

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM:

HON. JUSTICE S.B.K. KAVUMA, JA

HON. JUSTICE A.S. NSHIMYE, JA

HON. JUSTICE REMMY KASULE, JA

CIVIL APPLICATION NO.138 OF 2010

BETWEEN

10 WANUME DAVID KITAMIRIKE ::::::::::::::: APPELLANT

AND

UGANDA REVENUE AUTHORITY ::::::::::::::: RESPONDENT

[Arising from Civil Appeal No.43 of 2010: Appeal from the Judgment of the High Court at Kampala before Honourable Justice J.P.M. Tabaaro dated 28th September, 2009 in HCT-00-CV-MA 556 of 2008]

Ruling of the Court:

This application, brought under Rules 43, 82 and 83 of the Judicature (Court of Appeal Rules) Directions, seeks an order by the applicant that Civil Appeal No.43 of 2010 between the Respondent as the appellant and
20 the applicant as the respondent be struck out by reason that the

Respondent filed in this court the record and Memorandum of Appeal out of the prescribed time, thus failing to take an essential step in the Appeal proceedings.

The Applicant filed three affidavits in support of the Application. The one dated 19.07.2010 filed in the Notice of Motion, then the affidavit in rejoinder of 06.09.2010 and finally a supplementary affidavit of 20.09.2010.

10 Learned Counsel Yahaya Habib Arike, of the Respondent's Legal Services and board Affairs Department, deposed to an affidavit in reply on 30.08.2010 for and on behalf of the respondent.

The applicant, through a Judicial Review Application No. HCT-00-CV-MA-556 of 2008, in the High court at Kampala (Tabaaro, J.) obtained Judgment on 28.09.09 against the Respondent for wrongful termination of his services as Manager of the Respondent's Domestic taxes Department.

20 Dissatisfied with the High Court decision, the Respondent filed a Notice of Appeal in the High Court Civil Registry at Kampala on 05.10.09. The same was also lodged in the Court of Appeal Registry at Kampala on 06.10.09; and also subsequently served on counsel for the applicant.

The Respondent's version is that the respondent wrote on 30.09.09 and delivered a letter to the High Court Registry, Kampala, requesting for the proceedings of the trial court for purposes of the intended appeal. A copy of the letter was served on the applicant's counsel Chambers in Kampala on 05.10.09, and a copy thereof was subsequently transmitted to the Court of Appeal Registry on 06.10.2010.

Respondent then realized that though he had, in his application for proceedings, stated the correct parties, he had, inadvertently mis-stated the case number as HCT-00_CV-MC No.221 of 2008, instead of the one of HCT-00-CV-MA 556 of 2008. On 12.10.09 the respondent wrote to the Registrar, High Court, Civil Division, correcting the mistake. He served a copy of the said letter to counsel for the applicant on 13.10.09.

On 15.04.2010, the respondent wrote to the Registrar, High Court Kampala, pointing out that since 30.09.09 when the respondent applied for a typed and certified record of court proceedings, the same had not been availed. The letter requested that the same be availed soonest.

The Registrar, High Court, wrote to respondent to the effect that the typed copy and a certified record of court proceedings were ready for collection. According to the respondent, the said Registrar's letter was received on 19.05.2010.

The respondent only managed to collect a certified copy of the Judgment in HCT-00-CV-556 of 2008 on/or about 19.05.2010, as the rest of the proceedings were not on the court file. The same were only availed to respondent on 04.06.2010.

A Memorandum and Record of Appeal were prepared and filed in the Court of Appeal on 18.06.2010. Prior to filing the same, the Registrar High Court had duly certified under his hand and seal that the record of court proceedings applied for by the appellant on 30.09.09 had been prepared and made available for collection on 19.05.2010.

A copy of the Record of Appeal was served upon the applicant who, on the other hand, asserts that the Memorandum and Record of Appeal were filed out of time by the Respondent because on 12.03.2010, the Respondent was served with a letter from the Registrar, High Court, indicating that the typed court proceedings and judgment were ready and, therefore, an appeal filed on 18.06.2010., was filed out of time.

At Conferencing three (3) issues were framed:-

1. ***Whether the Respondent was on 12.03.2010 served with certified copies of proceedings and judgments and the Registrar's letter dated 11.03.2010.***

2. Whether the Registrar's certificate dated 17.06.2010 was validly issued.

3. Whether the appeal was filed within the time prescribed by law.

Though as already stated, the above issues were framed and agreed upon at conferencing, on the day of hearing of the application on 27.01.11, learned Counsel Okello for respondent submitted and prayed court that issues numbers 1 and 2 be struck out as they were not material to determining the application in terms of Rules 15(1) (2) and (5) of the Rules of this Court.

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Learned Counsel for the applicant, Mr. Ngaruriye Ruhindi, objected to having issues numbers 1 and 2 struck out.

According to applicant's counsel the two issues had been framed at the inter-party conferencing before Registrar, Court of Appeal. Learned Counsel for the respondent had participated in part of the proceedings of the inter-party conferencing and therefore was now estopped from submitting that the two issues were immaterial to determining the application. If anything, according to the applicant's counsel, the two
20 issues made it easier for counsel of the respective parties to argue their respective cases and for the Court to make a decision in the application.

The Court, having listened to the submissions of counsel for both parties to the application, resolved to dismiss, there and then, the application to strike out issues numbers 1 and 2 and promised to give its reasons for the decision later on in a full Ruling on the application. The following are now the reasons.

Learned Counsel Okello for respondent appeared before the Registrar for conferencing proceedings on 06.09.2010. The conferencing was then adjourned to 29.09.2010 at 2.30p.m.

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By appearing for the respondent, Counsel Okello, must be assumed to have had full instructions in the application. Though he was absent on the adjourned date of 29.09.2010, he must be taken to have passed over whatever instructions he had in the application to his colleagues, who appeared for the respondent: learned counsels Leonard Otee and Rodney Golooba. It is these two counsel, representing the respondent, who participated in the framing and drawing up the three issues, two of which learned counsel Okello was now praying to be struck out.

20 To that extent, it has not been shown in any way, that learned counsel Leonard Otee and Rodney Golooba, were acting without instructions when they framed and agreed upon the issues now being sought to be struck out. Therefore learned Counsel Okello is estopped from disputing what his learned colleagues agreed upon in Court on 29.09.2010.

Counsel Okello also failed to show to this court, in which way the first and second issues were irrelevant to the application.

The applicant's contention is that the respondent, in spite of having been served with the Court proceedings in time, the respondent's appeal was filed out of time.

10 The Respondent, on the other hand, partly relying on the Registrar's certificate dated 17.06.2010 contends that the appeal was filed in time.

In the judgment of this Court, because of the above considerations, issues numbers 1 and 2 as framed are crucial to the determination of the application.

Court thus found no merit in the submissions of learned counsel Okello for the respondent. Hence the dismissal of his submissions and the prayer to strike out issues numbers 1 and 2.

20 The first issue to resolve as regards the main application is whether or not the Respondent was on 12.03.2010 served with the certified copies of proceedings and judgments and the Registrar's letter dated 11.03.2010.

According to the applicant, because he was suspicious that by the respondent's dragging his feet, there would be a delay in prosecuting the appeal, which would negatively prejudice the applicant, the applicant took steps to ensure that the record of proceedings and Judgment were typed and certified. The same were ready by the 11.03.2010. The applicant collected them from the High Court registry and on 12.03.2010 a copy of the certified record of proceedings and judgment together with a copy of the Registrar's letter showing the readiness of the record, were served
10 upon the respondent, by the process server of the applicant's counsel.

Therefore, according to the applicant, the respondent received the court record of proceedings on 12.03.2010, and as such, time for filing the appeal in time lapsed on 11.05.2010. The appeal instituted on 18.06.2010 by respondent was thus manifestly out of time. It ought to be struck out by reason thereof.

The respondent denied receipt of a copy of the application by the applicant to the High Court for typed and certified record of proceedings as well as
20 the letter of the Registrar, High Court, dated 17.03.2010, informing him that certified proceedings, Rulings and Judgments in Miscellaneous Causes Numbers 21/08, 556/08 and Miscellaneous Application Number 527/09 were ready for collection.

The respondent made no specific denial or admission as to whether or not the respondent received the court proceedings in Miscellaneous Cause No.221 of 2008 on 12.03.2010 from applicant's counsel.

Under Rule 83(1) of the Rules of this Court, an appeal is instituted in this Court, by lodging in the registry, within sixty days after the date when the notice of appeal was lodged, a memorandum, the record of appeal, the prescribed fees and security for costs.

- 10 Rule 83 (2) provides 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 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.

The copy of the application must be in writing and must be served upon the respondent and the appellant must retain proof of that service.

- 20 The provisions of Rule 83(2) are mandatory. **See: *John Matsiko vs Banyankole Kweterana Co. (U) Ltd: Court of Appeal Civil Application No.43 of 1998***; and also:

Court of Appeal Civil application No.84 of 2001: Construction Engineers & Builders Limited vs The Attorney General.

This Court has also further held in ***Dr. S.B. Kinyatta & Another vs Suburamania Rajha Gopalan & Another: Civil Application No.1000 of 2000***, that although, in some instances, Rule 83(2) may be unfair to one who has already got Judgment, however,

10 ***“.....as long as the intending appellant has requested for the record of proceedings from the High Court, and served it on the respondent, he is not required to do anything more until the Registrar of the High Court has finished compilation of the record of proceedings”.***

In the case before us, we note that it is not denied that the respondent filed the notice of appeal in time on 05.10.09, and the same was served in time upon counsel for the applicant. It is also not disputed that the respondent applied for, in writing, and with a copy of the application being served upon the applicant's counsel, for the typed and certified copies of proceedings and Ruling in the cause intended to be the subject of the appeal.

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It is our considered Judgment, that having complied with Rule 83(2), the respondent was entitled to wait upon the Registrar of the High Court, to inform him that the court proceedings and the Ruling applied for were ready for collection. This was done by the Registrar, High Court, on 10.05.2010.

Therefore the time within which to lodge the Memorandum and Record of Appeal began to run as from the 19.05.2010. Since the respondent filed the Memorandum of Appeal and the Record of proceedings in the Court of Appeal and served the same on the applicant on 23.06.2010, it follows, that the respondent's appeal was filed in time.

We reiterate that the law requires and imposes a duty upon the Registrar of the High Court, to whom a written application for a copy of proceedings is made, to reply in writing to the applicant, informing the said applicant as to
10 the readiness and availability of the copy of proceedings applied for.

This duty remains, in our view, even where, as in this case, counsel on the opposite side of that of the intending appellant purports to notify the intending appellant that the court proceedings are ready for collection.

In the particular case before us, the respondent was still entitled, in spite of what counsel for the applicant claims he did, of serving a letter of the Registrar dated 11.03.2010 confirming that the court proceedings were ready for collection, and even enclosing a copy thereof to the respondent,
20 to insist on getting from the Registrar, High Court, communication to the effect that the proceedings respondent applied for were ready for collection. The evidence that there is, is to the effect that the respondent got this communication by 19.05.2010.

Court agrees with the respondent that the letter of 11.03.2010, being not addressed to the respondent, cannot be taken as an authentic source that the court proceedings the respondent had applied for were ready by the 11.03.2010.

Further, the letter itself refers to a multiplicity of proceedings, Rulings and Judgments in Miscellaneous Causes 221 of 2008, 556 of 2008 and Miscellaneous Application 527 of 2009. The respondent did not apply for proceedings in all these Causes.

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Finally, even though a copy of the certified proceedings was served upon the respondent, by the applicant's counsel, it still remained the responsibility of the respondent to cross-check the accuracy of this copy with the authentic copy the Registrar of the High Court had to avail to the respondent by reason of the respondent having applied for the same.

We, therefore, hold that the Respondent was not served by or on the instructions of the Registrar, High Court, as the law requires, with certified copies of proceedings and judgment plus the Registrar's letter dated
20 11.03.2010 on 12.03.2010. The respondent was only so lawfully served with the same on 19.05.2010.

It now remains for us to determine whether the Registrar's certificate dated 17.08.2010 was validly issued.

The applicant contends that the Registrar's certificate dated 17.06.2010 certifying that the record of proceedings of the High Court which was applied for by the appellant on 30.09.09, was prepared and made available for collection by the appellant from the High Court Registry on the 19.05.2010, is invalid in law. This is because, according to the applicant's counsel, the same is headed "***In the Court of Appeal of Uganda***" instead
10 of "***In the High Court of Uganda***" and also there is no seal on the same. Further, the Registrar having certified on 11.03.2010 that the record of proceedings was ready for collection, could not have issued another certificate to the effect that the same record was prepared and made available for collection by the appellant on 19.05.2010: annexure "E" to the applicant's affidavit in support of the motion sworn on 19.07.2010.

The Respondent, in reply, maintained that the Registrar had issued only one certificate certifying the readiness of the proceedings: the one dated 17.06.2010. He prayed court to hold that this certificate is a valid one.

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We have carefully considered the submissions of both counsel for the applicant and also for the respondent on this issue.

We are unable to agree with the submission of Counsel for applicant that the letter of the Deputy Registrar, Civil, dated 11.03.2010 addressed to M/S Ngaruriye Ruhindi, Spencer & Co. Advocates, and copied to no one else, annexure "E" to the applicant's affidavit, can be taken as a certificate of the readiness of the record of proceedings as far as the respondent is concerned. The letter was not addressed let alone copied to the respondent. The applicant provided no proof as to whom, of the officers of the respondent, was the same served upon and acknowledged with a signature. There is no reference in the said letter as to when the
10 respondent applied for the proceedings and what time it took to prepare the same. The letter also refers to a multiplicity of proceedings in three causes and is not restricted to the proceedings of the particular cause the respondent applied for.

We also wish to observe that under Rule 83(2), in computing the time within which the appeal is to be instituted, the court Registrar must certify the time as having been required for the preparation and delivery to the appellant of the copy of the proceedings. [Emphasis is ours]

20 The Rule, therefore, imposes upon the Registrar, first, a duty to certify the time taken by the process of making ready the proceedings. This process involves, in addition to producing typed copies, arranging and making available in sufficient number, copies, to the party applying, of all documents, and other matters such as annexures and exhibits, if any, constituting the proceedings in the case.

The other duty imposed on the court Registrar by this Rule is to ascertain the time it has taken to deliver a copy of the proceedings to the party who applied for the same. This involves communicating to the said party that the proceedings are ready for collection; or with appropriate arrangement, between the Registrar and the party applying, physically delivering by the Registrar, a copy of the proceedings to the party applying.

10 Bearing in mind the above two duties on the court Registrar, we are unable to hold that the Registrar's letter of 11.03.2010 constituted a certificate of the time taken for the preparation and the delivery to the respondent of a copy of court proceedings the respondent applied for.

The applicant did not, in any way, dispute the fact that the Registrar's certificate dated 17.06.2010 was signed by the appropriate Registrar, High Court, Civil Division. There is no allegation that the same is a forgery. The Registrar, High Court, Civil Division, was not summoned by the applicant for cross-examination as to how he came to issue the said certificate. The complaint that the said certificate is wrongly headed "***In the Court of***
20 ***Appeal***" instead of ***In the High Court***" and that no seal appears on it, are, in our view, mere irregularities, which in no way affect the genuineness and validity of the certificate.

The Respondent, having applied for a copy of the proceedings, was entitled to receive from, and the Court Registrar was under a legal duty to issue, a certificate certifying the time taken for the preparation and the availability of the Record of proceedings that the respondent had applied for.

We accordingly hold that the Registrar's certificate dated 17.06.2010 was validly issued.

10 The third issue to resolve is whether Civil Appeal Number 43 of 2010 was filed within the time prescribed by law.

From the way issues number 1 and 2 have been resolved, the time within which to lodge the appeal began to run as from 19.05.2010.

The Respondent filed the Memorandum of Appeal and the Record of proceedings in this court on 18.06.2010. The same was served on the applicant on 23.06.2010.

20 We accordingly hold that the appeal was filed within the time prescribed by law.

In the result, this application stands dismissed. It is ordered that Civil Appeal number 43 of 2010 be cause listed for hearing at the next convenient session of hearing of Civil Appeals.

As to costs, since the main appeal is yet to be determined, it is ordered that the costs of this application shall abide the outcome of that appeal.

Dated this ...**27th** ...day of**May**.....2011

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Hon. Justice S.B.K. Kavuma

JUSTICE OF APPEAL

Hon. Justice A.S. Nshimye

JUSTICE OF APPEAL

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Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

