IN THE COURT OF APPEAL

AT MENGO

(Coram: Manyindo, V-P., Lubogo, Ag. J.A., Odoki, J.A.)

CIVIL APPLICTION NO.1/87

BETEEN

RAHID KIBIRIGE…… APPELLANT

AND

DR. A. LUBEGA…… RESPONDENT

(Appeal from a Judgment of the High Court of Uganda at Kampala (Mr. Kityo, J.) dated 21st June, 1983)

RULING OF LUBOGO, AG. J.A.

This is an application for restoration of the appeal which was withdrawn by the former counsel of the applicant without the applicant's consent. Originally, there were two applications made namely for restoration of the appeal and extension of time to appeal under rules 67 and 4(3) respectively of the Court of Appeal rules. The application by Notice of motion was supported by affidavit sworn by Miss Kadaga the applicant's counsel in which she stated that Mr. C. Kateeba of Katende and Sempebwa Co. Advocates acted without instructions when he withdrew the application; that Mr. Y. Nsambu acted negligently in the preparations of the record of appeal, and thirdly, that there were serious points of law in the appeal which ought to be adjudicated upon by this court. Counsel for the respondent did not appear although he was served. The application was thus heard exparte. Counsel confined herself to issue of extension of time.

I am mainly concerned here with the withdrawal of appeal and the important points of law. In her submission counsel for the applicant stated that the application was withdrawn by mistake and not by fraud and for that reason the application should be reinstated under the provisions of Rule 67(3) of this court's rules.

The historical background of this application for restoration appears to be that in April 1986 Mr. Kateeba applied successfully for an adjournment on behalf of the applicant on the ground that he was not ready to proceed as he had no time to prepare the case since he was

instructed. On July, 18th 1986, counsel sought for another adjournment in order to enable him to consult with the applicant. This application was refused whereupon counsel for the applicant said,

> "In the circumstances I would ask for leave of this court to with draw this application."

Leave to withdraw the application was granted. It appears from the foregoing that counsel's intention was to ask for an adjournment in order to consult his client and hen the application was refused he acted on his own and asked for withdrawal of the application for which he had no instructions from the applicant.

In this regard, I would like to refer to A.P.C. Lobo & Another v. Saleh Salim Dhiyebi & Others (1961) E.A. 223. In that case the appellants ho were farmers sued the respondents as personal representatives. At the trial, the second and third respondents were by consent released from attendance. Evidence having been given in support of the claim the first respondent was called for the defence. He said that neither he nor the other respondents knew anything of the case. The respondent's counsel then sought an adjournment to call the other two respondents to say that they had not given instructions for the defence. The adjournment was refused and the magistrate thereupon entered judgment for the appellants. On appeal to the High Court it was held that the trial magistrate should not have given judgment without ascertaining that the respondents advocate had closed his case. Against this decision both parties appealed to E.A. court of Appeal. O'Connor, P. said,

> "an advocate who appears for a client in a contested case is retained to advance or defend his client's case and not his own. This he must do strictly upon instructions and with a scrupulous regard to professional ethics. Remembering that he is an officer of the court and owes a duty to the court as well as to his client he must never knowingly mislead the court am to the facts or the law."

It appears to me case when he withdrew regards ostensible or apparent authority of the advocate (see Hansraj Ranmal Shah v. Westlands General Stores Properties Ltd. & Another (1965) E.A. 642.

As regards serious points of law counsel submitted that litigation started 25 years ago in the now defunct Buganda Principal Court up to now passing through various courts of law. Probably, the argument on this issue would be jurisdiction or some other matters relevant to this case.

I would therefore, allow the application to restore Costs to abide the result of the appeal.

DATED this 20th day of November, 1987.

David L.M. Lubogo,
AG. Justice OF APPEAL.

Mrs. Kadaga counsel for the applicant
Mrs. Muguma holding brief for Mr. Kayondo for the Respondent.

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RULINC OF MANYINDO V-P.

I had the opportunity of reading the ruling of Lubogo, Ag. J.A. in draft and I agree with him that this application must succeed for the reasons he has stated. It appears that there is no provision for restoration or reinstatement of an appeal or application that has been withdrawn in court at the hearing. Rules 67 and 93 seem to cover the situation where the appeal or application has been withdrawn in writing and before hearing.

This point was neither raised nor argued by learned counsel for the applicant. For my part, I think that the provision in rule 67 must cover withdrawal at the hearing. It must surely be open to a litigant to withdraw his appeal at any stage of the proceedings.

I agree with the order as to costs proposed by Lubogo, Ag. J.A. and as Odoki, J.A. also agrees, it is ordered that the applicant's application which was withdrawn on 18th July, 1986 be reinstated for hearing at the next convenient session. There will be costs in terms proposed in the order of Lubogo, Ag. J.

DATED this 20th day of November, 1987 at Mengo.

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RULING OF ODOKI, J.A.

I am in complete agreement with the ruling of Lubogo, Ag. J. A. which I have had the benefit of reading in draft. I also concur in the order proposed by him.

DATED at Mengo this 20th day of November, 1987.

SIGNED:
B. J. Odoki,
JUSTICE OF APPEAL.

Mrs. Kadaga counsel for the Applicant
Mrs. Muguma holding brief for Mr. Kayondo for the Respondent.