

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPLICATION NO. 124 OF 2011**  
**ARISING FROM CIVIL APPEAL NUMBER 11 OF 2009**

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**ADMINISTRATOR GENERAL .....**  
**APPLICANT**

**VERSUS**

**ISAAC KASIBA LULE.....**  
**RESPONDEDNT**

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**CORAM.           HON. MR. JUSTICE S.B.K KAVUMA, JA**  
**HON. MR. JUSTICE KENNETH KAKURU, JA**  
**HON. JUSTICE PROF.LILLIAN E.TIBATEMWA,**  
**JA**

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**RULING OF THE COURT**

The applicant is the 1<sup>st</sup> respondent in ***Court of Appeal Civil Appeal No. 11 of 2009*** arising from ***High Court Civil Suit No. 760 of 2009***.

20

In the High Court suit, the respondent in this application now before us was the plaintiff. The applicant was the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was a one, Margaret Nabitale Nalongo who is not a party to this application.

The applicant brings this application under **Rules 2 (2), 43, 44** and **82** of the Rules of this Court seeking the following orders;-

**(a) That the appeal filed against the applicant in civil Appeal No. 11 of 2009 be struck out.**

5 **(b) That the costs of the application be provided for.**

The grounds upon which the application is based are set out in the Notice of Motion as follows;-

**a) The applicant was not served with the notice of appeal;**

10 **b) The applicant was not served with the record of appeal;**

**c) The applicant was not served with the memorandum of appeal;**

15 **d) The applicant was not served with the letter requesting for a typed copy of the proceedings of the High Court ;**

**e) The appeal was filed out of time;**

**f) The respondent is guilty of dilatory conduct in prosecuting his appeal.**

20 At the hearing of this application **Ms. Irene Mayiga** learned State Attorney appeared for the applicant together with **Mr. Simon Peter Muyomba State Attorney.**

Learned counsel **Mr. Salim Makeera** appeared for the respondent. The respondent was in court.

At the commencement of the hearing, Ms. Mayiga, learned counsel sought leave of this court to amend the Notice of Motion  
5 by deleting therefrom **Rule 82** of the Rules of this Court.

Mr. Makeera for the respondent opposed the application on the ground that, this application to strike out the appeal was based on **Rule 82** of the Rules of this Court and that if the amendment is granted it would have the effect of curing an otherwise fetal  
10 defect.

This Court allowed the applicant's counsel to amend the Notice of Motion as it was well within her right to do so and there was no prejudice caused to the respondent.

Mrs. Mayiga submitted that the respondent failed to comply with  
15 the Rules of this Court when he did not serve the respondent with both the Notice of Appeal and the Appeal itself. She submitted further that the fact of non service of the Notice of Appeal and the Appeal itself upon the applicant was admitted and was deliberate.

Mr. Makeera learned counsel for the respondent submitted that  
20 indeed the appellant had been dully served with the notice of Appeal, by a one, Diana Nabuso and an affidavit of service to that effect was made. He relied on the affidavit of Isaac Kasiba in reply to the affidavit in support of the Notice of Motion.

He contended that the affidavit in reply was not rebutted at all by the applicant.

In alternative but without prejudice to the above Mr. Makeera submitted that the applicant had not participated in the trial at the High Court and as such he had excluded himself from the proceedings where he appeared only as a witness and not as a party.

He submitted that **Rule 78 (1)** of the Rules of this Court require that service be effected upon only the persons affected by the appeal.

He submitted further that under **Rule 82** of the Rules of this Court only those persons upon whom a Notice of Appeal has been served can apply to have the Notice of Appeal and the appeal itself struck out.

That since the applicant had not been served with a Notice of Appeal he has no right to bring this application and he is not entitled to the orders sought as they are not available to him.

Mr. Makeera also submitted that there are two respondents to the main appeal herein Civil Appeal No. 11, the applicant and Margret Nabitalo Nalongo. The 2<sup>nd</sup> respondent in the appeal Nabitalo was duly served with both the notice of appeal and the appeal itself. She is not a party to this application as she has no complaint against the respondent.

Mr Makeera submitted further that granting the orders sought by the applicant would affect the whole appeal yet the appeal is valid as against the 2<sup>nd</sup> respondent in that appeal. Accordingly, he submitted, the Appeal cannot be struck out as a whole.

- 5 In reply Ms. Mayiga submitted that there was no proof of service of the Notice of Appeal as alleged and that the affidavit of Diana Nabuuso was never availed to court as it was not annexed to the affidavit in reply.

We agree with Ms. Mayiga learned State Attorney for the  
10 applicant that there is nothing on record to prove that the applicant was ever served with a Notice of Appeal or the Appeal itself. The affidavit in reply is not sufficient to prove service. As Ms. Mayiga correctly pointed out, the affidavit of service itself was not annexed to the affidavit in reply. It was merely alluded to. No  
15 place or date of service was set out in the affidavit in reply. The only evidence of service we have was provided by Mr. Makeera from the bar.

We find, therefore, that there was no proof of service of the Notice of Appeal, the letter requesting for proceedings and the  
20 Appeal itself, upon the applicant.

From the explanation given by Mr. Makeera, it appears he was under an honest but, mistaken belief that the applicant had excluded himself from the trial at High Court and as such he had no interest in the appeal. We say this was a mistaken belief

because the applicant had indeed filed a written statement of defence and he testified. The Judgment related to the applicant as well as the respondent and Nabitalo Nalongo.

5 The main appeal is clearly against the whole judgment and not part of it. In our view, the applicant has an interest in the main appeal herein as he is a person who took part in the proceedings in the High Court. The respondent therefore was required to serve upon him the Notice of Appeal under the provisions of **Rule 78** of the Rules of this court as a person directly affected by the  
10 appeal. The respondent failed to do so, and as such contravened the provisions of **Rule 78** of the Rules of this court which stipulates as follows;-

***“Service of notice of appeal on persons affected.***

15 ***1)An intended appellant shall, before or within seven days after lodging a Notice of Appeal , serve copies of it on all persons directly affected by the appeal ; but the court may, on application, which may be made ex parte, direct that service need not  
20 be effected on any person who took no part in the proceedings in the High Court.***

***2)Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with***

***the proceedings in the High Court, and not subsequently given any other address for service, the copy of the notice of appeal may be served on him or her at the address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.***

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We do not agree with Mr. Makeera that the applicant was not directly affected by the appeal and as such there was no requirement to serve upon him a Notice of Appeal.

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The reading of **Rule 78** above indicates that an intended appellant can only be exempted from serving a notice of appeal upon any person who took no part in the proceedings at the High Court upon an order of court and not otherwise. See **Francis Mukama vs Uganda Wildlife Authority; Court of appeal Civil Appeal No 75 of 2004.**

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We find that non service of the Notice of Appeal, the letter requesting for proceedings upon the applicant was a mistake of learned counsel, Mr. Makeera.

We do not accept Ms. Mayiga's submission that the non service of court process was deliberate or constituted dilatory conduct, in prosecuting this appeal.

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We hold so because the respondent filed a Notice of Appeal in time and wrote a letter requesting for proceedings in time. He

served both the above documents upon the 2<sup>nd</sup> respondent in the appeal, Margret Nabitano Nalongo's advocates Tumusiime Kabega & Co. Advocates in time. He also filed the appeal in time and served the same advocates.

5 We find that learned counsel for the respondent was laboring under an honest but mistaken belief that the appellant was not a person affected by the appeal. He also misconstrued the provisions of **Rule 78** of the Rules of this Court.

10 It is now trite law that a mistake or misunderstanding of counsel ought not to be visited upon his or her client. See **Julius Rwabinumi Versus Hope Bahimbisomwe Supreme Court Civil Application No. 14 of 2009, Hadondi Daniel versus Yolam Engondi C.A.C.A No. 67 of 2003, Captain Philip Ongom versus Catherine Nyero Owota SCCA No. 14 of**  
15 **2001.**

We find this principle very much applicable in this case.

Be that as it may, we are persuaded by the submissions of Mr. Makeera that since the 2<sup>nd</sup> respondent in the main appeal was duly served with court process, granting the orders sought by  
20 the applicant would result in the whole appeal being struck out. This we cannot do without having heard from the 2<sup>nd</sup> respondent. It would offend the rules of natural justice. Secondly it would visit injustice upon the second respondent in the appeal and the



respondent in this application as the dispute between the two is not affected by this application.

It would also appear to be superfluous to strike out the appeal only against the applicant and maintain it against the respondent  
5 in the main appeal Ms Margaret Nabitano Nalongo .

The issues before this Court in the pending appeal No. 11 of 2011 have direct effect on the rights, duties and obligations of the applicant herein, the Administrator General.

Excluding the applicant from the main appeal by having the  
10 appeal against him struck out would result in having the appeal heard without hearing the case for the applicant *albeit* on his own volition.

We therefore, invoke the provisions of **Rule 2(2)** of the Rules of this Court which stipulates as follows:

15 **“2(2)**

## **2. Application**

**(1) The practice and procedure of the court in connection with appeals and intended appeals from the High Court to the court and  
20 the practice and procedure of the High Court in connection with appeals to the court shall be set out in these rules.**

5 ***(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed , and shall be exercised to prevent abuse of process of any court caused by delay.***

10 We also invoke the provisions of **Rule 43** of the Rules of this Court which stipulates as follows;-

***“Order of hearing applications***

15 ***1) Whenever an application may be made either in the court or in the high court, it shall be made in the High Court.***

20 ***2) Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires , or entertain an application***

***under rule 6(2) (b) of these rules , in order to safe guard the right of appeal , notwithstanding the fact that no application for that purpose has first been made to the High court.”***

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We disallow the application and decline to grant the orders sought in it. Allowing this application would not serve the ends of justice. The main appeal seems to raise important Issues that require resolution by this Court. The interest of justice would better be served if all the parties are heard on appeal.

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We accordingly make the following orders;-

**1) This court on its own motion under the provisions of Rule 43 (2) of the Rules of this Court hereby extends time within which the respondent may serve a notice of appeal and the record of appeal upon the application.**

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**2) The respondent is hereby granted 7 days within which to serve the applicant with both the notice of appeal and the record of appeal.**

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**3) The costs of this application shall abide the results of the appeal.**

**It is so ordered:**

**Dated at Kampala** this 10<sup>th</sup> day of April 2014

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**HON. MR. JUSTICE S.B.K KAVUMA**  
**Ag. DEPUTY CHIEF JUSTICE**

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**HON. MR. JUSTICE KENNETH KAKURU**  
**JUSTICE OF APPEAL**

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**HON. JUSTICE PROF.LILLIAN E.TIBATEMWA**  
**JUSTICE OF APPEAL**

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