THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA
CIVIL APPLICATION NO. 27 OF 2010
BETWEEN

1. **MOLLY KYALUKINDA TURINAWE**
2. **FIONA TURINA WE**
3. **BERNESANKUNDA ::::::::::::::::::::::A]**
4. **ROBIN TURINA WE**
5. **DAVIS TURINA WE**

VERSUS

1. **ENGINEER EPHRAIM TURINAWE**
2. **DEWARK**K **LIMITED** **::::::::::::::::**

RULING OF DR. E. KISAAKYE, JSC.

The applicants brought this application by way of Notice of Motion under rules 2(1), 2(2), 5, 42 and 50 of the Judicature (Supreme Court) Rules. They are seeking extension of time within which to institute an appeal against the decision of the court of Appeal in Civil Appeal No. 18 of2009. They also pray that the costs of this application be provided for.

The brief background of this application is that the first appellant is the wife of the first respondent. The second, third, fourth and fifth applicants are children of the first applicant and the first respondent. The second respondent, Dewark Limited, purchased the suit property from the first respondent.

The applicants instituted a suit in the High Court praying for orders for nullification of the sale and transfer of a residential property at Kololo to the 2nd respondent by the first respondent without their consent, which they claimed was their matrimonial home. The High Court ruled in favour of the applicants. However, on 20th November 2009, the Court of Appeal reversed the judgment of High Court.

The applicants, being dissatisfied with that decision, instructed their former lawyers, *M/s* Bamwite & Kakuba Advocates, to file an appeal to the Supreme Court. The Advocates filed a Notice of Appeal in the Court of Appeal on the 23rd November 2009 and applied for a certified copy of proceedings. They also served the advocates of the respondents.

On 11th March 2010, the Registrar of the Court of Appeal notified Mis Bamwite & Kakuba Advocates that the proceedings were ready for collection but the lawyers did not take the necessary steps in filing the appeal on behalf of the applicants. The applicants only found out that their appeal had not been filed in October 2010 when *Mis* Bamwite & Kakuba Advocates notified the first applicant that they had been served with an application to strike out the Notice of Appeal. It is then that the applicants engaged their current lawyers who filed this application.

The application is based on several grounds which appear in the Notice of Motion and the accompanying affidavit of the 1st applicant, Molly Kyalikunda Turinawe sworn on the 13th October 2010.

At the hearing of this application, Mr. Kaggwa from Mis Kaggwa - Oweyisigire & Co. Advocates represented the applicants, while the respondents were

represented by Mr. Babigumira from Ms. Bamwe & Co. Advocates. Both the respondents and the applicants applied to the court to cross examine the first applicant and Ms. Joyce Lynn Kabutiiti, who was the deponent of the respondents' affidavit in reply, respectively. I granted both applications.

The first applicant was thus cross-examined and re-examined. Following her cross-examination, counsel for the respondents requested for a certified copy of the proceedings which had so far taken place. Counsel contended that the purpose of their cross examination of the first applicant was to prepare ground for a possible preliminary objection to her Affidavit and the Application, which they intended to make. I declined to provide the proceedings on grounds that counsel for the respondents had been present in court during the entire proceedings that had already taken place and that they were fully aware of what had transpired in court.

At the next hearing of this application, counsel for the respondents raised a preliminary objection to this application. He submitted that the affidavit sworn by the first applicant was incurably defective because while she claimed that her oath had been taken before one Bitaguma, a Commissioner for Oaths, she testified, while under cross-examination that she executed the Affidavit in the chambers of her lawyers. He further submitted that the only logical conclusion to draw from the first applicant's testimony was that after executing her affidavit, the same was taken to Mr. Bitaguma for his signature. He submitted that this procedure was contrary to sections 5 and 6 of the Oaths Act, Chapter 19, Laws of Uganda. He concluded by submitting that the act of her not signing her affidavit before the Commissioner for Oaths not only made the first applicant's affidavit incurably defective but also the whole application which

did not have any supporting affidavit as required by law. He prayed that the application be dismissed with costs.

Counsel for the applicants opposed the preliminary objection and submitted that it was not true that the first applicant's affidavit had been executed in noncompliance of the Oaths Act. He submitted that the first applicant was never asked during her cross examination before whom she had swore her Affidavit and that her admission that she had swore it in her Advocates' chambers did not exclude the fact that she did it before the said Commissioner for Oaths. He prayed that the objection be overruled.

Section 5 of this Act prescribes the form and manner in which an oath may be taken by people professing different faiths in Uganda. Section 6 on the other hand requires every Commissioner for Oaths before whom an oath is taken to state in the jurat where and on what date the affidavit was made.

Having considered the provisions of the Oaths Act and the submissions of both counsels, I overruled the respondents' preliminary objection on grounds that the objection was based on mere conjecture and was not supported by any credible evidence to prove the allegations he had made with respect to how the first applicant's affidavit had been sworn.

Counsel for the respondent failed to show how these sections had not been complied with and only made an attempt to testify from the bar as to how the first applicant's affidavit had been sworn.

The hearing was adjourned to another date for cross-examination of Ms. Kabutiiti, who was reported to have been indisposed by her counsel. I dully

informed the parties that this was the last adjournment I was granting in the matter and also ordered Ms. Kabutiiti to attend court at the next hearing which was scheduled on 14th April 2011, to enable counsel for the applicants to cross examine her if they still so wished to do so. Both parties were ordered to come prepared to make their submissions after the cross examination of the Ms. Kabutiiti.

Following the adjournment, counsel for the respondents resubmitted his request for a typed and certified copy of the proceedings and my ruling on his preliminary objection to enable them to formulate grounds for consideration by the full bench. I refused to grant this request on similar grounds as their earlier request. Subsequently, respondents' counsel wrote a letter to the Chief Justice which is on the court record, alleging bias on my part for my refusal to avail them the proceedings and the ruling and requested for his intervention.

Counsel for the respondents and Ms. Kabutiiti, did not attend court on 14th April, 2011 when the matter next came up for hearing. Instead, the court clerk brought to my attention a letter dated 13th April 2011 written by counsel for the respondents to the Registrar of the Supreme Court. Counsel reiterated his allegations of bias and indicated that his clients were only interested in making a reference to the full bench and were awaiting for the response from the Chief Justice and the results of their reference to a full bench.

Counsel for the applicants, on the other hand, who was in court applied to court for the matter to proceed in the absence of counsel for the respondents and his clients. He submitted that there was no basis for the respondents' allegations of bias and their prayer for this application to be heard by a full bench which is

contrary to the practice of this court to have such applications heard by a single judge. He also prayed that in the absence of the Ms. Kabutiiti, he be allowed to abandon his earlier request to cross-examine her and to proceed with the hearing of the application. Lastly, he prayed that he be allowed to withdraw his earlier written submissions which were already on file and to make new written submissions responding to the new matters that had come up in the respondents' affidavit in reply and during the cross examination of the first applicant.

Basing on rule 53(2) of the Supreme Court Rules which provide for the procedure where the applicant appears and the respondent fails to appear on the date set tor hearing, I ruled that the hearing continues. My ruling was further based on the fact that the hearing had been adjourned for the last time in the presence of counsel for the respondents, who had neither appeared in court in person or through another counsel holding brief on his behalf to seek an adjournment. I also granted the all applications made by counsel for the applicants. I ordered that counsel for the applicants file their new written submissions and serve counsel for the respondent, who were similarly directed to file their written submissions as scheduled and to serve counsel for the applicants. Subsequent to my orders, counsel for both parties filed their written submissions.

Counsel for the applicants submitted that ruled 5 of the Supreme Court Rules empowered this court to extend the time for doing any act authourised or required by the Rules, if there is sufficient reason to do so. Relying on the affidavit of the first applicant and her testimony during cross-examination, he contended that there is sufficient reason for the court to extend the time within

which to file the applicant's Appeal in this case. He argued that sufficient cause was constituted by the fact that it is the applicants' former advocates who either negligently or by mistake or error failed to file the appeal in court in time. He further contended that the applicants, as lay persons entrusted their case with their former advocates and so they ought not to be punished for the error, omission and negligence of their former lawyers. He reiterated the principle that the negligence, mistake error or omission of an advocate should not be visited on the party. He relied on several decisions of this court, namely ***Zamu Nalumansi v Sulaiman Lule S.C. Civil Application No.2 of* 1992; *Attorney General v. A.K.P.M, Lutaaya,* S. C. *Civil Application No.* 12 *of 2007; F. L. Kaderbhai & Anor v Shamsherali M. Zaver Virji* & 2 *Ors,* S. C. *Civil Application No. 20 of2008; Mulowooza &Bros Ltd v N. Shah & Co Ltd S.c.*** *Civil Application No. 20 of 2010;* where this court has reiterated this same principle and has also held that sufficient cause had been shown to extend the time to institute the applicant's appeal. He submitted that there was no evidence from the respondents to controvert the applicants' evidence that they indeed instructed their lawyer to institute their appeal and that it had been their lawyers who were negligent.

Secondly, counsel for the applicants submitted that in the instant case, a family residential house and land at Kololo which is prime property, was at stake. He contended that the applicants would suffer injustice and great loss if their right to the property and shelter is lost, without their appeal being heard and decided on its merits by the Supreme Court.

Thirdly, counsel also submitted that the fact that there was the pending application, Civil Application No.9 of 20 10, to strike out the applicant's Notice

of Appeal should not act as a bar to an application for extension of time, neither does it divest the court of its jurisdiction to any time. He relied on the case of ***Godfrey Magezi and Another vs. Sudhir Ruparelia,*** **S.C** ***Misc. Application No.6 of 2003***, when this court held that when dealing with a matter of this nature, "***the guiding principle should be that the rules of procedure are meant to serve as hand maids of justice and not to defeat justice".***

Lastly, counsel for the applicants contended that the respondents could be compensated with costs for any inconvenience caused. He concluded by praying to court to use its inherent powers under rule 5 and 41(2) to allow his clients' application and to extend the time within which they would file their appeal.

In reply, counsel for the respondents conceded that the while court had powers to extend the time to file an appeal, it could only do so for sufficient reason. He submitted that in the instant case, the applicants needed to prove that their advocate was not only in breach of his duty to them, but also that they t09 were not guilty of dilatory conduct. He contended that according to the reasons given by the first applicant, the applicants never visited their lawyer's chambers at all nor did they ever facilitate their former Advocate, Mr. Bamwite to prosecute their appeal. He submitted that there was no evidence of negligence on the part of counsel Bamwite. Secondly, counsel for the respondents submitted that the applicants were guilty of dilatory conduct. He relied on the cases of ***Hadondi Daniel v. Yolamu Egondi (2006) HCR Vol.*** **1,** ***103; Robert Kitariko v. David Twinokatama CA. Civil Application No.2 of*** **1982;** ***Paul Masiga v. Toro & Mityana Tea Co. Ltd, CA. Civil Application No.*** **79** ***of 1999 [2001J KALR*** 186; among others, in support of his contentions. He concluded

by submitting that the applicants had failed to establish or to show sufficient cause on grounds of their former counsel's negligence to warrant the application being granted and that even if he had been negligent, the applicants had been guilty of dilatory conduct.

Rule 5 of the Judicature (Supreme Court) Rules confers jurisdiction on this court to extend time. It provided as follows:

*"**The Court may, for sufficient reason, extend the time prescribed by these Rules or by any decision of the Court or of the Court of Appeal for doing of any act authorized or required by these Rules whether before or after the expiration of the at time and whether before or after the doing of the act, and any reference in these rules to any such time shall be construed as a reference to the time as so extended"***

It is therefore important the a consider the following three questions before I can dispose of this application;

(i) Whether the applicants have established sufficient reasons for this court to extend the time in which they may lodge their appeal.

(ii) Whether the applicants are guilty of dilatory conduct?

(iii) Whether any injustice would be caused if this application is not granted?

The basis of the applicant's evidence is to be found in the affidavit evidence of the first applicant. In paragraphs 4 to 8 of her Affidavit, she deponed as follows:

1. *"**That I and my co-Applicants instructed my former lawyers Ms. Bamwite & Kakuba Advocates to file an Appeal against the Court of Appeal judgment to the Supreme Court.***

2. ***That my former lawyers filed a Notice of Appeal on 23rd November 2009 and applied for the Court proceedings. The Notice of Appeal and letter applying for Court proceedings are annexed and marked "A" AND "B" respectively.***

3. ***That after the losing the family accommodation in Kampala, I went to stay at my parents home in Rukungiri and my children got scattered in different places so we lost contact with out former Advocates who had also changed offices.***

4. ***That my lawyers managed to trace me during the month of October 2010 and informed me that the Notice of Appeal was to be ~truck out because they did not take the necessary further steps on my Appeal.***

5. That when I asked them why they did not take the necessary further steps in the Appeal, they informed me that they did not do so because they could not trace me to give them money required for preparing the record of appeal, for Court fees and for security for costs."

During her re-examination in court, the first applicant repeated her contention that she relied on her lawyers to take the necessary action to lodge the appeal as follows:

"I t is Mr. Bamwite who filed the Notice of Appeal and sought for the record of appeal. When I was leaving, we agreed that Mr. Bamwite would handle everything and that I would pay him later. He told me all that involved was paper work. That is why I look long to get in touch"

From her evidence, it is evident that the applicants indeed instructed their former lawyers to institute a Notice of Appeal. That is borne out by the fact

that indeed the said lawyers filed a Notice of Appeal and also requested for a typed copy of the Judgment and proceedings on November 23rd 2009. It is also an undisputed fact that the said lawyers were duly notified by the Registrar that the proceedings were ready on 11 th March 2010. The first applicant's evidence is that the said lawyers never t.ook any necessary steps to institute the appeal hence this application.

The respondents' submissions collaborate these facts that indeed no appeal was ever filed. The respondent even proceeded to file an application to strike out the Notice of Appeal. From the receipt of the Registrar's letter informing the applicants' former lawyers that the proceedings were ready, the first applicant contends that she only heard from her former lawyers in October 2010 when they were notifying her that they had been served with an Application to strike out their Notice of Appeal. The respondents contested the first applicant's evidence that they did not facilitate the former lawyers to prosecute the appeal. They however did not offer any credible evidence to the contrary, to show what other steps the applicants' former lawyers took to inform the applicants that

(i) the certified typed proceedings were ready for collection;
(ii) that the applicants needed to deposit filing fees and security for costs; (iii) what were the next steps that needed to be taken to institute the appeal; and
(iv) the requisite timeframe provided for by the Judicature (Supreme Court) Rules with respect to filing an appeal.

Neither did the respondent~ provide any credible evidence to prove their claim that the applicants' former lawyers had not changed their offices and that the

first applicant was living in Kawempe and not in her home village as she claimed and that the rest of the applicants were scattered. The affidavit in reply of Ms. Kabutiiti, who holds Letters of Administration to the Estate of the late Elizabeth Kabutiiti, who is claimed to have been a shareholder in the second's Respondent Company does not help the respondents' case because it purports to depone to matters which are not within the deponent's personal knowledge. For example, it does not show whether Ms. Kabutiiti personally knew any of the applicants and their extended family, since her only known connection to the applicants is as a representative of the second respondent who claimed to have bought the house that is the subject matter of the intended appeal.

I have carefully considered the submissions of both counsels. Given the evidence adduced by the applicants, I am convinced that the appeal was not instituted in time, due to either the negligence, mistake, error or omission of their former advocates.

I find that the applicants have adduced sufficient reasons as required by Rule 5 to warrant me to exercise my discretion to grant the extension of time within which to institute their appeal. Counsels' negligence or omissions have indeed been found to constitute sufficient reasons in similar applications that have come before this court such as was the case in ***Zamu Nalumansi & Anor v Sulaiman Lule (Supra); Attorney General v A.K.P.M Lutaya (Supra); F.L. Kaderbhai & N. H. Vabiji & others (supra),***

I agree with the reasoning of my brother, Justice Seaton, JSC in the case of ***Zamu Nalumansi & Anor vs. Sulaiman Lule (Supra)*** when he observed as follows:

"…. the applicants are laymen. There is nothing in the evidence to indicate their degree of education or sophistication. I cannot say that in relying as they did on the assurance of negligent counsel, they were usually naive or unreasonable. Nor did their new counsel, who eventual discovered the former counsel's error or omission, appear to have been guilty of such delay as would justify depriving the applicants of their right to have their intended appeal adjudicated on its merits."

My resolution of the first question would be enough to disposal of this application. Let one however briefly comment on the two additional questions. This application was also brought under rule 2 (2) of the Supreme Court Rules which provided as follows:

"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court,' and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

The appeal that the applicants intended to lodge involves a subject matter of a house which the applicants are claiming was their matrimonial home. It is important that the applicants be allowed to file their appeal so that the matter is heard on its merits. Indeed, this is a case where the ends of justice would be served by hearing both parties on this important matter.

Since the ends of justice demand that this application be allowed, I accordingly grant this application. The applicants are hereby ordered to file their Memorandum of Appeal within 14 days from the date of delivery of this Ruling and to serve the respondents immediately.

On the issue of costs, I believe that this is a matter which the parties could have resolved quickly and where this protracted litigation could have been avoided. In light of this, I make no award as to costs. Each party shall meet their own costs.

Dated at Kampala this 25th day of January 2012.

Dr. Esther Kisaakye
Justice of the SupremeCourt