

**IN THE HIGH COURT OF UGANDA AT KAMPALA
SITTING AT KOLOLO**

CIVIL DIVISION

HCT-00- CV- CA- 0040 - 2009

BUSO FOUNDATION LTD ::::::::::::::::::::::::::::::APPELLANT

VERSUS

BOB MATE PHILIPS:.....RESPONDENT

BEFORE: HON. JUSTICE AKIIKI – KIIZA

RULING

This is an application to strike out the Notice and Memorandum of appeal. It is by way of a Notice of Motion and is taken out pursuant to O. 43 rr 1 & 27, C.P.R., O. 52 rr 1 & 3, C.P.R. SS 79 (1) (a) and 98 of C.P.A. It is supported by one Moses Paul Sserwanga's affidavit.

The Notice of Motion is on the following grounds:-

- a) The appeal was filed out of time and contrary to the law on commencement of appeals to the High Court.
- b) The Respondent has not sought an extension of time to appeal out of time.
- c) The Memorandum of Appeal seeks to recover land from a bonafide purchaser for value who was not a party to the execution proceedings.
- d) The orders sought from this Honourable Court would be in vain and unenforceable since they would affect the rights of a third party.
- e) That it is just and equitable that this application be allowed and the appeal be struck out with costs.

The supporting affidavit set out 20 grounds but I will restrict myself, to those relevant to this application.

- (10) That the said appeal was commenced by the filing of a Notice of Appeal on the 27th May, 2009, instead of the prescribed Memorandum of Appeal. **(A copy of the Notice of Appeal is attached hereto and marked as Annexure “C”).**
- (11) That the Memorandum of Appeal was filed on the 18/8/2009, after a lapse of the prescribed 30 days within which to lodge the appeal (a **copy of the Memorandum of Appeal is attached and marked as “D”**).
- (12) That the Notice of Appeal is not the prescribed mode of commencing appeals to the High Court, the subsequent Memorandum of Appeal is a nullity.

Paragraphs 13 – 18 go to the merits of the appeal, which is not the subject matter of this application, and I do not intend to dwell on them. The deponent then prays this application be allowed and the appeal be struck out.

On the other hand, the respondents filed an affidavit in reply which was deponed by Waniale Allan. I will reproduce the material paragraphs herein under:-

- 3: That whereas it is conceded that an appeal is instituted by a memorandum of appeal, the above appeal was filed within the prescribed 30 days.
- 4: That judgment was entered on the 15th day of May, 2009 and the respondent filed an application requesting for a copy of the proceedings dated the 22/5/2009 **(attachment “A”)**.
- 5: That under the Civil procedure Act, time taken by Court to prepare a judgment/Decree/Order and/or copy of the proceedings upon which the appeal is founded, is excluded in the computation of time.
- 6: That the Order appealed from was issued and/or prepared by the Trial Magistrate on the 20/5/2009 **(attachment “B”)**.
- 7: That the certified copy of the proceedings was certified on the 28/7/2009, and the Memorandum of Appeal was received by the Court on the 18/8/2009.
- 8: That it is clear the respondent’s appeal was well within the 30 days as prescribed for filing an appeal.

The next paragraphs (9 – 14) are not relevant to this application as they concern the merits of the appeal.

He prayed for dismissal of application with costs.

Having carefully listened to the submission of both Learned Counsel and having perused the filed Court papers and having reviewed the law applicable, the following are my findings:-

It is common ground that the law applicable to appeals to the High Court is embodied in O.43 C.P.R. and Section 79 of the C.P.A.

O. 43 r 1 of C.P.R. provides as follows:-

(i) 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.

Section 79 of C.P.A. deals with Limitation of appeals.

“ 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)

as the case may be appealed against; 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.”

In the instant case it is common ground that, the judgment/order of the lower Court was entered on the 15/5/2009. It is also not disputed that the Memorandum of Appeal was filed in this court on the 18/08/2009. This is about 3 months from the date of the lower court’s decree/order and prima facie offends the 30 day rules prescribed by S. 79 (1) of C.P.A., unless the case fell within the exception as provided by S. 79 (2) C.P.A. The learned Counsel for the applicant is of a view that, whereas the respondent’s Counsel wrote to the lower Court asking for the proceedings and Decree/Order, they never copied that letter to them. That this was contrary to the Court of Appeal Ruling in the case of **NYENDWOHA BIGIRWA VS. THE RETURNING OFFICER BULIISA DISTRICT & ANOR. UCA CIVIL APPEAL 23/2011** where it was held that, failure by the appellants to serve the respondent with a letter requesting for the lower Court’s

Decree/Order or proceedings appealed from, amounted to failure by the appellant taking an essential step in prosecuting his/her appeal which was fatal to the appeal and the appeal was struck out, as it was filed out of time.

On the other hand the Learned Counsel, for the respondent submitted that, the **NYENDWOHA Case** cited by the Learned Counsel for the applicant governed appeals to the Court of Appeal and that the rules governing appeals to that Court specifically requires the appellant to copy his letter of request to the lower court to be served on respondent if he had to benefit from the exclusion of the time taken by the lower court to supply the proceedings and decree/order sought to be appealed from. And that such specific requirement was absent in appeal to the High Court which is governed by O. 43 (1) C.P.R. Section 79 (1) and (2) C.P.A.

Unfortunately though Mr. Kagwa, the Learned Counsel for the Applicant undertook to supply the above authority to the Court, he did not live up to his promise, and I was denied the opportunity to peruse that Court of Appeal Ruling.

However, be it as it may, I am of a considered view that appeals to the High Court, are governed by the clear provisions of O. 43 C.P.R. and S. 79 of C.P.A. In both provisions, there is no mention requiring the appellant to copy and serve the letter to the lower court requesting for the decree/order and the proceeding to enable it prepare his appeal. He might do it as courtesy but not as a legal obligation.

S. 79 (2), of C.P.A. excludes the time taken by the Court to supply the lower Courts proceedings and order/decreed sought to be appealed from. (See the case of **EPHRAIM ONGOM & ANOR VS FRANCIS BENEGA, S.C.U. Civil Appeal 10/87** and the case of **ASADI WEKE VS LIVINGSTONE OALA [1985] HCB 50**).

In the premises, therefore, I find that, there is no legal requirement for the appellant to copy and serve his request to the lower Court's for the decree/order and proceedings to the respondent in appeals to the High Court. He could however as a matter of courtesy copy the same to the respondent.

In the instant case, the respondent requested for the lower Court's proceedings on the 18/5/2009. The Court received that request on the 22/5/2009. The proceedings were certified on the 28/7/2009 and the Memorandum of Appeal was received in Court on the 18/08/2009. All this is in the affidavit in reply and there is no affidavit in rejoinder challenging these averments, hence they are to be taken as uncontested by the applicant. (See **MASSA VS ACHEN [1978] HCB 297**).

The total sum of the above is that, the respondents appeal was lodged in time by the Memorandum of Appeal filed on the 18/08/2009. The time between the 15/5/2009 and 18/08/2009 is to be excluded under S. 79 (2) C.P.A.

As pointed out earlier on in my Ruling, the other issues raised by Learned Counsel for applicant goes to the substance and merit of the appeal which are beyond his application.

All in all this application fails with costs to the respondent. Order accordingly.

Justice Akiiki – Kiiza

Judge

06/06/2013.

06/06/2013: Namunsene holding brief for Kyaze.

No one for applicant.

Court: Ruling read in open Court.

Justice Akiiki – Kiiza

Judge

06/06/2013.