THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 792 of 2022

[Coram: Buteera, DCJ, Bamugemereire & Gashirabake, JJA]

SENDAGALA SAMUEL :: APPLICANT

VERSUS

1. **KYOMUGISHA NORAH**
2. **MANYEKI SUZAN** } :::::::::::::::::::::::: **RESPONDENTS**
3. **KIBERU RICHARD (Administrators of the**

Estate of the late Kimoimo Ruth)

(An Application rising from CIVIL APPEAL No. 301 of 2021 against the decision of Lydia Mugambe J, in High Court Civil Revision No. 15 of 2020 dated 17th August 2020 at Kampala)

RULING OF THE COURT

This Application is brought by way of Notice of Motion under Rules 5, 42 (2), 43(1) & (2) of the Judicature (Court of Appeal Rules)Direction SI 13-10 seeking orders that:

a) This court validates the late filing and service of the Notice of Appeal in Civil Revision No. 15 of 2018 upon the Respondent.

b) This court validates the filing and service of the letter requesting for the record of proceedings.

c) In the alternative, time be extended for the Applicant to file and serve the Notice of Appeal and letter requesting for record of proceedings in High Court Civil Revision No. 15 of 2018 at Kampala [Civil Division]

d) This court validates Civil Appeal No. 301 of 2021 filed on the 14th of October 2021 and served on the 20th of October 2021.

e) The costs of this Application be provided for.

Background

The late Ruth Kimoimo sued the Applicant and the late Julian Nakiyingi for trespass on her Kibanja holding situated at Nsubi in Nansana under Civil Suit No.033 of 2007. Ruth Kimoimo sought an injunction restraining the defendants or their agents from trespassing and destroying her property on her Kibanja, costs of the suit and any other remedy the court deemed fit. Judgment was entered in her favour but the trial court did not specify the measurements of the portion under encroachment making it difficult for the Execution Division of the High Court to issue an execution order.

The respondents as Administrators of the estate of the late Ruth Kimoimo filed Misc. Application No.128 of 2017 to review the judgment in Civil Suit No. 33 of 2007 to specify the demarcations and location of the plot of land. They indicated that it was an error on the face of the record for the trial magistrate to omit the specifications of the boundaries and description of the plot measuring 102 x 72 x76 x102 feet in her judgment. The Application was granted in favour of the administrators and a review order was extracted on 30th May 2018 with a declaration that the applicant encroached on the late Kimoimoi's land by 22x102x25 feet. On 13th June 2018, a revision order was extracted with a permanent injunction order and orders for the applicant to give vacant possession of the suit land.

The applicant filed Civil Revision No. 15 of 2018 in the High Court seeking a revision of the said Chief Magistrate's order dated 13th June 2018 claiming that the Chief Magistrate exercised jurisdiction that was not bestowed in her when she revised the decision of another Chief Magistrate, further that the Chief Magistrate exercised her jurisdiction illegally and

irregularly when she allowed additional evidence in a review application without affording the applicant an opportunity to test the authenticity of the evidence through cross examination and/or a hearing.

The High Court heard the Revision Application and dismissed it holding that the typos error titling the second order, revision instead of review is a simple error that occasioned no miscarriage of justice to the applicant and could not be used by the applicant to defeat justice for the Respondents. The court further ordered that the order titled revision should be amended to be titled review and extracted as such.

Dissatisfied with the decision of the High Court in the Revision Application, the applicant sought leave of court to appeal against the said decision. The applicant then filed this application seeking to validate the late filing and service of the notice of appeal in Civil Appeal No. 15 of 2018.

Grounds of the Application

The grounds of this application are contained in the affidavit of Sendagala Samuel (Applicant) but briefly are:-

a) That the applicant was prevented from filing the Notice of Appeal and letter requesting for record of proceedings owing to the fact that the application seeking leave to Appeal had not yet been disposed off.

b) That the provision requiring the filing of Notice of Appeal in case where leave to Appeal is to be sought is not mandatory but directory.

c) That the Respondents have not been prejudiced by the late filing and or service of the Notice of Appeal and letter requesting for proceedings and the Appeal process was not rendered difficult and inoperative as a result of such late filing and service.

d) That the Appeal raises a number of procedural irregularities and glaring misapplications of law (errors of law) which caused a miscarriage of justice hence warrant hearing and disposal of the Appeal on its merits by this honourable court.

Respondent's reply

The respondents filed an affidavit in reply deponed by Manyeki Suzan, the 2nd respondent rebutting the claims of the applicant. She stated that the applicant did not state what prevented him from taking the necessary steps in appealing but rather delves into the merits of his Appeal.

Susan Manyeki deponed that although the applicant lodged an appeal against a revision order that arose out of an order of review, he had conceded to and made a part payment in execution of the decree from the lower court. In her affidavit the irony that the applicant later filed for revision to block the recovery of the portion of land that was illegally encroached on by him, was not lost. She also stated that the revision order that the applicant seeks to appeal against, was delivered on the 17thAugust 2020 and the Notice of Appeal was lodged in the court registry on 24th February 2021, (5 and 1/2 months later) and then served on the respondents on 20th October 2021 (8 months later).

Her sworn affidavit revealed that the application for leave to Appeal was filed in the Registry on 1st September 2020 endorsed by the Registrar on 18th October 2020 who fixed the same for hearing on the 24th November

2020 and yet the same was only served on the respondents on the 18th December 2020 when the date for hearing the same had long lapsed (24 days later).

She prayed that the application be dismissed and the appeal be struck off for non-compliance with the essential steps of appealing and serving in the stipulated time.

Representation

At the hearing of the application, Mr. Javis Lou represented the applicant while Ms. Rachael Mulindwa represented the respondents. Both counsel prayed to proceed by written submissions, which was granted by court.

Applicant's Submissions

The Applicant submitted that the general considerations for the grant of leave for extension of time on the Application of Rule 5 states as follows;

"The court may, for sufficient reason, extend time limited by these Rules or by any decision of the court for the doing of any act authorized or required by these Rules, whether before or after 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."

The Applicant contended that rule 5 envisages scenarios in which extension of time for doing an act so authorized or required may be granted namely; before expiration of the limited time, after expiration of the limited time, before the act is done, and lastly, after the act is done.

On sufficient cause, the applicant cited **Rosette Kizito v Administrator General & others SCCA No. 9 of 1986** where the court defined sufficient

cause to mean something that must relate to the inability or failure to take the particular step in time.

Counsel submitted that the applicant was prevented from taking essential steps because he was waiting and pursuing the application for grant of leave to appeal. Counsel added that the application for leave to appeal amply brought to the attention of the respondents that the applicant was desirous of appealing the decision of court in Civil Revision No. 15 of 2018.

Counsel argued that the requirement to file a notice of appeal and serve the same is a technicality, which can be cured under **Article 126 (2) (e) of the Constitution** especially when the respondents did not suffer any prejudice.

Counsel further contended that the provision of rule 76(4) of the Court of Appeal Rules in respect to filing the notice of appeal where leave to appeal ought to be obtained is not mandatory. Counsel submitted that the use of the word shall in a statutory provision does not necessarily make the provision mandatory. He cited **Sitenda Sebalu v Sam K. Njuba & Electoral Commission SC Election petition Appeal No. 26 of 2006** where it was held that:-

"The Act does not provide for consequences of failure to comply with the provision. It is for the court, therefore, to determine if the legislature intended the provision to be mandatory, in which case failure to comply with the provision would render the petition null and void; or if the provision is directory, in which case non-compliance would only be an irregularity that may be curable, for example by extension of time."

Counsel related the above to the present case and submitted that **rule 76(4)** does not provide the consequence for non-compliance with the provision and as such, it is not mandatory but merely directory. Counsel prayed that this court grants the application and validates the late filing and service of the Notice of Appeal.

Respondent's submissions

Counsel submitted that a person who is desirous of appealing must give notice of appeal to the High Court within 14 days from the date of the decision intended to be appealed.

Counsel referred to **rule 76 (4) of the Court of Appeal Rules,** which provides that: -

"When an appeal lies only with leave or on a certificate that a point of law or of general public importance is involved, it shall not be necessary to obtain the leave or certificate before lodging the Notice of Appeal."

Counsel also cited rule 82 of the Rules of this court, which stipulates that: -

"A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal as the case may be, on the grounds that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time."

Counsel submitted that the applicant admitted in his affidavit that he was prevented from filing the notice of appeal because the leave to appeal had not been granted, but did not state why after filing the same out of time,

service onto the respondents was after 8 months from the date of lodgement in the court registry. He relied on **rule 78 (1)**, which requires a party to serve their notice of appeal on all persons affected within 7 days after lodgement in the registry.

Counsel submitted that the applicant had no intentions of having an interparty hearing of the said application as it was served 24 days after the date it was fixed to be heard, which was a clear manifestation of the applicant's deliberate abuse of the law and the justice system.

Counsel cited **Bhai Chand Shah v Jamadas & Co. Ltd (1959) EA 838** where it was held that; ***"failure by an applicant to explain delay in prosecuting the appeal may lead to an application for extension being refused."***

It was counsel's submission that if court is inclined to validate the irregularly filed Notice of Appeal, Letter requesting for record of proceedings, the appeal itself and the late service of the same onto the respondents, the facts of this scenario leave court no option to allow that, as it will be an abuse of the justice system.

Counsel prayed that the court dismisses the application with costs.

Consideration of Court

I have had opportunity to look at the documents on court record; the submissions by both counsel and the authorities availed to this court. This matter before court is one for leave to validate the late filing and service of the Notice of Appeal in Civil Revision No. 15 of 2018 upon the Respondents.

The application is brought under rule 5 of the Rules of this court. It 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 authorized 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."

It is trite that the time can only be extended if sufficient cause is shown. In **Hadondi Danile v Yolam Egondi CACA No. 67 of 2003,** court observed that sufficient cause must relate to the inability or failure to take a necessary step within the prescribed time. It does not relate to taking a wrong decision.

Failure to take an essential step in the proceedings was defined in **Andrew Maviri v Jomayi Property Consultants Ltd CACA No. 224 of 2014** thus:-

"Taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by the court, if the action is not performed as led by law prescribed, then whether legal process has been done before, becomes a nullity."

In this case, the decision sought to be appealed against was delivered on 17th August 2020. The Notice of appeal was filed on 24th February 2021 after almost 6 months and was served on the respondents on 20th October 2021, after 8 months. The application for leave to appeal was filed on 01st

September 2021, and on 23rd September 2021, leave was granted by the High Court. This application to validate the belated notice of appeal was filed in this court on 11th November 2022.

The applicant's reason for not filing the appeal on time was that he had not yet been granted leave to appeal and was pursuing the application before the High Court first. Before we conclude on the issue of sufficient reason, we would like to resolve the appeal as well as the outcome influences the entire decision.

At the hearing of this application, we notified the parties that the application to validate the late filing of the appeal and the main appeal would be handled together.

We also note that leave to appeal out of time will be granted where the court considers that the appeal will have a prospect of success; or there is some compelling reason why the appeal should be heard.

In **Swain v Hillman [2001] 1 All ER 91** Lord Woolf, MR observed that:

"***A real prospect of success means that the prospect for the success must be realistic rather than fanciful. The court considering a prospect for permission is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is real prospect of success.***"

What we ought to determine now is whether the intended appeal has some merits factual or legal. The applicant had nine grounds of appeal but abandoned grounds 7 and 8. The grounds of appeal are: -

1. **The Learned trial Judge erred in law and fact when she heard and entertained the respondents in Civil Revision No. 15 of**

2018 yet they had not filed an affidavit in Reply to the application and dismissed the application with costs.

2. The Learned trial Judge erred in fact and law when she held that it was prejudicial and that it did not violate the appellant's right to fair hearing when he was not heard on his case during the hearing of the Review application by the Chief Magistrate and subsequently Review and Revisions Orders which were at variance extracted.
3. The Learned trial Judge erred in law when she justified the extraction of two Orders (Review and Revision) arising from a hearing that the applicant was not party and yet the said orders had the effect of altering judgment to court in Civil suit No. 33 of 2007 and subsequently affected the interests of the appellant.
4. The Learned Judge erred in law and fact when she held that the Chief Magistrate in a Review Application rightly admitted additional evidence which evidence at the time of trial in the main suit did not exist and further erred when she also admitted the evidence of Mr. Charles Kato Mubiru in a Revision application to substantiate the evidence earlier admitted by the Chief Magistrate, consequently occasioning a grave miscarriage of justice to the Appellant.
5. The Learned Judge erred in law and fact when she held that there was an error apparent on face of the record of the Chief Magistrate's court and judgment of court in Civil Suit No. 33 of 2007.

6. **The Learned Judge erred in law and fact when she concluded that the Appellant/ Applicant was using technicalities to defeat substantive justice in questioning how the Chief Magistrate issued Revision Orders yet she is not vested with such jurisdiction.**
9. **The learned trial Judge erred in law and fact when she improperly conducted a locus visit on the suit land and later heavily relying on the findings thereat in her ruling.**

We have analysed the grounds of appeal and the entire record. The applicant was sued by a one Ruth Kimoimo at the Chief Magistrates Court of Nabweru (**C.S No. 33 of 2017**) for trespass on to her Kibanja, a permanent injunction and other remedies deemed fit by court. Judgment was entered in favour of Ruth Kimoimo but it was alleged that the said judgment did not specify the measurements of the land thereby making Execution difficult. The Administrators of the estate of the late Ruth Kimoimo (now respondents) filed **M.A No. 128 of 2017** seeking review of the earlier judgment in order to specify the demarcations of the Kibanja. A review order was granted by the Chief Magistrate and extracted on 30th May 2018 declaring that the applicant herein encroached on Kimoimo's land by 22x102x25 feet. Another order was extracted termed ***"revision order"*** which granted a permanent injunction and an order of vacant possession. This was the order that brought controversy. It was dated 30th June 2018. The applicant herein applied for revision in the High Court vide **Civil Revision No. 15 of 2018** claiming that that the Chief Magistrate exercised jurisdiction that was not bestowed on her when she revised the decision of another Chief Magistrate, further that the Chief Magistrate exercised her jurisdiction illegally and irregularly when she allowed

additional evidence in a review application without affording the applicant an opportunity to test the authenticity of the evidence through cross examination and/or a hearing.

The High Court heard the Revision Application and dismissed it holding that the typo error titling the second order, revision instead of review was a simple error that occasioned no miscarriage of justice to the applicant and could not be used by the applicant to defeat justice for the Respondents. The court further ordered that the order titled 'revision' should be amended to read 'review' and extracted as such.

It is against this background that the applicant sought leave of court to appeal against the High Court decision. The applicant then filed this application to validate the late filing and service of the notice of appeal in Civil Appeal No. 15 of 2018.

We have already expounded the background of this appeal and application above. In my view, having looked at the grounds of appeal, I find that they lack merit. The reason being the order titled ***"Revision order"*** in **M. A No. 128 of 2007** that the applicant seeks to appeal against in actual sense was not a revision order neither did it arise from a Revision application before the Chief Magistrate. The orders that were given in the said order arose from a Review application where the Chief Magistrate reviewed the earlier judgment in **CS No. 33 of 2007**, to clarify on minor omissions that were left out by the earlier judgment. The order read, "**Revision Order**" and it contained the following orders: -

1. **That the application is hereby granted in favour of the applicant against the respondent.**
2. **That the plaintiff land measures 72x102x76x102 feet.**

3. **That the respondent encroached on the plaintiff's land by 22x102x25 feet.**
4. **That a permanent injunction doth issue against the defendant/respondent, his agents and or any other person restraining them from trespassing on the plaintiff's plot of land.**
5. **That an order to give vacant possession doth issue against the defendants, their agents and or any other person acting on their behalf.**

The Judge at the High Court correctly observed that it was a typographical error terming a 'Review order' as 'Revision order,' which did not prejudice the applicant nor the case in any way. A judgment had already been entered in favour of Ruth Kimoimo but due to omissions on the specifications of the land, a review order was sought to clarify the same, and indeed, it was clarified. It provided for a permanent injunction and vacant possession, which the judgment in CS No. 33 of 2017 had already ordered as it was passed in favour of Ruth Kimoimo who had sued for trespass seeking a permanent injunction.

The present appeal was brought by the applicant seeking the same remedies he sought in the Revision application before the High Court against the orders of the Chief Magistrate.

We find that the Judge in the Revision application correctly dismissed the applicant's claims. We would not hold a different view in this appeal. The applicant laboured to convince this court that the High Court relied on new evidence that was not presented earlier on record. This is misconceived as the only evidence that the respondents sought to rely on

was the one clarifying the measurements of the Kibanja in issue. We would therefore find that there are no serious questions to be answered on appeal, which had not been properly tackled by the High Court.

In conclusion, even if we were inclined to allow the extension of time for sufficient reason being shown, the appeal itself has no merit as discussed above. For the stated reasons, we would decline to grant this application.

In conclusion, this application is dismissed with the following orders:

a) The order to validate the late filing and service of the Notice of Appeal in Civil Revision No. 15 of 2018 upon the Respondent is declined.

b) The order to validate Civil Appeal No. 301 of 2021 filed on the 14th of October 2021 and served on the 20th of October 2021 is declined.

c) Civil Appeal No. 301 of 2021 filed by the applicant fails for lack of merit and is hereby dismissed.

d) The applicant shall pay the costs of the application.

Dated at Kampala this 28th day of March 2024

RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL