not taking phone calls or out of touch with the public.

- 4. The dates of the letters from hospital and the date of filing of the Notice of Appeal clearly demonstrate a pattern to mislead court into believing that the applicant was unable to take necessary steps for sufficient cause whereas not.
- THAT the application to validate the Notice of Appeal filed out of time was triggered by a series of correspondences between the applicant and counsel for the respondent as demonstrated below:
- i . 16th 03.18, the applicant On the through M/s Akampumuza & Co. Advocates wrote to the respondent demanding payment of a sum of Ug. Shs. \$15,000,000/= and all attendant dues from the judgment of the High Court.

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At this point, no mention was made that the Applicant ii. intended to appeal the judgment of the Court of Appeal to which the said law firm of Akampumuza & Co Advocates was privy to.

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- On 23rd 03.18, M/s MMAKS Advocates responded to the iii. \$10 above letter and advised the applicant's counsel that their client was indebted to the respondent.
- On 9th 04.18, the applicant's counsel responded to the iv. letter above and made no hint that the applicant was not aware of the judgment of the Court of Appeal,
- It was only after the Applicant realized that he was V. heavily indebted to the respondent that he belatedly filed Notice of Appeal through M/S Tabaro & Co. Advocates who were in court the day judgment was delivered and M/S Akampumuza & Co. Advocates who elected not to appear even when served by the Court of Appeal.

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- It was evident from the above that the idea of sickness vi. by the applicant is an afterthought and a complete abuse of court process.
- THAT he was aware by virtue of his training as an Advocate 6. that representation by counsel is as good as attendance by a
- litigant and that for that reason, the attendance of the \$10 applicant's counsel when judgment was delivered was as good attendance by the applicant.
- further he was aware that much as this was an 7. **THAT** application for extension of time to file a Notice of Appeal and/or validate one belatedly filed, this Honourable Court is enjoined to ascertain whether the applicant had a plausible appeal and from the judgment of the Court of Appeal, he did not, for the reasons below:-

- 1. At the Court of Appeal, the application challenged the award of damages of *Ug. Shs. 15,000,000/* \$=\$ to him by the trial Judge. This was never part of his grounds of appeal and the Justices of the Court of Appeal can't be faulted for their finding on this matter.

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complaint against interest awarded to the 2. The respondent by the trial judge was rightly upheld by the Court of Appeal as the applicant had consented that it owed the respondent a sum of *Ug. Shs.* 96,096,307/= which attracted interest. it maintained that no fault can be sustained on appeal against that finding.

- 3. The complaint against alleged failure to evaluate evidence was rightly dealt with by the Court of Appeal. The ground of appeal in this case was too general and this notwithstanding, court rightly held that there was no fault on the part of the trial judge.

The background to this application was as stated by the Court of Appeal that:

"The appellant filed a suit against the respondent, a 20 Commercial Bank (in liquidation) on 20th June 2000, seeking orders for special damages of Shs 573,863,487/=-, general damages for breach of duty, interest and costs for alleged wrongful entries on his account at the respondent's Kasese branch. The appellant was a businessman in Kasese dealing 25

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in coffee at the material time and was a holder of account Number 3895 with the respondent Bank. It was the appellant's case that he obtained a loan of Shs. \$600,000,000/=\$ (six hundred million) from the respondent bank in October, 1998. In November of the same year, he discovered a number of anomalies in the way the bank was managing his loan account.

He sought for an explanation from the Bank, but none was forthcoming. Having received no satisfactory explanation from the respondent, the appellant filed a suit in the High Court seeking to recover as special damages shs \$573,863,484/=\$ general damages and interest. The respondent denied any wrong doing and filed a counterclaim seeking to recover shs \$80,299,636/\$ = from the appellant.

The learned trial judge found in favour of the appellant only to the extent that the respondent was in breach of its fiduciary duty. For that reason the Court awarded him shs \$15,000,000/=\$ as general damages. The Court also upheld the respondent's counterclaim which both parties had consented to amounting to shs 96,096,307/=-. Interest was

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awarded on the above sum at 18% per annum from 19th May 1999 the date when that amount became due and owing until payment in full".

Submissions for the applicant:

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Dr. Akampumuza submitted that applicant sought for orders as \$10\$ stated in the 15 grounds in the Notice of Motion and supported by the main affidavit and 2 affidavits in rejoinder.

He stated that the major gist was that there was a judgment that was entered against the applicant by the court. The applicant was

15 then hospitalized. He never got to know and was not in touch with his lawyers. He filed a Notice of Appeal out of time. (para \$5,6,12,13-18.\$

Counsel stated further that his client was aggrieved and seeks extension of time for validation of his appeal. According to 20 counsel, the applicant has sufficient cause of sickness in not taking steps and that he had a reasonable chance of success.

He argued further that there would be no prejudice to the In the affidavit in rejoinder....para 7-11, then 25 respondent.

counsel stated that he had no contact with the applicant with a view to appeal, he was hospitalized in 2017. He prayed that court do grant the orders sought.

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Counsel referred to this court's ruling in the case of James Bwogi & Sons Enterprises Ltd vs Kampala City Council and Kampala

District Land Board Supreme Court Civil Application No.09 of \$10\$ 2017.

He asked Court to look at sickness passionately and allow the applicant access to the final court of justice.

On this part he referred me to the judgment Justice Faith Mwendha - E. B. Nyakana and Sons Ltd vs Beatrice Kobusingye & 15 Others page 9a - 10 Supreme Court Civil Miscellaneous *Application No. 20 of 2017* and to the case of *Sitenda Sebalu vs* Sam Njuba Supreme Court Election Petition Appeal No.26 of 2007. Where this court emphasized its powers to extend time and validate pleadings even where there are limits created by the 20 statute.

Lastly, he begged court to consider that applicant had come to this court craving and crying to it, to exercise its inherent powers in his favour and to grant him leave as prayed.

Submissions of the respondent:

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Mr. Walukaga - for the respondent opposed the application in like manner as in the affidavit in reply of David Semakula Mr. Mukiibi. He submitted that court had to consider whether there was sufficient cause shown by the applicant.

On whether there is sufficient cause to validate the Notice of Motion, counsel referred to the case of Guliano Gariggio vs Claudio Casadio Supreme Court Civil Application No.01 of 2013 which gives the scenarios before rule 5 can be applied. That is where sufficient reason has been given.

Counsel also referred me to the case of Crane Finance Co Ltd Vs Makerere properties Ltd Supreme Court Civil Appeal No.1 of 2001 where this court held that where sufficient cause has been shown, it must relate to inability to take that particular step.

To fortify his point, counsel also cited the authority of **Attorney* General vs N. M Huda and others* Supreme Court Civil Application No.05/1988 reported in [1992] volume 4 KALR in 25 which it was held that sufficient cause must relate to what

prevented the applicant to take a step. Counsel does not need to wait for the client. According to him, filing a notice of appeal was a safety valve. He argued that the then counsel for the applicant was aware of the time within which to appeal and he was also aware of the priority of the appeal.

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Counsel pointed out that judgment sought to be appealed was delivered in the presence of counsel for the applicant Mr. Paul Waiswa. The last date to file the appeal was 16/2/2018 but was filed on 16/03/2018. This was inordinate delay of 30 days which must be only accommodated if the applicant demonstrated sufficient cause. In his view, the allegation that the applicant was sick is an after thought. He referred to paragraph 5 from Mukiibi's affidavit which states that when the judgment was delivered counsel for the applicant wrote demanding the money on 23.3.2018. He was therefore aware that there was a judgment with no allegation of sickness.

That having realized that there was a substantial amount to pay then the applicant came up with this application. In his submission, it was indicative of dishonesty on the part of the

applicant. He contended that it was trite law that representation $\$S$ by counsel was sufficient and Counsel's attendance was imputed on the applicant.

Counsel contended that It did not matter that the applicant did not attend court on the date of the judgment. His counsel was $\$10$ there and was aware.

In the affidavit in reply paragraph 6 there was no evidence that the applicant could not speak on phone. He referred to the case of Attorney General Vs N. M. Huda & Others case (Supra).

Court should take cognizance of the fact that there is no 15 mentioning in the affidavit in support of the date when Akampumuza got instructions to file the appeal. There was no letter of instructions to M/s Akampumuza & Co. Advocates. Sufficient cause should be demonstrated by the applicant that he was not aware of the judgment. The powers of this court are 20 discretionary and ought to be exercised judiciously.

He cited the authority of *Mugo&others v, Wanjiru and another* [1970] EA 481.

Counsel submitted further that the court was free to lift the veil S and look at the nature of the appeal being sought. Paragraph 7 of the affidavit in reply. The appeal was arising from a consent judgment. The consent judgment was annexed to the affidavit in reply. Annexure E paragraph 2 of the consent. There was an award 96,096,307/= to the respondent which according to page 7 \$10\$ of the Court Appeal Judgment the applicant admitted that he owed the respondent the said money.

According to counsel, plausible appeal can arise from that consented award.

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Counsel distinguished Bwogi's case from the one before court. The Notice of Appeal had been filed; leave was for time to serve the letter asking for proceedings. This application was different it was a total abdication of counsel and the applicant to take an essential step.

E. B Nyakana & Sons Ltd (supra) was also distinguishable. The Notice of appeal had been filed on time, leave was to serve the letter requesting for proceedings which was not the case here.

Sitenda Sebalu relates to a completely different legal regime relating to Election laws. \$25\$

He prayed that court dismisses the application with costs to avoid \$5\$ court abuse. The respondent was in liquidation. The applicant is holding tax payers money.

Akampumuza contended that counsel for the respondent emphasized that the applicant was indebted to the respondent. \$10\$ However, paragraph 20 of the rejoinder, the respondent denied being indebted in the manner alleged by the respondent.

Paragraph 22 of the affidavit in support the application concerns other matters not the consent. He distinguished the case of the 15 Attorney General vs N. M. Huda, in that the Attorney General was a statutory party where there are officers who handle matters as of course.

If counsel commences an appeal without instructions, he would personally liable to pay costs

Finally counsel submitted that although Mukiibi's affidavit tried to discredits the medical documents, they still provide sufficient cause for not having filed the appeal on time. He prayed that the application be granted, because it was genuine and was not prompted by demands of counsel for the Responded as alleged.

CONSIDERATION OF THE APPLICATION:

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Court has had sufficient time to read and consider the evidence of both sides which was by way of affidavits.

Submissions of both counsel and authorities referred to me have also been considered.

The law created gates of Justice through which people seeking justice pass to reach courts to be redressed. The Gates open and close at given intervals in accordance with rules of procedure. In rare circumstances gates which are closed may be opened to allow in a late entrant. The discretion to open or not open is vested in the court. The application before me is one of such rare cases of late coming.

- However, the rule under which the application was brought $\$20$ emphasizes showing "*sufficient reason*" which has been interpreted by this court and other equivalent courts in the region. Some of such cases have been ably referred to me by both counsel. For example the case of Guliano Gariggio vs Claudio
- Casadio Supreme Court Civil Application (supra) cited by counsel 25 for the respondent. This court observed that a sufficient reason

must relate to the ability or failure to take the particular step in $\$S$ time.

In that case the court further observed that the rule envisages from scenarios in which extension of time for doing an act so authorized or required may be granted namely:

- (a) Before the expiration of limited time. 10
- (b) After the expiration of the limited time,
- (c) Before the act is done
- (d) After the act is done

Facts and circumstances in the above case of Galliano Gariggio (page $\$12-13$) have similarities to the instant case. The applicant 15 in that case had deponed in his affidavit:-

> "4. That by the time the judgment was delivered on the 16/12/2009 I was not in court and only came to know about it one day after I had come back from Italy. Refer to copies of the travel documents attached herewith and collectively marked as annexure "B"

> 5. That my former lawyer Mr. Paul Muhimbura of M/S Muhimbura & Co Advocate did not inform me of the

judgment date nor did he brief me on the outcome of the appeal.

- 6. That I am advised by my said new lawyers that my former lawyer was supposed to lodge the Notice of Appeal within 14 days from the 16/12/2009.
- 7. That since the former lawyers did not inform me of the outcome of the appeal, I could not instruct him to appeal against the decision.

The court observed that:

- "Where an applicant has on the court record complete documents 15 which are in proper form save for their late filing, extension of time has the legal effect of validating them or excusing their late filing. The applicant had filed out of time the Notice of Appeal and eventually Civil Appeal No.13 of 2010".
- The court finally held "that in the result and for the reason given 20 above, we rule that the interest of justice will better be served by giving the applicant an opportunity to have his appeal considered on merit so as to put to rest this protracted litigation. In our view the respondent will not be unduly prejudiced since the machinery which form the core subject of the dispute between the two 25

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- parties is still in his possession. He can surely wait a little longer $\$ \setminus \mathrm{mathsf{S}} \$$ for the dispute to be resolved finally. The application was accordingly granted"
- 1. Taking a wholistic consideration of the instant application before me, I observed that the applicant looked of advanced \$10\$ age, sickly and stressed.
- 2. Considering that the bank could find him credible to be advanced a loan of shs 600 million shillings in October 1998, he was then an outstanding and I believe a successful business man dealing in coffee.
- 3. When he realized that the Bank was mismanaging his account by allowing strangers to unlawfully withdraw money from it he demanded for information from the bank which information was not availed. Being aggrieved he dragged the Bank to court although in it's defence, the bank also became a counter claimant in the same suit.
- 4. Although in a consent judgment, the applicant was found to 25 owe the bank some money, the Bank was equally found 21

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guilty of mismanaging the applicant's account to the extent of allowing fraudulent withdraws by un authorized people. which could have led to the collapse of the appellant's business.

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- 5. In the then prevailing circumstances, the issue whether the \$10\$ respondent was entitled to interest on the sum of shs 96,096,307/= from \$19^{\text{th}}\$ May 1999 being the date of closure of the respondent's bank until payment in full and if so what, was not resolved by the consent judgment. The Court of Appeal made a decision on interest upholding the 15 decision of the trial court which, decision the applicant seeks to appeal to the Supreme Court. Perhaps to consider whether the bank that had messed up his account is entitled to interest for the period in question..
- 6. In paragraph 22 of his affidavit support of the application, he stated his proposed grounds of appeal under (c) & (d):
- The learned Justices of Appeal erred in law when \$(c)\$ they upheld the court's award of interest of 18% against the Appellant despite Respondent's bank's admissions that it violated all the Banking

conditions and that the Appellant never used the overdraft money of UGX 600,000,000/= which was swallowed out of by the Respondent Bank's fraud.

The learned Justices of Appeal erred in law when \$(d)\$ they upheld the lower court's award of UGX \$15,000,000/= as general damages and ignored Respondent's fraud, breach of Banker's duty *leading to loss of Appellant's 3,000,000,000/=

- 7. I am satisfied that the applicant is an old sick person who is for having lost his property and business stressed investments while he was in banking relationship with the respondent bank.
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- 8. I believe him that his lawyers did not inform him of the date of judgment and the outcome.
- 9. With all due respect I don't accept the proposal by counsel for the respondent, that the previous counsel could have filed a Notice of Appeal as a safety valve without proper instructions of a client.

\$10.\$ As soon as the applicant knew about the judgment, though 30 days out of time, he promptly filed a notice of appeal which is on court record.

In paragraph 10 of his affidavit he deponed \$11.\$

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"That upon feeling better, I telephoned lawyers above who told me that the judgment of Court of Appeal had been delivered against me and I embarked on plans to look for resources to come to Kampala to attend to the matter".

In paragraph 13 he deponed that I have since filed a Notice of \$15\$ Appeal (Copy attached as "T5").

In paragraph 19 That I have promptly brought this application for extension of time for filing my Notice and for leave to file and serve the Notice of Appeal.

I am satisfied that the applicant has established the following sufficient reasons for having failed to appeal in time.

1. Illness
2. His counsel did not inform him of the outcome in time.
3. Lack of financial ability to immediately instruct another lawyer to appeal as soon as he knew of the judgment.

It is in the interest of justice that the application be granted. I exercise my inherent powers in favour of the applicant by granting the application as prayed.

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I order that the time within which the applicant had to appeal be enlarged to the extent that it would result in the Notice of Appeal filed on court record on 16.3.2018 being validated.

I also order that the applicant shall serve the respondent with the 15 said Notice of Appeal within 7 days from delivery of this ruling. The cost of this application will abide the outcome of the main appeal.

| Dated at Kampala this
. Hav of \$\mathbb{N}\$ | .2018. |

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| HON. JUSTICE A. S NSHIMYE | |

A. G. JUSTICE OF THE SUPREME COURT

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