THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi, and Christopher Gashirabake, JJA]

CIVIL APPLICATION NO. 326 OF 2017

(Arising from Civil Appeal No. 194 of 2017)

(Also arising from Jinja High Court Civil Appeal No.61 of 2014)

ELIZABETH W. BATABAIRE::APPLICANT

VERSUS

1. **NGOBI SIRAJ]**
2. **KAYEMBA PATRICK]**
3. **KAYONDO AHMED]**
4. **TAGEDHA MUZAMIL (ADMINISTRATORS OF THE ESTATE OF THE LATE SEBASTIAN WAISWA) :::::::::::::::::::::::::::: RESPONDENTS**

RULING OF MUZAMIRU MUTANGULA KIBEEDI, JA

Introduction

This is a ruling on the application that was filed by the applicant by Notice of Motion under Rules 82, 43(1), 44(1), and 53(2) (c) of the Judicature (Court of Appeal) Rules, S.I No. 13-10 seeking orders that Civil Appeal No. 194 of 2017 be struck out with costs.

Background facts

The dispute between the parties relates to land known as Plot 2 Bunya Road, Iganga. It was first heard and resolved in favour of the applicant by the Magistrate Grade One Court of Iganga in Civil Suit No. 91 of 2014. The respondents were dissatisfied with the decision of the Magistrate Grade One and appealed to the High Court of Uganda at Jinja presided over by Hon. Mr. Justice Godfrey Namundi, to wit: Civil Appeal No.61 of 2014 of Jinja High Court. On 31st March 2017, the High Court dismissed the appeal and upheld the judgment and orders of the Magistrate Grade One. The Respondents were not satisfied with the decision of the High Court and on the 11th day of April

2017, they filed in the Registry of Jinja High Court a Notice of Appeal and letter requesting for typed and certified copies of the judgment and proceedings. The Notice of Appeal was subsequently served on Counsel for the Applicant on 21st April 2017. On 29th August 2017, the Respondents filed the Memorandum of Appeal and Record of Appeal in this court instituting Civil Appeal No. 194 of 2017. On 13th October 2017 the applicant filed this application seeking to strike out Civil Appeal No. 194 of 2017 with costs.

The Grounds of the application

The grounds of the application were set out in the Notice of Motion as follows:-

i. ***That the applicant was the respondent in Jinja High Court Civil Appeal No. 61 of 2014 wherein judgment was entered in her favour by His Lordship the Honourable Mr. Justice Godfrey Namundi on 31/03/2017.***

ii. ***That the Respondents on the 11th day of April 2017 filed a Notice of Appeal and a Letter requesting for typed and certified copies of the judgments besides the record of proceedings.***

iii. ***That the letter requesting for the proceedings and judgment was neither served on the Applicant nor her Advocates.***

iv. ***That the Respondents failed to take an essential step in the proceedings within the prescribed time, to wit - filing the appeal within 60 days from the date when the notice of appeal was lodged.***

v. ***That it is in the interest of substantive justice that this application be allowed.***

The application is supported by the affidavit deponed by the Applicant stating that she was not served with a copy of the letter requesting for proceedings and neither were her advocates, M/s Henry Kunya & Co. Advocates. That the respondents having failed to serve the said letter, were supposed to file/institute their appeal within 60 days from the date of filing the Notice of Appeal. That by the time the respondents filed the appeal on 29th August 2017, the 60 days had already lapsed.

The Respondents filed an affidavit in reply affirmed by the 1st respondent, Mr. Siraj Ngobi, on 28th June 2022 in which he stated that the respondents filed Civil Appeal No. 194 of 2017 within the requisite time prescribed under the law.

Representation

When this application came up before us for hearing, the applicant was represented by Mr. Henry Kunya of M/s Henry Kunya & Co. Advocates, while the Respondents were represented by Mr. Ishaq Dhakaba of M/s Dhakaba & Nkuutu Co. Advocates. The Written submissions filed for either side were adopted at the hearing and have been considered in this Ruling.

Applicant's submissions

Counsel for the Applicant submitted that a closer perusal of the Record of Appeal reveals that the Respondents lodged their Notice of Appeal and letter requesting for the record of proceedings on 11th April, 2017, but it was only the Notice of Appeal which was served on Counsel for the Applicant on 21st April 2017 and the same was duly received and endorsed.

It was further submitted for the Applicant that the letter requesting for the typed and certified record and Judgment of the High Court was never served on Counsel for the Applicant and there is no endorsement to that effect whatsoever that the same was ever received. Thus, argued Counsel for the applicant, the Respondents failed to take an essential step in the proceedings within the prescribed time as explicitly provided under the provisions of rule 83 (1) of the Judicature (Court of Appeal) Rules, S.I. No. 13-10.

Counsel cited the case of *Enhas Limited Vs Henry Magino (COA C.A No. 26 of 2004) cited with approval in National Housing & Construction Co. Ltd Vs Salome T.B Kyomukama (COA Civil App No. 133 of 2009)* for the position that the rule does not stipulate the time within which the service of the copy of the letter ought to be effected on the Respondent. However, that the service is mandatory.

Counsel further submitted that proof of service of the letter envisaged under rule 83(3) of the Court of Appeal Rules can only be by having the letter endorsed. He referred to the case of *National*

Housing & Constitution Co. Ltd Vs Salome T.B Kyomukama (COA Civil App No. 133 of 2009) for this position.

Counsel concluded that Civil Appeal No. 194 of 2017 was filed out of time and the Respondents cannot rely on the provisions of rule 83(2) of the Court of Appeal Rules since the letter requesting for the record was never served on Counsel for the Applicant as required by rule 83(3) of the rules. Accordingly, that Civil Appeal No. 194 of 2017 is incompetent for noncompliance with the explicit provisions of Rule 83 (1), (2) & (3) of the Court of Appeal Rules.

Counsel prayed to this Court to strike out Civil Appeal No. 194 of 2017, with costs to the Applicant.

Respondents' Submissions

The respondents opposed the application. Counsel for the respondents submitted that Civil Appeal No.194 of 2017 was duly filed in the Court of appeal of Uganda. That the Notice of Appeal together with the letter applying for a certified record of the High Court Proceedings and Judgment was filed in the High Court on 11th April 2017 and the applicant's lawyer was served with the notice of appeal attached together with the application for certified copy of the record of proceedings and judgment. That however, the applicant's lawyer only endorsed on the Notice of Appeal (which was on the front) and did not turn to the next page to endorse on the application for the certified Record of Proceedings since the two documents were stapled as one.

Counsel argued that the fact that the application for the certified record of proceedings and judgment was never endorsed by the applicant's Counsel is a mere technicality that can be cured under Article 126(2) (e) of the Constitution and no injustice will be occasioned upon the applicant if the appeal proceeds to be heard on its merits.

Lastly, counsel submitted that inadvertence of the respondents' former Counsel to retain service of the said letter without it being endorsed by the applicant's Counsel cannot be visited the respondent. Counsel cited *Zam Nalumansi-Vs- Suleman Lule, Civil Application No. 02 of 1999, (SCU) and Mulowooza & Bros Ltd Vs. N. Shah & Co. Ltd, SCCA No. 26 of 2010* to back his submission.

He concluded by praying that the application be dismissed with costs to the respondents and the appeal be heard on its merits.

Resolution of the application

The issue for resolution in the instant application revolves around computation of the 60 days' period within which the respondents were required to file the Memorandum of Appeal and Record of Appeal instituting Civil Appeal No. 194 of 2017. The applicant contends that the 60 days should be computed from the date the respondent filed the Notice of Appeal in the High Court on 11th April 2017 since the respondent did not serve the applicant the letter applying for a certified copy of proceedings and judgment. Going by this approach, the applicant argues that Civil Appeal No. 194 of 2017 was filed outside the prescribed period of 60 days and, accordingly, the appeal ought to be struck out with costs to her.

On the other hand, the respondents contend that the 60 days should be computed from the 01st of August 2017 being the date they were availed the certified proceedings and judgment by the Registrar of the High Court. Going by this approach, the respondents argue that Civil Appeal No. 194 of 2017 was filed within the prescribed period of 60 days and, accordingly, the application should be dismissed, and the appeal disposed of on its merits.

Computation of the timelines for filing the Memorandum of Appeal and Record of Appeal is set by Rule 83 of the Court of Appeal Rules. As a general rule, they should be filed within 60 days from the date of filing the Notice of Appeal in the High Court by the intending appellant. See: ***Rule 83 (1) of the Court of Appeal Rules***.

However, sub-rules (2) and (3) of Rule 83 of this Court introduce an exception to the above general rule namely: that where an intending appellant makes a written application to the High court within 30 days of its decision requesting to be availed a certified true copy of the High Court proceedings and judgment, and serves the said written application onto the intended respondent, and retains proof of the service, then the 60 days within which to file the Memorandum and Record of Appeal instituting the appeal is computed from the date certified in the Registrar's Certificate of Completion as being the date on which the certified proceedings and judgment were delivered to the intending

In the instant case, both sides agree that the Notice of Appeal and respondent's letter applying for a certified copy of the judgment and proceedings of the High Court were filed in the High Court Registry on 11th April 2017 within the period prescribed by the Rules of this court. It is also an agreed fact that the Notice of Appeal was served on the applicant. What is not agreed is whether the respondent's letter applying for the certified judgment and proceedings of the High Court was served upon the applicant. The applicant's case is that neither her nor her counsel, M/s Henry Kunya and Co. Advocates, were served with the respondent's letter applying for the certified judgment. The applicant stated her case categorically in paragraph 4 of her Affidavit in Support of the application thus:

> *"That I was not served with a copy of the letter requesting for proceedings and neither were my advocates of M/s Henry Kunya & Co. Advocates."*

In those circumstances, the evidential burden shifted to the respondents to prove the fact of service of the impugned letter upon the applicant or her Counsel in order to bring themselves within the exception to the general rule as set out in sub rules (2) and (3) of Rule 83 of the Rules of this court which are couched in the following terms:

> ***"83. Institution of appeals.***
>
> *(2) Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.*
>
> *(3) 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."*

The question to guide court at this stage is: how did the respondents fare in the discharge of their evidential burden to proof service of the impugned letter upon the applicant?

I have closely examined the Respondents' Affidavit evidence in reply. It consists of the Affidavit which was affirmed by one of the respondents, Mr. Siraj Ngobi, on 28th June 2022. As far as proof of the critical fact of service of the impugned letter upon the applicant or her Counsel is concerned, Mr. Ngobi provided the answer in paragraph 10 of his Affidavit thus:

"That the applicant was duly served the notice of appeal together with a letter asking for a certified copy of proceedings and judgment through her lawyers Henry Kunya & Co. Advocates."

The deponent does not disclose who effected the service, when and where. Neither does the deponent disclose the particulars of the person who received the contested letter on behalf of M/s Henry Kunya & Co. Advocates like his/her name, occupation and the connection between the recipient and M/s Henry Kunya & Co. Advocates, and how he/she responded upon service. In short, the response is simply generic and carries no evidential value. It does not meet the standard set out in Rules 18 & 23 of the Rules of this court for service of the documents required by the Rules to be effected upon the party to the proceedings namely: that unless special directions have been given by court, service should be effected upon the litigant in person or his/her advocate or a clerk of an advocate at the office of the advocate. Rule 18 is couched as follows:

"18. Service and transmission of documents.

(1) *Where any document is required by these Rules to be served on any person, service may be effected in a way directed in each case by the court, which shall normally be a way in which a comparable process of the High Court could be served; and in the absence of any special direction, it shall be made personally on the person to be served or any person entitled under rule 23 of these Rules to appear on his or her behalf.*

(2) *N/A*

(3) *For the purpose of this rule, service on a partner or a clerk of an advocate at the office of the advocate shall be taken to be service on the advocate..."*

I also note that Mr. Ngobi, does not disclose what his involvement (if any) was in the whole saga of the alleged effecting service of the impugned letter and how he became aware of the "facts" he deponed upon in paragraph 10 above of his Affidavit. This renders the deponent's evidence in respect of the alleged service of the impugned letter inadmissible for breaching Rule 44(1) of the Rules of this court which requires Affidavits in support of formal applications to be of persons having knowledge of the facts. The Rule is couched thus:

"44. ***Supporting documents.***

(1) *Every formal application to the court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts."*

The aforesaid notwithstanding, I have looked at a copy of the Letter which is stated to have been served upon the applicant's counsel. It bears neither a signature of its recipient, nor the stamp endorsed on it by M/s Henry Kunya & Co. Advocates. This court (Mpagi Bahigeine, DCJ; Twinomujuni & Nshimye, JJA) held in *National Housing & Construction Co. Ltd Vs Salome T.B. Kyomukama, Civil Application No. 133 of 2009 (COA -U)* that proof of service of the letter envisaged by Rule 83(3) of the Court of Appeal Rules is by having the letter endorsed. The above decision is still a proper statement of the law. Without the impugned letter being endorsed by its alleged recipient, the respondent fell short of the evidence required to prove its service upon the applicant's Counsel as claimed.

I have also gone out of my way to examine the Record of Appeal filed in Civil Appeal No. 194 of 2017 by the respondent in search for any other possible evidence of proof of service of the contested letter upon the applicant. There is no Affidavit of service or other document explaining the absence of the endorsement of M/s Henry Kunya & Co. Advocates from the impugned letter or otherwise bringing the respondent within the scope of application of Rule 83(3) of the Rules of this Court. The respondent was, among other things, required by Rule 83(3) of the Rules of this court to retain proof of service of the impugned letter before qualifying to invoke the exception to the general Rule as to computation of the 60 days' period within which to file the Memorandum and record of appeal. In the circumstances, I would be inclined to find that the appellants failed to adduce credible evidence to prove service of the impugned letter upon the applicant.

In their submissions, the respondents attempt to explain the absence of the endorsement from the impugned letter thus:

> *"The applicant's lawyer was served with the notice of appeal attached together with the application for certified copy of the record of proceedings and judgment. However, the applicant's lawyer only endorsed on the notice of appeal (which was on the front) and did not turn to the next page to endorse on the application for a certified record of proceedings since the two documents were stapled as one."*

I have examined the Affidavit evidence of the respondent. The above explanation is not borne out of the respondent's evidence filed in this matter. Evidence sought to be introduced through submissions from the bar is not acceptable.

Needless to add, the explanation simply raised more questions than answers: If indeed the Notice of Appeal and impugned letter were stapled together and the applicant's lawyers endorsed on the Notice of Appeal only, when did the respondents discover this fact? And was it ever brought to the attention of the applicant's lawyers to remedy? And if yes, what was their response to the request to remedy the omission?

My finding is that even the respondents' attempt to "adduce evidence from the bar" did not assist the respondents' case at all.

The upshot of all the aforesaid is that the respondents have not proved to the required standard that they served the impugned letter upon the applicant. As such, they are not entitled to rely on Rule 83(2) & (3) of the Rules of this court. As a consequence, computation of the 60 days within which the Memorandum and Record of Appeal instituting Civil Appeal No. 194 of 2017 commenced on 11th April 2017 being the date on which the respondents filed their Notice of Appeal in the Registry of the High Court of Uganda at Jinja. By the time the respondents filed Civil Appeal No. 194 of 2017 in the Registry of this court on 29th August 2017, the prescribed period of 60 days had already lapsed. Rule 82 of the Rules of this court entitles a person on whom a notice of appeal has been served to apply to court for, among others, an order to strike out an appeal where some essential steps in the proceeding have not been taken within the prescribed time. The detailed rule is couched as follows:

> ***"82. Application to strike out notice of appeal or appeal.***
>
> *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."*

There is also no doubt that filing of the Memorandum and Record of Appeal are "*essential steps*" in the institution of appeals to this court. The respondent having filed the Memorandum and Record of Appeal beyond the 60 days prescribed by Rule 83 (1) of the Rules of this court entitled the applicant to apply to this court for an order to strike out the resultant appeal, Civil Appeal No. 194 of 2017 pursuant to Rule 82 of the Rules of this court.

Counsel for the respondents sought refuge in Article 126(2) (e) of the Constitution and argued that not serving the applicant with the letter applying for certified proceedings is a "minor technicality" which should not bar court from proceeding to hear the appeal on its merits. I do not accept the respondents' argument. This court and the Supreme Court while considering the import of Article 126(2) (e) of the Constitution have consistently held that the Article did not do away with the requirement for litigants to comply with the rules of court procedure. The holding can be found in such cases as *Kasirye Byaruhanga & Co. Advocates Vs Uganda Development Bank, SC Civil Application No. 2/97; Utex Industries Ltd Vs Attorney General, SCCA No. 52 of 1997;* and *Horizon Coaches Vs Edward Rurangaranga, SCCA No. 18 of 2009*.

In *Mulindwa v Kisubika, Supreme Court Civil Appeal No. 12 of 2014,* the Supreme Court reiterated the legal position thus:

> *"The settled position is that Article 126 (2) (e) has not done away with the requirement that litigants must comply with the Rules of procedure in litigation. The Article merely gives Constitutional force to the well settled common law principle that rules of procedure act as handmaidens of justice. The framers of the Constitution were alive to this fact. That is why they provided that the principles in Article 126 including administering substantive justice without undue regard to technicalities, must be applied "subject to the law." Such laws include the Rules of procedure."*

The above statement of the law is still good and binding upon this court under the principle of ***stare decisis***. The provisions in Rule 83 of the Rules of this Court requiring the respondents to effect service of the letter applying for the certified proceedings of the High Court upon an intended respondent and thereafter retain proof of service have been held by this court to be mandatory provisions. See: *National Housing & Construction Co. Ltd Vs Salome T.B. Kyomukama* (op cit); *ENHAS Limited Vs Henry Magino, Civil Application No. 26 of 2004 (COA -U)*; and *John Matsiko Vs Banyankole Kweterana Co. (U) Ltd, Civil Application No. 43 of 1998(COA-U)*. As such, the respondents cannot be allowed to take refuge in Article 126 (2) (e) of the Constitution to evade compliance with the mandatory rules of procedure of this court.

Lastly, Counsel for the respondents submitted in the alternative that in the event this court finds that indeed Civil Appeal No. 194 of 2017 was filed out of time, then we should invoke our "*unfettered and unlimited discretion derived from Rules 5 and 2(2) of the rules of this court to grant*

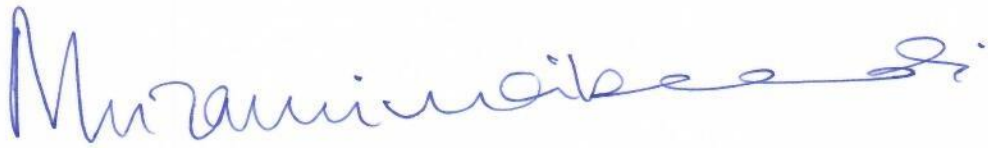
Exercise of this court's inherent discretion must be based on credible evidence furnished by the respondents to court setting out the matters that amount to "sufficient reason" for extension of time for the filing the impugned appeal. No such evidence is available in the instant matter. The arguments in the respondents' submissions to the effect that the respondents are innocent litigants who should not be victimized for the alleged negligence of their former lawyers in failing to comply with the rules of this court are not grounded in the Affidavit evidence filed by the respondents in this court in the instant manner. Submissions, however well written, can never be a substitute for evidence. If the respondents genuinely believe they have credible evidence to prove "sufficient reasons" for extension of time, they are at liberty to take out a formal application for that purpose. Resort to short cuts cannot redeem their matter.

Conclusion

I would grant this application and strike out Civil Appeal No. 194 of 2017

I would grant the costs of this application and Civil Appeal No. 194 of 2017 to the applicant.

Signed, dated and delivered at Kampala this 22nd day of Nov 2022



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Muzamiru Mutangula Kibeedi

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Elizabeth Musoke, Muzamiru M Kibeedi and Christopher Gashirabake & JJA*]

CIVIL APPLICATION NO. 326 OF 2017

(Arising from Civil Appeal No. 194 of 2017)

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ELIZABETH

BATABAIRE.....APPELLANT

VERSUS

1. **NGOBI SIRAJ]**
2. **KAYEMBA PATRICK]**
3. **KAYONDO AHMED]**
4. **TAGEDHA MUZAMIL (ADMINISTRATORS OF THE ESTATE OF THE LATE SEBASTIAN WAISWA).....RESPONDENTS**

RULING OF CHRISTOPHER GASHIRABAKE, JA

I have had the benefit of reading in draft the ruling of my brother, Muzamiru M.Kibeedi, JA. I concur with it.

Indeed, hiding under Article 126 (2) of the Constitution should not be entertained to defeat the requirement that litigants must comply with the Rules of procedure in litigation.

Dated at Kampala this 22nd day of Nov 2022

Christopher Gashirabake

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 0326 OF 2017
(Arising from Civil Appeal No. 194 of 2014)

ELIZABETH W. BATABAIRE::APPLICANT

VERSUS

1. **NGOBI SIRAJ**
2. **KAYEMBA PATRICK**
3. **KAYONDO AHMED**
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CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

RULING OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the ruling of my learned brother Kibeedi, JA. For the reasons he has given therein, I agree with him that this application should be allowed and that orders be made on terms as he proposes.

Since Gashirabake, JA also agrees, the Court unanimously allows the application and strikes out Civil Appeal No. 194 of 2017. The Court also grants the costs of the application to the applicant.

It is so ordered.

Dated at Kampala this ..... 22nd ..... day of..... Nov .....2022.

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Elizabeth Musoke

Justice of Appeal