

DAVID ETUKET.....APPLICANT

VERSUS

1.OKONYE MUSTAFA.

2. OKIRIA IBRAHIMRESPONDENT

CORAM: HON JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON JUSTICE PAUL KAHAIBALE MUG AM BA, JA

RULING OF THE COURT

This is an application seeking to strike out the respondent's notice of appeal, brought by way of Notice of Motion under Rules 2(2), 42 and 82 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.

The brief facts giving rise to this application are that on 9th November, 2006, the High Court at Mbale delivered judgment in favour of the applicant. Being dissatisfied with the decision of the High Court, on the 16th of February, 2007, the respondents lodged an appeal in this Court. On the 21st August, 2007, the applicant's then Advocates were served with conferencing notes in the appeal, to which they responded with a complaint to the Registrar of this Court regarding the respondent's failure to serve them with the notice of appeal. The applicant has now applied for the striking out of the notice of appeal/appeal before this Court.

The application is premised on several grounds which are contained in the Notice of motion and further elaborated in the applicant's affidavit in support and the affidavit of F.W Natsomi, the applicant's former Advocate. Briefly the grounds are that:-

1. The respondents failed to serve a Notice of Appeal, Memorandum of Appeal and the record of Appeal on the applicant within the prescribed time.
2. The respondents failed to deposit the mandatory security for costs at the time of instituting the appeal.
3. The 1st respondent purported to lodge a memorandum of appeal together with a record of appeal without lodging a notice of appeal.
4. The 1st respondent was on account of death incapable of instituting an appeal jointly with the 2nd respondent.

No reply was filed by the respondents or on their behalf. When the application came up for hearing, counsel for the applicant communicated to court information from the respondents' former Advocates that they had lost contact with the respondents and therefore sought leave of Court to withdraw from the matter. The respondents were, therefore, not present in Court and neither were they represented. The applicant was represented by learned Counsel Peter John Nagemi.

In his submissions, counsel for the applicant relied on **rule 78(1)** of the **Judicature (Court of Appeal Rules) Directions**, to state that where a notice of appeal is filed, it ought to be served on the opposite party within 7 days from the date of filing. He further relied on the affidavit of F.W

Natsomi to submit that by failing to serve the applicant with a notice of appeal, an essential step had not been taken by the respondents. Further, that the applicant had also not been served with the memorandum of appeal and the record of appeal, which was a requirement under rule 88(1) of the **Judicature (Court of Appeal Rules) Directions**. There was also no evidence of the mandatory payment of security for costs as provided under rule 105(1) of the Directions.

Counsel further submitted that as stated in the affidavit of the applicant, the 1st respondent had died at the time the appeal was instituted, and this had also been confirmed by the respondent's former Advocates. In Counsel's view, the institution of an appeal in the name of a dead person was a violation of the rules.

We have considered the application, the submissions of learned Counsel for the applicant and the law relied on in support of this application.

First of all, we find that the applicant has not provided substantial proof to satisfy this Court that the 1st respondent was dead at the time of instituting the appeal. Therefore, we do not accept this ground of the application.

Regarding the other grounds, **Rule 82** of the Rules of this Court under which this application was lodged provides as follows:-

'VI person on whom a notice of appeal has been served may at any time, either before or after institution of the appeal, apply to Court to strike out the notice & the appeal, as the case may be, on the grounds that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time .'

It is apparent that this application was based on the last part of the rule; that the respondents did not take an essential step in the proceedings within the prescribed time. The meaning of failure to take an essential step in the proceedings was considered in ***Andrew Maviri Versus Jomayi Property Consultants Ltd, CA Civil Application No 274 of 2014***, where it was stated that taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by the Court, if the action is not performed as by law prescribed, then whatever legal process has been done before, becomes a nullity, as against the part/ who has the duty to perform that act.

In the instant case, there is nothing on record to controvert the applicant's evidence that the respondents did not serve him with the notice of appeal, the memorandum of appeal and even the record of appeal. In essence, there is no indication that the respondents have ever taken any step in prosecuting the appeal since 2007 when the notice of appeal was lodged.

The respondent ought to have served the notice of appeal and the memorandum of appeal upon the applicant within 7 days of lodging the same, but more than 7 years have elapsed and no step has ever been taken to comply with the mandatory requirements of rule 78(1) of the Court of Appeal Rules. In addition, there is no proof that the respondents deposited security for costs at the time of lodging the appeal as required under rule 105(1) of the rules of this Court.

In conclusion, we find that the respondents did not take essential steps in the proceedings within the prescribed time as required by the rules.

We accordingly grant the application and order that the Notice of Appeal filed by the respondents be struck out with costs.

We so order.

Dated at Kampala this 24th day of March 2016.

Hon. Justice Elizabeth Musoke

JUSTICE OF APPEAL

Hon. Justice Cheberion Barishaki

JUSTICE OF APPEAL

Hon. Justice Paul Kahaibale Mugamba

JUSTICE OF APPEAL