THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO. 44 OF 2015
(Arising from Civil Appeal No.0010 of 2012)

(Coram: R. Buteera DCJ, CB. Bamugemereire, S Musota JJA)

SULAITI DUNGU:: APPELLANT

VERSUS

KATEERA G.AKUGIZBWE:: RESPONDENT

(Appeal from the ruling of Hon. Mr. Justice Byabakama Mugenyi Simon dated 3rd October 2014 at the High Court of Uganda holden at Masindi)

Civil Procedure –struck-out notice of appeal – Non-service of Notice of Appeal and Memorandum of Appeal- Rule 2(2) of the Judicature (Court of Appeal Rules), interest of justice.

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

This is an appeal from the ruling, of Benjamin Kabiito J striking out High Court Civil Appeal No.010 of 2012 as a result of the appellant missing an essential step in the appealing process.

Background

The facts as ascertained from the pleadings of the parties and the lower court are that the respondent filed a summary suit against the appellant before the Chief Magistrate's Court at Masindi; vide Civil Suit No.0015 of 2009. Judgment was entered in default upon failure by the respondent to file an application for leave to file a defence. The appellant subsequently filed Miscellaneous Application No.002 of 2009 before the same court seeking unconditional leave to file a defence and set aside the default judgment. The application was heard by the Chief Magistrate who dismissed the same. The appellant being

dissatisfied filed Misc App No.007 of 2011 seeking leave to appeal to the High Court against the ruling dismissing Misc. Application No.002 of 2009. It was heard by the learned Chief Magistrate who granted the respondent leave to appeal to the High Court on 9th March 2012. The appellant then appealed to the High Court in Civil Appeal No.0010 of 2012. The respondent filed an application to strike out the appeal vide Civil Misc Application No.0001 of 2013. This application was premised on the ground that the appellant did not serve the respondent with the Notice and Memorandum of Appeal within the time prescribed by law. Consequently, the application was allowed and Civil Appeal No.0010 of 2012 was struck out with costs to the applicant.

Being dissatisfied with the above ruling of the High Court, the appellant appealed to this Court on 3 grounds.

Grounds of appeal.

1. That the Learned Trial Judge erred in law when he based his decision on facts which constituted matters for trial.
2. That the Learned Trial Judge erred in law when he denied the appellant a hearing after striking out the notice of appeal on technical grounds.
3. That the Learned Trial Judge erred in law when he relied on the merits of the matter to adduce dilatory conduct on the part of the appellant.

Representation

The appellant was represented by Augustine Akineza while the respondent was represented by Odokel Opolot. Both counsel relied on written submissions that were adopted by this court.

Appellant's Submissions

Counsel for the appellant argued that the court needed to have taken a liberal view towards this matter in order to hear it on its merit rather than relying on technicalities to defeat it. Counsel argued Ground No.1 and No.3 jointly and Ground No.2 separately. On Grounds No.1 and No.3 counsel submitted that the Learned Trial Judge erred by basing his decision on the merits of the suit, rather than the facts in the application. Counsel argued that the neither the appellant nor the respondent made submissions on the merits of the case. That notwithstanding, the Learned Trial Judge pegged his decision on facts which had not yet been proved, which was an error.

On ground 2, counsel disagreed with the Learned Trial Judge for striking out the appeal on technical grounds which had the effect of penalising the appellant rather than doing justice. Counsel contended that the appellant took essential steps to have the appeal heard, by writing a letter applying for the record of the lower court in Misc. App No.0026/2009. Counsel added that the respondents did not show any injustice caused by the delay as a result of the appellants non-compliance with the alleged legal procedure. Counsel prayed that this court sets

aside the decision of the power court and that this appeal be allowed with costs.

Respondent's Submissions

In response, counsel for the respondent invited the court to agree with the findings of the Learned Trial Judge. He abridged all the issues into 1 and argued them conjointly. Counsel contended that the Learned Trial Judge rightly struck out the appeal for failure to take an essential step. He averred that the appellant ought to have served the respondent as is required by law. Counsel argued that the appellant failed to follow a mandatory procedure. It was counsel's submission that failure to serve the respondent led to the denial of the right to a fair hearing based. The matter was therefore dismissed on technicalities was baseless. Counsel invited court to dismiss the appeal with costs.

Appellant's Submissions in Rejoinder.

In rejoinder, the appellant averred that he filed his Memorandum of Appeal within time but served the respondent late. He added that such an irregularity was curable and could not warrant striking out the appeal where land was a subject matter. Counsel prayed that this court find merit in the appeal, reverses the decision of the lower court and orders that the appeal be heard on its merits.

Consideration of the Appeal

I have relied on the written submissions of both counsel and the authorities they cited in order to arrive at this Judgment. However

I will review both the duty of the first appellate court and the duty of this court as the second appellate court. It is the duty of a first appellate court to subject the whole evidence to a fresh and exhaustive scrutiny. The appellant is entitled to have the first appellate court's own consideration and views on the matter as a whole and to receive the court's finding, conclusions and its own decision thereon. The first appellate court has a duty to review the documentation involved and to reconsider the materials which were before the trial judge. The first appellate Court must then make up its own mind not disregarding the ruling appealed from but carefully weighing and considering it. **See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10, Fr. Narcensio Begumisa & Ors v Eric Tibebaaga SCCA No.17 of 2002, Kifamunte Henry v Uganda SCCA No. 10 of 1997, The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited SCCA No.15 of 2015 (unreported) and Pandya Vs R [1957] EA 336.**

This Court is alive to its role as a second appellate court, as set out in **Kifamunte Henry v Uganda (supra)** that:-" on a second appeal, a second appellate court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support these findings, though it may think it

possible, or even probable, that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. See also **Okeno v Republic (1972) E.A. 32** **Charles B. Bitwire v Uganda - Supreme Court Criminal Appeal No. 23 of 1985.**

Indeed, as a second appellate court I will bear in mind to interrogate questions of law including the question whether the first appellate court fulfilled its obligation under the law.

I will now resolve the appeal starting with Ground No.2, Ground No.1 and 3 will be resolved resolve jointly.

Ground No.2

> **That the Learned Trial Judge erred in law when he denied the appellant a hearing after striking out the notice of appeal on technical grounds.**

It was the respondent's contention that the appellant did not write to the Court requesting for a record of proceedings. This essential step is written into the law. The law on record of proceedings is provided for in Order 43 Rule 10 of the Civil Procedure Rules,

> "10. High Court to give notice to court where decree appealed from.
>
> (1) When a memorandum of appeal is lodged, the High Court shall send notice of the appeal to the court from whose decree the appeal is preferred.

(2) The court receiving the notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the High Court.

(3)Either party may apply in writing to the court from whose decree the appeal is preferred, specifying any of the papers of the court of which he or she requires copies to be. made; and copies shall be made at the expense of, and given to, the applicant on payment of the requisite charge."

From the above law, it is evident that there is no mandatory legal obligation imposed on any party to an appeal to attain the record of proceedings. Although this duty is imposed on the trial court, it is prudent for litigants to take initiative and to follow up on the records from the trial courts. On the issue of non-service, the appellant in his rejoinder conceded that he served the respondent late and argued that such an irregularity was curable and could not warrant striking out of the appeal.

Upon reviewing the record, I find that this matter was initiated at the Magistrate court. It has since been escalated to the Court of Appeal. This was a land case regarding the allocation of civil service houses to sitting tenants. The appellant/defendant having been suit by summary suit applied to appear and defend the suit. His application to defend was dismissed for reason that he did not have a good defence to the whole suit.

I agree with that although this was a summary suit, the facts on the face of the record, proved that the appellant was fighting over a civil service house already allocated to Philip Okwir who passed on and the daughter was granted letters of administration. She too sold to a third party. On the other hand, Suilaiti Ddungu did receive allocation of a separate property and had been warned that he could not receive a second allocation from the civil service pool houses. The face value facts of this appeal show that the appellant had no claim. I would agree with the learned Judge that the appellant does not have a good defence to the whole suit. His dilatory behaviour to have his appeal heard was therefore discernible. This is not a case involving failure to grant the appellant a right to be heard. The appellant has been heard and has not shown that he has a defensible cause. His dilatory behaviour in filing an appeal late, looked at together with the fact that he has no probable chance of success shows that he simply did not take essential steps in prosecuting his appeal and did not attempt to serve the other side with his appeal. We would find **Ketteman v Hansel Properties Ltd [1987] AC 18** distinguishable where the liberal views towards the right to be heard should be treated with exception in this case. This is for reason that while the appellant lodged a notice of appeal with a request for a typed copy of the proceedings on 13th March 2012, he did not take any other visible step in having his appeal heard. It is incumbent on the appellant to act diligently. Legal business should be conducted

with expedience and efficiency. Dilatory conduct will defeat a party's right to be heard.

On Ground No.1 and 3

That the Learned Trial Judge erred in law when he based his decision on facts which constituted matters for trial.

That the Learned Trial Judge erred in law when he relied on the merits of the matter to adduce dilatory conduct on the part of the appellant.

I have found that there was no limitation that barred the Learned Trial Judge from discussing the merits of the case while handling the application. As noted earlier, in the course of reviewing the materials placed before the high court, the nature of the case is made evident. The trial Judge re-evaluated the grounds and just like we have done above, he found that there is reason to impute dilatory conduct. I therefore agree with the respondent's arguments on these two grounds. The Learned Judge did not err when he relied on the merits of the matter to impute dilatory conduct. Ground No.1 and No. 3 of this appeal succeed.

This appeal fails and is dismissed with costs.

Dated this 9th day of March 2023.

CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 44 OF 2015

(Arising from Civil Appeal No. 0010 of 2012)

(Coram: Buteera DCJ, Bamugemereire & Musota JJA)

SULAITI DUNGU :::::::::::::::::::::::::::::: **APPELLANT**

VERSUS

KATEERA G. AKUGIZIBWE :::::::::::::::::::::::::::::: **RESPONDENT**

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JUDGMENT OF BUTEERA, DCJ

I have had the advantage of reading in draft the Judgment of Bamugemereire JA and I agree with her findings and the orders she has proposed.

Since all the members of the panel agree with her Judgment, the Appeal is hereby dismissed with costs.

R. Buteera
DEPUTY CHIEF JUSTICE

9/3/2022

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SULAITI DUNGU :: APPELLANT

VERSUS

KATEERA G. AKUGIZIBWE :::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT 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 analysis, conclusions and the orders she has proposed.

Dated this 9th day of March 2023

Stephen Musota

JUSTICE OF APPEAL