

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NUMBER 0037 OF 2006**

DAVID TOMUSANGE APPELLANT

VERSUS

PATRICK KIRUMIRA..... RESPONDENT

(Appeal arising from the Judgment and decree of the High Court of Uganda at Nakawa, sitting at Kampala, delivered by Her Lordship, Justice C.A. Okello, on the 19th day of July, 2005 in original HCCS No 225 of 2002)

Coram: Hon. Justice Eldad Mwangusya, JA

Hon. Lady Justice Faith E.K. Mwendha, JA

Hon. Lady Justice Professor Lilian Tibatemwa Ekirikubinza, JA

JUDGMENT

The appellant, David Tomusange filed an appeal against the Respondent from the judgment and decree of the High Court of Uganda at Nakawa delivered on the 19th day of July 2005. The appeal was filed on the 26th day of May 2006.

Following the filing of the Notice of Appeal the Respondent, Patrick Kirumira, filed a Notice and grounds of cross appeal on 28th June, 2006.

The appeal and cross appeal were not fixed for hearing until the 19th January 2015. When the appeal was called for hearing only the appellant and his Counsel attended trial. Counsel for the appellant reported that the

Respondent/cross appellant had died on 19th September, 2008 but no legal representative had been appointed to take over the Respondent's case. Counsel for the appellant then applied for a short adjournment which was granted.

The appeal was again called for hearing on 4th June 2015 and again only Mr. Chris Bakiiza Counsel for the appellant was in Court. He reported that the appellant was indisposed and as earlier reported the respondent was deceased. Mr. Bakiiza informed Court that the appellant had lost interest in the appeal because following a meeting with the widow of the respondent he found that she had not obtained letters of Administration and could not afford to engage a Lawyer to assist her obtain them.

Counsel prayed that the appeal be withdrawn citing Rule 94 (4) of the Judicature (Court of Appeal Rules) directions and the case *of British American Tobacco (U) Ltd Vs Mwijakubi & Others Supreme Court Civil Appeal No 01 of 2012* for the proposition that with Leave of this Court it is possible for a matter which has already been called for hearing to be withdrawn without the appellant being ordered to pay costs. He prayed Court to show compassion like the appellant had shown to the widow of the Respondent.

As rightly submitted by Mr. Bakiiza withdrawal of appeals in this Court is governed by Rule 94 of the Judicature (Court of Appeal Rules) Directions S.I. 13 – 10 which states:

“1. An appellant may at any time after instituting his or her appeal in the Court and before the appeal is called for hearing lodge in the registry notice in writing that he or she does not intend further to prosecute the appeal.

2. The appellant shall before or within seven days after lodging the notice of withdrawal, serve copies of it on each respondent who has complied with rule 80 of these Rules.

3. If all the parties to the appeal consent to the withdrawal of the appeal, the appellant may lodge in the appropriate registry the documents or documents signifying the consent of the parties, and the appeal shall then be struck out of the list of pending appeals.

4. If all the parties to the appeal do not consent to the withdrawal of the appeal, the appeal shall stand dismissed with costs except as against any party who has consented, unless the Court, on the Application of the appellant otherwise orders.

5. An application under Sub rule (4) of this rule shall be made within fourteen days after the lodging of the notice of withdrawal.”

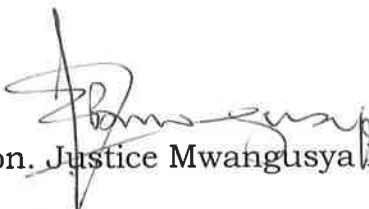
The withdrawal of this appeal is not made under the above rule. There was no notice of withdrawal and even if there was one it could not be served because the respondent is deceased and there is no legal representative to receive the notice. The withdrawal was done in open Court after the matter was fixed for hearing. In these circumstances it was not possible to comply with the rule and that is why the appellant sought the consent of the Court to withdraw it. The appellant's Counsel cited the case of ***British American Tobacco (U) Ltd Vs Mwijakubi & others (Supra)*** where a letter of withdrawal that did not fully comply with the rule was considered. The Supreme Court stated this:-


“Dr. Byamugisha’s letter does not state under which rule he is withdrawing the appeal but all the rules require further action from the party withdrawing the appeal. Rule 1 is supported by rule 2 which requires that a notice in writing is lodged in the registry and copies served on the respondent. I do not think this letter meets the requirements of a notice and in any case, there is not proof of copies being served on the respondent. Rule 3 similarly required documents to lodge in the registry. Moreover, the notice of appeal was lodged after the appeal had been called for hearing and pending judgment. The rules are rules are silent on withdrawal of appeal after the appeal had been called for hearing but it should be possible with Leave of the Court.” (Underlining provided)


So outside the application of Rule 94 of the rules of this Court an appeal can be withdrawn only with Leave of Court. In the circumstances of this case compliance with rule with rule 94 is not possible because there is no representative of the deceased respondent. Court grants Leave to the appellant to withdraw the appeal as a consequence of which the appeal is dismissed with no order as to costs since there was no respondent or a representative at the hearing of the appeal.

The respondent had filed a cross appeal. He died in 2008. Under rule 97 of the Judicature (Court of Appeal Rules) Directions the cross appeal does not abate. The court shall on the application of any interested person, or of the Courts own motion cause the legal representative of the deceased to be made a party in place of the deceased. Since 2008 nobody has shown any interest to prosecute the cross appeal filed by the respondent and there is nobody that Court can make his representative. The cross appeal stands dismissed with no order as to costs since the appellant has also decided to terminate the appeal.

Dated at Kampala this11.....day ofJune..... 2015


Hon. Justice Mwangusya Eldad
Justice of Appeal


Hon. Lady Justice Faith E. K. Mwendha
Justice of Appeal


Hon. Lady Justice Professor Lillian Tibatemwa Ekirikubinza
Justice of Appeal