

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 7 OF 2010

SEKYALA JAMES APPELLANT

VERSUS

CHARLES GODFREY KYAKWAMBALA RESPONDENT

Hon. Lady Justice Monica K. Mugenyi

RULING

James Sekyala, the appellant in the present appeal filed Civil Appeal No. 7 of 2010 challenging the decision of Mengo Chief Magistrates Court in Civil Suit 609 of 2007. At the hearing of the appeal counsel for the respondent raised a preliminary objection in which he argued that the memorandum of appeal was filed out of time and therefore improperly before this court. It was Mr. Kabenge's contention that since the judgment appealed from had been delivered on 1st July 2009, the memorandum of appeal should have been lodged in court within 30 days, that is, by 1st August 2009 as provided for under section 79 of the Civil Procedure Act (CPA). Counsel argued that the memorandum of appeal was filed on 10th February 2010 and was, therefore, 6 months out of time. He further contended that the offending memorandum of appeal had never been served upon him. Conceding that under section 79 of the CPA the time taken for preparation of the record shall not be taken into account in computing the cited 30 days, Counsel contended that where a letter requesting for a record of proceedings has never been served on opposite counsel such time shall not be considered. He then cited the case of **Mark Graves vs Balton Misc. Appl. No. 2 of 2010 (HC)** in support of his argument that time limits set by statutes are matters of substantive justice and must be complied with strictly.

On the other hand, learned counsel for the appellant contended that the present appeal was filed within time; a notice of appeal was duly filed on 8th July 2009, and the filing of the memorandum of appeal was delayed by the preparation of the record, which scenario was aptly provided for by section 79(3) of the CPA. Mr. Wameli further contended that the notice and memorandum of appeal were duly served on the law firm that previously handled the matter – M/s Sensuwa & Co. Advocates. He enjoined this court to decide this application without undue regard to technicalities as stated in article 126(2)(e) of the Constitution.

In his reply, counsel for the respondent argued that an appeal in the High Court was instituted by a memorandum and not notice of appeal. He further argued that there was no evidence that the memorandum of appeal had been duly served on the advocates that previously handled the appeal and that he only appeared before this court in the present matter by virtue of a hearing notice issued by court. With regard to the provisions of article 126(2)(e) of the constitution, counsel contended that the cited provision was not intended to be a remedy for defaulting litigants but, rather, was subject to existing statutory law.

Learned counsel then engaged in a discourse on how appeals to the High Court should be instituted, contending that there was confusion among advocates on how this should be done yet the procedure in the High Court was different from that in the Court of Appeal, and in the former court, it is the High Court that seeks record of proceedings. Mr. Kabenge also addressed court on the need for a certificate from the trial (magistrates) court distinctly and separate from the certification of the record of proceedings originating there from. He then contended that while counsel for the respondent had not provided him with the record of proceedings, he had gone ahead to file a typed record of proceedings in court. In conclusion, it was counsel's contention that the record of proceedings was not certified and therefore improperly before court, and there was no certificate from the trial court to indicate how long it had taken to prepare the record of proceedings.

This court did rule at the time that the foregoing discourse would be subject to confirmation that it did indeed arise in respondent counsel's response to the preliminary objection raised. It is a rule of procedure that an applicant's reply to the response from the respondent should be limited to what was raised in the response. This is only fair to ensure that the respondent is availed the opportunity to respond to all the grounds of an application, particularly where such an application is made orally. This court has since confirmed from the transcribed record of the present proceedings that the discourse highlighted above did not arise from Mr. Wameli's response to the preliminary objection. For learned counsel to seek to raise new grounds in reply is not fair to opposite counsel's right to adequately respond to his preliminary objection, and is therefore not acceptable. That discourse shall therefore not be considered under this application. It shall only be alluded to for purposes of clarity to forestall any confusion, real or imaginary, in that regard.

Section 79(1)(a) of the CPA provides that civil appeals shall be instituted within 30 days from the date of the decree or order appealed from. Section 79(2) of the same Act provides for due consideration to be given to the time taken by the lower court in making a copy of the decree or order appealed against, as well as the record thereof, in computing the period of limitation. The inference drawn from this provision is that time of limitation starts to run from the date the decree or order appealed from, and record of proceedings are availed to the intending appellant. This legal position was well conceded by both parties in the present application.

Nonetheless, it was the gist of Mr. Kabenge's objection first that, if the respondent wrote to the trial court seeking the record of proceedings, such letter was not copied to him; and secondly, that the memorandum of appeal has never been served upon him to date. In support of the first objection, Mr. Kabenge referred this court to the case of **Moses Kasibante vs. Electoral Commission Election Petition Appeal Number 007 of 2012**. He also availed this court with the decision in **Nyendwoha Bigirwa Norah vs. Electoral Commission & Another E.P Application No. 23 of 2011 (CA)** to presumably buttress his point.

This court has read the ruling in **Moses Kasibante vs. Electoral Commission** (supra) that judgment in depth and finds no reference whatsoever therein to the requirement for an appellant to serve a respondent with the letter seeking a record of proceedings. Counsel, most helpfully took liberty to highlight the text of that ruling that he sought to rely upon. However, that text simply stated that a party vested with the duty to take a particular step in any legal process should do so. In that text the step that was in reference was the action to prosecute the appeal. What is more, in the case of **Nyendwoha Bigirwa Norah vs. Electoral Commission & Another** (supra), the Court of Appeal rightly construed the rules applicable to appeals in the Court of Appeal and held that failure by the respondents to serve the applicant with a copy of the letter requesting for the proceedings immediately it was written to court amounted to failure by the respondents to take an essential step in prosecuting the appeal. In deciding as they did, their lordships referred to Rules 83(2) and (3) of the Judicature (Court of Appeal Rules) Directions. For ease of reference the cited provisions are reproduced below:

Rule 83(2) **“Where an application for a copy of the proceedings in the High Court has been made within 30 days after the decision desired to be appealed against has been made, there shall, in computing the time within which the appeal is to be instituted, be excluded time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.”**

Rule 83(3) **“An appellant shall not be entitled to rely on sub-rule (2) of this rule unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service.”**

This court has not come across similar legal provisions in respect of appeals to the High Court. In his remarks on certification and certificates, Mr. Kabenge did not cite the legal provisions he sought to rely on in advancement of his argument. Be that as it may, the law governing civil appeals from magistrates' courts is contained in section 220 of the Magistrates Courts Act (MCA). It is, however, silent on counsel's purported certificate from the trial magistrate. Civil appeals to the High Court are also governed by Order 43 of the CPR. That Order, too, is silent on any purported certificate. The only provisions this court found with regard to certification of judgments in the High Court are Order 43 rules 29 and 30. For ease of reference, the rules are reproduced below.

Rule 29 **“Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the High Court and on payment of the requisite charges.”**

Rule 30 **“A copy of the judgment of the decree, certified by the High Court or such officer as it appoints for this purpose, shall be sent to the Court which passed the decree appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the High Court shall be made in the register of civil suits.”**

The provisions above do not provide for the issuance of any certificate neither do they place a duty on the High Court to seek the record of proceedings, as was counsel’s argument. Rule 29 simply provides for the High Court sitting in its appellate jurisdiction to furnish certified copies of its own judgment and decree to parties upon request and payment by them of requisite charges. This is not tantamount to the High Court obtaining judgments and decrees from trial courts and certifying them at the request of the parties, as this court understood Mr. Kabenge to state. Finally, rule 30 simply directs the High Court sitting in appellate capacity to furnish the court from which an appeal originates with its judgment and decree. I find it curious that Mr. Kabenge sought to rely on the decision in **Nyendwoha Bigirwa Norah vs. Electoral Commission & Another** (supra) yet he was very well aware that he was appearing in a matter before the High Court. His objection, premised as it is on rules of procedure applicable to the Court of Appeal not the High Court, is clearly not sustainable.

With regard to the alleged non-service of the memorandum of appeal on counsel for the applicant, this court finds appropriate direction from the case of **F.L. Kaderbhai & Another vs. Shamsherali Zaver Virji & Others Civil Application No. 20 of 2008 (SC)**. The matter under consideration in that case was an application for enlargement of time within which to file a memorandum of appeal, but is quite instructive to the matter under consideration presently. In that case, after finding that the applicants had illustrated interest in having their appeal heard, Okello JSC cited with approval the decision in **Zam Nalumansi vs Suleiman Lule Civil Application No. 2 of 1999** and held:

“It would, in my view, be a grave injustice to deny an applicant such as this one, to pursue his rights of appeal simply because of the negligence of his lawyers when it is fairly well settled now that an error of counsel should not be visited on his client.”
(emphasis mine)

Although **F.L. Kaderbhai & Another vs. Shamsherali Zaver Virji & Others** (supra) relates to the procedure in appeals from the court of appeal to the supreme court it is good authority on the injustice of visiting the mistakes of counsel upon their clients.

In the premises, counsel's preliminary objection is hereby over-ruled. It is ordered that counsel for the appellant serve opposite party with his memorandum of appeal forthwith, and the appeal proceed to be heard on its merits. I so order.

Monica K. Mugenyi
JUDGE

23rd November, 2012