

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 261 OF 2013

BETWEEN

YUSUF MWESEKEZI ::::::::::::::::::::::::::::::::::::::
APPLICANT

VERSUS

JAMES KAJUBI ::::::::::::::::::::::::::::::::::::::
RESPONDENT

CORAM: HON MR. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. LADY JUSTICE PROF. L.E. TIBATEMWA, JA

RULING OF THE COURT

This is an application by Notice of Motion brought under **Rules 2 Sub Rule 2, 43 Sub Rule 1&2, 44 and 82 of the Rules of this Court** seeking to strike out both the Notice of Appeal and the appeal filed by the respondent in this court. The grounds of

this application are set out in the notice of motion but briefly they are as follows;

1. The appeal offends the rules of this court
2. The respondent did not take the essential mandatory steps
5 in prosecuting the appeal
3. The appeal was not filed within the time prescribed by law

At the hearing of this application, learned counsel Mr. Ambrose Tebyasa appeared for the applicant and Mr. Kusiima appeared for the respondent.

10 Mr. Tebyasa admitted that the Judgment from which the appeal arises was delivered on the 7th of September 2011. Whereas the respondent filed the notice of appeal at the High Court on 21st September 2011, he did not serve a copy upon the Registrar of this court as required by **Rule 77 of the Rules of this court.**

15 The respondent he contended did not serve the Notice of Appeal upon the applicant as required by **Rule 78 of the Rules of this court.** He submitted that under **Rule 72(2)**, the respondent was required to serve a Notice of Appeal on the address of the applicant set out in the High Court proceedings and record which

was stated to be Tebyasa & Co. Advocates. He also submitted that this appeal was incompetent in so far as the record of appeal filed in this court by this respondent did not bear the High Court Registrars certificate of correctness as required by the rules of
5 this court.

Mr. Tebyasa further submitted that the respondent didn't serve a copy of the letter requesting for proceedings upon the applicant or his counsel in the result that he should have filed the appeal within 60 days from date of Judgment which would have been 7th
10 November 2011. He referred us to a number of authorities in support of this application. He submitted that the above omissions are mandatory and not mere technicalities, he prayed for this application to be allowed and the notice of appeal and the appeal itself be struck out.

15 In reply, Mr. Kusiima submitted that the notice of appeal was filed in time on 21st September 2012 although it was endorsed by the Registrar of the High Court on 28th September 2011. He however conceded that there was no evidence of service of the notice of appeal upon the applicant or his counsel. Although paragraph 3 of

the affidavit in reply states that the applicant was served in person, no affidavit of service was filed. He conceded that Mr. Brian Tindyebwa who deponed the affidavit in reply on 4th February 2014 a day before the hearing of this application was not the person who is said to have served the notice of appeal upon the applicant. That person was stated to be Mr. Deo Kisekka who did not swear an affidavit of service. Mr. Kusiima therefore conceded that there was no proof of service of the notice of appeal upon the applicant. He also conceded that the appeal was filed out of time and that the letter requesting for proceedings was never served upon the applicant as required by **Rule 83 2 Sub Rule 2 of the Rules of this court**. He submitted that this court has power and discretion under **Rule 2 Sub Rule 2 of the Rules of this court** to validate the Notice of Appeal and the appeal. Since both are already filed in this court **albeit** late. He relied on the Supreme Court authority of **Godfrey Magezi and Brian Mbaziira Vs Sudhir Rupareria Supreme Court Civil Application No 10 of 2002 (Unreported)** and requested this court to dismiss this application and validate the appeal. We agree with Mr. Kusiima that the Notice of Appeal was filed within

time although the Registrar signed it on 28th September 2011, it bears a court registry stamp of 21st September 2011 which is within 14 days stipulated by law.

Registrars must ensure that the date of lodging the Notice of Appeal tallies with the date upon which it is endorsed. However, where there is a disparity as in this case the applicants should get a benefit of doubt in absence of contrary evidence. Mr. Tebyasa submitted that the respondent failed to serve the Notice of Appeal upon the Registrar of this court. We don't agree that this is a requirement. **Rule 77 of the Rules of this court stipulates as follows;**

“Upon receipt of the Notice of Appeal, the Registrar of the High Court shall immediately send one copy of it to the Registrar”.

Accordingly it is the duty of the Registrar of the High Court to serve a copy of the Notice of Appeal upon the Registrar of this court and not a duty of the respondent. However it is good practice for counsel for an intending appellant to do so.

Since the notice of appeal was filed on 21st September 2011 the appeal ought to have been filed by 21st November 2011. It was not. It was in fact filed on 17th December 2012 more than 12 months out of time. Since the letter requesting for proceedings was not served upon the applicant as conceded by Mr. Kusiima, the applicant could not take the benefit of **Rule 83 Sub Rule 2 of the Rules of this court** which excludes the time of preparation of the proceedings by the High Court. In any event the proceedings were ready by 20th January 2012 at the High Court in Kampala. They were collected by one Sam Kigundu of Kusiima & Co. Advocates on 14th March 2012. Still no appeal was filed until 17th December 2012. We agree with the decision of this court in **Gaba Beach Hotel Ltd Vs. Cairo International Bank Civil Application No.34 of 2003** where this court held as follows;

“We don’t regard the rules relating to the institution of appeals in this court to be mere technicalities that parties can dispense with under Article 126 (2) (e) of the Constitution. They got the root of substantive justice and the

doctrine of fair trial. They are intended to protect both parties from possible abuse of court process to the prejudice of proper administration of justice”.

5 We don't agree with Mr. Kusiima that we can extend time on our own under ***Rule 2 (2) of the Rules of this court***, in any case no application for extension of time has been made. We note that Godfrey Magezi case (Supra) was an application for extension of time. This is not an application for extension of time. The
10 respondent has not bothered to file one.

Mr. Kusiima's arguments are therefore devoid of any merit.

Since the appeal was filed out of time, we find that no appeal lies. We accordingly strike out both the Notice of Appeal and the appeal itself with costs to the applicant.

15 Accordingly all the other applications between the parties hereto arising from the appeal namely ***Civil Application No.300 of 2013*** seeking a stay of execution and ***Civil Application No. 332*** for amendment of ***Application No. 300 of 2013*** are also struck out with no order as to costs.

Dated at Kampala this **05th** day of **February, 2014**.

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HON ELDAD MWANGUSYA
JUSTICE OF APPEAL.

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HON. KENNETH KAKURU
JUSTICE OF APPEAL

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HON. PROF. L.E. TIBATEMWA
JUSTICE OF APPEAL.