

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CIVIL
APPLICATION NO.264 OF 2013**

**1.TEGRAS BYEITIMA
2.KUGONZA FRANKLINE**

**3.RAJAB
RUGADYA.....APPELLANTS**

VERSES

**ASABA
JAIDEN.....RESPONDEN
T**

CIVIL APPLICATION NO.248 OF 2013

**(ARISING OUT OF HIGH COURT CIVIL
SUIT NO.0024 OF 2010)**

CORAM:-

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE ELDAD MWANGUSYA, JA

HON. MR. JUSTICE RUBBY AWERI OPIO, JA

RULING OF THE COURT

This application was brought by way of Notice of Motion under Rules 78(1), 82, 43(1) AND 44(1) of the Judicature (Court of Appeal) Rules, SI 13-10.

It seeks for orders that:-

- (a) The respondent's notice of appeal dated 26th February 2013 intending to appeal against the judgment of Hon. Justice Ralph Ochan in Civil Suit No. 0024 of 2010 be struck out.
- (b) Costs of this application be provided for.

The grounds upon which this application is premised are elaborated in the supporting affidavit of Tegras Byeitima sworn on 19th day of August of 2013.

The respondent opposed the application while relying on the affidavits deponed to by Natukunda Andrew and Asaba Jaiden.

REPRESENTATION

At the hearing of this application, learned Counsel Mr. Emmanuel Twaribireho and Allan Tumwesigye appeared for the applicants whereas Mr. Tugume Moses represented the respondent.

The issues for determination are as follows:-

1. *Whether the respondents notice of appeal dated 26^h february 2013 intending to appeal against the judgment of Hon Justice Ralph Ochan in Civil Suit No.0024 of 2010 is liable to be struck out*

2. *Costs of this application be provided for.*

APPLICANTS CASE

The respondent filed a notice of appeal against the decision in Civil Suit No.0024 of 2010 on 26th February 2013. However, the applicant's advocate received the same on 18th March 2013 outside the 7 days as required by law. Secondly, more than sixty (60) days have elapsed since the respondent filed the said appeal in court without prosecuting the appeal

in accordance with the law. That such failure to prosecute an appeal within sixty (60) days entitles the applicant to have the notice of appeal struck out for failure to take an essential step. That the respondent's primary motive of lodging the said notice of appeal was simply calculated to delay the applicants from enjoying the fruits of the judgment given in their favour by the High Court. Learned counsel submitted that it is in the interest of justice to prevent abuse of court process and to meet the ends of justice that the notice of appeal be struck out. This will enable the applicants to enjoy the fruits of the said judgment given in their favour by the High Court at Masindi.

RESPONDENTS' CASE

It was contended for the respondent that the notice of appeal and the letter requesting for the typed certified record of proceedings were filed in court on 26th February 2013 as admitted by the applicants but the said notice of appeal was never sealed by court until 7th March 2013 when copies of the same were availed to the first applicant.

On 14th March 2013 the applicants' lawyers were served with a Notice of appeal and a letter requesting for a record of proceedings.

The respondents affidavit in reply indicate that the respondent accompanied the process server up to applicants law firm and he was served on 14th March within 7 days counting from 7th March but counsel for appellants chose to date the documents as received on 18th March, 2013 as per paragraph 10 of the 2nd affidavit in reply.

Counsel prayed to Court to find that the Notice of Appeal and the letter requesting for the record were served within 7 days as provided for by Rule 78 of the Rules of this Court.

In response to the second ground regarding time for filing the Memorandum of Appeal and the record of Appeal Counsel argued that a record was availed to the applicant's counsel on 5th September 2013 and is marked annexure "A" to the 2nd applicant's affidavit in rejoinder. The respondent's lawyer Complained to court that the record had inaccuracies and was incomplete. Subsequently a complete record was prepared and a certificate in response to that letter was prepared

and sealed on 20th December 2013. Having received the record and certificate of Registrar on 20th December 2013, this appeal was lodged on 21st February 2014. The applicants state that this was out of time by one day. However counsel submitted that Rule 4 of the Rules of this Court requires that in reckoning time, the period of Christmas vacation shall not be taken into account unless the court directs otherwise. However Order 51 r 4 of the Civil Procedure Rules defines Christmas vacation to mean the period from 24th December to 15th January in the year following. If that Rule is taken into account then the 60 days rule was not offended. The respondent has since filed a record of appeal, scheduling notes and the appeal is due for scheduling. Counsel reiterated his earlier prayers that all essential steps were taken in time and the respondent who was condemned unheard in the lower court should be given an opportunity to be heard on appeal.

REJOINDER

Mr. Twarebireho maintained the fact that service was on 18th March not 14th March 2013. He reiterated their earlier prayers.

COURTS FINDINGS

Upon perusal of the file, the record and certificate of Registrar are dated 20th December 2013. Another certificate of correctness is dated 18th December 2013. One would therefore wonder why there were two certificates issued in respect of the same issue. These discrepancies in the certificate of correctness raise suspicion. Rule 4 of the Rules of this Court requires that in reckoning time the period Of Christmas vacation shall not be taken into account subject to direction of this Court Order 51 r.4 of the Civil Procedure Rules defines Christmas vacation to mean the period from 24th December to 15th January in the year following. Since the proceedings were being prepared and collected from the High Court where Order 51 Rule 4 of the Civil Procedure Rules applies, it is only fair that this Court in this case takes into account the court vacation period in reckoning the time. That period is thus discounted. If that rule is taken into account then, this appeal was lodged on 21st February, 2014, one day after the 60 days rule. We note that the main complaint in the intended appeal is that there

was failure or no evaluation of evidence because the respondent was not accorded an opportunity to present his side of the case and was therefore condemned unheard. The complaint is that the learned trial Judge merely used the surveyors' report to pass judgment without calling evidence from both parties.

This appeal will determine whether or not **Article 126(1) (e) of the Constitution** that provides that substantive justice shall be administered without undue regard to technicalities was contravened. We are strengthened by the decision in **Kasaala** Growers Co-operative Society VS Jonathan and another Supreme Court, Civil Application No. 24 of **2010** where Tsekooko, (JSC) in a similar application rejected the application to strike out notice of appeal and allowed parties to exhaust their legal right to appeal.

Accordingly, given the fact that the appeal is now ready for hearing and these parties should exhaust their legal rights on appeal, it is therefore in the interest of justice that the appeal be heard and decided on its merits. This application stands dismissed. Let the appeal be fixed for hearing, costs of this application shall abide the results of the appeal.

Dated at Kampala this 23rd day of October 2015

Hon.Mr.Remmy Kasule, JA

Hon. Mr. Elidad Mwangusya, JA

Hon. Mr. Rubby Aweri Opiyo, JA