

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 04 OF 2013

(Arising from Miscellaneous Application No.105 of 2012)

5 **MARGARET LUGARAMA ::::::::::::::::::::::::::::::: APPLICANT**

VERSUS

NKUMBA COLLEGE SCHOOL ::::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE EZEKIEL MUHANGUZI, JA

10 **HON. JUSTICE STEPHEN MUSOTA, JA**

HON. JUSTICE REMMY KASULE, Ag. JA

RULING OF THE COURT

15 This application was brought under Rules 82, 43 and 44 of the Court
of Appeal Rules seeking for orders that;

- a) The Notice of Appeal filed by the Respondent be struck out.
- b) The purported service of court process and affidavit of service
20 in Miscellaneous Application No. 105 of 2012 filed by the
Respondent was not proper in law.
- c) Leave to appeal granted to the Respondent in its application in
Miscellaneous Application. No. 105 of 2012 was procured
without necessary extension of time.
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- d) Costs of this application be borne by the Respondent.

The grounds upon which this application is premised are set out in the Notice of Motion and the affidavit in support sworn by Margaret Rugarama in which she deponed;

- 5 1. *“THAT I am the Applicant herein and depone this affidavit in this capacity.*
- 10 2. *THAT I am advised by lawyers M/s Murungi, Kairu & Co. Advocates and I verily believe that the Respondent herein filed MA. No. 105 of 2012 for leave to appeal to the Court of Appeal. A copy of the motion and affidavit in support is attached hereto and marked Annexure “A”.*
- 15 3. *THAT the above motion was heard and determined by the Registrar of this Court with orders granting leave to appeal to the Respondent herein and to file a memorandum of appeal within fourteen days on the 11th June 2012. A copy of the order is attached hereto and marked Annexure “B”.*
- 20 4. *THAT I am advised by my said lawyers and verily believe that the Respondents Counsel Ms. Tumwesigye, Baingana & Co. Advocates, misrepresented to the Court that my lawyers had been served with Court process through the receptionist and caused an affidavit of service to be filed on the Court record. A copy of the affidavit of service relied upon by the Respondent’s*
25 *Counsel to secure leave is attached hereto and marked Annexure “C”.*
- 30 5. *THAT I am advised by my lawyers and I verily believe that there was no service of court process in MA No. 105 of 2012 on them as evidenced by the omission to name the purported receptionist alleged to have received the process moreover service on the receptionist is not proper service in law. Court will be moved to cross examine the court process server and deponent of the*

affidavit of service engaged by M/S Tumwesigye, Baingana & Co. Advocates.

- 5 6. *THAT I am also advised by my lawyers and I verily believe that the Respondent and/or his Counsel Tumwesigye, Baingana & Co. Advocates committed a fraud on the Court in procuring the order for leave to appeal in MA.105 of 2012 that the Respondent has applied for leave to appeal on the same facts and grounds in*
- 10 *MA. No. 55 of 2012 and the same was heard and dismissed against the Respondent. A copy of the motion and ruling is attached hereto and marked Annexure “D” and “E” respectively.*
- 15 7. *THAT in further support of paragraph 6 above, the Respondent herein alleged in MA. 105 of 2012 that the Assistant Registrar had ruled in the said motion declining to grant the orders sought allegedly because he lacked jurisdiction.*
- 20 8. *THAT a perusal of the said ruling (Annexure “E”) will show that show that the said assertion by the Respondent in its affidavit in support is false because the Assistant Registrar in his ruling did not allude no decline to grant the application for leave owing to lack of jurisdiction as alleged by the respondent in MA. No. 105*
- 25 *of 2012.*
- 30 9. *THAT I am further advised by my lawyers and I verily believe that the leave to appeal granted by the Registrar in MA. No. 105 of 2012 was produced irregularly and illegally without securing the necessary extension of time as prescribed by the rules of this Court and is therefore incompetent.*

10. THAT I am further advised by my lawyers and I verily believe that without prejudice no notice of appeal has been served on them nor on me in accordance with the prescribed rules of this court.

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11. THAT I am in the same breadth advised by my lawyers and I verily believe that without prejudice to the above depositions above no appeal by the Respondent lies in Court because in complete disregard or abuse of the orders of the court in MA No. 105 of 2012 requiring the appeal to be filed within 14 days from 11th June 2012, no such appeal has been filed in Court and non has been served on them or me.

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12. That I depone this affidavit in support of the motion.

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13. That what I have stated herein is true and correct to the best of my knowledge save for the information given to me by lawyers". (Sic)

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The respondent filed an affidavit in reply and deposed that the respondent sued the applicant for breach of tenancy and judgment was delivered on 28th March 2008. The applicant appealed the decision in the High Court and the appeal was decided against the respondent but neither the respondent nor the counsel was present. The respondent only instructed their lawyers on 6th June 2011 to file a Notice of Appeal but was out of time. That the respondent's former lawyers negligently handled its instructions. The respondent filed Civil Application No. 105 of 2012 in the Court of Appeal for extension of time and leave was dully granted by this court.

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Background

The respondent filed Miscellaneous Application No. 105 of 2012 in this court against the applicant seeking leave to appeal the decision of the lower court and its agent swore a fraudulent affidavit of service purporting to have served M/s Murungi, Kairu & Co. Advocates through the secretary. The Registrar of this court heard and determined the motion and granted the respondent leave to appeal and ordered the respondent to file a memorandum within 14 days from 11th June 2012.

10 The applicant's case is that the said court process was never served on them. The respondent had previously filed Miscellaneous Application No. 55 of 2012 in this court seeking leave to appeal the decision of the lower court against the applicant on the same facts and this motion was heard and dismissed with costs and the
15 respondent has not filed an appeal since 11th June 2012.

Representation

At the hearing of the application, Mr. Joseph Manoba appeared for the applicant while Mr. Hakim Lukenge appeared for the respondent.

20 Submissions of the parties

Counsel for the applicant submitted that the affidavit of service deposited by Nsubuga Edward in Miscellaneous Application No. 55 of 2012 did not state in what capacity he received the hearing notices. In the affidavit, he stated that the service was effected on the
25 receptionist but the name and description of the receptionist were not stated therein. Counsel argued that the leave to appeal in Miscellaneous Application No. 105 of 2012 granted to the respondent was obtained by fraud and was granted without seeking the necessary extension of time.

The respondent argued that they got to know about the judgment in H.C.C.S No. 04 of 2008 on 6th June 2011 and instructed their advocate to handle the matter. The respondent believed the matter was being handled only to later discover that no memorandum of appeal was ever filed. The respondent went to the Commercial Court Division of the High Court and discovered that the original file had been transferred to Entebbe Court for taxation. The respondent filed Civil Application No. 55 of 2012 seeking leave to appeal but the Registrar dismissed it on grounds that he had no jurisdiction to hear it.

In addition, that the respondent filed Civil Application No. 105 of 2012 for leave and extension of time within which to file an appeal and it was granted by this court. However, the respondent claims that up to date, they have failed to trace the original file so as to file a memorandum and notice of appeal.

Consideration of the application

We have carefully considered the submissions of the parties and the authorities cited.

Rules 82 of the rules of this court provides:-

“Application to strike 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 respondent’s case is that they got to know about the judgment in H.C.C.S No. 04 of 2008 on 6th June 2011 and instructed their advocate to handle the matter. The respondent believed the matter was being handled only to later discover that no memorandum of appeal was ever filed. The respondent went to the Commercial Court

Dvision of the High Court and discovered that the original file had been transferred to Entebbe Court for taxation. The respondent filed Civil Application No. 55 of 2012 seeking leave to appeal but the Registrar dismissed it on grounds that he had no jurisdiction to hear it.

The respondent filed Civil Application No. 105 of 2012 for leave and extension of time within which to file an appeal and it was granted by this court. However, the respondent claims that up to date, they have failed to trace the original file so as to file a memorandum and notice of appeal.

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".

From the record, the Court of Appeal order granting extension of time to the respondents was made on 11th June 2012 and the respondents were given 14 days from the date of the order. To date, the respondents have not filed a Memorandum or Record of Appeal for reasons that they have failed to trace the original file at the High Court. It is seven years since the respondents got an order of extension of time within which to file an appeal and no appeal has been filed.

We are of the considered view that the respondent has not taken the necessary steps to file the appeal after seven years of the order of extension of time. We accordingly strike out the respondent's Notice of Appeal under Rule 82 of the Judicature (Court of Appeal Rules) Directions, with costs.

Dated this 10 day of Jan 2020

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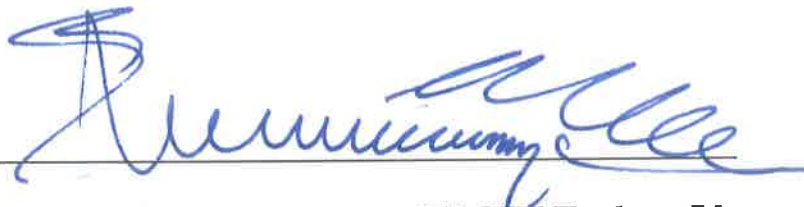
HON. JUSTICE EZEKIEL MUHANGUZI, JA

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