THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 9 OF 2020

1. EQUITY BANK UGANDA LTD
2. KATAMBA EMMANUEL
3. KABIRA JOVIAN :: APPELLANTS

VERSUS

NASSIWA FATIMA :: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

JUDGMENT

Background

1. This is a first appeal against the judgment and decree of His Worship Dr. Mushabe Alex Karocho, the then Chief Magistrate of the then Chief Magistrate's Court of Kampala at Mengo, delivered on 17th December 2019. Briefly, the respondent's case at the trial was that her husband, Mr. Kayemba Mawazi, sent her USD 10,000 from South Africa through MoneyGram on 7th July 2014. On 8th July 2014, she went to the 1st appellant's branch in Katwe, Kampala to withdraw the money. She was served by the 2nd appellant who was, at the time, a teller at the branch.

2. The respondent filled in a MoneyGram form providing her particulars and the secret code. She also handed over her identity card, voter's card and passport. However, the 3rd appellant, who was the 1st appellant's branch supervisor, ordered the 2nd appellant not to give the respondent the money on grounds that he was not satisfied with her identification documents. He told her to return on subsequent days to settle the matter.

3. On 10th July 2014, the respondent consulted with another MoneyGram agent who told her that her money had been withdrawn at the 1st appellant's branch in Kawempe on 9th July 2014, through an account that had been created in her names. The respondent reported the matter to the Central Police Station in Kampala, but subsequent investigations into

the fraud did not yield any success. The respondent then filed Civil Suit No. 33 of 2015 in the then Chief Magistrate's Court of Kampala at Mengo against the appellants seeking to recover her money from the appellants.

4. At the trial, the appellants maintained that when the respondent went to the 1st appellant's Katwe branch on 8th July 2014, the voter's card she produced bore the names **"NASSIWA FATIMA NTANDA"** which differed from the names provided by the sender. The respondent failed to produce any valid identification card to prove that the 3rd name is also hers. Her forms were returned to her and she left the banking hall after being advised to either to return with proper identification or to contact the sender to amend the particulars of the recipient of the money.

5. The appellants further contended that on 9th July 2014, a one **"NASSIWA FATIMA"** went to the 1st appellant's branch in Kawempe with the proper identification documents and withdrew the money. The respondent showed up on 10th July 2014 also seeking to withdraw the money.

6. In his judgment, the learned trial Chief Magistrate found that the impugned USD 10,000 belonged to the respondent. He held that the appellants had acted fraudulently when they refused to pay the money to the respondent and instead remitted it to a fraudulent person. He ordered the respondents to refund the USD 10,000 to the respondent and to pay her general damages of UGX 5,000,000, both with interest accruing thereon at the rate of 8% per annum from the date of the judgment until payment in full. He also awarded the costs of the suit to the respondent.

The Appeal

7. The appellants were aggrieved by the judgment and decree of the trial Court. They appealed to this Court on the following 5 grounds:

> ***"1. The learned Chief Magistrate erred in law and fact when he awarded a sum of USD 10,000 (Ten Thousand United States Dollars) in absence of any evidence in support of the amount in United States currency, thereby reaching a wrong decision.***

2. The learned Chief Magistrate erred in law and in fact when he held that the claimed amount belonged to the Plaintiff, thereby reaching a wrong decision.

3. The learned Chief Magistrate erred in law and fact when he failed to direct himself on the standard of proof required to prove fraud, thereby wrongly holding that the Defendants were fraudulent.

4. The learned Chief Magistrate erred in law and in fact when he failed to adequately evaluate the evidence on record as a whole thereby reaching a wrong decision.

5. The learned Chief Magistrate erred in law and in fact when he awarded general damages of UGX 5,000,000 without a proper legal and factual assessment of the same."

8. The respondent raised 4 preliminary objections challenging the propriety of the appeal. She also opposed the merits of the appeal.

Representation and hearing

9. At the hearing, the appellants were represented by Ms Alowo Patricia Majwere of M/S OSH Advocates while the respondent was represented by Mr. Sematengo Abubaker holding brief for Mr. Mujulizi Jamil from M/S Mujurizi & Tumwesigye Advocates. I have considered the materials on record, the submissions of counsel and the law and authorities cited.

Duty of a first appellate court

10. This is a first appeal. The duty of a first appellate court has, for long, been settled. In the case of **Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, it was held:

"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on

manner and demeanour, the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not or which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witnesses which the appellate Court has not. See Pandya vs. R. (1957) E.A. 32, Charles B. Bitwire vs. Uganda Supreme Court Criminal Appeal No. 23 of 1985 at page 5." Emphasis mine.

11. I shall bear the above principles in mind as I determine this appeal. Counsel for the appellants argued the grounds of appeal chronologically from ground 1 to 5. Counsel for the respondent first argued her preliminary objections before also arguing the 5 grounds of appeal chronologically. The appellants did not file any submissions in rejoinder.

Respondent's submissions on the preliminary objections

12. On the 1st preliminary objection, counsel for the respondent submitted that since the appeal was lodged on 12th February 2020 (54 days after the decision of the trial Court), it was lodged out of the time allowed. Counsel also submitted that the memorandum of appeal was served on 28th June 2022 outside the time allowed.

13. On the 2nd preliminary objection, counsel for the respondent argued that that since the appellants did not take any action to prosecute the appeal from 12th February 2020 when they lodged the memorandum of appeal until 23rd June 2022 when they formally requested for the typed and certified copy of proceedings and judgment from the trial Court, the appeal automatically abated.

14. Thirdly, counsel for the respondent submitted that there is no valid memorandum of appeal filed in Court as the one served was not signed by the appellants or their counsel. Finally, counsel for the respondent argued that the appeal is incompetent due to the appellants' omission to extract a decree before lodging the memorandum of appeal.

15. As noted above, the appellants did not file any submissions replying to the preliminary objections. I will first resolve the 3rd objection and thereafter deal with the 2nd, 4th and 1st objections in that order.

Determination of the preliminary objections

i. That the appeal is incompetent since the served memorandum of appeal, as enclosed in the record of appeal, is unsigned

16. Although the copy of the memorandum of appeal enclosed in the record of appeal served on the respondent is neither signed by any of the appellants nor their counsel, the copy of the memorandum of appeal first filed on Court record on 12th February 2023 is duly signed by counsel for the appellants. This copy satisfies the relevant requirements of **Order 43 rule 1** of the **Civil Procedure Rules** which are that the memorandum of appeal must be *"signed by the appellant or his or her advocate"*.

17. While there is a defect in the copy of the memorandum of appeal enclosed in the record of appeal since the same is neither signed by any of the appellants nor their counsel, this defect is cured by the fact that there is an earlier filed copy of the memorandum of appeal on Court record which is complete and duly signed by the appellants' advocate. The 3rd preliminary objection is, therefore, overruled.

ii. That the appeal has abated

18. The record of appeal shows that the memorandum of appeal was filed on 12th February 2020. No action was taken thereafter by the appellants to prosecute the appeal until 7th February 2022 when the appellants' counsel wrote to the trial Court requesting for a typed and certified record of proceedings and judgment. This letter was not filed in the trial Court's registry until 23rd February 2022.

19. In **Katsigazi Benson v Lorna Musanyusa Kamau, High Court of Uganda at Kabale Misc. Application No. 22 of 2021**, which has been relied on by the respondent, the High Court dealt with a situation in which an appeal had been filed in its circuit registry at Kabale on 23rd October 2019 but the respondent had only been served with scheduling notes and submissions

in the appeal in January 2021. The learned appellate Judge, Hon. Justice Moses Kazibwe Kawumi noted:

> ***"... Further still, Rule 4 of the Civil Procedure (Amendment) Rules, 2019 provides for the abatement of matter in which no action is taken within six months. The Respondent did not take any action to prosecute her appeal from the 23rd October 2019 until the 29th January 2021 way after the stipulated time and when the appeal had long abated..."***

20. It is on the above facts and authority that the respondent relied to assert that the appeal had abated by the time the appellants wrote to the trial Court for the typed and certified record of proceedings and judgment in February 2022. For clarity, I will reproduce **Rule 4** of the **Civil Procedure (Amendment) Rules, S.I. No. 33 of 2019** in its entirety. The rule provides:

> ***"4. Amendment of Order XVII***
>
> ***The Principal Rules are amended in Order XVII by substituting for rules 5 and 6 the following –***
>
> ***"5. Dismissal of suit for want of prosecution.***
>
> ***(1) In any case, not otherwise provided for, in which no application is made or step taken for a period of six months by either party with a view to proceeding with the suit after the mandatory scheduling conference, the suit shall automatically abate; and***
>
> (2) ***Where a suit abates under subrule (1) of this rule, the plaintiff may, subject to the law of limitation bring a fresh suit.""*** Emphasis mine.

21. With the greatest respect, I am unable to agree with my learned brother's application of Rule 4 of the Civil Procedure (Amendment) Rules to the facts in the **Katsigazi Benson** decision for two reasons. First, the said **Rule 4** amends **Order 17** of the **Civil Procedure Rules** which deals with prosecution and adjournments of suits at first instance by court in the exercise of original jurisdiction. Proceedings in appeals before the High Court are dealt with under **Order 43** of the **Civil Procedure Rules**. It

therefore seems to me, from the onset, that the law on abatement of suits as prescribed in **Order 17** of the **Civil Procedure Rules** applies to suits which are before court at first instance and it is not applicable to appeals or to the exercise of appellate jurisdiction by appellate courts.

22. Second, **Rule 4** of the **Civil Procedure (Amendment) Rules**, as quoted above, provides for the abatement of a suit *"in which no application is made or step taken for a period of six months with a view to proceeding with the suit after the mandatory scheduling conference"*. The six months begin to run from the date of the mandatory scheduling conference. Therefore, not every inaction for a period of 6 months or more in the course of litigation will abate a suit. It is only that inaction for a period of six months or more after the mandatory scheduling conference that will abate the suit.

23. For these two reasons, I am unable to uphold the respondent's 2nd preliminary objection and the same is, accordingly, disregarded.

iii. That the appeal is incompetent since the appellants omitted to extract a decree before lodging the memorandum of appeal.

24. A perusal of the record of appeal confirms that the appellants did not enclose a duly extracted and endorsed decree from the judgment appealed from in the record of appeal. The respondent asserts that this omission is fatal to the appeal. There are now two distinct conflicting bodies of High Court decisions on this issue in our jurisprudence today, with one body positing that the failure to extract the decree or order appealed from renders an appeal incurably defective while another body posits that such a defect does not render an appeal incompetent.

25. This controversy was considered in **John Byekwaso & Anor v Yudaya Ndagire, High Court of Uganda at Kampala (Land Division) Civil Appeal No. 078 of 2012** in which the appellants' appeal had not been accompanied by a copy of the decree appealed from. Justice Percy Night Tuhaise, after citing some of the decisions which posit that failure to extract the decree or order appealed from renders an appeal incompetent, had this to say:

> ***"... The foregoing decisions were based on Section 220(1)(a) of the Magistrate's Act. All of them were made before the current Constitution which was promulgated in 1995. This legal position appears to have changed in light of Article 126(2)(e) of the said Constitution which enjoins courts to administer substantive justice without undue regard to technicalities. It has since been held by the Court of Appeal in Banco Arabe Espanol v Bank of Uganda, Civil Appeal No. 42/1998 that the extraction of a decree was a mere technicality which the old municipal law put in the way of intending appellants and which at times prevented them from having their cases heard on the merits, and that such a law cannot co-exist in the context of Article 126(2)(e) of the Constitution. The position was maintained by the same Court of Appeal in Standard Chartered Bank (U) Ltd v Grand Hotel (U) Ltd, Civil Appeal No. 13/1999 ..."*** Emphasis mine.

26. I am in full agreement with the reasoning and conclusions of the Court in the above **John Byekwaso decision (supra)**. In light of **Article 2** of the Constitution, the constitutional directive in **Article 126(2)(e)** of the Constitution takes precedence of the statutory requirement in **Section 220(1)(a)** of the **Magistrates Courts Act**. The failure to extract a decree or order from the judgment or ruling appealed from before lodging the appeal is no longer fatal to an appeal. It is a technicality which should no longer defeat an appellant's substantive interests in the appeal. Accordingly, the respondent's 4th preliminary objection is also overruled.

iv. The appeal was filed and served out of time.

27. Pursuant to **Section 79(1)(a)** of the **Civil Procedure Act Cap 71**, an appeal to the High Court must be filed within 30 (thirty) days from the date of the decree or order of the court appealed from. The High Court has reiterated this position in several decisions, including **Luzinda George v Edward Wasswa, High Court Land Division Civil Appeal No. 39 of 2009** and **Migadde Richard Lubinga & 2 Ors v Nakibuule Sandra & 2 Ors, High Court Land Division Civil Appeal No. 0053 of 2019**, among others.

28. In the instant appeal, the decision of the learned trial Chief Magistrate was delivered on 17th December 2019. This appeal ought to have been

lodged on or by 16th January 2020. The appeal was instead filed on 12th February 2020 (54 days after the delivery of the judgment).

29. **Section 79(2)** of the **Civil Procedure Act** freezes the tabulation of the time allowed to lodge an appeal once a request is made to the court to avail the intending appellant with the decree, order or the record of proceedings to be appealed from until such decree, order or proceedings are availed. My understanding is that the request must be made before the lapse of 30 days from the date of the decision. It cannot be made after the lapse because at that point the intending appellant is already out of time to lodge the appeal. In the present facts, the letter requesting for a typed and certified copy of the record of proceedings in this case was written on 7th February 2022, over two years after the time for lodging the appeal had lapsed. The appellants are, therefore, not entitled to any cover or protection under **Section 79(2)** of the **Civil Procedure Act**.

30. The respondent also complained that the appeal was served on her out of time. She asserted that the memorandum of appeal was served on her on 28th June 2022 which was 2 years and 4 months after its filing. **Order 43** of the **Civil Procedure Rules** does not stipulate the time within which a memorandum of appeal ought to be served on the respondent. Recourse must then be had to **Order 49 rule 2** of the same Rules which provides that all orders, notices and documents required by the Act to be given to or served on any person shall be served in the manner provided for the service of summons. **Order 5 rule 2** of the Rules provides that summons ought to be served within 21 days from the date of issuance. Therefore, in this case, the memorandum of appeal ought to have been served on the respondent within 21 days from the date on which this Court acknowledged its lodgement. This was not done.

31. The appellants neither filed an application for leave to appeal and serve the appeal out of time nor an application to validate the late filing and service of the appeal. Timelines enable the courts to deliver a speedy litigation process to the society. It is trite law that an appeal filed out of time without leave is incompetent and ought to be struck out (see **Geoffrey Nangumya t/a Nangumya & Co. Advocates v Security Plus (U) Ltd, High Court of Uganda at Kampala (Commercial Division) Misc.**

Application No. 0858 of 2021). The Court, therefore, upholds the 1st preliminary objection and finds that the appeal ought to be struck off the Court record with costs for late filing and late service.

32. Considering the above findings, it is unnecessary to delve into the merits of the appeal. Consequently, I make the following orders:

    i. This appeal is hereby struck off the Court record.

    ii. Costs of this appeal and those in the Court below are awarded to the respondent.

Dated this 23rd day of October 2023

Patricia Mutesi

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Hon. Justice Patricia Mutesi

JUDGE