THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 770 OF 2019

(ARISING FROM CIVIL SUIT NO. 22 OF 2015)

1. NAJJUMA JESCA

2. SEMAKULA MAGARANI

3. MIREMBE ANNET ..... **APPELLANTS**

4. NALWEYISO CHRISTINE

5. MAGALA JAMES

6. KIWANDA GODFREY

VERSUS

1. MOSES JOLOBA

2. EDITH NAKKU JOLOBA ..... **RESPONDENTS**

BEFORE: HON. JUSTICE NYANZI YASIN

RULING

1.0. Introduction

This is an application brought under Order 44 and Order 52 of the Civil Procedure Rules SI 71 -1 alongside Sections 96 and 98 of the Civil Procedure Act seeking for;

1. Extension of time within which to file a Notice of Appeal.

2. Leave to appeal against the Judgment and Decree in Civil Suit No. 022 of 2015 dated 16th April, 2019.

The grounds for the Application are contained in the Affidavit in support sworn by the 6th Applicant on behalf of the 1st to 5th Applicant's but briefly are that:

1. None of the Applicants were served with notice of the Judgment delivery date thus their inability to take note of the statutory 14 days within which to file an appeal;
2. The Applicants got to know of the Judgment and decree only when they were served by the respondents' lawyer with a decree and notice to show-cause why execution should not issue.
3. The applicants were not legally represented by any lawyers to keep them abreast with all stages and procedures of court.

In his Submissions, Counsel for the Respondents raised a point of law to the effect that the Affidavit in support of the Application was defective since it was purportedly sworn on behalf of all the Applicants. Counsel for the respondents also argued that the correct procedure is not to seek leave to appeal but rather apply to the court that entered the ex-parte decree to set aside the order. Court was then invited to dismiss the Application on the basis of the points of law raised by Counsel.

2.0. Issues for Determination

1. Whether an Affidavit in support of an Application sworn by one Applicant, on behalf of all the other Applicants, is fatally defective and renders the Application a nullity.

2. Whether the Applicants erroneously filed the Application for Extension of time within which to file a Notice of Appeal before this court.

3.0. Determination of Issues

Issue 1. Whether an Affidavit in support of an Application sworn by one Applicant, on behalf of all the other Applicants, is fatally defective and renders the Application a nullity.

The challenged Affidavit in this application sworn by Kiwanda Godfrey has paragraphs couched in the following words;

Paragraph 1 States;

"That I am a male adult Ugandan of sound mind, the 6th applicant herein and with approval of the rest of the applicants in which capacity I depone hereof."

Order 1 Rule 12 of the Civil Procedure Rules SI 71-1 provides thus:

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for that other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

The principle espoused in Order 1 Rule 12 of the Civil Procedure Rules SI 71-1 is that, whereas in Representative suits, the party who obtains the Order to file the suit can swear Affidavits binding on others on whose behalf the suit is brought, this exception does not apply to all other suits. In cases where an Affidavit is sworn on one's behalf and on behalf of others, there is need to prove that the others authorized the deponent to swear on their behalf. Proof of such authorization is by a written document attached to the Affidavit. ***See*** **KAINGANA V DABO BOUBOU (1986) HCB** 59, where it was held inter-alia that, *"a person cannot swear an affidavit in representative capacity unless advocate or holder of powers of attorney or duly authorized."*

In the instant case, semblance of such authorization seen on record is within the Affidavit itself (specifically Paragraph 10) where the other defendants consented and approved the averments deponed to by the 6th Applicant.

For reasons of relevance, Paragraph 10 is reproduced below;

"WE the undersigned hereby consent and approve to all the above averments deponed to by the 6th Applicant.

a) NAJJUMA JESCA ……signed……

b) SEMAKULA MAGARANI ……

c) MIREMBE ANNET …… signed……

d) NALWEYISO CHRISTINE …… signed ……

e) MAGALLA JAMES …… signed ……"

This defect that offends Order 1 Rule 12 should however be regarded as an irregularity which can be remedied under Article 126 (2) (e) of the Constitution of the Republic of Uganda, Section 43 of the Interpretations Act Cap. 3, and Case law, rather than as a nullity.

Article 126 (2) (e) of the Constitution of the Republic of Uganda provides:

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—

a)……

b)……

c)……

d)……

e) Substantive justice shall be administered without undue regard to technicalities.

While the procedures stipulated under the law are to ensure speedy and effective dispensation of justice, the framers of the 1995 constitution of the Republic of Uganda placed a burden on courts to ensure that people should not be denied justice because of failure to strictly adhere to a technicality of law especially if courts' honor is not in danger.

Justice Ssekaana Musa in **Grace Namulondo & 3 Others V Jone Johns Serwanga Salongo, Senyonga Patrick, and the Commissioner for Land Registration, Misc. Cause No. 001 of 2019**, observed as follows;

Our laws of procedure are based on the principle that as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. The provisions of the civil procedure rules must be interpreted in a manner so as to sub-serve and advance the cause of justice rather than to defeat it... Every omission or mistake in practice or procedure is henceforth to be regarded as an irregularity which court can and should rectify, as long as it can do so without injustice and is not an abuse of court process.

Furthermore, Section 43 of the Interpretations Act Cap. 3 Provides:

Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that forum which does not affect the substance of the instrument or document or which is not calculated to mislead.

It would therefore be absurd for Court to declare the affidavit in question void for reason of deviation from the prescribed format, yet, the substance of the affidavit is not affected in anyway. In those circumstances, the objection on the ground of a defective affidavit cannot be sustained. The Application is hereby granted. Costs shall be in the cause.

When this matter came up for Ruling On 26th February, 2021, court only ruled on the first preliminary objection to wit; whether an Affidavit in support of an Application sworn by one Applicant, on behalf of all the other Applicants, is fatally defective and renders the Application a nullity, and reserved the second one to wit; Whether the Applicants erroneously filed the Application for Extension of time within which to file a Notice of Appeal before this court, to be dealt with in the main Ruling herein.

Issue 2: Whether the Applicants erroneously filed the Application for Extension of time within which to file a Notice of Appeal before this court.

The considerations which guide courts in arriving at the appropriate decision were outlined in the case of **Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal No. 51 of 2001**, where it was held that;

(a) *First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.*

(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.

(c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.

(d) Unless the Appellant was guilty of dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.

(e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ...".

Similarly in **Phillip Keipto Chemwolo and another v. Augustine Kubende [1986] KLR 495** the Kenya Court of Appeal held that:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

Furthermore In **Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22** by the Supreme Court of Uganda that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from

the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

In the instant application, the Ex-parte decree in Civil Suit No. 22 of 2015 was delivered on 16th April, 2019. Notice to show-cause why execution should not issue against the applicants herein was signed on 08th May, 2019. This application was promptly filed on 21st May, 2019, thirteen days after they became aware of the ex-parte decree. There is no evidence to show that there has been any dilatory conduct on the part of the applicants.

The general principle is that leave to appeal will be allowed where, prima facie, there are grounds of appeal that merit judicial consideration or the intended appeal has reasonable chance of success, or if the decision sought to be appealed conclusively determines the rights of the parties (see **Sango Bay Estates Ltd. and others v. Dresdener Bank [1971] EA 17).**

While the applicants in the instant case have not disclosed what the grounds of the intended appeal are, it is not in doubt that the subject matter in issue is land; the decision they seek to appeal was made ex-parte; and the decision sought to be appealed conclusively determines the rights of the parties. At paragraph 3 of the Affidavit in Support, it is averred that, "*we got to know of the judgment and decree only when the respondent's lawyer served us with the decree and notice to show cause why execution should not issue...*" that At paragraph 6 of the Affidavit in Support, it is averred that, " *the decision of the lower court raises appealable questions of law and fact as will be contained in our memorandum of appeal to be*

filed if leave of court is granted since the subject matter is a matrimonial family burial ground for all."

It is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties. So if there is no proper service, an ex-parte judgment can be set aside (see **Okello v. Mudukanya [1993] I K.A.L.R. 110)**. At paragraph 4 of the Affidavit in Reply, the respondents averred that, "*...the Chief Magistrate at the time Her Worship Dorothy Lwanga directed a court process server by the names of Esther to effect service upon the applicants for the second time but the latter who were fully aware of the suit against them chose to stay away. Her Worship Dorothy Lwanga then entered interlocutory judgment against the Applicants/Respondents.*" The respondents herein however do not attach a copy of the Affidavit of Service they allude to.

In his submissions, counsel for the respondent's argued that if the interlocutory judgment was entered erroneously, the correct procedure is not to seek leave to appeal but rather apply to the court that entered the ex-parte decree to set it aside under Order 9 Rule 27.

While the applicant under Order 9 Rule 7 of the Civil Procedure Rules had the option of applying to the Court that passed the order to have the same set aside, that is not a bar to seeking to appeal it instead. Contrary to the submissions of counsel for the respondent, under section 67 (1) of *The Civil Procedure Act*, an appeal may lie from an original decree passed ex parte.

In **Ojara V Okwera Misc. App. No. 23 of 2017, (2018) UGHCCD**, Justice Stephen Mubiru stated that, "*...A litigant, unless estopped by his or her conduct, or by a former adjudication, or by law, is not foreclosed or otherwise prevented from a determination of the merits of his or her cause or defence by means of any of the available remedies. Litigants are at liberty of choosing one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An election of remedies arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event she or he loses the right to thereafter exercise the other. The doctrine provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she has chosen one of them...*"

The application is therefore allowed in the following terms;

1. The Applicants shall file and serve the memorandum of appeal within fourteen days from the date the record of proceedings is received from the lower court.
2. The Applicants shall fix the appeal for hearing on a date falling within three months from the date of filing the memorandum of appeal, failure of which the appeal may be dismissed.
3. The costs of this application will abide the results of the appeal.

Dated at Kampala this 4th day of August 2021

Nyanzi.

NYANZI YASIN
JUDGE