THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 133 OF 2009

BETWEEN

NATIONAL HOUSING & CONSTRUCTION CO. LTD ::::::: APPLICANT

AND

SALOME T. B. KYOMUKAMA :::::::::::::::::: REPONDENT

CORAM: HON. JUSTICE A. E. MPAGI BAHIGEINE, DCJ;

HON. JUSTICE A. TWINOMUJUNI, JA;

HON. JUSTICE A. S. NSHIMYE, JA.

Ruling of the Court

This ruling arises out of an application to strike out Civil Application No. 82 of 2007.

It is brought, by way of Notice of Motion, under **Rules 43,44** and **82** of the Judicature (Court of Appeal) **Rules S 1 13 – 10.** It is premised on two grounds, namely that:

i) *Some essential steps in the proceedings were not taken, as required by law, within the prescribed time; and*
ii) *Primary documents were omitted/excluded from the Record of Appeal without the direction of court.*

The application is supported by an affidavit, dated 26th November 2008, sworn by Mike Okua, the advocate who had personal conduct of the applicant's case in the High Court (Land Division), from which Civil Appeal No. 82 of 2007 arose. The affidavit in reply was deponed by one Abaine Jonathan, also the advocate who conducted the proceedings in the High Court.

At the hearing of this application, Mr. Paul Rutisya appeared for the applicant while Mr. Maxim Mutabingwa was for the respondent.

The background is as follows. The respondent herein is defendant in a pending suit, in Land Division Civil Suit No. 224/2004, filed by the applicant. The suit is based upon trespass. The applicants seek to evict the respondent.

The respondent filed Miscellaneous Application No. 467 of 2005 in the High Court of Kampala, seeking a temporary injunction to prevent her eviction pending disposal of her case. The application was heard and dismissed by Maitum J. on 20th April 2007. The respondent being aggrieved filed Civil Appeal No. 82, to challenge the said dismissal. The applicants filed the present application, (Civil Application No. 133 of 2008), to move the Court of Appeal for orders that the Civil Appeal No. 82 of 2007 be struck out with costs. The sole issue to be resolved is whether Civil Appeal No. 82 of 2007 is incompetent or incurably defective and therefore ought to be struck out.

The applicant, referring to the provisions of **Rule 83 (1)** of the Rules of this Court, contended that an appellant must lodge his or her appeal within sixty days after the date when the notice of appeal was lodged. In this cases, the respondent's Notice of Appeal was filed both in the High Court and this Court on 7/05/2007, and the memorandum and record of appeal were filed on 31/12/2007. **Rule 83 (2)** and **(3)** together allow an appellant to file their appeal, after the prescribed sixty days, by excluding from the computation of the sixty days such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery to the appellant of the typed copy of proceedings. However, to benefit from this provision, the appellant has to show that:

a) *Her application for a copy of the proceedings in the High Court was in writing ; and*
b) *That a copy of the application for a copy of the proceedings was served on the respondent who has retained proof of the service.*

Learned counsel cited ***Enhas Limited V Henry Magino; C. A. Civil Application No. 26 of 2006 (unreported)*** in support of his contention. The respondent did not serve either the applicant or her lawyers with the copy of her application for a typed copy of the proceedings. She cannot therefore take the benefit of the time exclusion available under **Rule 83**

(2). It follows, therefore, that Civil Appeal No. 82 of 2007 ought to have been lodged on or before 7/07/2007 i.e. the 60th day from the date of filing the notice of appeal, on 7/05/2007. He argued that service of process on a litigant is an essential requirement of an appeal and if it is not done, the appeal is rendered incompetent, null and void, unless leave of court for extension of time to serve is obtained. – ***Afmc Co-operative Society V Uganda Railways Corporation (2002) IEA!***

He also referred to ***Shaban V ABC Holding Corporation (2004) 2 E A 262*** where the Court of Appeal of Tanzania, in striking out the notice of appeal, held that non-compliance with the provisions of **Rules 77 (1)** and **83 (2)** of the Court of Appeal Rules nullifies a notice of appeal or an appeal. He submitted that the respondent's failure to comply with the mandatory requirement under **Rule 83 (3)** of the rules of this Court means that there is no competent appeal before Court.

Submissions of the Respondent

Learned counsel submitted that Civil Appeal No. 82 of 2007 was properly before court and that there was no essential step in the proceedings which was omitted. He narrated the sequence of events. The ruling in Misc. App No. 457 of 2006 was delivered on 20th April 2007. The Notice of Appeal and the letter requesting for proceedings were filed on the same day, on 7/05/2007, and were served on counsel

for the applicant on 9/05/2007, but according to the affidavit of Jonathan Abaine, counsel only acknowledged receipt of the notice of appeal and omitted to stamp and sign on the letter requesting for the proceedings, which in the deponent's opinion must have been intentional to defeat the appeal. Counsel submitted that the appellant/respondent had satisfied the requirement of **Rule 83 (1), (2)** and **(3)** of the rules of this court because the applicant filed a notice of appeal and letter requesting for the record of proceedings in time and served the two documents on counsel for the applicant.

The affidavit of service sworn by Sewanyana Steven indicates that there was no step omitted. The appeal was duly filed within the prescribed time. The application has no merit and should be dismissed with costs

Court's Findings.

Rule 83 (1) provides that appeals must be filed within 60 days of the date of the initial decision. However, **Rules 83 (2)** and **83 (3)** permit an appellant to exclude, from the computation of the 60 days' limit, time taken by the Registrar to prepare and deliver copies of the typed proceedings to the appellant, provided that the application for proceedings was in writing and that a copy of the said letter/application was served upon the respondent. A look at the record indicates that the Notice of Appeal dated 24th April 2007 was duly stamped by M/S Kasirye, Byaruhanga & Co. Advocates. However, the application

similarly dated 24th April 2007 and bearing the High Court Stamp at Kampala, reading 25th April 2007 is not stamped by the applicants' counsel. The affidavit of Mike Okua, an advocate with M/S Kasirye Byaruhanga and Co. Advocates, representing the applicants, and who received service, avers:

Paragraph 4:

> *"4. That I hand personal conduct of this case of this case for the Applicant herein before the High Court and I am conversant with the factual background pertaining thereto and I depone this affidavit in such capacity.*
>
> *9. That the respondent being aggrieved by the said order of the court, filed and served a Notice of Appeal upon the applicants' counsel M/S Kasirye Byaruhanga & Co. Advocates, on 9th May 2007. (A copy of the Notice of Appeal is attached and marked "D")*
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> *10. That on 31st December 2007, the Respondent filed in this Honourable Court her Memorandum and Record of Appeal, and the same was served upon the Applicants lawyers on 7th January 2008. (A copy of the acknowledgement page of Record of Appeal is attached as "R").*

11. That save for the Notice of Appeal, and the Memorandum and Record of Appeal, there were no other documents served by the Respondent upon the Applicant herein or his lawyers.

13. That I have perused the High Court file and established as a fact that there is no certificate by the Registrar of the time required for the preparation and delivery to the Respondent/Appellant of the typed copy of proceedings."

Nonetheless the affidavit of service, sworn by Steven Sewanyana on 12th November 2009, two and a half years later avers in part:

Paragraph 2:

"2. That on the 8th day of May 2007, I proceeded to this Honourable Court and obtained copies of Notice of Appeal together with the letter requesting for certified proceedings for service unto the Applicant.

3. That on the 9th day of May 2007, I proceeded to the Applicant's lawyers, M/S Kasirye Byaruhanga and Co. Advocates located on plot 33, Clement Hill Road, Kampala to serve them with the said court document on behalf of the Applicant.

4. That on reaching there, I met counsel Mike Okua who is well known to me and I introduced myself and the purpose of my

visit to him and served him with copies of notice of Appeal together with the letter requesting for certified proceedings which he received and <u>acknowledged the service by only stamping and signing on the copy of Notice of Appeal</u> (See copies attached).

5. That from the circumstances, I believe that a copy of Notice of Appeal together with the letter requesting for certified proceedings were duly served to the Applicant's Advocates"

First and foremost, immediately or soon after effecting service, the affidavit of service should have been returned to court with the endorsed copies of the Notice of Appeal together with the letter applying for proceedings.(05 rule 16 Civil Procedure Rules) It is incomprehensible that the return was filed in court on 12th November 2009, two and a half years after having effected service, on 9th May 2007

Most importantly, by paragraph 4 of his affidavit, Sewanyana seems to have been aware at the time of service that the advocate had only stamped the Notice of Appeal and not the application letter, yet he did nothing to draw the Advocate's attention to rectify the omission. It is not indicated anywhere whether any effort was made thereafter to get the advocate to sign the letter and that he declined to do so. By paragraph 4, he opines that the omission of the certificate of correctness of the record was due to inadvertence and that it is not fatal to the appeal as the

correctness of the record of appeal is not disputed by the respondent nor the time within which the record of appeal was filed.

We consider this to be a most unsatisfactory affidavit as it does not attempt to address the issue of the letter. Counsel seems not to appreciate the pivotal effect of the letter to the sustenance of the appeal. It should pointed out that proof of service of the letter envisaged by rule **83 (3)** can only be by having the letter endorsed. This, together with the certificate of correctness of the record, by the Registrar goes to confirm when the time starts to run within which to file the appeal.

It is thus clear that in the absence of the endorsement on the letter applying for the record, the respondent cannot claim the benefit of **Rule 83 (3)** for there is no way of proving that the letter was actually served on the respondent. Service and proof of such service is mandatory. – See ***Enhas Limited V Henry Magino, Court of Appeal Civil Application No. 26 of 2004 (Unreported) per Byamugisha J. A***. where the learned Justice observed:

> *"The rule does not stipulate the time within which the service of the copy ought to be effected on the respondent. The service is, however, mandatory."*

In ***Shaban V NBC Holding Corporation (2004) 2 E. A. 262***, it was held that non-compliance with the provisions of **Rules 77 (1)** and **83 (2)** of

the Court of Appeal Rules nullifies a notice of appeal or an appeal. Most crucially, there is no indication on the record of proceedings when the record was certified ready awaiting collection.

The court, therefore, has no option but to hold that the letter applying for the record was never served and that therefore, the notice of appeal is null and void. It is accordingly struck out.

Ground No. 2 was to the effect that the respondent omitted/excluded documents from the Record of appeal without leave of court under **Rule 87** of the Rules of this Court. Learned counsel argued that the record omitted some of the primary documents necessary for the proper determination of the appeal. He submitted that the omission of primary documents from the record of appeal renders the appeal incurably defective and incompetent, citing ***Commercial Bank of Africa V Ndirangu (2000) 1 E. A. 29.*** A party has no discretion in the matter except upon the direction of a judge or registrar of the High Court as stipulated under **Rule 87 (4)**. The document being referred to is an affidavit in reply sworn by the Company Secretary of National Housing and Construction Company Ltd. It was in opposition to the application for an injunction. It was not included among the documents in the Record of Appeal.

We are of the view that the affidavit omitted for the record of appeal has no bearing on this appeal as pointed out by the counsel for the

respondent. Secondly, the Justices seized with the hearing of the appeal can always decide whether an omitted document is material to the disposal of the appeal or not. Thirdly, **Rule 90** of the rules of this Court mandates a respondent who is dissatisfied with the record of appeal filed by the appellant to invoke **Rule 90** and prepare a supplementary record.

We thus consider this ground of appeal to be devoid of any merit and is accordingly answered in the negative.

Consequently on the basis of Ground 1, the Notice of Appeal is hereby struck out with costs.

Dated at Kampala this __***02nd*** ___ day of ___***September***__ 2011

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A. E. N. MPAGI-BAHIGEINE
DEPUTY CHIEF JUSTICE

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HON. JUSTICE A. TWINOMUJUNI, JA;
JUSTICE OF APPEAL

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HON. JUSTICE A. S. NSHIMYE, JA.
JUSTICE OF APPEAL