

CONGO TRADING CORPORATION LTD.....APPLICANT

VERSUS

ALZAHIRI .A. WISSANJI.....

RESPONDENT

CORAM : HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

### RULING OF THE COURT

This is an application brought under **Rule 82** of the Judicature Court of Appeal Rules seeking to strike out the Notice of Appeal lodged by the Respondent in this Court on the 19<sup>th</sup> day of August 2010 and Civil Appeal No. 89 of 2010 filed on 8<sup>th</sup> November 2010.

The grounds for the application as set out in the motion and supported by the affidavit of one Mr. Emmanuel Bakwega, the applicant's counsel are as follows;

**1. The Respondent sought and did obtain satisfaction of the judgement and Decree in his favour in High Court Civil Suit No. 664 of 2006 against the Applicant who duly paid the decretal sum after the period prescribed for lodging a Notice of Appeal had expired with none being lodged.**

**2. The Respondent's Appeal against the Judgement and Decree is unconscionable being an attempt to approbate and reprobate and therefore no appeal lies.**

**3. The Notice of Appeal was lodged outside the time given by law for lodging Notices of Appeal and thereby an essential step in the proceedings had not been taken within the prescribed time.**

No affidavit in reply was filed by or on behalf of the Respondent.

When the Application came up for hearing on 21/03/2016, Mr. Didas Nkurunziza appeared for the Applicant while the Respondent who was unrepresented, elected to present his case personally.

Counsel for the Applicant submitted that the application sought an order that the Notice of Appeal lodged by the Respondent in this Court on 19/8/2010 and Civil Appeal No. 89 of 2010 filed on 8/11/2010 be struck out as an essential step had not been taken by the Respondent in time and as such no appeal lies. Further, that the Respondent has not been granted leave to extend the time within which to lodge the Notice of Appeal and the appeal.

The Respondent's Counsel abandoned the first and second grounds of the notice of motion, leaving only the third ground for resolution.

It was submitted for the Applicant that the notice of appeal was filed out of time. Further, that no leave had been granted by this Court extending the time within which to file the notice of appeal and/or to regularise the late filing of the appeal.

The Respondent concedes that both the notice of appeal and the appeal itself were filed out of time. In his statement in Court he blamed his former Advocates M/s. Barya Byamugisha & Company Advocates for the late filing of the notice of appeal and the appeal itself.

We cannot accept this statement made by the respondent during his submissions. It was not made from the witnesses stand and as such it cannot constitute evidence. As already stated above he filed no affidavit in reply.

Be that as it may, Rule 82 of the Rules of this Court under which the application was lodged provides as follows;

***“A person on whom a notice of Appeal has been served may at any time, either before or after the institution of the Appeal apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no Appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time”***

The meaning of failure to take an essential step in the proceedings was considered in **Andrew Maviri v Jomayi Property Consultants Ltd CACA No 224 of 2014**, where it was stated at page 8 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 led by law prescribed, then whether legal process has been done before, becomes a nullity".***

The record in this matter shows that judgement in Civil Suit No. 664 of 2006 from which the appeal arises was delivered on 28/6/2010. The Respondent's Advocates then extracted a Decree on 14/July/2010. The Respondent changed Advocates and a Notice of change of Advocates was filed on 19/08/2010. On the same day the new Advocates filed a Notice of Appeal and applied for the record of proceedings. The record was availed to them in September 2010. They then filed the Memorandum of Appeal on 8/11/2010.

The record also indicates that on 22/11/2010, the applicant filed at this Court, Civil Appeal No. 197 of 2010 seeking leave to regularise the late filing of the Notice of Appeal and the appeal apparently having realised that both had been filed out of time.

We find it surprising that instead of fixing the application for extension of time to file the Notice of Appeal first, this Court fixed the present application which seeks to strike out the Notice of Appeal. If allowed, the application to strike out the Notice of Appeal would render the Application for extension of time nugatory and this would result in denial of justice.

We are persuaded that the Respondent took essential steps to file the Appeal and was diligent. When he realised that time had lapsed, he applied for extension time to validate the late filing of Notice of Appeal and the Appeal.

In the case of **Multiple & Professional Services Ltd & Anor v Arvind City Properties Ltd CACA No 37/1997**, This Court held that, filing an appeal one month after the delivery of the judgment, but just 8 days only after instructing a new advocate was considerable diligence. We are persuaded by this authority.

In this case before us the Respondent took all necessary, steps in ensuring that this appeal is filed as soon as he realised that the time had lapsed and he filed an application for extension of time.

**Article 126(2) (e)** of the Constitution enjoins Courts in this Country to administer substantive justice without undue regard to technicalities. The import of this provision is that courts have a duty to examine all the circumstances of a case before rejecting it. In our view, this is a proper case where this Court should exercise its discretion under **Rules 42 of the Rules of Court** to have the ends of justice met.

Rule 42 (2) provides that;

***“Notwithstanding sub Rule (1) of this rule, in any Civil matter, the Court may, on application or on its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under Rule 6 (2) of the these Rules in order to safe guard the right of Appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court”.***

It is obvious that the intended effect of Rule 42 is to bring an act within the accepted time if the justice of the case requires. There would have been no reason to have the above provision if an act done out of time was an incurable nullity. A document filed out of time is therefore voidable as it may be validated by extension of time. We are of the considered view that the justice of this case requires us to exercise our discretion under Rule 42 (a) to extend time for the respondent to file his appeal.

We make the following orders:-

- 1. This application is hereby dismissed.***
- 2. We hereby grant a consequential extension of time for filing the Notice of Appeal and the appeal herein that is, Court of Appeal Civil Appeal No 89 of 2010.***
- 3. The late filing of the Notice of Appeal and the appeal herein is hereby validated.***
- 4. The above order disposes of Court Appeal Civil Application No. 197 of 2010 between the same parties which is hereby struck out.***
- 5. The Registrar of this Court is hereby directed to fix the Court of Appeal Civil Appeal No 89 of 2010 for hearing at the earliest convenient date.***
- 6. The costs of this application shall abide the results of the appeal.***

Before we take leave of this matter, we observe that this application would not have been necessary had the Register of this Court been more diligent.

The Registrar should always ensure that matters pending hearing arising from the same appeal are set for hearing in such a manner that meets the ends of Justice. In this case the application for extension of time ought to have been fixed and determined before this one.

Dated this 4<sup>th</sup> day of April 2016.

**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**

**HON. MR. JUSTICE KENNETH KAKURU, JA**

**HON. MR. JUSTICE CHEBERION BARISHAKI, JA**