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The Republic of Uganda
In the High Court of Uganda Holden at Soroti
Miscellaneous Application No. 151 of 2022

(Arising out of Civil Suit No. 003 of 2017 of the Chief Magistrate's Court of Kumi at Kumi)

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Ajilong Christine Applicant

Versus

Airtel (U) Ltd Respondent

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Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

1. Introduction:

20 This application was brought by way of a Notice of Motion under Sections 98, 96,
and 79(1)(b) of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act,
Cap 13 and for orders that;

a) The Applicant be granted leave to Appeal Civil Suit No. 003 of 2017 out
of time.

25 b) The costs of this application be provided for.

2. Grounds of the application:

The application is anchored on grounds set out in the affidavit of the applicant;
That,

30 a) The applicant filed Civil Suit No. 003 of 2017 in the Chief Magistrate's
Court of Kumi at Kumi against the respondent for a permanent injunction
restraining the defendants from operating a mast in a manner dangerous



- 5 to the applicant's building and further damaging her property, compensation for the lost income in rent of UGX 6,000,000 for six units unoccupied due to pollution, special damages for the destroyed roof worth UGX 3,500,000, general damages, interest and costs of the suit. (a copy of the plaint marked as annexure "A")
- 10 b) Civil Suit No. 3 of 2017 was determined in a judgement read on 1st June 2022 by the trial Magistrate in the absence of the applicant and her lawyers and without their prior notification. (A copy of the Judgement marked as annexure "B")
- 15 c) The applicant's lawyers learned about the judgement when they went to court for a different matter and took the initiative to follow up on the judgement in the head suit and discovered that it had been delivered and put in the court file.
- d) Upon such a discovery, the applicant instructed her lawyers to peruse the court file and advise on the way forward.
- 20 e) The applicant's lawyers advised that the judgment had been entered against the applicant and that the time of appeal had lapsed.
- f) The applicant is just a layperson who does not understand the time limits of the court and how the legal profession functions.
- g) The applicant could not file an appeal in time.
- 25 h) The application is brought without inordinate delay.
- i) This court has the discretion to extend the time to commence an appeal/file a memorandum of appeal.
- j) It is just and equitable that this application be granted.

5 3. Objection:

On the other hand, Hudson Andrew Katumba, the Legal and Commercial Manager of the respondent, deposed an affidavit in reply opposing the application that,

10 a) According to the advice and belief of his lawyers, M/s Verma Jivram & Associates, the instant application is an abuse of the court process as the applicant is guilty of dilatory conduct, to which the respondent's lawyers shall raise a preliminary point of law.

15 b) The head suit was fixed for judgment on 27 April 2022 in the applicant's and her lawyers' presence. However, the applicant did not bother to follow up with the court for judgment for over seven months from 27 April 2022.

c) The applicant does not state the date when she found out that the judgement had been delivered, and this application was filed after a long period of five months from the delivery of the judgement.

20 d) The applicant's guilt of dilatory conduct negates sufficient cause in law and fact.

e) It is not in order for the applicant to blame the court for her own mistake and dilatory conduct.

25 f) No appeal is lodged, and the applicant has not attached or referred to any possible grounds of appeal for the court to assess the chance of success.

g) The applicant has not demonstrated sufficient cause in law or fact.

The applicant filed an affidavit in rejoinder, which spotlighted that;

30 a) This application is not an abuse of court process, and the applicant is not guilty of dilatory conduct.

- 5 b) The applicant was unaware that the court had delivered judgment in the matter.
- c) By 27th April 2022, the judgment in Civil Suit No. 3 of 2017 was not yet ready, and the court did not give another date for judgment.
- d) The practice suggests that upon the court finishing writing a judgment, it
10 is supposed to issue judgment notices setting a date on which the judgment will be delivered or opting to email the judgement to their parties with their respective lawyers.
- e) Attaching a draft copy of a Memorandum of Appeal is not a prerequisite for the Court to grant an application for leave to appeal out of time. All that
15 is required is sufficient cause as to why one could not appeal within time.
- f) The trial court delivered judgment in the matter on 1st June 2022 in the absence and without the knowledge of both parties in this case and their lawyers, and the time for appeal lapsed.
- g) It is in the interest of justice that this application be allowed so that the
20 appeal can be heard on its merits.

4. Representation:

According to the pleadings, Ms Omongole and Company Advocates represent the applicant while M/s Verma Jivram & Associates represent the respondent.

5. Issues:

25 The parties filed written submissions to support their respective cases. For brevity, I will not reproduce the submissions in their entirety, but hitherto, I have studied and comprehended the same in determining the issues in the instant application.

- 30 a) Whether there is a proper case for the Applicant to be granted leave to file an appeal against Civil Suit No. 003 of 2017 of the Chief Magistrate's Court of Kumi at Kumi out of time or time?

5 b) What are the remedies to the applicant in the circumstances?

6. Resolution:

This application was brought under Section 98 of the Civil Procedure Act (CPA), which inherently empowers this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court and Section
10 33 of the Judicature Act, Cap 13, which empowers this court to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all
15 multiplicities of legal proceedings concerning any of those matters avoided.

This application was also brought under Section 96 of the CPA which enjoins the court with discretion, from time to time, to enlarge a period, even though the period originally fixed or granted may have expired, where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act,
20 This application arises from a civil matter thus it is trite that the duty and burden of proof lies on the applicant because she is the one who seeks to get a decision of this court in her favour. (See: Sections 101 and 102 of the Evidence Act, Cap 6).

25 a) Whether there is a proper case for the Applicant to be granted leave to file an appeal against Civil Suit No. 003 of 2017 of the Chief Magistrate's Court of Kumi at Kumi out of time or time?

Counsel for the respondent, in his submissions, contends that prior to the institution of this instant application in this court, the applicant ought to have
30 sought leave to appeal in the trial court in the first instance according to Order 44 Rule 3 of the Civil Procedure Rules.

5 The respondent's counsel submitted that in the circumstances, the instant application could not arise from the judgment of the lower court in law and fact because the applicant should have first sought leave from the lower court.

In reply, the applicant's lawyers submitted that the High Court has unlimited original jurisdiction and such appellate and other jurisdiction and that it is not
10 fatal for one to apply for leave to appeal out of time in the High Court when appealing the decision of the Chief Magistrate's Court.

Order 44 Rule (1)(3) of the Civil Procedure Rules provides that applications for leave to appeal shall, such as the instant one as a matter of first instance, be made to the court making the order sought to be appealed from. It is evident that the
15 applicant did not seek leave to appeal in the trial court as a matter of first instance.

However, Section 14 of the Judicature Act, Cap 13 provides that this court has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as maybe conferred on it by the constitution or this Act or any other
20 Law.

Furthermore, Section 16 (1) of the Judicature Act provides that the High Court has jurisdiction to hear and determine appeals which lie to it by any enactment from the decisions of the Magistrate's Courts and other subordinate courts in the exercise of their original appellate jurisdiction.

25 Even though the applicant did not seek leave to appeal out of time in the trial court, the Constitution of the Republic of Uganda, 1995 and Sections 14 and 16(1) of the Judicature confer upon this court original jurisdiction in all matters and such appellant jurisdiction.

Article 126 (2)(e) of the Constitution of the Republic of Uganda further enjoins
30 this court to administer substantive justice shall be administered without undue regard to technicalities.

5 Considering that the applicant avers that the Learned Trial Magistrate delivered the Judgement from which this application arises on 1st June 2022 in the absence of both the applicant and her lawyers and without notifying any of them and that the applicant's lawyers only got to know about the Judgement when they went to Court on a different matter and took the initiative to follow up on the
10 Judgement only to find out that it was delivered long ago, I would find that the same is a genuine basis for considering this application based on this court's original and appellate jurisdiction even though the applicant did not seek leave in the trial court as a matter of first instance.

Therefore, I would overrule the preliminary point of law raised by the
15 respondent's counsel.

Next, the applicant states in his affidavit that whereas she filed Civil Suit No. 003 of 2017 of the Chief Magistrate's Court of Kumi at Kumi against the respondent, the same was determined in a judgement read on 1st June 2022 by the trial Magistrate in the absence of the applicant and her lawyers and without their
20 prior notification.

That the applicant's lawyers learned about the judgement when they went to court for a different matter and took the initiative to follow up on the judgement in the head suit and discovered that it had been delivered and put in the court file. The applicant averred that her lawyers advised that the judgment had been
25 entered against her and that the time of appeal had lapsed but that this court has the discretion to extend the time to commence an appeal/file a memorandum of appeal.

The applicant's lawyers similarly aver so that while judgement delivery had been scheduled for 27th April 2022, the judgment was not ready then and the court did
30 not give another date and neither did it ever issue judgement notices when it set 1st June 2022 as the date of delivery of the judgement.

- 5 On the other hand, the respondent contends that the applicant is guilty of dilatory conduct because Civil Suit No. 003 of 2017 was fixed for judgment on 27 April 2022 in the applicant's and her lawyers' presence, however, they did not bother to follow up with the court for judgment for over seven months from 27 April 2022 and that the applicant has not demonstrated any sufficient cause.
- 10 Section 79(1)(a) of the CPA makes provision for time limitation for appeals, and it states that except as otherwise specifically provided in any other law, every appeal shall be entered within thirty days of the date of the decree or order of the court.

- Section 96 of the CPA enjoins this court with the discretion from time to time to
- 15 enlarge any period which is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, even though the period originally fixed or granted may have expired.

- The discretion of the court is not fettered in such applications as long as sufficient reason is disclosed to justify the court's exercise of its discretion in favour of the
- 20 applicant (see *William Odoi Nyandusi Vs Jackson Oyuku Kasendi C/A 0032/2018*). The discretion must however be exercised judicially on proper analysis of the facts and the proper application of the law to the facts (see *J Hannington Wasswa v M Onyango Ochola [1992-1993] HCB 103 (SC)*)

- According to the case of *Hodandi Daniel vs Yalamu Engondi CA.CA No. 67 of 2003*,
- 25 the applicant must also show sufficient cause.

An applicant for an extension of time has the burden of proving to court satisfaction that, for sufficient reason, it was not possible for the appeal to be lodged in the time prescribed. (see *Delvi v Diamond Concrete Company [1974] EA 493*).

5 Ordinarily sufficient reason for an extension of time must relate to the inability or failure to take a particular step. (see *Mugo and others v Wanjiru* [1970] EA 481 and also *Rosette Kizito Vs Administrator General and Others* SCCA. NO.9/1986.

In the case of *Mulindwa George William versus Kisubika Joseph* SCCA No. 12 of 2014, the Supreme Court observed that;

10 *"The applicant seeking for extension of time has the burden of proving to the Court's satisfaction that, for sufficient reasons, it was not possible to lodge the appeal in the prescribed time. Sufficient reason must relate to the inability or failure to take a particular step in the proceedings. Each application must be*
15 *viewed by reference to the criterion of justice, and it is important to bear in mind that time limits are there to be observed, and justice may be defeated if there is laxity. Factors to be considered in an application for an extension of time are:*

- i. *The length of delay;*
- 20 ii. *The reason for delay;*
- iii. *The possibility or chances of success;*
- iv. *The degree of prejudice to the other party.*

Once a delay is not accounted for, it does not matter the length of the delay. There must always be an explanation for the period
25 *of delay."*

The applicant herein has averred that the delay in filing an appeal on time was orchestrated by the trial court's failure to issue ruling notices of the date when the judgment was expected to be delivered following the judgment not being ready on the mutually known adjourned date.

30 I have had the occasion to peruse the record and I note that the judgement in Civil Suit No. 003 of 2017 was fixed for delivery on 27th April 2022. The record of

5 proceedings on 27th April 2022 show that the applicant/plaintiff was present in court but the defendant was not represented in court. The matter was adjourned to 18/05/2022 for judgment. Nothing happened on 18/05/2022 as the next recorded date on the proceedings is 01/06/2022 when the judgment was delivered in open court in the presence of Mr Masajage for the plaintiff, but in
10 the absence of the plaintiff, applicant and the defendant.

I have also perused the proceedings in Civil Suit No. 003 of 2017 and noted that Counsel Stephen Masajage appeared for the plaintiff/applicant many times, such as on 23/02/2022, which was the date of hearing when the matter was adjourned then for judgment on 27/04/2022.

15 Counsel Stephen Masajage also appeared for the plaintiff on 25/01/2022.

I have, however, not seen any judgement notices on the file notifying the parties of judgement on 01/06/2022, but Counsel Stephen Masajage, having appeared for the plaintiff on the date of judgment, evidently had the judgment read in his presence and is presumed to have knowledge of its outcome and being an
20 advocate was expected to know the timelines of the subsequent possible courses of action.

I have also perused from the trial court file a letter dated 1st July 2022 from M/s Omongole and Co. Advocates in which is communicated the failure of the defendant's counsel in filing their submissions and requesting the court to deliver
25 judgment based on the plaintiff's submissions.

This letter portrays a contrary position because the plaintiff's lawyer in the name of Stephen Masajage, was in court on the 1st of June 2022 when the judgement was delivered.

I find that the plaintiff had sufficient notice of the day of judgment through his
30 lawyer – Counsel Stephen Masajage, who attended court on the 1st of June 2022

5 when the judgment was delivered. This instant application is thus an abuse of court process and the applicant is guilty of dilatory conduct.

Be that as it may, it is trite that the mistake of counsel (see *Gurdial Singh Dhillon v Sham Kaur [1960] EA 795*) should not be visited on the applicant, and also, given the fact that the court did not issue and serve notices of the fixed date for
10 judgment delivery.

In that regard, I am inclined to exercise my discretion to grant an extension of time to appeal Civil Suit No. 003 of 2017 of the Chief Magistrate's Court of Kumi at Kumi so that the appeal is heard on its merits so that the dispute can be settled. This ground succeeds only on that basis.

15 b) What remedies are available to the applicant in the circumstances?

The applicant sought the following orders that;

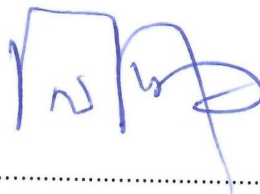
a) The Applicant be granted leave to Appeal Civil Suit No. 003 of 2017 out of time.

b) The costs of this application be provided for.

20 Having decided the mistake of the advocate should not be visited onto the applicant and also because the trial court did not serve the parties with judgment notices for a judgment delivered on 01/06/2022, I hereby grant the applicant leave to Appeal Civil Suit No. 003 of 2017 of the Chief Magistrate's Court of Kumi at Kumi out of time with no order as to costs.

25 The applicant has up to 1st March 2024 to lodge a notice and memorandum of appeal with this court.

I so order



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Hon. Justice Dr Henry Peter Adonyo

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Judge

1st February, 2024