

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISC. APPLICATION NO. 383 OF 2020

(Arising from Misc. Cause No. 44 Of 2019)

NEW VISION PRINTING & PUBLISHING CO. LTD :::::::::::::::::::: APPLICANT

VERSUS

MAJ. GEN. (RTD) KAHINDA OTAFIRE :::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under Order 51 Rule 6 of the Civil Procedure Rules (CPR), Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act (CPA) seeking orders that:

1. The time within which the Applicant may file its Notice of Appeal and Letter requesting for proceedings in order to appeal be extended.
2. The costs of the application abide the outcome of the appeal.

The grounds of the application are set out in the Notice of Motion and are also contained in an affidavit in support of the application sworn by **Thomas Ocaya**, an advocate with the firm representing the Applicant.

Briefly, the grounds are that a ruling was delivered against the Applicant in Misc. Cause No. 44 of 2019 on the 14th February 2020. On the 18th February 2020, the Applicant instructed its lawyers and specifically the deponent to file an appeal against the decision of the Learned Trial Judge. As Counsel in personal conduct, the deponent received the instructions which encompassed other additional instructions for other matters of the Applicant. The deponent inadvertently misread the instructions to include only two matters which had

been numbered in the letter of instructions and did not see the third matter which was in the body of the letter. As a result of the said inadvertence, the deponent did not act upon the instruction in respect of this matter and only acted upon the instructions in the two listed matters. Consequently, the time within which to file the appeal lapsed.

Subsequently, the COVID 19 Pandemic set in and a nationwide lockdown was declared which included the suspension of all court hearings between 20th March 2020 and 22nd April 2020; and later extended till June 2020. Sometime towards the end of June 2020, the Applicant contacted the deponent for an update on the matter and that was when the deponent realised the inadvertence. The deponent stated that the delay and/or failure to take the necessary step in time was a result of the fact that he mistakenly read the letter of instructions and did not act upon the given instructions. He further stated that the Applicant is ready and very interested in prosecuting its appeal; the Respondent will and has not suffered any prejudice; and it is in the interest of justice that the application be allowed.

The Respondent opposed the application vide an affidavit in reply deposed to by himself. In the affidavit, the Respondent stated that he had been informed by his lawyers that the application lacks merit and was filed out of time for which it ought to be dismissed with costs. He was further informed that the application was just another move to waste the court's meagre resources and time. The Respondent stated that according to his lawyers, the Orders from the Ruling in Misc. Cause No. 44 of 2019 were served onto the Applicant on 12th March 2020 and on several occasions thereafter, the Respondent's lawyers had written to the Applicant seeking for a meeting to discuss the payment of the court award and at no particular occasion did the Applicant mention any change in instructions.

The Respondent further stated that the Applicant had enough time since service of the Orders on them to file for extension of time but only waited until July 2020. The Respondent is most likely to suffer prejudice as this application is clearly a knee jerk reaction to the bill of costs and taxation hearing notice that has been filed and fixed for the 20th of October 2020.

The Respondent filed a supplementary affidavit deponed to by **Nahamya Bruce Mugisha**, a lawyer in the firm representing the Respondent, who stated that on 15th September 2020, he attended to the Registry at the Civil Division to file the affidavit in reply in the present matter. On 21st September 2020, he verbally inquired from one of the Registry staff named Hope as to the status of the cases referred to by Counsel Ocaya Thomas in the affidavit in support of the application. The deponent was verbally informed that the said cases did not exist in the High Court data base contrary to what was stated in the affidavit in support. The deponent stated that the said contradiction casts doubt on the genuineness and honesty of the Applicant.

The Applicant filed an affidavit in rejoinder sworn by the same deponent, Thomas Ocaya, in which he stated that in rejoinder to the supplementary affidavit, the information that Nahamya Bruce Mugisha allegedly sought would have been readily available from the computer system. The two named cases existed; one in the Civil Division and the other in the Commercial Division. The deponent attached copies of the Written Statements of Defence (WSDs) in the said matters. The deponent stated that in rejoinder to the averments in the affidavit in reply, the deponent attended a meeting with the Respondent's Counsel at which the former disclosed that he had been instructed in the matter and had filed the present application. It was therefore not true that this application was a knee jerk reaction to the filing of the bill of costs since the application was filed earlier than the bill of costs.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Isingoma Esau while the Respondent was represented by Mr. Ahanya Sam and Mr. Kasumba Noah. The hearing proceeded by way of written submissions which are on record.

Issue for determination by the Court

One issue is up for determination by the Court, namely; **Whether the Applicant has shown sufficient cause to warrant exercise of court's discretion to enlarge time.**

Applicant's Submissions

Counsel for the Applicant relied on the provisions under Section 96 of the CPA and Order 51 Rule 6 of the CPR and submitted that the question for determination by the Court was whether the Applicant has shown any "good cause" for the Court to enlarge the time within which to appeal. Counsel referred the Court to a number of decided cases that have given meaning to the term "good cause" as to justify grant of applications of this nature. These include; ***Tight Security v. Chartis Uganda Insurance Company Ltd & Another, HC M.A No. 8 of 2014; Pinnacle Projects Limited v. Business in Motion Consultants Limited, HC M.A No. 362 of 2010; Shanti v. Hindocha & Others [1973] EA 207; Tiberio Okeny & Another v. Attorney General & 2 Others, C.A Civil Appeal No. 51 of 2001; National Enterprises Corporation v. Mukisa Foods, C.A Civil Appeal No. 42 of 1997; Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22; and Ojara Otto Julius Vs Okwera Benson, HC M.A No. 023 of 2017.***

Counsel submitted that in the affidavit in support, the Applicant clearly set out the circumstances under which the counsel in personal conduct failed to take the necessary step which was due to inadvertence of counsel. Counsel submitted that the Applicant had shown good cause as there was no proof of

dilatory conduct and of any prejudice that may be occasioned to the Respondent. Counsel prayed to Court to allow the application.

Respondent's Submissions

For the Respondent, it was submitted that the application by the Applicant and the supporting affidavit are ambiguous in nature as they are not clear on the orders they intend to appeal against. Counsel submitted that Misc. Cause No. 44 of 2019 arises from the orders granted in HCCS No. 661 of 2003 wherein a permanent injunction was granted against the Applicant herein restraining them from publishing any defamatory matter against the Respondent. From the orders sought in this application and the supporting affidavit, it is not clear whether the intended appeal is in regards to Miscellaneous Cause 44 of 2019 or HCCS No. 661 of 2003 as they are ambiguous and do not disclose a cause of action.

Counsel agreed with the Applicant's Counsel on their reliance on the decision in ***Tiberio Okeny & Another v. Attorney General & 2 Others (supra)*** in as far as it sets out the pre-requisites for grant of an application for enlargement of time. Counsel submitted that the Applicant had to show that the sufficient cause pleaded related to the inability or failure to take some particular step within the prescribed time. The Applicant also had to show that they had not acted in a negligent manner or that there was no want of bona fides on the part of the Applicant in view of the facts and circumstances of the case. Counsel relied on the decision in ***Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers Society & 2 Others, HC Misc. Application No. 696 of 2018.***

Counsel submitted that the Applicant and its lawyers deliberately neglected to file the notice of appeal and the letter requesting for the typed copy of the proceedings in time since the delivery of the ruling and even after service upon them of the Order of the Court. The Applicant was aware of the ruling and went

ahead to give instructions to K & K Advocates, the current lawyers, on the 17th day of February of 2020. The letter was brought to the attention of counsel Thomas Ocaya with specific instructions to appeal against the ruling and orders of court delivered in Hon. Maj Gen. (Rtd) Kahinda Otafiire v New Vision Misc. Cause No.44 of 2019. Counsel for the Applicant was, therefore, well aware of the instructions given to him but negligently failed or refused to file the notice of appeal and the letter requesting for proceedings.

Counsel for the Respondent therefore submitted that the Applicant had failed to show that there was sufficient reason related to the inability or failure to take some particular step within the prescribed time. Counsel prayed that this Court finds that the application fails on this ground.

Counsel further submitted that according to the same decision in ***Tiberio Okeny & Another v. Attorney General & 2 Others (supra)***, while mistake of counsel may sometimes amount to sufficient reason, this is only if it amounts to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law as is seen in this matter. Counsel submitted that in the instant case, Counsel Thomas Ocaya's mistake was not an error of judgment but an inordinate delay and negligent as he knew that he had to file the appeal but delayed to do so.

The other pre-requisite, Counsel submitted, is that 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. Counsel submitted that the Applicant itself is guilty of dilatory conduct. Under paragraph 6 & 7 of the Respondent's affidavit in reply, it is clear that there were several correspondences between the Applicant and the Respondent's lawyers on several occasions discussing the payment of the court award. As evidence of dilatory conduct on the part of the Applicant, Counsel for the Respondent

pointed out the Applicant's delay to file this application and the failure to file their submissions in time as per the schedule fixed by the Court. Counsel prayed that the application be dismissed with costs.

Applicant's Submissions in Rejoinder

Counsel for the Applicant submitted that the submission by the Respondent that the filing of this application was a knee jerk reaction towards the filing of the bill of costs by the Respondent was meant to mislead the Court. Counsel pointed out that this application was filed earlier than the said bill of costs; that is, on 22nd July 2020; while the bill of costs was filed on 31st August 2020.

Counsel for the Applicant refuted the claim that this application is ambiguous. It is clearly stated in the application that it is in respect of the decision in Misc. Cause No. 44 of 2019 being the decision that was delivered on 14th February 2020. Counsel further submitted that the Applicant had established that the mistake by Counsel Thomas Ocaya was due to inadvertence and not deliberate negligence as alleged by the Respondent or at all. Neither was the Applicant negligent as they gave instructions to their lawyers within time before the elapse of the period within which the appeal was to be filed. Counsel prayed that the application be allowed.

Resolution by the Court

Order 51 Rule 6 of the CPR provides –

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and

of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order.

Under the above stated provision, the power and discretion of the Court to enlarge time set by statute or by the Court are not in dispute. The parameters upon which the said power and discretion may be exercised are now well settled and have been a subject in a number of court decisions. The law is that for an application for extension of time to be granted, the applicant must show sufficient or good cause. What constitutes sufficient or good cause depends on the facts and circumstances of each case. In ***Tiberio Okeny & Another v. Attorney General & 2 Others, C.A Civil Appeal No. 51 of 2001***, the considerations for the exercise of the court's discretion to grant or not an application of this nature were outlined thus:

- a) The Applicant must show sufficient reason which must be related to the inability or failure to take some particular step within the prescribed time.
- b) The administration of justice normally requires that the 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 party 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/her right should not be blocked on grounds of the 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.

In ***Ojara Otto Julius Vs Okwera Benson, HC M.A No. 023 of 2017***, the court held that an application for enlargement of time should not be granted as a matter of course. The court is required to carefully scrutinize the application to determine whether it presents proper grounds justifying the grant of such enlargement. The evidence in support of the application ought to be very carefully scrutinized, and if that evidence does not make it quite clear that the applicant comes within the terms of the established considerations, then the order ought to be refused. It is only if that evidence makes it absolutely plain that the applicant is entitled to an extension that the application should be granted and the order made, for such an order may have the effect of depriving the respondent of a very valuable right to finality of litigation.

On the facts before me, the Applicant explained the cause of their inability or failure to take the particular step that was necessary to file the Notice of Appeal and the letter requesting for the record of the court within time. It was shown by the Applicant that they gave instructions to their lawyers to take the said step well within time. However, by inadvertence, Counsel in personal conduct misread the letter which contained instructions concerning several other cases and while the said Counsel acted upon the instructions in the two other cases, he omitted to act in the present matter. Counsel Thomas Ocaya, who deponed to the affidavits in this application for the Applicant, indicated that the omission was a mistake on his part which was not deliberate or negligent and which should not be visited on the Applicant.

The Respondent insisted that the mistake by Counsel Thomas Ocaya was deliberate and negligent and the Applicant was also guilty of inordinate delay. It was argued for the Respondent that the Applicant had not satisfied the

conditions for grant of an extension of time and the application ought to be dismissed.

It is clear to me that the Applicant acted diligently and timeously in pursuit of their interest to appeal the decision in Misc. Cause No. 44 of 2019. Contrary to the allegation by the Respondent, there is no evidence of negligence or dilatory conduct on the part of the Applicant personally. The delay to take the essential step to file the appeal or to bring this application has been appropriately attributed to the Counsel in personal conduct of the matter. It cannot therefore constitute negligence or delay on the part of the Applicant personally. The delay to file written submissions cannot constitute an essential consideration whether to grant this application or not. It is clearly conduct that is after the fact and is off the point as far as the court's determination on existence of sufficient cause herein is concerned.

Regarding the conduct of the Applicant's Counsel, Counsel Thomas Ocaya attributed his failure to take the essential step to his mistake or inadvertence in reading the letter of instructions. He showed in the affidavit that he acted on the two other matters that were numbered in the said letter and had filed written statements of defence therein, copies of which he attached to the affidavit in rejoinder. It was argued for the Applicant that the conduct by Counsel Thomas Ocaya was not negligent but an inadvertent mistake which can be made by any prudent counsel.

In my view, I find it negligent for Counsel Thomas Ocaya to read the letter of instructions in part and to restrict his mind to the matters that were expressly numbered in the letter, thereby omitting to notice the other instructions in the body of the letter. However, I find the negligent conduct excusable and not gross. It is not accompanied by inordinate delay given the circumstances that prevailed at the time which included a nationwide lockdown occasioned by the

COVID 19 Pandemic. As stated in the criteria above, unless the party 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. There was no such dilatory conduct on the part of the Applicant herein. As such, the mistake by the Applicant's Counsel, particularly one that was not grossly negligent, cannot be a basis for denial of the Applicant of an order for extension of time. I have not found any prejudice that will be occasioned to the Respondent if this application is granted.

Decision of the Court

In all therefore, the Applicant has established sufficient cause to warrant the exercise of the court's discretion to grant an order of enlargement of time within which the Applicant may file a Notice of Appeal and a letter requesting for a copy of the record of the trial court. This application is therefore allowed with orders that:

1. The Applicant is granted an extension of time within which to file its Notice of Appeal and Letter requesting for a copy of proceedings of the trial Court.
2. The Applicant is granted 15 days from the date of this Order within which to take the above mentioned step.
3. The costs of the application shall be met by the Applicant as guided under Rule 6 of Order 51 CPR.

It is so ordered.

Dated, signed and delivered by email this 30th day of December, 2020.



Boniface Wamala

JUDGE