

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

**HOLDEN AT MBALE**

**HCT-04-CV-MA-149-2008**

**(FROM HCCA NO. 0001/2007)**

**(FROM BUSIA CIVIL SUIT NO. 117/2004)**

**YONAH MUKAGA.....APPLICANT**

**VERSUS**

**BWIRE OTEMA.....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN**

**JUDGMENT**

The applicant/appellant Yonah Mukaga filed this Notice of Motion through M/s Mangeni Law Chambers under sections 79, 96 and 98 of the Civil Procedure Act and Article 126 (2) (e) of the Constitution, O.51 r.6 CPR and O.52 r.1 and 3 CPR for orders that:-

- (a) Leave be granted to appeal to the Court of Appeal;
- (b) Leave to appeal to this court be granted; and
- (c) Costs be provided for.

The application is supported by the affidavit of Mr. Yonah Mukaga the contents of which are summarized in the Notice of Motion that:

1. The High Court passed judgment on appeal on the 5<sup>th</sup> day of February 2008.
2. The applicant immediately after passing the judgment instructed Mr. Magellan F. Olubwe his advocate to appeal against the said judgment.
3. The applicant's counsel never appealed as instructed but kept on telling the applicant that he had filed the appeal whereas not.
4. On 17<sup>th</sup> July 2008 the applicant checked the court record and discovered that there was no any appeal and thereafter instructed Mangeni & Co. Advocates to file this application.
5. It is in the interest of justice and equity that court uses its judicial discretion and grants leave to appeal out of time.
6. The applicant is interested in appealing against the judgment of the High Court.
7. It is in the interest of justice and equity that this court grants leave to appeal out of time.

The respondent is represented by M/s Majanga & Co. Advocates. Mr. Bwire Otema filed an affidavit in rebuttal contending inter alia that:

- (i) He was the appellant in HCCA No. 001 of 2007 and judgment of the said appeal was pronounced on 5<sup>th</sup> February 2008. The applicant herein was represented by M/s Okuku & Co. Advocates.
- (ii) Both parties were present when judgment was pronounced by the Deputy Registrar and the right of appeal was explained.
- (iii) The applicant has not explained why he never instructed Counsel James Okuku to lodge in court a notice of appeal.
- (iv) That sometime in September 2008 the respondent herein was served with Misc. Application No.120 of 2008 filed by the applicant in court

through M/s Magellan F. Olubwe & Co. Advocates on 11<sup>th</sup> July 2008 seeking *inter alia* for orders of review of judgment of this court.

(v) That in the supporting affidavit to the application, the applicant did not depone that he had instructed M/s Olubwe to file a Notice of Appeal.

(vi) By conduct the applicant exhibited dilatory conduct in seeking the current reliefs.

I allowed respective counsel to file written submissions in support of their respective cases.

Mr. Obel Majanga learned counsel for the respondent raised a preliminary objection arguing that the present application is incompetent and bad in law and should be struck out with costs without going into its merits. That the laws the applicant has relied on to bring the application do not enable him to do so. Further that the applicant is in a wrong court not clothed with jurisdiction to grant the reliefs sought by the applicant.

In reply Mr. Mangeni for the applicant relies on Article 126 (2) (e) arguing that the cited laws on the application are good laws and further that citing a wrong law in the notice of motion is a mere technicality which is not fatal to the application since it does not occasion any failure of justice to the other party. That typing errors and mistakes on an application are mere technicalities which are outlawed by Article 126 (2) (e) of the Constitution.

Mr. Mangeni further submits that this application is seeking leave of court to extend time for lodging a notice of Appeal as the first step towards appealing to the court of Appeal and there is no way one can proceed to lodge a record of proceedings of any appeal to the court of appeal without observing the first step of filing a notice of appeal as provided under R.76 of the Court of Appeal Rules.

I have meticulously studied the record regarding this case. I have considered the relevant law applicable and the law cited by respective counsel. I have taken into account the submissions by respective counsel.

I note that in this application the applicant is applying for leave to be granted to him to appeal to the court of appeal after extension of time to do so. The application is grounded on sections 79, 96 and 98 of the Civil Procedure Act (CPA) and Article 126 (2) (e) of the Constitution. It is also based on Orders 51 r.6 and 52 r.1 CPR.

Section 79 of the CPA deals with limitation of time for appeal and extension of the same in case of default. Unless otherwise provided every appeal shall be entered:-

- (a) Within thirty days of the decree or order of court.
- (b) Within 7 days of the order of a Registrar.

However, for good cause the appellate court may admit an appeal though the period of limitation has elapsed.

S.96 CPA provides for enlargement of time where the period under consideration is fixed or granted by Court for doing any act prescribed or allowed by the Civil Procedure Act. This can be done from time to time.

S.98 deals with inherent powers of court.

Article 126 (2) (e) of the Constitution requires court to administer substantive justice without undue regard to technicalities. Further to this, O.51 r.6 CPR provides for power to enlarge time fixed for doing any act or taking any proceedings under the Civil Procedure Rules or by order of court.

In view of these self explanatory provisions of the law I am in agreement with Mr. Majanga's skepticism whether the instant application is properly before this court and whether this court is clothed with jurisdiction to grant the reliefs sought. The applicant wishes to lodge a second appeal.

The first appeal was against the decision of a Magistrate Grade I. This court allowed the appeal setting aside the decree of the lower court. A second appeal is a creature of Statute by S.72 of the Civil Procedure Act which also allows appeals from decisions passed *ex parte*. The exception to this is where a law exists which bars an appeal so allowed by S.72 CPA. There is no law brought forward which requires seeking leave of this court before an appeal as the one intended by the applicant is lodged. This lends credence to the submission by Mr. Majanga that the applicant herein does not need leave of this court to appeal to the Court of Appeal.

Leave is only necessary under S.73 CPA where third appeals to the Court of Appeal are allowed on a Certificate of the High Court that the appeal concerns a matter of law of great public or general importance which is not the case in this application. Where the appeal is a creature of statute like the one the applicant intended to file the applicant ought to have given a notice of appeal within 14 days

of the decision against which the desired appeal is intended. This notice has to be lodged in the High Court. It is the court of appeal which can extend the time for sufficient reason. See Rule 5 of the Civil Appeal Rules.

In the instant case the applicant missed a step in that he failed to file a notice of appeal in the High Court within the required 14 days. This time span is a creature of the Judicature (Court of Appeal) Rules, Rule 76 and not the laws relied on by the applicant herein.

The applicant is also seeking leave to appeal to “this court” out of time. I doubt this is the intention of the applicant because he intends to appeal to the Court of Appeal not this court. I do not agree with learned counsel for the applicant that this is a mere typing error or a simple mistake because it ought to be the gist of why he is in court. It can not pass as a mere technicality outlawed by Article 126 (2) (e) of the Constitution. There is no justifiable reason therefore for the applicant to hide under Article 126 (2) (e) of the Constitution because this article is not intended to fraught rules of pleadings and procedure to suit personal conveniences of litigants. I see no technicality in this mistake. It is mere carelessness which cannot be condoned by this court. This court disposed of the appeal in favour of the applicant. The applicant cannot still want to appeal to this Court. The applicant does not mention his wish to file a notice of appeal in his application.

A party who has not filed a notice of appeal cannot file the appeal itself in the Court of Appeal.

Consequently a party who has not filed a notice of appeal cannot apply for leave to extend time to file an appeal before seeking and getting leave to file a notice of appeal. *Y. MUTUNGIREHI V. RWANGWADE & GROUP [1998-2000] HCB 30.*

In *MUTUNGIREHI*'s case (supra) the applicant filed an application in the High Court seeking leave to appeal against the decision and orders of the Chief Magistrate which application had been struck out as incompetent on 24<sup>th</sup> February 1999 because counsel for the applicant did not file a notice of appeal hence the above quoted holding.

In conclusion I will uphold the preliminary point of law raised by Mr. Majanga learned counsel for the respondent that the applicant relied on laws which do not enable him have audience in this court. The application has been brought in a wrong court which is not clothed with jurisdiction to grant the reliefs the applicant is seeking. This application is therefore bad in law, incompetent and is struck out with costs.

**Musota Stephen**

**JUDGE**

**3.3.2011**

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Parties in Court.

Mangeni for Applicant.

Dagira on brief for Majanga Obel.

Kimono Interpreter.

**Mangeni:** Matter for Ruling/judgment.

Court: judgment delivered.

**Musota Stephen**

**JUDGE**

**3.3.2011**