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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

MISCELLANEOUS APPLICATION NO. 269 OF 2013

[Arising from High Court Miscellaneous Application No. 448 of 2009, itself arising from High Court Miscellaneous Application No. 763 of 2003 and HCCS No. 1010 of 1996]

James Bahinguza
Edward Grace Lubega
(Suing on their own behalf and
on behalf of 622 other former
employees of the defunct East African Airways) :::::::::: Applicants

VERSUS

The Attorney General of Uganda:::::::::::::::::::::::::::::::: Respondent

Coram: Hon. Justice Remmy Kasule, JA

Hon. Justice Eldad Mwangusya, JA

Hon. Justice Geoffrey Kiryabwire, JA

RULING OF THE COURT

This application is to strike out the Notice of Appeal. The same was filed in Court by the respondent on 20th February, 2013. The application is brought by the applicants under **Rules 43(1), 82, 83(1) (2) and 84** of the Rules of this Court.

The contention of the applicant is that because the respondent has failed to take an essential step to prosecute the intended appeal in that no Memorandum of Appeal has been filed in Court within the prescribed time since the lodgment of the Notice of Appeal, therefore the Notice of Appeal ought to be struck out.

Learned Counsel Roscoe Ssozi and Joseph Kasozi appeared for the applicants while Gerald Batanda, State Attorney represented the respondents.

At the commencement of hearing, His Lordship Justice Remmy Kasule, JA, indicated to all Counsel and their clients who were around that he was ready to excuse himself from handling this application as on 23rd May, 2006, while still at the High Court Bench, he had entertained by entering on the record of High Court at Kampala, in **Miscellaneous Application No. 763 of 2003** arising from **High Court Civil Suit No. 1010 of 1996** an order by consent. All Counsel, after appropriate consultations with those of their clients who were present, stated that given the neutral nature of the order by consent that was entered on the Court Record at the High Court coupled with the fact that this application had been pending for long in this Court since 19th August, 2013, there was no reason to justify the withdraw by Honourable Justice Remmy Kasule, JA, from resolving this application. The Honourable Justice Remmy Kasule, JA, then agreed to participate on the Coram although he had entered the order by consent as already indicated above. We agreed with the position of Honourable Justice Remmy Kasule, JA, as the order by consent, like any other consent order or Judgment is a resolution of the dispute in issue by the consent of parties and is not an adjudication of the issue in dispute by the trial Judge presiding over the case or cause.

The background to this application is that as a representative action **Civil Suit No. 1010 of 1996** was filed in the High Court at Kampala by the applicants as plaintiffs representing themselves

and other employees from Uganda of the now defunct East African Airways Corporation, against the Attorney General, representing the Uganda Government whereby the applicants, as plaintiffs, sought to be paid their terminal benefits and other related reliefs by the Government of Uganda.

The said suit came before **Tabaaro, J,** in the High Court on 27th October, 2000. A Consent Judgment was entered into by the parties to the Suit and recorded by Court on that day. The same was duly respectively signed by Counsel for the plaintiffs and for the defendant Attorney General. The Government of Uganda, through this Consent Judgment, undertook to pay retirement benefits and costs of the suit to the plaintiffs, now applicants, arising out of their employment with the said defunct East African Airways Corporation and through it, the defunct East African Community.

Paragraph 3 of the 27th October, 2000 Consent Judgment provided that the compensation for loss of office of the former employees of East African Airways Corporation was to be considered by the defendant upon proof that the same was due and not paid.

On 19th May, 2003 again before **Tabaaro, J,** the parties to the Suit, as a matter arising from the stated paragraph 3 of the Consent Judgment of 27th October, 2000, executed another Consent Order and the same was recorded on the Court Record on 20th May, 2003, in the terms that:

> ***" 1) The Ugandan former employees of the now defunct East African Airways Corporation are entitled to compensation for loss of office.***
>
> ***2) The Ugandan former employees of the now defunct East African Airways Corporation be paid compensation for loss of office in accordance with the formula that was***

applied to pay the Kenyan former employees of the East African Airways Corporation, namely for each employee:

i) 15 days salary for every month served as an employee".

On 23rd May, 2006, the same parties to the original Consent Judgment and to the Consent Order of 19th May, 2003, yet again, executed another Order by Consent which they stated was superseding the one of 19th May, 2003. This time the order was to the effect that the compensation to be paid for loss of office was to be based upon the formula of 9 (nine) days salary for every month served as an employee, and not 15 days as per Consent Order of 19th May, 2003. The 23rd May, 2006, Order by Consent was also recorded on the Court record.

A number of the plaintiffs/Judgment creditors in **Civil Suit No. 1010 of 1996** were dissatisfied with the Order by Consent of 23rd May, 2006. They lodged in the High Court, Kampala, **Miscellaneous Application No. 0448 of 2009: James Bahinguza & 622 others vs The Attorney General,** seeking a review of the said Order. The High Court, Elizabeth Musoke, J, held on 7th February, 2013 that the Order by Consent of 23rd May, 2006 was illegal and so the formula stated in the Consent Order of 19th May, 2003, was to be applied for calculating compensation for loss of office.

The Attorney General, dissatisfied with the above High Court decision, lodged a Notice of Appeal on 20th February, 2013 and served a copy of the same upon the respondent to the intended appeal on 27th February, 2013. A copy of the record of proceedings was also requested for by the Attorney General on 18th February, 2013 and a copy of the request letter served upon Counsel for the opposite party.

On 14th May, 2013 or thereafter, the Registrar, High Court, Civil Division, communicated in writing to the Attorney General's Chambers that the requested for Court Proceedings were ready for collection. An endorsement on the said letter, annexure "F", to the affidavit of Mr. Cheborion Barishaki, the Director of Civil Litigation, shows that the letter was served upon and received by the Attorney General's Chambers on 12th June, 2013 and the Court Proceedings were taken from the trial Court by the Attorney General's Chambers on 26th June, 2013.

The applicants have moved this Court to strike out the Notice of Appeal on the ground that no Memorandum of Appeal was filed within the time prescribed by law and as such the respondent had failed to take an essential step to lodge and prosecute the intended appeal.

Through affidavits in support of the application dated 10th August, 2013 and in rejoinder of 05th February, 2014, the applicants' advocate Tino Mabel Sharon, asserted that the respondent failed to file the appeal within the mandatory period of sixty (60) days as from 12th June, 2013 the date of receipt by the respondent of the letter of the Registrar, High Court, that the certified copy of the Court proceedings in High Court **Miscellaneous Application No. 448 of 2009** were ready for collection. The said letter of the Registrar was in response to a request by the respondent to be supplied with the said proceedings dated 18th February, 2013, a copy of which had been served upon the applicants' Counsel on 27th February, 2013. The applicants' contention is thus that the respondent ought to have filed the Memorandum and Record of Appeal not later than the 12th August, 2013. By having failed to do so the respondent had failed to take essential steps to lodge and prosecute the intended appeal. Hence the application to strike out the Notice of Appeal.

The respondent opposes the application. He does so basing on an affidavit in reply dated 21st January, 2014 by Mr. Cheborion Barishaki, the learned Director of Civil Litigation. While acknowledging that the respondent received on 12th June, 2013 letter of the Registrar, High Court, inviting the respondent to collect the typed record of the Court proceedings, the respondent asserts that such service was wrong in law as the same was effected upon a one Mr. Obong Patrick, a records assistant in the Directorate of Civil Litigation registry, Attorney General's Chambers, while proper service ought to have been effected upon an officer of Government entitled to practice as an advocate, as required by law.

Further, though the respondent collected the Court proceedings on 26th June, 2013, it was not possible to file the appeal in time as the file of the case with the Directorate of Civil Litigation had been forwarded to the Department of Finance and Administration within the Attorney General's Chambers for purposes of clearing outstanding liabilities of the applicants arising from the Consent Judgment of 27th October, 2000 and the Consent Order of 20th May, 2003. By the time the said file was retrieved from where it was by Mr. Obong Patrick, the records assistant, and passed over to the Director of Civil Litigation, the applicants had already lodged this application to strike out the Notice of Appeal.

The respondent thus prays that he should be let to file the Memorandum of Appeal so as to prevent grave injustice and substantial loss as the Government of Uganda stood to pay colossal sums of money to which the applicants are not entitled, if the appeal is not heard on merit.

Rule 82 of the Rules of this Court empowers one on whom a Notice of Appeal has been served to apply to this Court to strike out the said notice of appeal on the ground that no appeal lies or

that some essential step in the proceedings has not been taken at all or within the prescribed time.

In Civil Litigation the Notice of Appeal is the notice in writing lodged by one who desires to appeal to this Court a Civil Court decision of the High Court and is lodged in duplicate with the registrar of the High Court under **Rule 76 (1)** of the Rules of this Court. It has to be lodged within 14 days after the date of the decision against which it is desired to appeal: See: **Rule 76(2).**

The Notice of Appeal expresses one's intention to appeal against the whole or part of the High Court decision, gives the address for service of the appellant and states the names and addresses of those intended to be served with copies of the notice. A copy of the Notice of Appeal has to be served upon the one affected by the appeal within a period of seven (7) days after its lodgment. A Notice of Appeal is thus a critical document expressing one's intention to appeal. It is the foundation for an appeal and without it an appeal cannot be said to exist. Its existence is the basis upon which this Court, as the appellate Court of first instance, can be said to have the power to entertain the appeal from the decision intended to be appealed from. Thus a Notice of Appeal is a jurisdictional legal instrument.

Given its critical legal nature, a party that lodges in this Court a Notice of Appeal is enjoined by law to follow up the prosecution of the intended appeal with due diligence and without dilatory conduct on his/her part. This is required by **Rule 83(2)** of the Rules of this Court where the intending appellant has in writing applied for a copy of proceeding within thirty days after the date of the decision being appealed against and a copy of such application has been served upon the intended respondent, then, when computing the sixty days within which the memorandum of appeal has to be filed, the period, as shall be certified by the High Court Registrar as having been required for the preparation and

delivery to the appellant of a copy of the Court proceedings, shall be excluded.

Failure to carry out the above acts (there may be others) within the stipulated time is what constitutes failure to take an essential step in the proceedings.

To fail to take an essential step is failure by the party concerned to a cause before Court to perform a fundamentally necessary action demanded by the legal process, and the duty to perform such is upon that party to a cause, so that, subject to permission by the Court, if the action is not performed in the manner and/or within the time as by law prescribed, then whatever legal process has been done before the requisite action, becomes a nullity as against the party who has the legal duty to perform such requisite act: See: **Court of Appeal Election Petition Application No. 07 of 2012: Kasibante Moses vs The Electoral Commission,** unreported.

The intending appellant has the legal duty to take and pursue the essential steps necessary to prosecute the appeal without any dilatory conduct on his/her part. It is not the duty of the Court or any other person to do this on behalf of such a party. See: **Uganda Supreme Court Civil Application No. 52 of 1995: Utex Industries Limited vs The Attorney General.**

Failure to take an essential step in a cause may entitle the opposite party to a cause to apply to strike out the pleadings constituting the cause of action of the offending party.

There are a number of considerations that a Court has to consider before deciding to grant or not to grant such an order of striking out such pleadings.

The Court must be conscious of the fact that striking out a pleading and/or a proceeding that may deprive a party of presenting and prosecuting his /her cause of action is an

extreme measure and as such should be taken as a last resort and in the clearest of cases.

Deviations and lapses in form and procedure, which are not jurisdictional in nature, not causing prejudice or miscarriage of justice to the opposite party or where the inconvenience can be catered for with costs against the offending party, should not lead to such a heavy punishment of extinguishing the cause of action of a party to the cause. After all, the rules of procedure are complex and technical and should therefore not be applied in such a way as to have an invalidating effect to the offending party's cause of action, even where it is an election matter: See: **Court of Appeal of Nigeria case: DR. CHRIS NWEBUEZE NGIGE V PETER OBI and 436 Others: 2006 Vol. 18 WRN 33.**

A Court of law, should apply and enforce the objects, purposes, spirit and code values of the statutory provision, rather than its mere words or rules. The Court should not allow itself to be too bound and tied by the procedural rules of practice as to be compelled to do that which will cause injustice in a particular case. The Court should be guided by considering issues like the delay likely to be occasioned, as well as the costs and prejudice to the parties to be suffered should the Court strike out the offending document. The Court should focus on the wider interests of justice before coming to a decision one way or the other.

However, while having regard to the above considerations and the constitutional principle that substantial justice shall be done without undue regard to technicalities, that is not to say that procedural improprieties are to be ignored altogether. The Court has to consider the prejudice that is likely to be suffered by the non-offending party and compare it against the prejudice to be suffered by the offending party if the Court's order results in wiping out the cause of action. The Court should aim at

achieving fair, just, speedy, proportionate, timely and costs saving adjudication of cases before it. See: **The Kenya Case of: Civil Application No. NAI 293 of 2009: KARIUKI NETWORK LIMITED & ANOTHER vs DALY & FIGGS ADVOCATES**.

The Court must not overlook or fail to act firmly against acts/omissions that result in failure to take an essential step and thus subvert the expeditious disposal of cases/appeals. Therefore mistakes and/or lapses, negligent acts or dilatory tactics or acts of Counsel or the client of Counsel, that amount to abuse of Court process ought not to be tolerated by a Court of law, once that Court is satisfied that there has been intentional and/or continuous default on the part of the offending party. If it is delay, then the delay must not be inordinate. The Court must consider all the circumstances surrounding the failure to take an essential step, and once satisfied that the failure to do so amounts to depriving of the innocent party a fair trial, then the Court must act firmly against the offending party.

A Court of law ought to be conscious that justice looks at both sides of the highway and must be administered in accordance with the law, whether procedural or substantive.

The Court should therefore not tolerate disobedience of the law out of sympathy to the offending party, or on the mere assertion that no prejudice has been caused to the innocent party. Absence of prejudice is no excuse for disobeying the law. Rules and timelines set by law must be complied with by all. It is through such compliance that certainty, confidence and clarity become the bedrock of Court adjudication of causes. That way the rules and regulations become the means guiding the Court and the parties in obtaining justice from the Courts. Every party to a cause must therefore take care and pay scrupulous attention to complying with the Court Rules: See: Court of Appeal of Kenya: **Civil Appeal Application No. 228 of 2013: Nicholas**

Kiptoo Arap Korr Salt vs Independent Electoral and Boundaries Commission & Wilfred Rottich Lesan.

We will bear in mind the above principles while resolving the main issue in this application.

It is a fact that the applicants have been seeking from the respondent payment of their terminal benefit through **Civil Suit No. 1010 of 1996** lodged in the High Court at Kampala almost eighteen years ago as of to date: 23rd June, 2014 the date of hearing of this application. The issue of terminal benefits for the applicants seems to have arisen in the mid 1970s with the collapse of the then East African Community of which the now defunct East African Airways Corporation was a component. This is more than thirty (30) years ago to date i.e. 23rd June, 2014. It also appears that since 27th October, 2000 when the Consent Judgment was entered in **Civil Suit No. 1010 of 1996** the applicants had never fully benefited from the said Judgment. That is fourteen (14) years ago. The applicants were also not able to secure their terminal benefits out of the 19th May, 2003 and 23rd May, 2006 Consent Orders that were entered into so as to secure payment of benefits to the applicants by the respondent arising from the Consent Judgment of 27th October, 2000. The Consent Order of 23rd May, 2006 gave rise to **High Court Miscellaneous Application No. 448 of 2009** in respect of which the Notice of Appeal sought to be struck out through this Application was filed in this Court.

This Court therefore concludes from the above history relating to this litigation, that the applicants have for a very long period of years been deprived of payment to them of their terminal benefits as former employees of the East African Community. Furthermore, part of that long period since 1996, the applicants have been battling with the respondent for that payment in the

Uganda High Court at Kampala through **HCCS No. 1010 of 1996** and now this **Application No. 269 of 2013** before us.

The respondent, of course, had a right to appeal against the decision of Court made in **Miscellaneous Application No. 448 of 2009;** and this right was exercised with the lodgment of the Notice of Appeal in the High Court, Kampala, on 20th February, 2013.

Having applied to the High Court, Kampala to be supplied with the Court record of proceedings of **Miscellaneous Application No. 448 of 2009** the respondent was notified in writing by the Deputy Registrar, Civil Division, that those proceedings were ready for collection and the respondent received this letter on 12th June, 2013. Inspite of the receipt of this letter and collecting the Court Proceedings on 26th June, 2013 the respondent never filed in this Court a Memorandum and Record of Appeal and none had been drawn up or prepared even by the 23rd June, 2014 when this application came up for hearing. This is contrary to **Rule 83(1) (2) and (3) of the Rules of this Court**.

The respondent's argument is that there was no lawful service of the letter of Court that the Court proceedings were ready upon the Attorney General on 12th June, 2013 because service of the said letter was effected upon the respondent's Records Assistant one Obongo Patrick, and not upon an officer of the respondent entitled to practise as an advocate as required by law.

We are unable to accept the above submission of the respondent's Counsel. **Section 11** of the Government Proceedings Act, Cap. 77, requires that documents in connection with Civil Proceedings to be served upon Government be served upon the Attorney General. The Deputy Registrar's letter of 14th May, 2013 to the effect that the Court Proceedings were ready for collection is stamped with the stamp of Ministry of Justice & Constitutional Affairs, Directorate of Civil Litigation Indicating:

"received 12 JUN 2013" together with a signature on the very stamp. Following receipt of this letter, according to the affidavit of Mr. Cheborion Barishaki, Director, Civil Litigation, Attorney General's Chambers, Ministry of Justice & Constitutional Affairs, the Attorney General, collected the Court Proceedings from Court on 26th June, 2013. There is therefore no doubt, in our considered view, that the Attorney General's Chambers received and acted upon the Court's letter of 14th May, 2013.

The submission for the respondent that the person upon whom the said letter of 14th May, 2013 was served was not a practicing lawyer in the Attorney General's Chambers and therefore the said service was wrong in law, null and void, is also not acceptable to us.

Rule 5 of the Government Proceedings (Civil Procedure) Rules: SI 77-1 provides:

"5. Service of documents.

(1) Service of a document on the Attorney General for the purpose of or in connection with civil proceedings by or against the Government shall be effected by delivering or sending the document to be served and a duplicate or copy of the document to the office of the Attorney General, and shall be deemed not to be complete until the Attorney General or another officer of the Government entitled to practise as an advocate in connection with the duties of his or her office has endorsed an acknowledgement of service on the document to be served.

(2) In this rule, "document" includes a notice, pleading, order summons, warrant and any written proceeding or communication.

We note that the learned Director-Civil Litigation, does not give any explanation as to why another officer of the Government entitled to practise as an advocate did not endorse acknowledgement of service of the Court's letter of 14th May, 2013 after the same had been received, acknowledged and stamped with the requisite stamp by a staff of the Attorney General's Chambers on 12th June, 2013. The fact that the Attorney General's Chambers acted on the said letter by collecting the Court proceedings from the High Court on 26th June, 2013 deprives of any validity the respondent's submission that there was no proper and effective service of the said letter upon the respondent.

Indeed, it appears to us, that the respondent, by advancing such a submission, is purporting to gain out of his own wrong doing. It is the respondent who employed Patrick Obong as a Records Assistant and by virtue of that employment allowed him to receive the Court's letter of 14th May, 2013 even though he was not a practising lawyer in the Attorney General's Chambers, which, according to the respondent, was wrong. It is also the respondent who failed to ensure that a practising lawyer in the Attorney General's Chambers endorses acknowledgment of receipt by the Attorney General of the letter of 14th May, 2013, pursuant to Rule 5 of the Government Proceedings (Civil Procedure) Rules. The respondent being the author of the above two wrongs cannot, in the same measure, take advantage of the said wrongs by claiming that service upon the respondent of the letter of 14th May, 2013 does not bind the respondent. To submit as such, as Counsel for the respondent has done, amounts to a traversity of justice.

We are also unable to accept the submission put up by respondent's Counsel that it was not possible of the respondent to file the appeal in time because when on 26th June, 2013 the Court proceedings were collected from Court, the file of the case

with the Directorate of Civil Litigation had been forwarded to onother department of Finance and Administration, within the Attorney General's Chambers/Ministry of Justice and Constitutional Affairs. The transfer was for the purpose of clearing some outstanding liabilities of some of the applicants. By the time the Records Assistant, Mr. Patrick Obong, retrieved the file and passed over the same to the Director, Civil Litigation, the applicants had already filed in this Court this application which is the subject of this ruling.

It appears to us that the Records Assistant, Patrick Obong, who received the Court's letter of 14th May, 2013 that the Court proceedings were ready for collection, is also the one who was in charge of the movement of the file from the Directorate of Civil Litigation to the Department of Finance and Administration within the Attorney general's Chambers/Ministry of Justice and Constitutional Affairs. That is why he was able to retrieve it. As a Records Assistant he would also have records as to the movement of the file. Therefore there appears to be no plausible explanation from the respondent, as to why, given the fact that the respondent was in possession of the Court proceedings and was aware, or was in a position to be aware, where the file pertaining to the case was within the set up of the Attorney General's Chambers/Ministry of Justice and Constitutional Affairs, the respondent was not able to file the memorandum and record of appeal within the time prescribed by law. Indeed, even as at the time of the hearing of this application, the respondent adduced no evidence at all that he had drawn up a draft of memorandum of appeal or let alone made any attempt to prepare the record of appeal.

We therefore find on the basis of the facts before us that the respondent's conduct has been dilatory in pursuing the prosecution of the intended appeal. On the other hand, the applicants have been pursuing their claims in the High Court

and now in this Court for the last eighteen (18) years. Before coming to Court in 2006, they had pursued the claim for a considerably long period since the breakup of the East African Community in the 1970s. All along the respondent has been the one dealing with the issues of the said applicant's claim for terminal benefits. We have accordingly come to the conclusion that any further delay, given the dilatory conduct of the respondent in not pursuing the intended appeal, and given the fact that the applicants have been deprived of what they are entitled to by way of terminal benefits, for so long, will cause further injustice to the applicants. This will be, in a way, a denial of justice to the applicants. Furthermore, litigation must come to an end and protracted litigation based on dilatory conduct amounts to an abuse of Court process which Courts of law should guard against.

Accordingly this application is allowed. The Notice of Appeal lodged in the High Court on 20th February, 2013 is hereby struck out by reason of the intending appellant failing to file the Memorandum of Appeal and Record of Appeal within the time by law prescribed.

The Applicants are awarded the costs of this application.

Dated at Kampala this 20th day of January ~~2014~~ 2015

Hon. Remmy Kasule
JUSTICE OF APPEAL

23.10.2014

Hon. Justice Eldad Mwangusya
JUSTICE OF APPEAL

Hon. Justice Geoffrey Kiryabwire
JUSTICE OF APPEAL