

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPLICATION NUMBER 04 OF 2009

AD1AMA EKAJU JOHN ROBERT:;;  
APPELLANT

VERSUS

ELOBU ANGONU  
PATRICK;;RESPONDENT

CORAM:

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

RULING

This is an application by way of Notice of Motion (brought under Rules 82, 43(1) & (2) of the Judicature (Court of Appeal Rules) Directions, SI 13-10) [hereinafter referred to as the “Rules of this Court”] for Orders that

- a) The respondent’s Notice of Appeal or Appeal be struck out.
- b) The costs of the application be provided for...”

The application is premised upon 4 grounds in the motion and one affidavit in support of the motion sworn by Mr. Henry Ddungu, an advocate with M/s Ssekaana Associated Advocates & Consultants. The application was opposed by an affidavit in reply and a supplementary affidavit sworn by Mr. Kenneth Paul Omoding, an advocate at M/s Omoding, Ojakol & Okallany Advocates. Mr. Adiana Ekaju John Robert, the applicant herein deponed an affidavit in rejoinder.

At the hearing of the application, the applicant and his counsel were absent while Mr. Richard Okalany appeared for the Respondent.

### Background

The background to this application is that the respondent, applied for judicial review against the applicant in the High Court of Uganda at Soroti challenging his removal from office of the Speaker and the subsequent election of the applicant as the new Speaker of Amuria district. The trial Judge, the **Hon. Justice Musota Stephen**, decided the matter in the applicant's favour and dismissed the respondent's application for judicial review with costs. The respondent, being dissatisfied with the said decision, appealed against the ruling.

He lodged a Notice of Appeal in the High Court of Uganda at Soroti on the 9<sup>th</sup> day of December 2008. It is this Notice of Appeal that this application seeks to strike out.

### Submissions

Since the applicant and his counsel did not appear at the hearing, we shall rely on their pleadings on the record. The affidavit in

support of the motion, dated 9<sup>th</sup> February 2009 and sworn by Henry Ddungu stated that the respondent has never served the Notice of Appeal on the applicant's counsel.

He further stated that the letter requesting for proceedings was also not served on the applicant and that neither the memorandum nor the record of appeal were filed within the stipulated time. Mr. Adiamo Ekaju John Robert who deponed a supplementary affidavit dated 8<sup>th</sup> February 2010 disputed the fact that he was ever served with any Notice of Appeal and refused to sign for it as alleged in the affidavit of service by Ecutu Robert. He further stated that his lawyers had the duty to receive any documents relating to his case because he is represented by counsel. The applicant seeks that this application be allowed and the Notice of Appeal be struck out to enable the applicant enjoy the fruits of his judgment.

Counsel for the respondent submitted that the Notice of Appeal was served on the applicant and that there is proof of service on record. He relied on two affidavits of service, one deponed by Ecutu Robert, a process server at Soroti High Court, dated 15<sup>th</sup> December 2008, and another by Isodo Samuel, an advocate with M/s Omoding, Ojakol & Okalany Advocates, dated 16<sup>th</sup> December 2008. Counsel further relied on a supplementary affidavit by Kenneth Paul Omoding (advocate), dated 15<sup>th</sup> February 2010, which confirms the two aforementioned affidavits of service on the record as proof that the Notice of Appeal was served on the applicant and the Attorney General of Uganda. The latter was a party in the matter before the High Court. Regarding the record and memorandum of appeal, counsel submitted that these were filed on the 12<sup>th</sup> February 2008 within the 60 days prescribed after lodging the Notice of Appeal. He pointed out that the period of Christmas vacation was excluded in the computation of time within which to file the memorandum of appeal

according to Rule 4(e) of the Rules of this Court. However, counsel conceded to the fact that there was no letter applying for a copy of proceedings and also that there was no affidavit of service regarding service of the record and memorandum of appeal upon the applicant. Counsel for the respondent prayed that this application be dismissed with costs and that the respondent be allowed to pursue his meritorious appeal which has been pending before this Court since 2008.

#### Resolution

The applicant relied on Rules 82, 43(1) & (2) of the Rules of this court to strike out the notice of appeal. Rules 82 of the rules of this court provides:-

“82 application to strick out notice of appeal or appeals. A person on whom a notice of appeal has been served may at any time either before or after the institution of 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 Rule allows Court to strike out an appeal or notice of appeal on grounds that there is no appeal that lies to Court or that an appellant has failed to take essential steps or has failed to take them within the time prescribed. These are the parameters that a Court has to take into account when striking out an appeal or a Notice of Appeal.

In the instant case, counsel for the respondent relied on the affidavit of service deponed by a one Ecutu Robert, a process server at Soroti High Court dated 15<sup>th</sup> December 2008.

This affidavit states:

*"5.... That the 2<sup>nd</sup> respondent (applicant herein), on hearing about the appeal came to the registry on the 15th day of December 2008 and / served him with a copy of the notice of appeal*

*6. That he did not acknowledge receipt of the same but went away with a copy and said he would first give his lawyers and seek redress from them..."*

*Another affidavit of service by Isodo Samuel, an advocate with M/s Omoding, Ojakol & Okalany Advocates dated 16<sup>th</sup> December 2008 states:*

*"...4. That on the same day 11<sup>th</sup> December 2008), / proceeded to the Attorney General's Chambers In Mbale Regional Office located at Plot 61 Republic street in Mbale district, counsel for the respondent.*

*5. That I got the secretary thereto who Identified herself as Sarah Koloto and she told me that all the lawyers had gone out and she was not aware as to what time they would return.*

*6. That since / was to return to Soroti and It was getting late, I tendered her a copy of the notice of appeal which she willingly accepted but declined to acknowledge..."*

These two affidavits of service show that the notice of appeal was served on the applicant and the Attorney General. However, we find these affidavits strange since they were drawn and filed by counsel for the respondent as pointed out in paragraph 8 by Mr. Adiamo's supplementary affidavit dated 8<sup>th</sup> February 2010. Paragraph 9 of the same affidavit states:

*"...9. That the two affidavits clearly contain similar mistakes in the title as no case or application number is shown and the word Uganda Is misspelt*

Counsel for the respondent during the hearing submitted that the reason for drawing the affidavits on behalf of Court was to have proof of service on record. With respect, it is also strange that the applicant was alleged to have been served and not his counsel. With regard to the service by one Ecutu Robert, we find it irregular for a process server of the Court to serve process on behalf of one of the litigants on another litigant on a matter in Court; when not directed by Court to do so. Such service is suspect and cannot amount to effective service. In a similar manner, with regard to the service by Isodo Samuel (Advocate) on the Attorney General, we find it irregular that he would serve a secretary in the Attorney General’s Chambers who he claims “willingly accepted” service but declined to acknowledge it in writing. This too does not amount to effective service. Further, both affidavits of Ecutu Robert and Isodo Samuel, apart from being mistitled “*The Republic of Ganda*”, do not specifically state anywhere in their respective contents the particular number of suit/ application that each affidavit relates to.

It is also our finding that the letter applying for a copy of court proceedings was not served upon the applicant or his counsel as required under Rule **83 (3)** of the **Rules of this Court** because there is no evidence to show when this service was made. A careful perusal of the

record reveals no letter applying for a copy of proceedings and no affidavit of service of the letter. We wonder whether the letter was ever drafted by counsel for the respondent. In the case of **Edison Kanyabwera v Pastorl Tumwebaze, Supreme Court Civil Appeal No. 6 of 2004**, Justice Oder (RIP) held that:

***“There was no affidavit of service on the record. The absence of such affidavit leads inevitably to the conclusion that the defendant was not properly served with the hearing notice before the suit was heard in his absence. ”***

We inevitably conclude that there was no service of the letter applying for proceedings. It would have been prudent for counsel for the respondent to file a supplementary record according to **Rule 90** of the Rules of this Court if these documents were only missing on the file. However, this has not been done after almost 7 years of filing the record of appeal.

Counsel for the respondent submitted also that the record and memorandum of appeal were filed in time and personally served on the applicant’s lawyer, Mr. Ssekaana. Counsel for the respondent sought to seek refuge in a minute by counsel for the applicant on the office copy acknowledging receipt of the record but that counsel also stated that an application to strike out the respondent’s Notice of Appeal had been filed by the applicant. This was evidence from the bar. A return of service can only be made through a valid affidavit of service filed on the court record.

Furthermore, Rule 83(3) of the same Rules provides:

***“An appellant shall not be entitled to rely on sub rule (2) of this rule, unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service. ” (sic)***

Although Justice A. **Oder (JSC as he then was, (R.I.P.))** in the case of *Edison Kanyabwera (supra)* relied on the provisions of Order 5, rule 17 (now

rule 16) of the Civil Procedure Rules, SI 71-1 (C.P.R) regarding retaining proof of service through an affidavit of service, we find that the provisions of Rule **83(3)** of the Rules of this Court in *pari materia* have the same mandatory requirements which were not complied with in the instant case. Counsel submitted that the period of Christmas vacation should be excluded in the computation of time within which to file the memorandum of appeal according to Rule 4(e) of the Rules of this Court. However, as provided for in **Rule 83(3)** of the Rules of this Court, an appellant shall not be entitled to rely on sub rule (2) of this rule, unless his or her application (letter applying for a copy of proceedings) for the copy was in writing and a copy of it was served on the respondent, and the appellant had retained proof of that service. Counsel for the respondent has not shown proof of serving the letter applying for proceedings in order to benefit from that provision.

We agree with the applicant and it is our finding that the Notice of Appeal, the letter requesting for proceedings, the memorandum and record of appeal were not served as required by law.

For each of those reasons, we accordingly strike out the Notice of Appeal. No order is made as to costs since the applicant and applicant's counsel did not attend the hearing.

We so order.

Dated this 13<sup>th</sup> day of April 2016.

HON.JUSTICE REMMY KASULE

Justice of Appeal



HON.JUSTICE GEOFFERY KIRYABWIRE

Justice of Appeal

HON.JUSTICE PAUL KAHAIBALE MUGAMBA

Justice of Appeal