

5 **THE REPUBLIC OF UGANDA**
IN THE HIGH COURT OF UGANDA

[COMMERCIAL COURT]

CIVIL APPEAL No. 40 OF 2016

(Arising out of Mengo Suit No. 15 of 23013)

10 **OGBUONYE GERALD ::: APPELLANT**

VERSUS

KAWOOYA JOHN ALEX ::: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

15 This ruling arises from a Preliminary Objections raised by the respondent that the appellant’s appeal above is incompetent, illegal on court record and a nullity which cannot stand based on two grounds.

➤ *The appellants appeal was illegally filled out of time contrary to **Section 79(1) a** of the CPA cap 71.*

20 ➤ *The appellants appeal was improperly instituted by a Notice of Appeal contrary to **Order 43 r 1 CPR S.I 71-1** which provides a mode of filling an appeal by a Memorandum of Appeal.*

Respondent’s Submission

Counsel for the respondent submitted on the first ground that the appellants appeal was filled
25 illegally out of the time contrary to **Section 79(1) a** of the **CPA** which stipulates that;-

“except as otherwise specifically provides in any other law, every appeal shall be entered within thirty days of the date of the decree or order of the court”.

Counsel for the respondent submitted that the above provision is codified in mandatory terms as it uses the words “Every appeal shall be entered within thirty days of the date of the decree.”

Counsel further submitted that the judgment and decree of the Magistrate Grade One at Mengo, which the appellant appeals against was delivered on the 12th day of July 2016. According to Counsel, the appellant should have appealed by the 12th day of August 2016, which he neglected to do. Instead he chose to file his Notice of Appeal accompanied by a Memorandum of Appeal in
5 this court on the 10th day of November 2016 a period of 3 months and twenty eight days (118 days) from the date of the decree of the 12th July 2016. Counsel asserted that the appellant filed his appeal after 118 days from the date of issuance of the decree instead of mandatory 30 days, hence the appellants appeal is illegally instituted under to **Section 79 (1)** of the **CPA**.

Counsel for the respondents relied on the judgment in **Luzinda George Vs Edward Wasswa**
10 **HCCA No. 39 of 2009** (unreported) where court held that;

“Appeal from the Magistrate Grade One and Chief Magistrates shall be lodged in the high court within 30 days from the date of the decree or order,..... This appeal thus has no merit. It is accordingly dismissed.”

Counsel went on to submit that the appellant was required to first get leave of court extending
15 time within which to appeal showing sufficient reasons for appealing out of time and that upon grant of such leave would the appellant have a valid appeal which according to Counsel the appellant did not seek henceforth filling an illegal appeal out of time.

Regarding the second ground of the preliminary objection Counsel for the respondent asserted that the appellants appeal was improperly instituted by a Notice of Appeal contrary to **O.43 r 1**
20 **CPR** which provides that an appeal to the High Court shall be instituted by a Memorandum of Appeal.

Counsel submitted that according to the court record in this appeal, the appellant commenced his appeal by a Notice of Appeal dated the 26th day of October 2016, and filed in court on the 10th day of November 2016,

25 Counsel for the respondent relying on the case of **Sempebwa William Vs Byamungu Muhammed, HCA No. 12 of 2012** (unreported) submitted that the legal effect of non-compliance with **O.43 r 1 CPR** by instituting an appeal by a Notice of Appeal as opposed to a Memorandum of Appeal is that such an appeal is irregular hence an abuse of the court process and should be dismissed with costs.

Appellant's Submission.

Counsel for the appellant in reply to the Preliminary Objection termed the PO in vivid terms as misconceived, nugatory and brought in bad faith.

In reference to the first objection, that is the appeal filed out of time, Counsel noted that indeed
5 the appeal was on the face of it filed out of time but that this was done with leave of court which was granted on the 1st day of December 2016 by trial court which according to Counsel meant that the appeal was not illegally filed.

In so far the improper institution of the appeal by way of Notice of Appeal. Counsel for the appellants in response cited **O.43 r 1 CPR** and submitted that all appeals to the High Court are to
10 be preferred in the form of a Memorandum signed by the appellant or his Advocate, filled with court and accordingly served on the opposite party.

Counsel for the appellant further submitted that the appeal was preferred by a Memorandum of appeal filed in this court on the 10th day of November 2016, and served on the respondent's Advocates on the 23rd day of November 2016.

15 Counsel therefore prayed that in due consideration of the frivolous nature of these points of law raised by the respondent's Counsel, the objection be dismissed with costs since they are baseless and aimed at wasting court's time.

Ruling

With regard to the first objection, that the appeal was filed out of time, **Section 220 (1) (a)** of the
20 **Magistrates Courts Act**, provides for appeals as of right, from the decrees and from orders of a Magistrates Court presided over by a Magistrate Grade one in the exercise of its original jurisdiction, to the High Court. According to **Section 79 (1) (a)** of the **Civil Procedure Act**, every appeal should be filed within thirty days from the date of the decree or order of the court, except where it is otherwise specifically provided in any law. These time specifications are
25 aimed at avoiding delays. The subsequent provisions hence are designed to dictate a time schedule within which certain steps ought to be taken. And as such, as was held in *Njagi Vs Munyi (1975) E A 179*, for any delay to be excused, it must be satisfactorily explained.

The appeal was filed in this court on the 10th Day of November 2016 which appeal should have been filed by the 12th day of August 2016.

From the evidence on court record, leave to file the appeal out of time was sought by the appellant on the 1st day of December 2016 from the Magistrate Grade one Mengo Court, and
5 through an order the said court granted the extension of the time within which to file an appeal out of time. The order is dated the 5th day of December 2016.

The appellant contends that in as far as the appeal was filed out of time, the applicant nevertheless obtained leave of the trial Court in Magistrate Grade One to file the appeal out of time.

10 On record there is an order made in Misc Appl No. 746 of 2016 granted on 1st December 2016. The order reads;-

1. An order extending time to file an appeal out of time be and is hereby granted.

With due respect to Learned Counsel for the appellant, **Section 79 (1)** of **CPA** is clear. It provides;-

15 **S.79 (1)** Except as otherwise specifically provided in any other law, every *appeal shall be entered*;-

(a) *Within thirty days of the date of the decree or order of the court or....*

b)

20 *as the case may be, appealed against, but the appellate court may for good cause admit and appeal through the period of limitations prescribed by this section has elapsed. (emphasis mine).*

My reading of the above section is that the application for extension of time should be made in the appellate court which was not done in this case. Accordingly it is my finding that the appeal
25 was filed out of time.

Since the resolution of this ground effectively disposes of the PO i will not delve further in the other ground of the PO.

In the circumstances this appeal is dismissed as being incompetent.

The respondent is awarded costs of the appeal.

5 **B.Kainamura**

Judge

24.07.2018