

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 0212 OF 2013

STANBIC BANK UGANDA LTDAPPLICANT

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VESUS

ARIM FELIX CLIVE.....RESPONDENT

CORAM: HON. MR. JUSTICE SBK KAVUMA, Ag DCJ

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

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RULING OF THE COURT

This is an application to strike out both the notice of appeal and the appeal itself on account that the respondent failed to comply with **Rule 78 (1)** of the Rules of this Court.

15 Dr. Byamugisha, learned counsel for the applicant, contended that whereas **Rule 78(1)** of this Court requires that a notice of appeal be served upon the intended respondent within 7 days of lodging a notice of appeal or earlier, the respondent in this case failed to do so.

20 He relied on the affidavit of Mr. Albert Byamugisha dated 2nd July 2013 in which it was stated that counsel for the respondent was served with the notice of appeal on 29th May 2013. That since the notice of appeal had been lodged at the High Court on 6th May 2013, it was therefore served 15 days out of time without leave of court.

Counsel contended that since the respondent failed to comply with the law, both the notice of appeal and the appeal itself are incompetent and ought to be struck out.

He relied on the case of **Barclays Bank (U) Ltd Vs Eddy Rodrigus Civil Appeal No. 5 of 1987** (*Court of Appeal as it then was*) for the proposition that where a notice of appeal is filed out of

time and no leave to extend the time within which to appeal has been granted the appeal is incompetent.

He asked this Court to allow this application to strike out both the notice of appeal and the appeal itself.

5 Mr. Renoto Kania for the respondent opposed the application. He contended that the applicant had been served with the notice of appeal in time, which was accepted by their advocate's law firm Byamugisha & Co Advocates on 8th May 2012 only 2 days after it had been lodged at the High Court. He was relying on the affidavit of Sebowa Solomon dated 15th July 2013. In that affidavit it is deponed that the notice of appeal had been left at the applicant's Advocates office
10 reception but had not been endorsed by the receptionist.

That the receptionist had advised Mr. Sebowa to leave the notice behind and to check the next day as the only person who could endorse it was the advocate in personal conduct of the suit who, at the time, was not in office.

That Mr. Sebowa had returned to the office of the applicants' advocates on 13th, 18th, 20th and
15 24th days of May 2013 but no endorsement been made on the notice.

He eventually picked up the notice on 30th May 2013, the same having been stamped and signed "received" on 29th May 2013.

Section 14 of the Civil Procedure Act requires a person served with court process to endorse acknowledgement of service on the summons or other court process. Where the person being
20 served refuses to endorse on the court process the court may declare the process to have been duly served.

In this case the respondent ought to have filed an affidavit of service at the earliest possible date indicating that the applicant's counsel had refused service, having been served within the time prescribed by the law.

25 The above was not done and the endorsement that was made indicates that service of the notice of appeal was made out of time. We therefore, find that the respondent did not comply with the provisions of **Rule 78(1)** of the Rules of this Court.

On the other hand the affidavit of Albert Byamigisha does not rule out the possibility that the respondent had indeed left the notice of appeal at Byamugisha & Co Advocates' chambers on the 8th May 2013 probably without the advocate's knowledge. Mr. Albert Byamugisha may have been under an honest but mistaken belief that service had been effected on 29th May 2013, when the notice came to his attention whereas in fact the same had been lying in his chambers since 8th May 2013, the day it was accepted by the receptionist as contended for the respondent.

We have carefully considered the submissions of counsel for both parties in this application. We have also had a careful perusal of the pleadings on record in this application and the appeal itself.

In view of the peculiar facts and circumstances and in the interest of substantive justice to both parties we are satisfied that it is a proper case for Court to invoke the provisions of **Article 126(2) (e)** of the Constitution and **Rules 2(2)** and **5** of the Rules of this Court

That **Rule 5** stipulates as follows:-

5. Extension of time

“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 in these Rules to any such time shall be construed as a reference to the time as extended”

The above rule read together with **Rule 2(2)** and **Article 126 (2) (e)** of the Constitution empower this Court on its motion to grant to the respondent leave to serve a notice of appeal out of time. We hereby grant such leave.

The consequence of granting leave is to validate the service of the notice of appeal which has already been effected as if the same had been served within the prescribed time.

The service of the notice of appeal has therefore been so validated.

This application therefore fails and we make no order as to costs.

In the result court will proceed to hear Civil Appeal No. 212 of 2013 on its merit. We so order.

Dated at Kampala this 17th day of **April** 2014.

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HON. MR. JUSTICE S.B.K. KAVUMA
AG DEPUTY CHIEF JUSTICE.

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL.

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL.

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