

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPLICATION NO.324 OF 2016**

**(ARISING FROM HCT-05-CV-MA-126-2015)**

**(ARISING FROM HCT-05-CV-CR-0011-2013)**

**BARYAIJA**

**JULIUS:::::**

**:::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**1. KIKWISIRE ZAVERIO**

**2. KABAREEBE BURAZIO:::::::RESPONDENTS**

**(Before: Hon. Lady Justice Hellen Obura, JA)**

### **RULING OF COURT**

#### **Introduction**

This is an application for extension of time within which to file a notice of appeal brought under Rule 5 and 76 (2) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is supported by the affidavit of Baryaija Julius, the applicant.

#### **Background Facts**

The background to the application, as gleaned from the pleadings and the annexures thereto, dates as far back as 1977 when Mr. Yosamu Rwmuyanga, the father of the applicant instituted Civil Suit No. 54 of 1977 against a one Asanasio Babikeraki at the 3<sup>rd</sup> Grade Magistrate's Court sitting at Rwanyamahembe, Bwizibwera, Kashari. The subject matter of that suit was a kibanja which the plaintiff claimed belonged to him having purchased it in 1940. The 3<sup>rd</sup> Grade Magistrate heard the case and delivered judgment in favour of the plaintiff on 17<sup>th</sup> May, 1978. The plaintiff's effort to get vacant possession of the suit land appeared to have met a lot of resistance because as late as July 1989, 11 years after obtaining judgment in his favour, his lawyer was still complaining about the respondent's agents' refusal to vacate the land despite consenting to do so.

The plaintiff was shot dead later under some mysterious circumstances before he got vacant possession of the land. The applicant in this matter jointly with his mother obtained letters of administration of the deceased plaintiff's estate in September 2000 and applied for execution of the judgment in Civil Suit No. 54 of 1977. The execution was carried out in 2003 against the respondents and other people who were in occupancy of the land some of whom claimed their right over that land through the respondent in Civil Suit No. 54 of 1977. The boundary marks were put back and the applicant was given vacant possession of the suit land.

Soon thereafter, the respondents removed the boundary marks and continued using the land. The applicant filed a complaint which led to the arrest of the respondents and 4 others. They were charged, prosecuted and convicted on three counts of removing boundary marks, threatening violence and wrongfully taking possession of land. Each of the accused persons were sentenced to a period of 6 months on each count to be served concurrently. The respondents and the other convicts seemed to have appealed against the conviction and sentence. At the hearing of that appeal, prosecution conceded to the grounds of appeal stating that the Magistrate did not evaluate the evidence on record as the execution in the civil matter was against the wrong parties. He asked court to set aside the judgment and sentences. By consent, court quashed the conviction of the accused persons and set aside the sentences on that basis.

The applicant again applied for execution of the judgment and order in Civil Suit No. 54 of 1977 and a warrant to give vacant possession of the land was issued on 26<sup>th</sup> April 2007. According to the return filed by the court bailiff, execution was carried out by; putting back the boundary marks around the kibanja that was decreed to the applicant through his deceased father, destroying the gardens that were in the kibanja and pulling down the 2 goal posts that were in the football pitch on the kibanja.

Upon being acquitted after their conviction was quashed and the sentence set aside, the respondents sued the applicant in the Local Council 1 (LC1) Court of Kigoro over the same land and they obtained judgment against the applicant. It appears there was an appeal against the LC1 Court by the applicant to the Chief Magistrates' Court which confirmed the decision of the LC1 Court.

Relatedly and surprisingly, on the 9<sup>th</sup> December 2009, the Chief Magistrate of Mbarara Chief Magistrates' Court wrote a letter cancelling the judgment of Bwizibwera Court in Civil Suit No. 54 of 1977 for reason that it was no longer valid as it was outdated and had outlived its usefulness and therefore the applicant should forthwith stop using it.

In 2013, the applicant sought revisional orders from the High Court at Mbarara vide HCT-05-CV-CR-0011-2013, challenging the decision of the Chief Magistrate which confirmed that of the LC1 Court of Kigoro. In a ruling delivered on 27<sup>th</sup> November 2014, the learned Judge at the High

Court, held, inter-alia, that the decision of the Magistrate in Civil Suit No. 54 of 1977 could not have been set aside by the letter of the Chief Magistrate dated 9<sup>th</sup> December 2009. He noted that since there was no appeal lodged against that decision it still stands. He instead set aside the letter of the Chief Magistrate. The Judge held further that since there was also no appeal against the decision of the LC1 Court of Kigoro the same is left to stand and the people

who are occupying the suit land by virtue of the LC1 Court decision should continue doing so. He ordered each party to bear his own costs since the application partly succeeded.

In 2015, the respondents vide HCT-05-CV-MA-126-2015, applied for a review of the High Court ruling in HCT-05-CV-CR-0011-2013, by removing paragraph 10 thereof which declared that the decision in Civil Suit No. 54 of

**1977** Still stands. In a ruling delivered on 29<sup>th</sup> January 2016, the Judge declined to grant the orders sought and confirmed his decision. He dismissed the application with no orders as to costs as both counsel failed to file submissions. The applicant being dissatisfied with the decision of the High Court is desirous of appealing against it. However, the time within which to lodge his appeal has since lapsed, hence this application that seeks for extension of time.

I have elaborately set out the background facts of this application so that it can be considered in that context.

### **Grounds of the application**

The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application where the applicant gave the background of the case as already alluded to above and averred, inter-alia,

that; in Mbarara High Court Misc. Application No. HCT-05-CV-MA-00126- 2015 **Kikwisire Zaverino and Kabareebe Burazio vs Baryaija Julius**, His Lordship David Matovu, in a judgment dated 29<sup>th</sup> January, 2016, ordered the eviction of the applicant from his father's land whereupon the 5 court bailiffs demolished his houses, crops and imprisoned him as a civil prisoner in satisfaction of the award of costs against him, as a result, he (applicant) was unable to lodge a notice of appeal against the said decision within the mandated 14 days as required under Rule 76 (2) of the Court of Appeal Rules.

Further, that he has a right to appeal in the Court of Appeal under 0.44 r 1 (t) of the Civil Procedure Rules and in the circumstances it is just and equitable that this Honourable Court be pleased to grant this application.

### **Reply to the application**

An affidavit in reply dated 20<sup>th</sup> February 2017 was sworn by Kikwisire Zaverio, the 1<sup>st</sup> respondent. He averred, inter-alia, that the applicant filed this application on 24<sup>th</sup> November, 2016 and it was signed and sealed by the Registrar of this Court on the same day but the motion was served onto his advocate on 16<sup>th</sup> February, 2017 which is a clear indication that

the applicant is dilatory and is not entitled to the remedy of extension of time. Further, that it is not true that the applicant was ever imprisoned as a civil prisoner in respect of HCT-05-CV-MA-00126-2015 in satisfaction of the award of costs against him but rather the applicant was arrested in respect of costs in HCT-05-CV-CR-290-2014 determined on 3<sup>rd</sup> February 2015.

The respondent averred further that the applicant was arrested on 1/4/2016 by a court bailiff who produced him before the Registrar on 4/4/2016 and

the Registrar released him after advising him to go and negotiate a schedule of payment with the judgment creditors and their lawyers. Instead of negotiating the schedule of payment, the applicant went and organised a gang of thugs who invaded the respondent's land, uprooted the fences, set ablaze and destroyed the respondent's fencing poles and growing trees. The applicant was re-arrested in November 2016 and on 9/11/2016 he signed a consent. It is therefore not true that the applicant was prevented by any sufficient cause from filing a notice of appeal and no sufficient cause for extension of time has been disclosed.

### **Affidavit in rejoinder**

In an affidavit in rejoinder dated 22<sup>nd</sup> February 2017, the applicant averred that; the affidavit in reply dwells on High Court Civil Revision Application No. 290 of 2014 which is not the subject matter of this application. The land in dispute is the applicant's ancestral land originally owned by his late father and was handed back to him by a valid court process way back in 1978 but the respondents are trespassers thereon who have gained access and remained settled there because of the wrong decision made by Hon. Justice David Matovu being complained about.

Further that the applicant's lawyers in the lower courts M/S Twinamatsiko & Co. Advocates did not carry out their mandate to represent him as they should have done in the lower court and in particular they failed to advise the applicant accordingly.

### **Representation**

At the hearing of the application, the applicant was represented by Mr. James Okuku while the respondents were represented by Mr. Ngaruye

Ruhindi. Counsel for the respondents informed court that he had 4 preliminary points of law to rise. Court directed the applicant's counsel to raise the preliminary points of law as part of his submissions in reply so that they could be considered together with the merits of the application.

## **Case for the applicant**

Counsel submitted that this Court has discretion under rule 2 of the Judicature (Court of Appeal Rules) Directions to grant this application. He submitted that the ruling states that both parties were represented but the lawyers never carried out their mandate of filing written submissions. He contended that even after the ruling was delivered, counsel for the applicant did not carry out his mandate to appeal. He further submitted that annex "D" inferred that there was negligence of counsel by them not filing submissions and this was pleaded by reference to the Judge's ruling and the authorities counsel was relying on. He argued that mistake of counsel is should not be visited on the litigant which is a good ground for extension of time.

Counsel relied on the case of **Molly Kyalukinda and others vs Engineer Ephraim Turinawe and others; Supreme Court Civil Application No. 27 of 2010**, where that principle was stated. Counsel submitted further that his client was an illiterate peasant who needed his lawyer to read the ruling, interpret it and advise him whether there was a chance of correcting it on appeal.

Counsel also submitted that it is just and equitable that this application be allowed because the subject matter in dispute is ancestral land which belonged to the applicant's late father. He submitted that in 1978 the Chief

Magistrate ruled that this was applicant's father's land and this judgment of the lower court has not been set aside. He further submitted that the respondents who were not even parties to the 1977 case are trying to gain access to this land using the decision of the High Court. He prayed that the application be allowed in the interest of justice.

Counsel further submitted that he did not see how a Judge of the High Court can revise a decision made 40 years ago and moreover in favour of persons who were not party to the suit in 1977. He argued that it is sad that the trial Judge confirmed the decision of the LC1 Court which had no jurisdiction to deal with land matters as was held in the case of **Rubaramira Ruranga vs Electoral Commission and anor; Constitutional Petition No. 21 of 2006**. In that case, it was held that the impugned provisions of the Local Government Act that provide for oral nomination of candidates for election in the local council are unconstitutional because they were enacted under the movement system and as such they deny political parties participation in the election.

In conclusion, counsel submitted that the purpose of this application is to enable the applicant to be heard on the merits of the case on appeal. He prayed that this Court allows the

application.

By the foregoing submissions, counsel appeared to have abandoned the main ground of the application as contained in the motion and the affidavit in support that the applicant was unable to lodge a notice of appeal because he was arrested and put in civil prison.

### **Case for the respondents**

Counsel for the respondents raised objection on four preliminary points of law. On the first preliminary point, he submitted that this application ought to be summarily dismissed with costs as it is misconceived, ambiguous, vexatious, frivolous and incompetent. He contended that the application offends section 66 and 67 of the Advocates Act which requires that documents for legal proceedings when drawn by an advocate; it shall bear the name and address of that advocate at the foot of the document. Counsel contended that the applicant's application did not contain such information. Counsel submitted further that the affidavit in support does not also bear the name and address of the advocate and under the Advocates Act it is criminal not to do so. He prayed that the motion and affidavit be struck out summarily for that reason.

On the second preliminary point of law, counsel pointed out that there are two rulings attached to the affidavit in support of the application, namely; one in HCT-05-CV-MA-126-2015 and the other one in HCT-05-CV-CR- 0011-2013. He submitted that the application is unarguable because the motion does not specify which of the two rulings is sought to be appealed against.

Furthermore, that a motion is supposed to be specific so that the court knows what it is being moved to do or to grant. Miscellaneous Application No. 126 of 2015 sought to review the decision in HCT-05-CV-CR-0011- 2013 and this is a decision that was made on 27<sup>th</sup> November, 2014, which should have been appealed then if the applicant was aggrieved. Counsel contended that the only decision that the Judge made in the review decision on 29<sup>th</sup> January, 2016 was to dismiss the matter saying he had already ruled on it. There is therefore no justification for extension of time.

On the third preliminary point of law, counsel submitted that the application is supported by a false affidavit. He contended that in paragraph 5 of the affidavit the applicant stated that he was arrested in respect of costs in Miscellaneous Application No. 126 of 2015 and yet the same was dismissed with no order for costs. Counsel argued that an affidavit that contains an obvious falsehood like this one should be struck out. He referred this Court to the decision in **Bitaitana and 4 others vs Kananura; Civil Appeal No. 47 of 1976**. Counsel concluded that it cannot therefore be true that the applicant was prevented from filing his appeal in time by

his arrest and committal to civil prison for failure to pay costs awarded in Miscellaneous Application No. 126 of 2015.

The fourth preliminary point of law raised by counsel is that the manner in which the annexures were attached is improper and none of them has been endorsed by the Commissioner for Oaths before whom the applicant appeared. Counsel contended that this is contrary to rule 8 of the schedule to the Commissioner for Oaths (Advocates) Act, Cap 5. He cited the cases of **Kassami vs Commissioner Land Registration; Miscellaneous Application No. 424 of 1996 at pages 7 & 8** and **Byeshamika John vs Kankwerere Lydia; Miscellaneous Application No. 82 of 2005**.

Counsel also urged this Court to disbelieve the two annexures “A” because the handwritten version was made by a 3<sup>rd</sup> Grade Magistrate on 17/5/1978 while the typed one was made by a 2<sup>nd</sup> Grade Magistrate on the same day but they bear different signatures. He submitted that this makes the judgment suspect and as such it cannot be considered as a valid annexure to an affidavit made on oath. He prayed that, for all the above four Preliminary points of law, this application be summarily struck out with costs.

On the merits of the application, counsel submitted that an applicant for extension of time must satisfy the court that there was sufficient reason that prevented him or her to take the necessary steps within the prescribed time. Counsel contended that the decision in Miscellaneous Application No. 126 of 2015 for which the applicant is seeking extension of time was made on 29/01/2016 and thus, he should have filed a notice of appeal latest by 12/02/2016. Further that the applicant’s allegation that he was in prison as a result of that very Case is not true because no costs were awarded in that case. Counsel also submitted that the aspect of negligence of counsel as alleged by the applicant and submitted by his counsel is foreign and strange to the notice of motion which does not mention it.

Regarding the applicant’s assertion in paragraph 2 (c) of his affidavit in rejoinder that his lawyers failed to advise him, counsel submitted that lawyers do not advise parties to appeal but instead it is the parties who instruct lawyers to appeal.

On the applicant’s contention that in the interest of justice the application should be allowed because it concerns land, counsel submitted that the applicant should have been vigilant to take the necessary steps in time. He referred this Court to the case of **Molly Kyalikunda Turinawe & 4 others vs Engineer Ephraim Turinawe & another (supra)** where it was stated that the applicant must show sufficient cause why he did not take the necessary step in time and must not be guilty of dilatory conduct. Counsel contended that the applicant is guilty of dilatory

conduct so he cannot have this Court's discretion exercised in his favour.

On the issue of LC courts determining land disputes, counsel submitted that under the LC courts Act No. 13 of 2006 and the predecessor Act, LC courts were given powers to determine land disputes. He further submitted that the case of **Rubaramira Ruranga vs Electoral Commission & Anor (supra)** cited by counsel for the applicant, did not remove the judicial powers of the LC courts but it simply said that under the multi-party system there should be a different law because the law that was made then did not envisage a multi-party dispensation.

He prayed that the application be dismissed with costs but should court be inclined to grant it, the applicant should pay costs because he is guilty of dilatory conduct.

### **Reply to the preliminary objections**

Regarding commissioning of the attachments, counsel for the applicant submitted that judgment of court does not need certification under sections 55 and 57 of the Evidence Act since they form part and parcel of the application.

On allegations that the motion and affidavit did not bear the name and address of counsel, counsel submitted that he signed the motion and indicated his firm name even on the list of authorities as drawn and filed by Okuku & Co. Advocates together with his address. According to him, there was no need to do so on each document.

On the objection regarding the unspecified ruling sought to be appealed from, counsel referred to the head note of the motion which he submitted is very specific that the application arises from HCT-05-CV-MA-126 of 2015.

Regarding the alleged falsehoods, counsel referred to annexure "A" to the affidavit in reply which shows that costs were awarded against the applicant and this led to his imprisonment.

On the issue raised concerning the two annexures "A", counsel submitted that he did not cross check to see that the typed version tallied with the handwritten one as he had assumed they were okay.

In conclusion, counsel prayed that this application be allowed and each party should bear his costs due to negligence of counsel.

### **Consideration by the Court**

This Court has the discretion, for sufficient cause, to extend time under rule 5 of the Judicature (Court of Appeal Rules) Directions, SI 13-10. Sufficient cause should relate to the inability to do a

particular act.

Rule 5 provides as follows:-

*“The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorised or required by these Rules, whether before or after the expiration of that 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 extended.”*

In the case of **Molly Kyalikunda Turinawe and 4 others vs Engineer Ephraim Turinawe & another (supra)**, Kisaakye, JSC stated 3 questions to be determined before disposing of an application for extension of time like this one. These are:

1. *Whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the appeal.*
2. *Whether the applicant is guilty of dilatory conduct.*
3. *Whether any injustice will be caused if the application is not granted.*

The above principles were earlier considered by Duff P in the case of **Mugo and ors vs Wanjiru and anor [1970] EA 481 at p.484** where he stated thus;

*"Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."*

I will bear the above principle in mind as I proceed to determine this application beginning with the preliminary points of law raised by counsel for the respondents.

### **Consideration of the preliminary points of law**

On the 1<sup>st</sup> preliminary point of law relating to sections 66 and 67 of the Advocates Act, I have had the opportunity to read and internalize the said sections and I am of the view that the mischief that the said sections seek to address is preparation of legal documents/instruments by unqualified

Persons. This is clear from the headnote of section 66 which says: “penalty for unqualified persons preparing certain instruments”. To that end, section 67 then requires instruments to be endorsed with the name and address of the drawer. This, in my view, is for purposes of identifying the drawer to determine whether they are qualified persons to draw the same or not.

In the instant case, the notice of motion does not have the endorsement “drawn and filed by” at

the foot of the document but it was signed by James Okuku for M/S Okuku & Co. Advocates counsel for the applicant. The affidavit in support of the application does not also have the endorsement. Nevertheless, the list of authorities attached to the application has the name and address of the drawer being M/S Okuku & Co. Advocates, Plot 37 Majanji Road, P.O. Box 272 Busia. Tel. 0772535496.

To my mind, the pertinent question to be asked is whether the purpose of sections 66 and 67 of the Advocates Act is achieved by the endorsement in this application which only appears in the list of authorities. I would say yes for reason that there is no doubt that the motion as well as the supporting affidavit and the other accompanying documents were drawn and filed by M/S Okuku & Co. Advocates who signed the motion as counsel for the applicant.

Therefore, I am satisfied that the purpose of sections 66 & 67 of the Advocates Act is served by that endorsement. Consequently, this Court finds no merit in the 1<sup>st</sup> preliminary point of objection and it is accordingly overruled. In coming to that decision this Court is also fortified by the decision in **Rtd Col. Dr. Kizza Besigye vs Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006** where the Supreme Court refused to reject affidavits that were not duly endorsed by the person who prepared them as required by section 67 of the Advocates Act for reason that it would be unfair to reject the same.

On the 2<sup>nd</sup> preliminary point of law, concerning the alleged non- specification of the ruling intended to be appealed from, I agree with counsel for the applicant that the headnote of the application indicates the matter from which the application arises. It therefore follows that the ruling intended to be appealed from is in respect of HCT-05-CV-MA-126-2015 from which this application arises. In the premises, the 2<sup>nd</sup> preliminary point of objection also has no merit and it is overruled.

On the contention that the application is supported by a false affidavit as argued in the 3<sup>rd</sup> preliminary point of law, I have carefully perused paragraph 5 of the affidavit in which the applicant averred that;

*In Mbarara High Court Misc. Appl. No. HCT-05-CV-CR-0011-2015 Kikwisire*

*Zaverino and Kabareebe Burazio versus Baryaija Julius*

*judgment dated 29<sup>th</sup>/01/2016, his Lordship David Matovu went further and ordered the eviction of the applicant from his father's land whereupon the court bailiffs demolished his houses, crops and imprisoned him as a civil prisoner in satisfaction of the award of costs against him, a photocopy of the judgment is annexed hereto marked*

Counsel for the respondents contended that this is falsehood because no costs were awarded in that matter as borne out by the ruling attached as annexure “D” to the affidavit in support. According to counsel, costs were awarded in another matter as clearly indicated in annexure “A” to the affidavit in reply.

Annexure “D” that is attached to the affidavit is a copy of the ruling in HCT- 05-CV-MA-126-2015 which arose from HCT-05-CV-CR-0011-2013. First of all, there was an error in the application number as stated in that paragraph of the affidavit. Secondly, in both applications no costs were ordered. However, the respondent in his affidavit in reply averred in paragraph 11 thereof that the applicant was arrested in respect of costs in HCT-05-CV- CR-290-2014 determined on 3<sup>rd</sup> February 2015.

It is therefore not in dispute that the applicant was at one point arrested and put in civil prison for failure to pay costs. The affidavit is only challenged for allegedly stating that the costs were in respect of a matter where no costs were awarded. A careful perusal of the content of paragraph 5 of the applicant’s affidavit reproduced above, in my view, does not say that the costs in respect of which he was imprisonment was awarded specifically in the matter he referred to therein. To my mind, the applicant was narrating what the court bailiff did in enforcement of the court order which included his arrest and imprisonment in civil prison. Therefore, I do not see the alleged falsehood in paragraph 5 of the affidavit in support of the application.

In any event, even if the affidavit indeed contained falsehood, it is now settled that, in the interest of substantive justice, the court can apply the doctrine of severance and such matters as are affected can be excluded and the remaining paragraphs can be relied on. See: **Rtd Col. Dr. Kizza Besigye vs Electoral Commission and Yoweri Kaguta Museveni, (supra).**

On the 4<sup>th</sup> preliminary point of law concerning the annexures to the affidavit in support of the application, rule 8 of the Commissioner for Oaths Rules made under the Commissioner for Oaths (Advocates) Act, Cap 5 which counsel argued has been offended by the applicant provides as follows:

*“All exhibits to the affidavits shall be securely sealed to the affidavits under the seal of the commissioner and shall be marked with serial letters of identification.”*

In the instant case, the applicant’s affidavit introduces some documents and indicates that they are attached as annexures “A”, “B”, “C”, and “D”. Besides those four annexures which are not even securely sealed by the commissioner for oaths, there are a host of other documents attached to the affidavit which are neither marked nor sealed. All those documents relate to the dispute over the suit land which has a span of 40 years.

The applicant's counsel argued that there was no need to endorse those documents because the judgment of court does not need certification under sections 55 and 57 of the Evidence Act since they form part and parcel of the application. He did not explain why the rest of the documents that are not judgment were not sealed and marked with serial letters of identification as required by rule 8.

First of all, I do not agree with the argument that the judgment of court attached to an affidavit need not be securely sealed by the commissioner for oaths. Sealing is a requirement of rule 8 of the Commissioner for Oaths

Rules which does not provide for any exceptions. If at all the framers of that rule intended judgments of courts to be exempted, they would have provided for exceptions under the Rules.

They have not done so, therefore,

I find no basis for counsel's submission.

Secondly, I find no relevance of the provisions of sections 55 and 57 of the Evidence Act to the facts and circumstances of this case. It is a misdirection that ought to be disregarded. This leaves the applicant with no justification for failure to comply with rule 8 of the Commissioner for Oaths Rules and it is indeed my finding that the said rule was not complied with.

Be that as it may, it is still the duty of this Court to determine whether the non-compliance with that provision of the law is a mere irregularity which can be ignored or it is fatal, in which case the annexures should not be relied on. To answer this question, I have looked at the purpose of rule 8 of the Commissioner for Oaths Rules by considering the language used and the object of those Rules as guided in **Project Blue Sky Inc. vs. Australian Broadcasting Authority (1998) 194 CLR 355** which was followed by the Supreme Court of Uganda in **Sitenda Sebalu vs. Sam K. Njuba & another; Supreme Court Election Petition Appeal No. 26 of 2007.**

The Commissioner for Oaths Rules are made under the Commissioner for Oaths (Advocates) Act which consolidates the law relating to commissioner for oaths. It is a very short statute that constitutes only 7 sections which provide inter-alia for; appointment of practising advocates as commissioners for oaths, requirement for every commissioner for oaths on appointment to sign a roll, power of commissioner for oaths, particulars to be stated in jurat or attestation clause, and penalty for unlawfully practising. Section 7 gives the Chief Justice power, from time to time, to make rules for better carrying into effect that Act. The Commissioner for Oaths Rules were made under that section.

It is the view of this Court that the purpose of rule 8 of the Commissioner for Oaths Rules is to ensure

authentication of the documents referred to in the affidavit and attached thereto. The mischief to be avoided, to my mind, is attachment of and reliance on a document other than the one referred to in the affidavit. That is why the rule requires the secure sealing of the exhibits and marking with serial letters identification.

I must observe that an affidavit filed in support of a motion like in this case contains evidence which the applicant seeks to rely on to support his/her case. Documents attached thereto are part of that evidence and therefore it should be specifically introduced in the affidavit and as such sealed and is marked by the commissioner for oaths who commissions the affidavit to show that it forms part and parcel of it.

In this case, the only documents referred to in the affidavit in support are; the judgment of the 3<sup>rd</sup> Grade Magistrates' Court, both the handwritten and the typed copy marked as annexure "A", a copy of the ruling of LC1 Court of Kigoro (in vernacular) marked as annexure "B" and the two rulings of the High Court marked as annexures "C" and "D". None of them was sealed and marked with serial letter of identification by the commissioner for oaths as required by rule 8.

Be that as it may, it is the considered view of this Court that apart from annexures "C" and "D", the rest of the documents attached to the affidavit

are not relevant for proving the grounds of this application. They were attached for information so failure to seal and mark them would be a mere irregularity as rule 8 itself appears to be merely directive since it does not provide for the consequence of non-compliance.

As regards the rulings which I said are relevant, it is not in dispute that they were delivered by the High Court as counsel for the respondents also alluded to them in his submissions. I am therefore inclined to consider them in the interest of justice since counsel for the respondents did not challenge their authenticity.

On the whole, all the four grounds of counsel for the respondents' preliminary objection on points of law are overruled and this application shall be determined on its merits.

### **Consideration of the merits of the application**

On the alleged mistake of counsel and the contention that this was not pleaded, it is indeed true that the applicant did not plead negligence of counsel in the motion and the supporting affidavit. His only ground of the application was that he failed to lodge the notice of appeal within the prescribed time because he was evicted from his father's land, his houses were demolished, the crops destroyed and he was imprisoned as a civil prisoner in satisfaction of the award of costs against him.

However, in the affidavit in rejoinder, the applicant stated that his lawyers in the lower courts M/S Twinamatsiko & Co. Advocates did not carry out their mandate to represent him as they should have done and, in particular failed to advise him accordingly.

The applicant's counsel also submitted that the failure to file a notice of appeal in time was caused by the negligence of the applicant's former counsel who never advised him on the need to appeal since he was an illiterate peasant who needed his lawyer to read and interpret the judgment to him and advise whether there was a chance of appealing against the same.

Ordinarily, if court considers new matters that are raised in rejoinder to an affidavit in reply it would be prejudicial to the respondents' case because they would have been denied the opportunity to respond to it in the affidavit in reply. However, in this case, counsel for the respondents had opportunity to respond to the submissions of counsel for the applicant on the matter, though under protest. He argued that it is not the duty of counsel to advise litigants to appeal but rather it is the litigants who instruct counsel to lodge appeal. For that reason, this Court will consider that ground of the alleged mistake of counsel for whatever value it may add to the appellant's case.

I have found some sense in the applicant's contention that his lawyer failed to read the judgment, interpret it to him and then advise him whether to appeal. This is because matters of law are so technical that even elites who are non-lawyers find problems in comprehending most legal issues. It is even worse for illiterate or semi-illiterate persons like the applicant. To that extent I agree with the applicant that if at all his former counsel did not help him to internalize the judgment and advise him on the chance of appealing, then that lapse, if proved to the satisfaction of court would constitute sufficient ground for extension of time.

However, in this case I find no proof of that allegation since the applicant's former lawyer did not swear an affidavit to that effect. This ground is therefore unconvincing as it is not supported by any evidence of the alleged failure on the part of the former lawyers.

Although counsel for the applicant seemed to have tactfully abandoned the main ground of this application, I note from annexure "A" to the respondent's affidavit in reply that the order for costs against the applicant was made on 3<sup>rd</sup> February 2015. It is not indicated when the bill of costs were taxed and served on the applicant. Neither did the applicant tell this Court when he was arrested and put in civil prison and how long he took in prison. The respondent stated in his affidavit in reply that the applicant was arrested on 1/4/2016 and released on 3/4/2016. This evidence was not controverted by the applicant in his affidavit in rejoinder. I will therefore take it as the date of his arrest and incarceration.

The ruling intended to be appealed from was delivered on the 29<sup>th</sup> January 2016. Under rule 76 (2) of the **Judicature (Court of Appeal Rules) Directions**, the notice of appeal should have been lodged by the applicant by 12<sup>th</sup> February 2016 which is 14 days from the date of the ruling. The memorandum of appeal would then be filed within 60 days after the date of lodging the notice of appeal. The applicant concedes that he did not take those necessary steps. He

attributes his failure to do so to his arrest whose date he does not state but with the evidence given by the respondent, the applicant was arrested long after the period for filing the appeal had expired. In the premises, this ground of application has no merit.

From the foregoing analysis of the applicant's grounds of application as relate to his failure to take the necessary steps in instituting the appeal, it is clear that the applicant has failed to demonstrate any sufficient ground that prevented him from acting within time. Ordinarily, this application would be dismissed for that reason.

However, the applicant also relied on two other grounds, namely that;

(1) The subject matter of this dispute is ancestral land which belonged to the applicant's late father. The Magistrates' Court had ruled in favour of the applicant's father in 1978 but according to counsel, the respondents who

were not even party to that suit are trying to gain access to that land.

(2) The High Court Judge confirmed the decision of the LC1 court which had no jurisdiction to handle land matters pursuant to the decision in **Rubaramira Ruranga vs Electoral Commission and anor (supra)**.

I have carefully considered the arguments of both counsel on these grounds vis-3-vis the background of this application. On the first one, it is indeed true that the subject matter of the dispute between the parties herein is land and the dispute has lasted for over 40 years. As stated in the background to this application, the suit was commenced by the applicant's father who got judgment in his favour but unfortunately he died without enjoying the fruits of his judgment and, moreover under suspicious circumstances which are alleged to be connected to the dispute.

As indicated in the background facts to this application, there were protracted efforts to execute for vacant possession of the suit land without much success. There also appears to be two contradictory judgments 25 conferring ownership of the same land to the applicant's father and to the respondents. In the circumstances, it would be in the interest of justice that this dispute is resolved conclusively to avoid mob justice.

It is not uncommon in this country that unresolved land dispute has caused bloody clashes that have, in some instances, resulted into loss of life. A court of justice cannot turn a blind eye to such looming danger and send back parties that run to it for redress to go and face it simply because certain requirements of the law or conditions set by court are not strictly met. Article 126 (2) (e) of the Constitution enjoins court to administer substantive justice without undue regard to technicalities. It has been held by the Supreme Court that this article is not a magic

wand in the hands of a defaulting litigant. See: **Kasirye, Byaruhanga & Co. Advocates vs. Uganda Development Bank, Supreme Court Civil Appeal No. 2 of 1997.**

However, in **Utex Industries Ltd vs. Attorney General, Supreme Court Civil Application No. 52 of 1995** the Court said Article 126 (2) (e) of the Constitution appears to be a reflection of the saying that rules of procedure are handmaidens to justice-meaning that they should be **applied with due regard to the circumstances of each case**. Emphasis is added to the words in bold because that should be the guiding factor.

Considering the circumstances of this case as explained above, I would, in exercise of the inherent power of this Court under rule 2 (2) of the **Judicature (Court of Appeal Rules) Directions**, be inclined to grant this application on the ground of sensitivity of the subject matter alone. Be that as it may, the last ground of jurisdiction also raises some serious question of law which this Court needs to consider on the merits of the intended *appeal in view of the decisions in Rubaramira Ruranga vs Electoral Commission and anor (supra) and Nalongo Burashe vs. Kekitibwa Mangadalena, Court of Appeal Criminal Appeal No. 89 of 2011.*

In conclusion, the last two grounds of this application have merit since they raise serious questions of law and facts that ought to be addressed by this Court on appeal. It would therefore serve the best interest of justice if the time within which the appeal should be filed is extended to enable the applicant file his appeal so that it is heard on the merits.

In the result, this application is allowed and time is extended for the applicant to file his appeal. The notice of appeal shall be filed within 14 days from the date of this ruling and the timelines for filing the memorandum of appeal and the record of appeal provided under rule 83 of the Rules of this Court shall apply.

Costs of this application shall abide the outcome of the appeal, but in the event that the appeal is not filed within the 14 days the applicant shall pay costs to the respondent.

I so order

Dated this 24<sup>th</sup> day of October 2017

Hon. Lady Justice Hellen Obura, JA

JUSTICE OF APPEAL



