THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL HOLDEN AT KAMPALA

(Coram: Elizabeth Musoke, JA, Christopher Gashirabake, JA, Eva Luswata, JA,)

MISCELLANOUS APPLICATION NO 64 OF 2021

(Arising from H.C.C.S No. 220 Of 2008)

1. BUKENYA MUHAMOOD

2. MRS FATUMA NALUKWAGO :::::::::::::::::::::::::::: APPLICANTS

VERSUS

1. KIRUMIRA GODFREY

2. REV.FR. JOSEPH FISHER KORTORUM

3. FRED MUKWAYA :::::::::::::::::::::::::::::::::::::: RESPONDENTS

RULING

1] This is an application for striking out a notice of appeal and Civil Appeal No. 28 of 2018 brought by way of Notice of Motion under Rules 2(2), 43(1) & (2), 44 and 82 of the Judicature (Court of Appeal Rules) Directions, SI 13-10) (hereinafter COA Rules) and for orders for costs.

2] The application filed by M/s Odokel Opolot & Co., Advocates is premised upon seven grounds which are contained in the notice of motion. It is contended for the applicant as follows:

i. *That the applicants were successful parties in Civil Suit No. 220 of 2008 and the 1st respondent having been dissatisfied with the decision of the High Court filed a notice of appeal that was served on the applicants on the 30th day of April, 2018.*

ii. *That it is now more than 2 and a half years, almost getting to 3 years since the notice of appeal was filed and served on the applicants.*

iii. *That the respondents through their lawyers, M/S Sekabanja and Company Advocates wrote a letter requesting for the record of proceedings and the same was filed on the 17th day of April, 2018*

iv. *That indeed no such memorandum and record of appeal have ever been filed in the Court of Appeal*

v. *That the 1st Respondent has never taken any essential steps in pursuing the appeal.*

vi. *That this application has been brought to stop the 1st Respondent from misusing the court process so as to disable the applicants from enforcing the decree issued by the court in H.C.C.S No. 220 of 2008.*

vii. *That it is in the interest of Justice that this Application be allowed.*

3] Muhamood Bukenya swore an affidavit in support of the motion in which the above grounds were amplified. Bukenya in addition stated that upon the advice of his legal counsel, failure to file and serve a memorandum of appeal renders the appeal nugatory and once no action is taken to pursue the appeal, it ought to be struck

out. He added that the dilatory conduct of the respondents, is an indication that they have lost interest in pursuing it.

4] Godfrey Kirumira who was represented by M/s Sekabanja & Co., Advocates opposed the application. He filed an affidavit in reply in which he conceded that the applicants were the successful parties in the suit, against which he had intentions to appeal. That to effectuate that intention, he instructed his lawyers above to file an appeal and they requested for the typed record of proceedings. That both the notice of appeal and formal request for the record were served upon the applicants. He continued that neither him nor his lawyers have since been called upon to collect the typed proceedings despite his counsel's numerous efforts to follow up the same. In his view, the delay to provide those proceedings cannot be attributed to him, an innocent litigant. That upon the advice of his counsel, this application lacks merit and ought to dismissed with costs.

5] At the hearing of this application, the applicants were represented by Mr. James Oluka while the 1st respondent was represented by Mr. Opio Moses. Counsel for the parties filed written submissions which this Court will consider to decide the application. In his submissions, counsel for the applicant raised two issues for determination, to wit:

i. Whether the notice of appeal No. 28 of 2018 can be struck out for failure to take essential steps.

ii. What remedies are available to the parties

Applicants submissions

6] Citing the decision of **Baku Obudra & Ors versus the Attorney General Constitutional Appeal No. 1 of 2005** and **Attorney General versus Shah (No.4) [1971] EA 50,** counsel for the applicant submitted that an appeal is a creature of statute and no court of law has a residual right of appeal. He in addition relied on **Rule 83 COA Rules** which affords an appellant 60 days (following lodgment of a notice of appeal), to lodge a memorandum of appeal. It was counsel's view that the memorandum was overdue since none had been filed since 17/4/2018. He continued that the 1st respondent's notice of appeal offends the COA Rules because the statutory 60 days within which to file a memorandum of appeal was not complied with. In that regard, counsel referred to paragraph 2 of Bukenya's affidavit in which he states that the applicants or their lawyers have never filed nor served a memorandum of appeal on the applicants' lawyer, which assertion is proved by the absence of any proof of service of the same.

7] In conclusion counsel submitted that the respondents failed to comply with Rule 84(a) of the COA Rules, and by failing to take the essential step of lodging and serving the memorandum of appeal for the last three years, they are deemed to have voluntarily

withdrawn the appeal. In conclusion, counsel prayed that this honourable court strikes off the 1st respondents intended notice in respect of Civil Appeal No. 28 with costs.

Respondents submissions

8] In response, respondent's counsel agreed with the provisions of Rule 82 COA Rules. He then referred to Rule 83(1) COA and the case of **Andrew Maviri versus Jomayi Property Consultants Limited, CA Civil Application No. 274 of 2014.** It was held therein that according to Rule 83(1) COA Rules, an appeal must be filed within 60 days of the date of the initial decision. That on the other hand, Rule 83(2) and (3) COA Rules, permit an appellant to exclude from the computation of the 60 days' limit, the time taken by the Registrar to prepare and deliver copies of typed proceedings to the appellant, provided the application for the proceedings was in writing, and that a copy of the said letter/ application was served upon the respondent.

9] In counsel's view, there is need for this honourable court to determine whether the applicant took an essential step in the proceedings which the respondent submits that he took. In that regard, he referred to the case of **Utex Industries Ltd versus Attorney General, SC Civil Appeal No. 52 of 1995** cited with approval in **All Muss Properties Ltd & 2 Others versus CTM Uganda Ltd & 2 Others, Civil Application No. 379 of 2017** where it was held 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.

10] In order to explain his submission, counsel showed that after the decision of the High Court was delivered on 11/4/2018, on 16/4/2018, the 1st respondent wrote to the Registrar High Court Land Division requesting for a typed record of proceedings and filed the same on 17/4/2018. That since Bukenya conceded to have received that letter together with a notice of appeal that counsel for the 1st respondent had filed in court, it should be taken that the 1st respondents took the essential steps fundamentally expected of them.

11] In addition, counsel for the 1st respondent submitted that the 60-day rule under Rule 83(10) ceased to apply when his client filed a letter requesting for the typed record of proceedings in the High Court. That it is now upon the High Court to prepare and inform the 1st Respondent that the typed record of proceedings is ready for picking in order for him to prepare and file the Memorandum and record of appeal. Counsel submitted that he has never been called upon to pick the record of proceedings. That the law for filing the appeal in time cannot be used against them for they have not yet been availed with the typed record and proceedings.

12] In conclusion, counsel for the 1st respondent submitted that the respondent took all the necessary steps in the circumstances of this case, and only awaits to be availed with the record of proceedings by the trial Court. He prayed that the notice of appeal of No. 28 of 2018 should not be struck out.

Applicants submissions in rejoinder

13] In rejoinder, applicant's counsel drew our attention to the contents of paragraph 2(c) of Bukenya's affidavit in rejoinder. He deposed that after filing a notice of appeal, the respondents adamantly refused to file a memorandum of appeal for four years yet the typed record of proceedings and the judgment were ready for collection on 12th August, 2020. He considered paragraph 6 of the 1st respondent's affidavit as falsehoods and argued that after filing the notice of appeal, the 1st respondent became indolent and slept for four years yet the typed record of proceedings and judgement were ready for collection, two years previously.

14] Citing the decision of **Andrew Maviri vs Jomayi Property Consultants Ltd, Civil Appeal No. 274 of 2014** counsel then repeated the submission that the 1st respondent had failed to comply with the provision of Rule 82 COA Rules by collecting from Court the record of proceedings and filing the memorandum of

appeal. That in the result, the appeal was rendered incompetent and nugatory and ought to be struck out with costs.

15] In conclusion counsel submitted that the 1st respondent having failed to take essential steps in proceedings within 60 days as prescribed by law, and ignoring to collect the record of proceedings and judgement of civil suit No. 22 of 2008 renders his purported notice of appeal nugatory and incompetent and liable to be struck out with costs for failure to take essential steps.

Issue 2

16] On issue two, applicant's counsel submitted that the award of costs is a discretionary remedy that can be granted by court to a party that has incurred expenses in the course of litigating a suit. He cited o **Section 27(1) of the Civil Procedure Act** and the decision of **Andrew Maviri versus Jomayi Property Consultants Limited, (Supra)** where court struck out a notice of appeal with costs to the applicant. He prayed that likewise, this application be granted with costs against the 1st respondent. Counsel for the respondents submitted conversely that since their client had taken the essential step in prosecuting his appeal, the application ought to fail and be dismissed with costs.

Respondent's reply to the applicant's submissions in rejoinder.

17] Counsel for the respondent submitted that he was mindful that his client had no right of rejoinder. However, that he was

persuaded to make one because Bukenya introduced new facts by attaching to his affidavit in rejoinder, a letter from the Deputy Registrar of the High Court. In that letter, the Registrar indicated that the record of proceedings was ready for collection. Counsel then submitted that the letter was addressed to M/S Odokel Opolot & Co. Advocates, counsel for the intended respondents in the appeal, as opposed to being addressed and served upon counsel for the appellants. That appellant's counsel was neither served nor notified to collect the record of proceedings from the High Court, which was the duty of the Registrar. Counsel further submitted that M/S Odokel & Co. Advocates despite having knowledge of the letter concealed its existence. In his view, its concealment was in bad faith intended to deprive the 1st respondent from pursuing his rights.

Our decision

18] Under Rule 76(1) COA, filing of a notice of appeal will commence an appeal. It is then provided under Rule 83(1) COA, that a party who files a notice of appeal, must follow it up with lodgment of a memorandum of appeal and record of appeal after 60 days. Under Rule 83(2) COA, that period may be enlarged if the intending appellant made a written application for the certified record of the lower court, and served such notice on the intended respondent. A party may only rely on such an extension under Rule 83(2) COA, only if the Registrar has certified the time as was required to prepare and deliver the typed record. Under Rule 84(1) COA, a party who files a notice of appeal but fails to institute the

appeal within the prescribed time, shall be deemed to have withdrawn the appeal.

19] There is remedy for a respondent who is confronted with a delayed appeal, for they can apply for the notice to be struck off the record. Rule 82 COA provides as follows:

"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 83(1) COA is couched in mandatory terms. However, the established practice has been for the Courts to maintain delayed appeals if good cause is shown. Although in this case we are not dealing with an application for extension of time to file a memorandum of appeal, it is necessary that the applicant shows that the respondent failed to take the necessary step, and for the 1st respondent to convince us that there is good reason for his failure to take the right step in time. See **Njagi v Munyiri[1975]EA 179.** In the case of **Utex Industries Ltd versus Attorney General (supra)** followed with approval in **Juliet Kalema versus William Kalema & Anor, CA Civil Application No. 24/2004,** the Supreme Court while dealing with an application for enlargement of time had this to say:

"To avoid delays, rules of Court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily".

Thus we shall in addition to considering the application, consider the reasons advanced for the delay to have it filed as the law provides.

21] We have confirmed from the record that although there were three judgment debtors in the lower court, it is only Godfrey Kirumira who filed an appeal against the judgment. The gist of the complaint before us is that after Kirumira lodged a notice of appeal in the High Court, he failed to file the memorandum of appeal within the presctibed time. That although his request for typed copies of the order and proceedings was issued by the Registrar, he neglected to take the necessary step for a period of up to four years. Kirumira argued that he served the notice of appeal on the appellants. He conceded that no memorandum was filed, but placed the blame on both the Registrar and the applicant's counsel for failing to bring to his attention the fact that the letter was issued and was ready for collection.

22] Having perused the record, we confirmed the uncontested fact that through his lawyers, M/s Sekabanja & Co., Advocates, Kirumira filed and lodged the notice of appeal in the High Court Land Division on 17/4/2018. It is also evident that using the same

lawyers, on 16/4/2018, he wrote a letter to the Registrar, High Court, Land Division requesting for the record of appeal. In a letter dated 12/8/2020, the Registrar wrote to M/s Odokel Opolot & Co., Advocates requesting them to collect the record of proceedings from court. That letter was not copied to Kirumira or his lawyers, and there being no corresponding notice to them, we are inclined to believe Kirumira's evidence that his lawyers did not receive any response from the Registrar, or any notification from the applicants and their lawyers.

23] It is clear that the Registrar notified the wrong firm of advocates about the typed record. However, in his affidavit in reply to the application, Kirumira claimed that his lawyers had on numerous occasions been going to court in as an attempt to obtain the typed record of proceedings that they had applied for, but all in vain. With respect, in view of the Registrar's letter above, we are unable to believe that evidence. Nothing was attached to the affidavit to confirm his lawyers' efforts and had they visited the Court as he stated, then they should have been able to see that letter and the typed proceedings as well. Again, Kirumira's request for the record was made during April 2018, and the record was ready for collection in August 2020, more than two years later. The application was filed in June 2022, another two years after the Registrar's letter. All that time, Kirumira and his advocates were not aware of it or taken any documented step to engage the Registrar over the delay in responding to a request in 2018.

24] In our view, this was clearly a case of negligence of Kirumira and his lawyers for failing to follow up on the a request they made to Court way back on 16/4/2018. The applicants' or their lawyers who came to learn that the typed record was ready, were under no duty to inform Kirumira or his lawyers of that fact. It may well be that the Registrar was duty bound to respond to a formal request for the proceedings, it still remained the duty of Kirumira or his lawyers to follow up the matter.

25] Kirumira advanced a strong argument that he cannot be penalized for his Advocate's actions. That may be so because an entrenched principle is that a person cannot be punished for the errors of his advocate. See for example **Sepiriya Kyamuresire versus Justine Bikanchurika Bagambe SC Civil Appeal No. 20/1995**. However, that privilege cannot be extended to a litigant who is privy to the advocate's actions or is at least, guilty of dilatory conduct in the instruction of a lawyer. See **Phillip Ongom Capt & Anor versus Catherine Nyero Owota CA Civil Appeal No. 14/2001 [2003] UGSC 16** and **Mohamad B. Kasasa versus Jasphar Buyonga Sirasi Bwogi, CA Civil Appeal No. 42 of 2008.** Although Kirumira instructed lawyers to file the appeal, he was not completely absolved from following up on the its progress. He did not do so for a period of nearly four years and appears to have only woken up when served with this application.

26] It is our decision then that once they filed the notice of appeal, Kirumira through his lawyers was duty bound to take the necessary step to have the memorandum of appeal filed within 60 days, which is a mandatory requirement. Making a formal request for the proceedings alone did not necessary place Kirumira outside that mandatory provision. He had to act on that request, which Kirumira and his lawyers failed to do. Rising up nearly four years after filing the notice of appeal would be inordinate delay of spectacular proportion. We would for that reason follow the decision in **Andrew Maviri vs Jomayi Property Consultants Ltd, CA Civil Appeal No. 274 of 2014** where it was held that a respondent who failed to lodge the appeal within 60 days from the date of receipt of a record from the High Court, was deemed not to have taken the essential steps to prosecute the appeal. The delayed appeal if not halted, will continue to frustrate the applicants who were the successful party in the High Court, to enjoy the fruits of the judgment.

27] For the reasons above, we strike out Civil Appeal Number 28 of 2018 and the Notice of Appeal by which it was lodged. The costs of application shall be borne by the 1st respondent, Godfrey Kirumira.

DATED at Kampala this 9th day of march 2023.

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ELIZABETH MUSOKE JA

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CHRISTOPHER GASHIRABAKE JA

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EVA K. LUSWATA JA