

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-CA-0033-2020**

(ARISING FROM BUSHENYI CIVIL SUIT NO. 0245 OF 2008)

1. TUMUSIIME JOAB

T/A JB BAKERY

2. JBO SWEET BREAD CO. LTD ::::::::::: APPELLANTS

VERSUS

SUN SARA AGRO LIMITED ::::::::::: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] The Respondent herein sued the Appellants in Bushenyi Chief Magistrate Court for recovery of UGX. 11,000,000/= arising out of supply of cooking oil by the Respondent to the Appellants. After a full trial, the learned trial Magistrate entered judgment on **27th/02/2020** in favor of the Respondent.

The Appellants feeling dissatisfied with the judgment and orders of the trial court, filed a notice of appeal on **4th/03/2020** and subsequently a memorandum of appeal on **22nd/07/2020**.

When the appeal came up for hearing, counsel for both parties prayed and were granted their prayer to proceed by way of written submissions.

Representation.

[2] The Appellants were represented by *M/s Twinamatsiko & Agaba Advocates* while the Respondents were represented by *M/s Ngaruye Ruhindi, Spencer & Co. Advocates*.

When this appeal came up for the first time, Counsel for the Respondent submitted that the matter was last in court on **23rd/11/2021** and on that date a schedule was made for filing of written submissions. However, only the Respondent filed their

submissions. Counsel prayed that the appeal be dismissed for want of prosecution and in the alternative, counsel prayed that the Respondent's submissions be considered and the appeal be determined.

The discretion is with the court on how to proceed where a party has not made submissions as and when ordered to do so.

Order 17 rule 4 of the Civil Procedure Rules gives guidance in this regard. It provides that,

"Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other necessary act to the further progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately."

Having found no submissions from the Appellant or their counsel on the court record, and being guided by **Order 17 rule 4**, I have therefore considered only the Respondent's submissions in coming up with this judgment.

The Respondent's case

[3] Counsel for the Respondent raised a preliminary point of law contending that the Appeal be struck out for being incompetent by reason of having been filed out of time. Counsel submitted that the judgment and decree of the Magistrate Grade one which the Appellants were appealing against was delivered on **27th/02/2020**. That the memorandum of appeal was filed in court on **22nd/07/2020** and endorsed by the Registrar on **29th/07/2020**. That at the time of filing the appeal, the Appellants were out of time. It was counsel's submission that the appeal was filed after over five months from the date of the judgment instead of the mandatory thirty days provided for under **Section 79(1) of the Civil Procedure Act**. Counsel cited **Luzinda George vs Edward Wasswa HCCA no. 39 of 2009 and Ogbuounye Gerald vs Kawooya John Alex HCCA no. 40 of 2016.** Counsel prayed for the appeal to be dismissed on this.

Counsel for the Respondent went further to submit that even if the Appellants were to argue that they had requested for the record of

proceedings and the same had not been availed to them, the letter requesting for the record was written on **10th/06/2020** and filed in court on **11th/06/2020**. This was six months from the date of judgment.

Analysis and decision.

[4]An appeal filed out of time and without leave of court is incompetent and will be struck out for being incompetent. (See **Maria Onyango Ochola and others vs J Hannington Wasswa [1996] HCB 43 and Hajj Mohammed Nyanzi vs Ali Sseggane [1992 – 1993] HCB 218**).

The law regulating the time within which an appeal to the High Court is to be filed is provided for in **Order 43** of the Civil Procedure Rules (CPR) and **Section 79** of the Civil Procedure Act (CPA).

Order 43 rules 1 and 10(3) of the CPR provide as follows:

“(1) Every Appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the Court or to such officer as it shall appoint for that purpose.

(10) (3) Either party may apply in writing to the court from whose decree the appeal is preferred, specifying any of the papers of the court of which he or she requires copies to be made; and copies shall be made at the expense of and given to the applicant on payment of the requisite fees.”

Section 79 of the CPA on the other hand provides that:

“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

(b) ...but the appellate Court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.

(2) In computing the period of limitation, prescribed by this Section, the time taken by the Court or Registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.”

[5] I have examined the record of the lower court; the judgment from which this appeal emanated was delivered on **27th/02/2020**. From the record of the appeal, the Appellants filed a memorandum of appeal on **22nd/07/2020**. This was more than four months after which was clearly out of time.

The Appellants wrote a letter requesting for the record of proceedings on **10th/06/2020** from the lower court and filed it with the court on **11th/06/2020**. This was also out of time. The Appellants cannot benefit from the exception under **Section 79(2) of the CPA**.

The Appellants first filed a notice of appeal on **04/03/2020** with this court. Counsel for the Respondent submitted that appeals to the High Court are commenced by a memorandum of appeal and not by notice of appeal. Counsel invited this court to strike out the notice of appeal.

In **Maria Onyango Ochola and Others vs J. Hannington Wasswa (supra)**, it was held that a notice of appeal does not commence an appeal in the High Court from the judgment of the Magistrate's Court. An appeal is commenced by a memorandum of appeal lodged in the High Court.

I agree with counsel for the Respondent that a notice of appeal does not commence an appeal to the High Court. The notice of appeal is therefore struck off the record of the court.

Having found that the Appellant's memorandum of appeal is incompetent for being filed out of time, I do not find it gainful to go into the merits of this appeal.

Consequently, this appeal is struck out with costs to the Respondent.

I so order.

Dated, delivered and signed at Mbarara this 20th day of July **2022**.


Joyce Kavuma
Judge