

Following the decision on 25/10/2017 by His Lordship David Wangutusi, the notice of appeal in the appeal case of 2015 is Revoked notwithstanding (as noted by order)

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 379 OF 2017
(Arising from Misc. Application No. 904 of 2015)
(Also arising from Civil Suit No. 467 of 2013)

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- 1. ALL MUSS PROPERTIES UGANDA LTD
 - 2. ITALTILE CERAMICS LIMITED
 - 3. ITALTILE LIMITED
-APPLICANTS



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VERSUS

- 1. CTM UGANDA LTD
 - 2. PRIME HOLDINGS LTD
 - 3. JOSEPH MAGEZI
- RESPONDENTS

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(Coram: Musoke Elizabeth, JA, Cheborion Barishaki, JA, Hellen Obura, JA)

RULING OF THE COURT

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This application was brought under Order 46 rule 1 (2), (3) of the Civil Procedure Rules, SI 71-1 (CPR), Rules 82, 40 (2) (a); 43 and 44 of the Judicature (Court of Appeal Rules) Directions SI 13-10. It is seeking for orders that the Notice of Appeal filed by the respondents be struck out and costs be provided for.

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The application arises from a decision made by His Lordship David Wangutusi on 25/10/2017 by which he dismissed with costs Application No. 904 of 2015 in which the applicants sought for orders that the consent judgment signed by the applicants and the 1st respondent on 20/02/2015 be set aside and a consequential order doth issue setting aside the share transfer form, the land transfer and the special resolution made pursuant to the impugned consent



judgment. Being dissatisfied with the decision of the lower court, the respondents filed a Notice of Appeal and requested for a copy of the lower court proceedings that very day and served the lawyers of the 1st, 2nd and 3rd applicants and the lawyers for Gregory Magezi. On 20/11/2017, the applicants filed in this Court an application by notice of motion to strike out the Notice of Appeal. The respondents then filed an application for leave to appeal on 28/11/2017 which application was fixed to be heard on 10/01/2018 before Hon. Justice David Wangutusi.

The grounds upon which this application is premised are elaborated in the affidavit in support of the notice of motion deposed by Phoebe Murungi, an advocate practicing with Kampala Associated Advocates, on the 20/11/2018. They are briefly as follows;

- (1) That the applicants were respondents in Misc. Application No. 904 of 2015 in the Commercial Court, High Court of Uganda.
- (2) That on the 25th day of October, 2017 the learned trial Judge Hon, Mr. Justice David Wangutusi delivered his ruling in Miscellaneous Application No. 904 of 2015.
- (3) The respondents being aggrieved by the decision of the learned Judge filed a Notice of Appeal in the Commercial Division, High Court of Uganda on the 25th day of October, 2017.
- (4) That the decision of the learned Judge is one whose appeal to the Court of Appeal lies with leave of court.
- (5) That the respondents have neither sought leave of court in the court of first instance or the Court of Appeal.
- (6) That the time within which to seek leave of court to appeal has since lapsed.
- (7) That the Notice of Appeal is incompetent for failure to seek leave of court to appeal which is an essential step in the proceedings within the prescribed time of 14 days.
- (8) It is in the interest of justice and equity that this Notice of Appeal be struck out with costs to the applicant.

The respondents opposed the application based on the grounds stated in the affidavit in reply deposed to by Bernard Mabonga of Web Advocates & Solicitors dated 9/01/2018. He raised



4 preliminary points of law and averred that the application is misconceived, an abuse of process and it is incurably incompetent in so far as;

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- (a) O.46 Rule 1(2) (3) of the Civil Procedure Rules SI 7- under which it is brought relates to review of judgments which is wholly inapplicable to the orders sought therein.
 - (b) There is a pending application for leave to appeal which has been fixed for hearing on the 10th of January 2018 to which the applicants have subjected themselves and which potentially disposes of this application or which would render this application moot.
 - (c) That the applicants have struck out a one Gregory Magezi the 4th respondent in Misc. Application No. 904 of 2015 from which this application arises without leave of court.
 - 10 (d) That application is supported by an incurably defective affidavit and a preliminary objection to this effect shall be raised at the hearing.

Representation

At the hearing of the application Mr. Augustine Idoot appeared for the applicants while Mr. Emoru Emmanuel appeared for the respondents.

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Applicants' Case

Counsel submitted that this application seeks an order to strike out the Notice of Appeal as an essential step, namely; leave to appeal was not sought within the prescribed time. He added that this application was filed on 20/11/2017 and the application for leave to appeal was filed on 28/11/2017, hence it was filed out of time. He argued that rule 40 of the Rules of this Court requires that leave of court must be sought within 14 days and under rule 42(1) that leave must first be sought from the High Court. Further, that the ruling sought to be appealed against was delivered on 25/10/2017 and the Notice of Appeal was filed on 25/10/2017 without leave. He cited the case of **Andrew Maviri vs Jomayi Property Consultants Ltd, CA Civil Appeal No. 274 of 2014** where it was observed that a Notice of Appeal filed without leave is a nullity and whatever legal process emanating from it also becomes a nullity. He also referred to the case of **Hwangung Ltd vs M&D Timber Merchants and Transporters**

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Ltd, CA Civil Appeal No. 30 of 2016 for the position that appellate jurisdiction is a matter of law and cannot be inferred. Counsel prayed that this Court strikes out the respondent's Notice of Appeal which was filed without leave of court.

Respondents' Case

5 Counsel submitted that failure to seek leave in time does not warrant striking out a Notice of Appeal. He argued that rule 76(4) provides that it shall not be necessary to obtain the leave or certificate before lodging the Notice of Appeal. He added that rule 40 applies to 2nd appeals to this Court as was held in ***Sylvester Byaruhanga vs Fr. Emmanuel Ruvugwaho & anor, CA Civil Application No. 228 of 2014*** whereas order 44 of the Civil Procedure Rules does
10 not provide the time frame for filing an application for leave.

Counsel also contended that although the application for leave to appeal was filed after this application to strike out the Notice of Appeal had been filed, he did not know about the existence of this application as it had not yet been served on them. Further that, this Court has discretion to grant application for leave to appeal out of time. He submitted that in the
15 event that this Court finds that the application for leave was filed out of time, it should exercise its powers under Rule 40 (2) and grant leave to the respondent. He prayed that this application be dismissed and the respondent be allowed to proceed with its application for leave to appeal.

Rejoinder

20 In rejoinder counsel for the applicant urged this Court not to exercise its discretion to grant the respondent leave to appeal as prayed. He prayed that the authority of ***Sylvester Byaruhanga vs Fr. Emmanuel Ruvugwaho & anor (supra)*** cited by the respondent be disregarded as it relates to appeals from this Court to the Supreme Court. He prayed that court grants his prayers.

Court's Finding/Decision

We note that this application was brought inter alia under Order 46 rule 1(2), (3) of the Civil Procedure Rules, SI 71-1 which provision relates to review of judgments which is wholly inapplicable to the orders sought herein. We find that the relevant provision which should have been cited is rule 44 of the CPR. However, this does not affect the competence of the application. In **Alcon international Ltd vs The New Vision Publishing Co. Ltd & 2 ors**, Okello JSC held that

10 *"Citing a wrong provision of the law or failure to cite a provision of the law under which a party seeks a redress before court is a technicality which should not obstruct the cause of justice. It can safely be ignored in terms of article 126(2) (e) of the Constitution."*

This application was also brought under rule 82 of the Rules of this Court which provides as follows;

15 *"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."*

20 Rule 40 (2) (a) of the rules of this Court provides thus;

"Where formerly an appeal lay from the High Court to the Supreme Court with leave of either the High Court or Supreme Court the same rules shall apply to appeals to the court—

(a) where an appeal lies with leave of the High Court, application for the leave shall be made informally at the time when the decision against which it is desired to appeal is given; or failing that application or if the court so orders, by notice of motion within fourteen days of the decision."

Rule 82 (1)(a) which was applied not only in the instant case but also in the case of *Utex Industries Ltd vs Attorney General*, *SCCA No.52 of 1995*, the Supreme Court 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 court, if the action is not performed by law prescribed, then whatever legal process has been done before becomes a nullity, as against the party who has the duty to perform that act". Also see: *Andrew Maviri vs Jomayi Property Consultants Ltd, (supra)*; *Bakaluba Mukasa Peter & another vs Nalugo Mary Margret Sekiziyivu, CA Election Petition Application No. 24 of 2011*.

Rule 82 makes provision for striking out a notice of appeal if no appeal lies or where an essential step has not been taken. It is apparent that in the instant application the respondents did not take an essential step within the prescribed time of 14 days provided for under rule 40 (2) (a) of the Rules of this Court. In the case of ***Utex Industries Ltd vs Attorney General, SCCA No.52 of 1995***, the Supreme Court 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 court, if the action is not performed by law prescribed, then whatever legal process has been done before becomes a nullity, as against the party who has the duty to perform that act". Also see: ***Andrew Maviri vs Jomayi Property Consultants Ltd, (supra)***; ***Bakaluba Mukasa Peter & another vs Nalugo Mary Margret Sekiziyivu, CA Election Petition Application No. 24 of 2011***.

In the instant application, the decision sought to be appealed against was delivered on 25/10/2017 and the respondents filed a Notice of Appeal the same day. On 28/11/2017 the respondent, filed an application for leave to appeal. We note that this was after 35 days from the date when the ruling was delivered. It is therefore clear that the application for leave was filed way after the 14 days prescribed by law had lapsed. We accept the submission of counsel for the respondent that under rule 76 (4) there is no need to obtain leave to appeal before a Notice of Appeal is filed. However, upon filing the Notice of Appeal, the intended appellant (s) is/are required to seek leave to appeal within the prescribed time. In the instant case, an essential step was not taken by the respondents in time and the application for leave to appeal was also made out of time without the leave of court.

Counsel for the respondents argued that Order 44 does not specify the time lines within which an application for leave should be filed. Rule 40 (2) (a) of the Rules of this Court which we have reproduced herein above and which rule forms part of the Rules that govern the proceedings of this Court, specifies the time frame within which to make an application for leave to be 14 days. In our considered view, the lacuna in Order 44 of the CPR is cured by

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rule 40 (2) (a) of the Rules of this Court and thus we do not accept the contention of counsel for the respondents that time within which to file an application for leave to appeal to this Court is not provided for.

In **Dr. Sheikh Ahmed Mohammed Kisuule vs Greenland Bank (in liquidation) SCCA No.**

5 **11 of 2010**, Kitumba JSC observed as follows:

"Additionally where leave is required to file an appeal such leave is not obtained the appeal filed is incompetent and cannot even be withdrawn as an appeal. See: Makhangu vs Kibwana [1995-1998]1 EA175. It is not a merely procedural matter but an essential step envisaged by Rule 78 of the rules of this Court."

10 The respondents ought to have filed the application for leave by 8/11/2017 since the decision of the lower court was made on 25/10/2018. However, the respondents waited for 20 more days after the 14 days period to elapse before they applied for leave. In our conclusion, we find that the respondents did not take the essential step in the proceedings within the prescribed time as provided by law.

15 Before we take leave of this matter, we note from the Court record that the respondent had lodged an application for leave in the High Court on 28/11/2017 which was to be heard on 10/1/2018 at 9:00am. However, the application to strike out the Notice of Appeal filed in this Court was first scheduled to be heard on 11/01/2018 but was adjourned to 29/3/2018 when it was heard. Counsel for the respondents did not inform court on whether or not the application
20 for leave in the lower court was heard and determined. To our minds, if the application had been heard on 11/01/2018 and granted, the respondent would have brought it to the attention of this Court on 29/3/2018 when this application was heard. Since he did not address us on the status of that application but instead urged us to consider granting the applicant leave to appeal, we shall only determine what was formally brought before us.

In the premises, and for the reasons given above, we allow the application and find that the Notice of Appeal as filed is incompetent. It is accordingly struck out.

Costs of this application shall go to the applicants.

We so order.

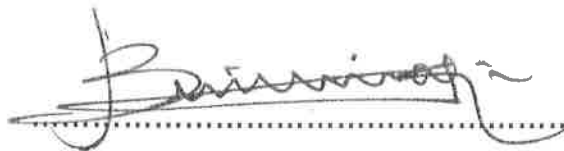
5 **Dated at Kampala** this 25th day of April 2019



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10 HON. LADY JUSTICE ELIZABETH MUSOKE

JUSTICE OF APPEAL



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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA

JUSTICE OF APPEAL

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