

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT
KAMPALA**

CIVIL APPLICATION NO165 OF 2018

Hon. Lady Justice Elizabeth Musoke JA,
Hon. Lady Justice Catherine Bamugemereire JA,
Hon. Mr. Justice Stephen Musota JA

**FRED. K. RWABUHORO ::::::::::::::: APPLICANT
VERSUS**

1.ZUBAIRU MUKASA

2.MARIAM NAMUBIRU ::::::::::::::: RESPONDENTS

3.AMINA MUKASA

*(Arising out of the ruling of Anthony Oyuko J, in High Court Civil
Appeal No.65 Of 2016 delivered at the High Court Circuit Fort
Portal on the 10th day of April 2017)*

RULING OF CATHERINE BAMUGEMEREIRE JA

Background

20 The brief facts to this instant application are that the
respondent being dissatisfied with the Judgment on Appeal
filed a notice of appeal in this Court and subsequently wrote
a letter requesting for the record of proceedings and
24 accordingly served onto the then Counsel for the applicants
as required by the law. The respondents having duly
instructed their then lawyers and paid the requisite
instruction fees were sadly informed by their counsel that
28 there was a missing record which caused an inordinate
delay in filing the Memorandum of Appeal. Despite the
missing record, the respondents were served with a hearing
notice and an application to strike out their notice of appeal.

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Representation

The applicant was represented by Enock Wahinga of
4 Ahabwe and Co Advocates while the Respondent was
represented by Kaweesi Kakooza holding brief for Anthony
Tebyasa and Co Advocates.

Applicant's Submissions

8 The applicant seeks that the notice of appeal be struck out,
an order that the order for stay of execution be set aside and
costs of the application. The applicant relied on Rule 82 of
the rules of this court that permits a party to whom a notice
12 of appeal has been served to apply to court to strike it out
on the ground that no appeal lies or that some essential step
in the proceedings has not been taken within the prescribed
time. Counsel prayed that the notice of appeal and order of
16 stay of execution filed by the respondent be struck out with
costs to the applicant.

Respondents' Submissions

The respondent opposed the application to strike out the
20 notice of appeal and order of stay of execution. Counsel
submitted that respondent filed an appeal to High Court
that was dismissed and therefore instructed their lawyer
Mssr Mukiibi- Kyeyune & Co Advocates to file an appeal to
24 this court. The respondents facilitated their lawyers who at
a later stage informed them that a missing court record
prevented them from being able to draft a Memorandum of
Appeal containing grounds of the appeal. Counsel

contended that it was a negligent mistake or error on part of counsel and that it should not be visited onto the client. He relied on **Sepiria Kyamulesire v Justine Bikanchurika Bagambe SCCA No. 20 1995** which cited **Captain Phillip Ongom v Catherine Nyero Owota CACA No. 2001** with approval and in which Karokora JSC opined as follows:

8 *'In my considered opinion considering the decided cases of this court and other courts at this point, it is now settled that errors of omission by counsel are no longer considered to be fatal to an application under Rule 4 of the rules of this court unless there is evidence*
12 *that the applicant was guilty of dilatory conduct in the instructions of his lawyer...'*

The respondent submitted that they used their very best
16 endeavours to fully instruct Counsel but to their disappointment counsel was not able to deliver the resulting appeal. He prayed that the application to strike out the respondents notice of appeal be rejected and further prayed
20 that this court extends time and allows the respondent to access the record of proceedings in order to file their Memorandum of Appeal on timelines set by court.

Considerations of the Appeal

24 The applicant relied on Rule 82 of the rules of this court that provides that:

28 *"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 maybe, 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."

4 The Rule allows this court to strike out an appeal or notice
of appeal and specifies the circumstances under which this
court may consider when striking out an Appeal or a Notice
of Appeal. Where no appeal lies or some essential step in
8 the proceedings has not been taken or has not been taken
within the prescribed time, this court may strike out such
appeal.

In the instant application, Counsel for the applicant
12 submitted that the respondent had never filed an appeal and
even when the Deputy Registrar of the High Court of
Uganda at Fort Portal communicated to the respondents by
a letter dated 10/01/2018 notifying them that the matter from
16 which the respondent intended to appeal had been prepared
but the respondent choose to ignore the communication.

The respondent however submitted that they did whatever
they could within their limits, as far as the law requires, to
20 instruct counsel, and that the respondent had duly paid a
handsome fee to counsel for representation. He argued that
Counsel for the respondent was negligent and made the
applicant fail to get proper representation in the matter.

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The respondent submitted that it was justifiable to argue
that only one with the actual intention to appeal would go
to such length to incur colossal sums of money as costs for
28 legal fees paid to counsel. Once fees are paid an advocate-

client relationship is created and counsel owes his client a duty of competent representation. **Regulation 12 of the Advocates (professional conduct) regulations** requires
4 advocates to advise clients in the client's best interests. It was submitted that in this case the lawyer for the respondent wilfully neglected the client's case, which amounts to exploitation of the client, by the advocate under
8 **Regulation 11.**

This Court will rely on the authority cited by Counsel for the respondent, **Sepiria Kyamulesire v Justine Bikanchurika Bagambe SCCA No. 20 1995** cited in the case of **Captain Phillip Ongom v Catherine Nyero Owota CACA No. 2001**
12 where Karokora JSC had this to say:

*"In my considered opinion considering the decided cases of this court and other courts at this point, it is now settled that errors or omission by counsel are no longer considered to be fatal to an application under rule 4 of the rules of this court unless there is evidence
16 that the applicant was guilty of dilatory conduct in the instructions of his lawyer...."*
20

I therefore agree with the reasoning that I would not be dispensing justice if a citizen's right of appeal were blocked
24 on the ground of his lawyer's negligence when he failed to take essential steps necessary under the law, to lodge the appeal; and especially when the lawyer had been instructed in time. This court cannot therefore visit the negligence of
28 counsel on his client. Our rules are very clear. Where no appeal lies or some essential step in the proceedings has not

been taken or has not been taken within the prescribed time,
this court may strike out such appeal. This court takes
cognisance of the fact that the client took steps to instruct a
4 lawyer but the process, which has frustrated this appeal,
was not the making of the respondent.

I would decline the application to strike out the
respondent's notice of appeal with costs.

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Dated at Kampala this ...10th...day of
.....*March*.....2022

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20 Catherine Bamugemereire
Justice of Appeal

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0165 OF 2018**

FRED K. RWABUHHORO:.....APPELLANT

VERSUS

1. ZUBAIRU MUKASA

2. MARIAM NAMUBIRU

3. AMINA MUKASA

4. MRS. MUKASA:.....RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Fort Portal before Oyuko, J dated 10th April, 2017 in Civil Appeal No. 65 of 2016)

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA**

RULING OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the ruling of my learned sister Bamugemereire, JA. I agree with it and, for the reasons she has given, I too would dismiss the application with orders as she has proposed.

As Musota JA also agrees, the Court unanimously dismisses the application with costs to the respondents.

It is so ordered.

Dated at Kampala this^{10th}..... day of.....^{March}.....2022.



Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 165 OF 2018

(Arising from High Court Civil Appeal No. 65 of 2016)

FRED. K. RWABUHORO ::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1. ZUBAIRU MUKASA

2. MARIAM NAMUBIRU

3. AMINA MUKASA ::::::::::::::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

RULING OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Catherine Bamugemereire, JA.

I agree with her decision that this court will not be dispensing justice if a party's right of appeal were blocked on grounds of the lawyers' negligence. This application therefore lacks merit and ought to be dismissed.

Dated this 10th day of March 2022



Hon. Stephen Musota

JUSTICE OF APPEAL