THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 418 OF 2021

(ARISING OUT OF CIVIL APPEAL NO. 72 OF 2017)

STANDARD CHARTERED BANK (U) LIMITED :::::::::::::::::::: APPLICANT

VERSUS

AMIN RIZWAN :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this application by Notice of Motion under Sections 79(1)(b) & 98 of the CPA and Order 52 rules 1 and 3 of the CPR seeking orders that;

a) The Applicant be allowed to serve its Memorandum of Appeal onto the Respondent out of time

b) The costs of the Application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deposed by **Stella Keshubi**, the Country Legal Counsel of the Applicant. Briefly, the grounds upon which the application is based are that the Applicant being aggrieved by the decision of the Mengo Chief Magistrates Court in Civil Suit No. 1359 of 2012 where the Respondent was ordered to pay a sum of USD 7,500 instructed its former lawyers of M/s Byenkya, Kihika & Co. Advocates to lodge an appeal. The said lawyers filed a letter in the High Court on 12th July 2017 requesting for the record of proceedings and also filed a memorandum of Appeal which was allocated a reference number Civil Appeal No. 72 of 2017. The deponent stated that the

Applicant followed up the progress of the appeal on several occasions with its former lawyers but was informed that the appeal was pending hearing before the trial Judge. Unknown to the Applicant, the lawyers had not served the Respondent with the memorandum of appeal until 7th April 2021 when the Applicant was served with an application to dismiss the civil appeal for want of prosecution. The deponent stated that the Applicant is still interested in litigating the appeal which has a high likelihood of success. She further stated that the mistakes and lapses of previous counsel should not be visited onto the Applicant and the application has been brought without inordinate delay upon discovery of the mistake and negligence of its previous lawyers.

[3] The Respondent opposed the application through an affidavit in reply deposed by **Mr. Ateeq-UR-Rehman**, a donee of powers of attorney in Civil Suit No. 4777of 2016 who stated that he has been advised by the Respondent's lawyers that a party aggrieved by a judgment of a lower court institutes an appeal by filing and serving a notice and memorandum of appeal to the intended Respondent but the Respondent was only served with a letter requesting for a record of proceedings on 12th July 2017. The deponent stated that the Applicant, as a financial institution with rigorous auditing procedures, ought to have made an effort to follow up the progress of the appeal from their lawyers and that a laxity period of almost four years (47 months) without an effort to prosecute the appeal speaks dilatory conduct on the part of the Applicant and is evident that they are only interested in delaying the Respondent from enjoying the fruits of the judgment. The deponent also stated that the Applicant continues to engage in frivolous litigation out of the limitation period to bring an appeal and it is in the interest of justice that the application is dismissed with costs.

Representation and Hearing

[4] At the hearing, the Applicant was represented **Ms. Akampurira Patience** of M/s Kampala Associated Advocates while the Respondent was represented by

Mr. Osinde Nathan from M/s OSH Advocates. Counsel agreed to make and file written submissions which were duly filed and have been considered by the Court in the determination of this matter.

Issues for Determination by the Court

[5] Three issues are up for determination by the Court, namely;

a) Whether the Applicant has established sufficient reasons for Court to extend time in which to serve the Memorandum of Appeal?

b) Whether the Applicant is guilty of dilatory conduct?

c) Whether any injustice will be caused if the application is not granted?

Resolution of the Issues

Issue One: Whether the Applicant has established sufficient reasons for Court to extend time in which to serve the Memorandum of Appeal?

Submissions by Counsel for the Applicant

[6] Counsel for the Applicant cited the case of *James Bwogi & Sons Enterprises Ltd v Kampala City Council & Anor, SCCA No. 09 of 2017* to the effect that before the discretional power to extend the time prescribed is exercised, sufficient reason has to be shown by the applicant for not doing what he was supposed to do. Counsel also relied on the case of *Nicholous Roussos v Gulam Hussein Habib Virani & Anor SCCA No. 9 of 1993* for the submission that circumstances that may amount to sufficient cause include mistake by an advocate through negligence, ignorance of procedure by an unrepresented defendant or illness by a party. Counsel stated that the failure to serve the memorandum of appeal was due to mistake of former counsel which the Applicant did not know about until the Respondent served them with an application to dismiss the appeal for want of prosecution on 7th April 2021 and the same should not be visited on the Applicant as an innocent party. Counsel concluded that the Applicant has demonstrated sufficient cause to warrant extension of time to serve its Memorandum of Appeal onto the Respondent.

Submissions by Counsel for the Respondent

[7] In reply, Counsel for the Respondent cited the case of *Hon. Gerald Kafureeka Karuhanga & Anor v AG HC Misc. Application No. 060 of 2015* to the effect that the common feature of an abuse of court process is in the improper use of a judicial process by a party in litigation and submitted that the memorandum of appeal that the Applicant intends to rely on is an abuse of the court process aiming at continuing to delay the Respondent from enjoying the fruits of his judgement. Counsel submitted that the said memorandum of appeal is neither signed by the appellant nor its advocate which renders it fatally defective and incurable. Counsel argued that the failure to sign the memorandum of appeal and the ultimate refusal to serve it for more than four years was not a mistake of counsel but a well calculated maneuver intended to keep the Respondent in limbo of protracted court processes and derail the dispensation of justice to the Respondent.

[8] Counsel also cited the case of *Mulindwa George William v Kisubika Joseph SCCA No. 12 of 2014* to the effect that in applications for extension of time, the court considers the length of the delay, the reason for the delay, the possibility or chances of success and the degree of prejudice to the other party. Counsel submitted that whereas the prescribed time for serving the memorandum of appeal in the instant case is 21 days after the memorandum of appeal was filed, the judgement intended to be appealed against having been delivered on 29th June 2017, the Respondent was only served with a letter requesting for a record of proceedings on 12th July 2017. It has then taken more than four years without the Applicant taking further steps to prosecute the appeal. Counsel pointed out that the Applicant is a reputable financial institution with robust established structures and it was neglect of the bank and its staff not to inquire about the progress of the appeal for a period of four years to which it cannot hide behind the cover of mistake of counsel. Counsel concluded that the purported appeal has no good possibility of success on account that the handwriting expert showed that the Applicant bank, despite having specimen

signatures of the Respondent, debited the Respondent's account upon different specimen signatures.

Determination by the Court

[9] The courts have over time established the test as to what amounts to good or sufficient cause to warrant the grant of leave to extend time within which to take particular steps in a matter. It is settled that sufficient reason must relate to inability or failure to take a particular step in a matter. See: *William Odoi Nyandusi v Jackson Oyuko Kasendi, CA Civil Appeal No. 32 of 2018* and *Rosette Kizito v Administrator General & Others, SC Civil Application No. 9 of 1986*. In *Captain Phillip Ongom v Catherine Nyero Owoto SCCA No. 14 of 2001*, it was held that what amounts to sufficient cause may include a mistake by an advocate, illness of a party or advocate and ignorance of filing procedure by the party or their advocate. In such cases, the court will generally consider whether the delay is one that is explainable to the satisfaction of the court when granting leave or not.

[10] On the case before me, the Applicant has relied on the ground of mistake of counsel. It was averred that the Applicant having duly instructed their former lawyers to file an appeal, the failure to serve the memorandum of appeal was due to mistake of the former lawyers which the Applicant did not know about until the Respondent served them with an application to dismiss the appeal for want of prosecution on 7th April 2021 and the same should not be visited on the Applicant as an innocent party. For the Respondent, it was argued that the failure to sign the memorandum of appeal and the ultimate refusal to serve it for more than four years was not a mistake of counsel but a well calculated maneuver intended to keep the Respondent in limbo of protracted court processes and derail the dispensation of justice to the Respondent.

[11] It is apparent that the Applicant's former advocates omitted to sign and serve the memorandum of appeal onto the Respondent in time. Such a mistake, even when negligent, should not be visited on an innocent litigant and would constitute sufficient cause for failure to act within time as to entitle the Applicant to enlargement of time. In my view, on the facts and circumstances of the present case, the Applicant has established sufficient cause to warrant extension of time within which to serve the memorandum of appeal. I find reason to exercise discretion in favour of the Applicant. This issue is answered in the affirmative.

Issue 2: Whether the Applicant is guilty of dilatory conduct?

Submissions by Counsel for the Applicant

[12] It was submitted by Counsel for the Applicant that the failure to serve the memorandum of appeal in time was a mistake of counsel and was not occasioned by dilatory conduct on the part of the Applicant. Counsel referred the Court to paragraphs 4-7 of the affidavit in support to the effect that the Applicant duly instructed its former lawyers to lodge an appeal in time who filed a memorandum of appeal and a letter requesting for certified proceedings on 12th July 2017, the judgment having been delivered on 29th June 2017. Counsel also stated that the Applicant inquired from its former counsel about the status of the appeal on various occasions and was informed that it was pending hearing and only got to know about the failure to serve the memorandum of appeal on 7th April 2021 when the Applicant was served with an application to strike out its appeal. The Applicant then immediately instructed new counsel who filed the present application without unreasonable delay on 27th May 2021 less than two months from the date of discovery of the Applicant's failure to serve the memorandum of appeal. Counsel prayed to the Court to find that the application has been brought without unreasonable delay.

Submissions by Counsel for the Respondent

[13] Counsel for the Respondent relied on the cases of *Stone Concrete Limited v Jubilee Insurance Company Ltd, HCMA No. 358 of 2012* and *Seperi Kyamulesiire v Justine Bikanshiire Bagambe, SCCA No. 20 of 1995* to the effect that where the applicant is guilty of dilatory conduct, he or she cannot rely on negligence of counsel to amount to sufficient cause. Counsel submitted that the Applicant being one of the leading financial institutions in the country and on the continent with advanced legal and audit procedures, it is not possible that an appeal could take four years without the Applicant's legal department or auditors raising questions as to the progress or lack of it. Counsel argued that the absence of any sort of evidence showing due diligence in the matter by way of correspondences to support their assertion that they attempted to follow up with their former counsel over a four-year period imputes dilatory conduct on their part. Counsel prayed that the application be dismissed with costs on account of dilatory conduct on the part of the Applicant.

Determination by the Court

[14] I have already stated under issue one that mistake by an advocate even when negligent may be accepted as sufficient cause. However, it is also true that for the principle to apply, the litigant must be innocent in the matter. This implies that the party on their part must have taken due diligence as to be in a position to rely on the advocate's professional skill and diligence. In a situation where a litigant makes no contact with their advocates for years, it would be wrong for the litigant to claim that they were innocently sitting home and waiting for the advocate to tell them the result of the case in court.

[15] In this case, it was claimed by the Applicant that they kept inquiring from their former lawyers as to the progress of the case and the lawyers indicated that they were awaiting fixture of the matter. This claim is, however, not supported by any formal correspondence. I am inclined to agree with Counsel for the Respondent that the absence of any sort of evidence to show their

diligence in the matter by way of correspondences to support their assertion that they attempted to follow up with their former counsel over a four-year period imputes dilatory conduct on their part. I therefore agree that despite the contribution of mistake of the Applicant's former advocates, the Applicant was, as well, guilty of dilatory conduct and this issue is accordingly answered in the affirmative. The effect of the dilatory conduct on the part of the Applicant will be dealt with under the next issue.

Issue 3: Whether any injustice will be caused if the application is not granted?

Submissions by Counsel for the Applicant

[16] It was submitted by Counsel for the Applicant that no significant injustice will be occasioned to the Respondent if the application is granted and instead it would be the Applicant who would be denied the right to present and prosecute their appeal and be condemned to pay exorbitant costs on account of deficiency of their counsel. Counsel cited the case of *Butebi Investment Enterprise Ltd v Kibalama Mugwanya, CACA No. 354 of 2013* to the effect that denying a subject a hearing should be the last resort of court and argued that the Applicant has arguable grounds of appeal as per the attached memorandum of appeal and it is in the interest of justice that the appeal is determined on its merits. Counsel concluded that the Applicant has proved sufficient grounds to warrant the Court to exercise discretion and allow the Applicant to serve its memorandum of appeal out of time.

Submissions by Counsel for the Respondent

[17] Counsel submitted that the Respondent, whose account was illegally debited in August 2011, got judgement in his favour on 27th July 2017 and has been holding a decree for more than four years, will suffer injustice by being made to continue waiting in order to enjoy the fruits of litigation yet the Applicant does not have a good case with a probability of success. Counsel also

cited the case of *Auma & 2 Ors v Okuti Nasur, HC Misc. Application No. 12 of 2016* to the effect that in the interest of society as a whole, litigation must come to an end and argued that the Applicant has failed to provide solid grounds as to why litigation in this matter must continue.

Determination by the Court

[18] Having found that there was sufficient cause for the delay in serving the memorandum of appeal on account of mistake of the Applicant's former advocates, and considering the fact that the Applicant brought this application without any further inordinate delay upon discovery that the memorandum of appeal had never been served upon the Respondent, I am satisfied that the grant of leave to file and serve a proper memorandum of appeal out of time will not prejudice the Respondent but will, rather, enable the court to determine the appeal on its merits. I believe that the proposed appeal contains arguable points of law and fact. I find that it would not serve the interest of justice to close out the Applicant from being heard on the appeal.

[19] In *Re Christine Namatovu Tebajjukira [1992-93] HCB 85*, it was stated that the administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights. In *Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1*, the same position was restated when the Court held that denying a subject a hearing should be the last resort and the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and lapses or errors should not necessarily debar a litigant from pursuit of their rights.

[20] Based on the above findings, despite there being an instance of dilatory conduct on the part of the Applicant, I find that the Applicant has on the whole established sufficient cause to warrant the exercise of discretion by the Court

to grant extension of time within which to file and serve a proper Memorandum of Appeal. Nevertheless, owing to the finding that the Applicant was guilty of dilatory conduct, it is ordered that the costs of this application shall be met by the Applicant in any event. In the premises, the application is allowed with orders that;

a) The Applicant is granted leave to file and serve a duly signed memorandum of appeal, within 15 days from the date of delivery of this ruling.
b) The costs of this application shall be met by the Applicant in any event.

It is so ordered.

Dated, signed and delivered by email this 29th day of January, 2024.

Boniface Wamala
JUDGE