

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

CIVIL APPLICATION NO. 104 OF 2009
(ARISING FROM CIVIL APPEAL NO. 26 OF 2009)

Coram: Hon. Justice A.S. Nshimye, JA.
Hon. Justice M.S. Arach Amoko, JA.
Hon. Justice Remmy Kasule, JA.

PETER MURAMIRA:.....:APPLICANT

VS

BRIAN KAGGWA:.....:RESPONDENT

RULING OF THE COURT.

The Applicant, Peter Muramira, filed the instant application under **Rules 82 and 43 of the Judicature (Court of Appeal Rules) Directions S.I 13-10** seeking orders that:-

- 1. The notice of appeal herein be struck out***
- 2. That the costs be provided for.***

The application was based on three grounds which were set out in the body of the Notice of Motion and detailed in the affidavit deponed by the applicant dated 16th July 2009. The grounds were that:-

(a) That no appeal lies.

(b) That important steps have not been taken by the appellant/ respondent.

35 *(c) That time for filing a memorandum of appeal lapsed before the memorandum of appeal was filed in this court.*

The respondent opposed the application by filing an affidavit in reply dated 17th September 2009.

40 **Background of the application.**

On February 2009, the applicant obtained judgment against the respondent in the High Court, in Civil Suit No. 64 of 2008. Being dissatisfied with the said judgment, the respondent filed a Notice of Appeal on 4th February 2009
45 coupled with a letter requesting for a copy of proceedings. In his affidavit in reply, the respondent stated that his previous lawyer failed or omitted to serve counsel for the applicant a copy of the letter requesting for proceedings and retain proof of service within the time prescribed by
50 law.

On 17th July 2009, when the applicant moved this court to strike out the Notice of Appeal, the respondent also moved

Court under **Rule 2 (2), 5, 43 (1) and (2) of the Court of Appeal Rules** and obtained leave to serve the applicant
55 with the letter requesting for proceedings out of time thus
validating Civil Appeal No. 26 of 2009. The proceedings
were attended by both parties.

During the joint conferencing, the parties agreed on the
issues for determination as being:-

60 ***(1) Whether there is an appeal.***

***(2) Whether the respondent is entitled to the
remedies sought.***

Representation.

65 Mr. Kenneth Kakuru appeared for the applicant while Mr.
Othieno Brian appeared for the respondent.

Submissions for the applicant.

70 Counsel for the applicant submitted that the respondent
had no appeal. He should have filed his memorandum of
appeal before the expiry of 60 days after the Notice of
Appeal.

The respondent did not apply for extension of time within which to file a memorandum of appeal. Counsel cited rule
75 83 (1) of this Court's rules to support his submission.

He referred to paragraph 5 of the respondent's affidavit in reply in which he admitted the non compliance with rule 83 of this Court's rules.

80 Counsel prayed that the appeal be struck out with costs.

Submissions by the respondent.

Counsel for the respondent strongly opposed the application and admitted that they had no proof of service
85 of the letter applying for the record of proceedings.

He however submitted that after he realized the mistake made by the respondent's previous counsel M/s Kibuka Musoke & Company Advocates, he decided to file ***Miscellaneous Application No 130 of 2009*** to rectify the
90 anomaly. That both parties argued the application to its finality without objection and it was granted by the Registrar on 5th March 2010 and had the effect of validating the documents already filed. Counsel relied on the case of ***Dr. James Rwanyarare & 5 Others V. Peter Mukidi Walubiri, Court of Appeal Civil Appeal NO. 67***
95 ***of 2006*** in which this Court stated that, if one realised

that a mistake has been made, the prudent step is to file an application for extension of time, which according to counsel, his client had done.

100 He hence, submitted that the appeal was proper and valid since the memorandum of appeal and record were on file and that the application had been overtaken by events as a result of the order to extend time.

105 Counsel prayed that the application be dismissed with costs.

Submissions in rejoinder.

110 Counsel K. Kakuru in rejoinder submitted that the respondent should have applied for leave to file the appeal out of time. That the respondent waited until an application to strike out the appeal was filed and served and then thought of applying for extension of time.

115 In counsel's view, the application had no legal consequence and that the Registrar had no jurisdiction to hear an application whose effect was to defeat a substantive application pending before court.

In conclusion, he submitted that the Registrar's ruling was not an authority worth relying on.

120 Counsel reiterated his earlier prayer to strike out the appeal with costs.

Findings of Court.

125 This Application is premised on rules 82 and 43 of this Court's Rules. Rule 82 provides:-

130 ***"... A person may make an application to strike out a notice of appeal or appeal on grounds that no appeal lies where an essential step in the proceedings had not been or has not been taken within the prescribed time".***

Rule 82 envisages the taking of essential steps in prosecuting one's appeal.

135 **Rule 83 (1)** of this Court's rules provides that an appeal is commenced by filing a notice of appeal. The rule further gives an allowance of 60 days within which an appellant should have filed a memorandum of appeal and a record of proceedings.

Rule 83(2) and (3) provides:

140 ***"(2) That where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision***

145

against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded 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 that copy.

150

(3) An appellant shall not be entitled to rely on sub rule (2) of this rule, unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service”.

155

The main purpose of the rule is to freeze time within which to file an appeal while taking into account the time spent during the preparation of the record of proceedings before the High Court.

160

The respondent under the above rule had to apply for proceedings by letter within 30 days from the date of judgment which he did.

165

In order for an appellant to be able to benefit from the rule, he or she had to file and later serve a Notice of appeal on

the opposite party within thirty days from the date of the decision to be appealed from and also apply in writing for the record of proceedings, serve the opposite party within
170 thirty days from the date of the decision and retain evidence of that service.

In this case the respondent wrote a letter requesting for the record of proceedings and according to the affidavit
175 evidence of the Law Clerk to the respondent's former counsel, he received the notice of appeal and letter requesting for a copy of proceedings for filing and service on the applicant's counsel on 5th February 2009 which he duly served on them but by mistake and oversight did not
180 bother to check whether the letter applying for the record of proceedings was stamped as well.

The inadvertence of counsel to retain service of the said letter cannot be visited on his client- the respondent.

185 Counsel for the applicant did not contest the fact that a letter was written to the Registrar applying for the record.

It is the duty of every intending appellant to be seen taking
190 an active role within the time stipulated by the rules to prosecute his or her appeal.

After the respondent knew of the mistake or inadvertence of his former counsel, he took the most essential step which was to apply for the extension of time within which to serve the other party a letter requesting for the record of proceedings. The application was argued by both counsel without any objections.

In the case of **Godfrey Magezi & Brian Mbazira V. Sudhir Ruperelia, Supreme Court Civil Application NO. 10 of 2002**, Court quoted with approval the decision of the East African Court of Appeal in **Shanti V. Hindocha [1973] EA 207**, where court held that:-

“... We think that when the time for lodging a document is extended, the document is duly lodged if lodged within the time as so extended, whether the actual lodging is before or after the order of execution...”

The legal effect of extension of time was stated by Odoki B. JSC in the case of **The Executrix of the Estate of Christine Mary Tibaijuka & Anor. V. Noel Grace Shalita, Supreme Court Civil Application No.8 of 1999** that:-

“... to validate or excuse the documents, the applicant need not file fresh documents if those already filed are completed and in proper form...”

220 This application raises basically two issues namely:-

1. Whether the learned Registrar had jurisdiction to hear and determine the application for the extension of time.

225 ***2. Whether leave to serve the letter out of time validated Civil Appeal No. 26 of 2009.***

On the issue of the Registrar’s jurisdiction, we wish to refer to rule 3 of this Court’s Rules which defines ‘Court’ to mean:-

230 ***“The Court of Appeal of Uganda established under Article 129 of the Constitution, and includes any division of the court and a single Judge exercising any power vested in him or her sitting alone”.***

235 The Registrar is also defined to mean:-

“The Registrar of the Court and includes a Deputy and an Assistant Registrar of the Court”

The Judicature Act Cap. 13, Section 43 (1) provides that:-

240 ***“ there shall be such officers of court of
Judicature as may be necessary for the
performance of any special duties in
connection with the business of the Courts of
Judicature, and such officers shall include
245 the Chief Registrar, Registrars, Deputy
Registrar and Assistant Registrars”***

Sub Section (2) goes further to provide that:-

250 ***“Subject to Article 133 of the Constitution, the
officers of the Courts of Judicature shall
perform such duties as may be assigned to
them under the rules of court and shall be
subject to the general direction and
supervision of the Chief Justice”.***

While Section 41(1) provides that:-

255 ***“The Rules Committee may, by Statutory
Instrument, make rules for regulating the
practice and procedure of the Supreme Court,***

the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court”

260

Under the ***Court of Appeal (Judicial Powers of the Registrars) Practice Direction No. 1 of 2004, pursuant to the Court of Appeal Directions 1996 made under Section 41 (i) (v) of the Judicature Act, 2000***, and in order to ensure expeditious disposal of case, the powers of the Registrars shall include but not limited to entertaining matters under the following rules:-

265

Rule 4- extension of time (now rule 5)

270

The Practice Directions remain in force and the power to make such rules is Statutory thus, the Registrar is clothed with the jurisdiction to hear any application there under provided.

275

Prior to 2004, the power to hear such applications was vested in a single Judge of the Court of Appeal however, after the issuance of the Practice Direction No. 1 of 2004; the power is now exercised by the Registrar of the Court of Appeal.

280 In this case, the Registrar had powers to hear the
Application for extension of time within which to file the
letter requesting for proceedings.

285 ***Did the leave that was granted validate Civil Appeal
No. 26 of 2009?***

Rule 5 of the Judicature (Court of Appeal) Rules,
provides that:-

290 ***“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
295 in these rules to any such time shall be
construed as a reference to the time as
extended”.***

300 The Registrar on 5th March through his Order to serve the
letter on the applicant resurrected the appeal.

The applicant did not in any way show that the application
for extension of time within which to serve would cause
him any miscarriage of justice. It was so held by the

Supreme Court in the case of *Plaxeda Semmbatya Vs*
305 *Tropical Africa Bank [1993] KALR 105.*

Since the respondent in the main suit was not afforded a
fair trial, we feel that his appeal should be given a chance
to be heard on merit

310 The application is disallowed.

Each party shall bear its own costs for this application.

We so order.

315 **DATED THIS ...23rd...DAY OF...November...2012.**

320 **HON. JUSTICE A. S. NSHIMYE,
JUSTICE OF APPEAL**

325 **HON. JUSTICE M. S. ARACH AMOKO,
JUSTICE OF APPEAL**

330 **HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL.**