

and judgment was entered in her favour on 12/2/2007. Dissatisfied with the judgment of the LC III Court, the Appellant herein instructed *M/s Kwizera & Co. Advocates* file an to appeal against the same on his behalf.

On 19/2/2007, the Appellant's Counsel notified the Chief Magistrate's Court at Mbarara of the Appellant's intention to appeal, and applied that the Chief Magistrate directs the LC III Court Chairperson to forward the lower courts' record to enable the said Advocates to pursue the appeal. On 28/02/ 2007 the Chief Magistrate directed the Chairman LC III Kanoni Sub - County to forward the lower courts' record to enable the Appellant file his appeal. The lower court record was forwarded, and availed to the Appellants on 7/5/2007; upon which he paid fees for the same under receipt No. 3413463, and proceeded and on 10/5/2007 filed his memorandum of appeal in the Chief Magistrate's Court.

On 9/5/2008, Counsel for the Respondent, *M/s Katembeko & Co Advocates*, raised a preliminary objection that the appeal was filed out of time, and the Chief Magistrate upheld the objection and accordingly struck out the appeal with costs. It is this order to strike out the appeal that the Appellant has appealed against and seeks orders that the appeal be set down for hearing before the Chief Magistrate, and that he be awarded costs of this appeal.

The Appellant preferred three grounds of appeal as follows;

- 1. The trial Chief Magistrate erred on the law and misdirected himself on the evidence when he found that the Appellant's appeal vide MBR-00.CV.CA-005/2007 was filed beyond the statutory period.***
- 2. The trail Chief Magistrate erred in law when he disregarded the Appellant's application for proceedings and instead held that a Notice of Memorandum of Appeal under S.33(3) of the Local Council Court's Act, would in effect provide for a situation where proceedings have not been obtained in time.***

3. The trial Chief Magistrate erred in law and misdirected himself on the evidence when he struck out appeal No. MBR-00-CV-CA-005/2007 thereby occasioning a gross miscarriage of justice to the Appellant.

Consideration.

GROUND 1.

Section 33 (2) of the Local Council Courts' Act which governs time within which to lodge appeals in matters within or originating from Local Council courts provides that an appeal shall be presented in a memorandum signed by the Appellant setting forth the grounds of appeal within 14 days of the decision being appealed.

The guiding principle, however, is that where an application for a copy of the proceedings has been made to the court the period for preparation and delivery of the proceedings shall be not be reckoned with in the computation of the time within which to lodge the appeal. It follows that the time for lodgment of an appeal does not begin to run against the intending appellant until that party receives a copy of the proceedings against which intends to appeal. See ***Godfrey Tuwangye Kazoora vs. Georgina Kitarikwenda [1992 – 1993] HCB 145.***

In the instant case, the record shows that the Appellant filed a notice of intention to appeal, and applied for a copy of the lower courts' record, which the Chief Magistrate's Court acknowledged receipt of on 19/02/2007, and called for the lower courts' record on 28/2/2007. The Appellant received the record on 7/5/2007 and paid fees for the same and obtained a receipt thereof vide No.3413463, and filed his appeal on 10/5/2007; which was just three days after the Appellant had received the record of proceedings. Accordingly, the appeal was filed well within

the prescribed time, and the learned Chief Magistrate erred to strike out the appeal as incompetent on account of limitation of time. Ground 1 of the appeal succeeds.

GROUND 2

The main complaint in this ground of appeal hinges on provisions of **S.33 (3) of the Local Council Court's Act(supra)** which stipulates that;

“The appellate court shall cause a notice of memorandum of appeal to be served on the respondent and the notice shall be substantially set out in form E of the Joint Schedule of this Act”.

Interpreting this provision in his ruling (at page 2) the Learned Chief Magistrate held that;

“However Section 33(3) provides for a Notice of Memorandum of Appeal to be served upon the other party. That Notice would in effect provide for a situation such as this one where the proceedings have not been obtained in time”.

Counsel for the Appellant submitted, and correctly so in my view, that the finding above was a misdirection by the Learned Chief Magistrate. The reading of **S.33 (3) (supra)** simply places a duty on the appellate court to issue a notice of memorandum of appeal on to be the Respondent. The provision logically presupposes that the memorandum of appeal is already filed on court record, and this can only be possible after the lower court's record has been availed to and/ or obtained by the intending appellant. Accordingly, the purpose and effect of **S.33 (3) (supra)** is to allow for hearing notice of the memorandum of appeal to be served on the Respondent, and this cannot be done where the proceedings have not been obtained in time. Ground 2 of the appeal succeeds.

GROUND 3.

The main complaint in this ground of appeal is that striking out of the appeal occasioned gross miscarriage of justice to the Appellant. Counsel for the Respondent submitted, in reply, that the trial court observed in its ruling that notices under S.33 (3) (*supra*) would provide for a situation where the proceedings have not been obtained in time, and that if this was an oversight on part of the Chief magistrate, the error does not amount to an important question of law nor does it occasion any substantial miscarriage of justice.

I respectfully disagree with the submissions of Counsel for the Respondent. Where a decision of a court based on misdirection on facts and/or the law has the effect of effectively shutting out the rights of a party to a case, that decision, in my view, would cause a substantial miscarriage of justice. As was held in ***Matayo Okumu vs. Francisko Amudhe & 2 O'rs [1979] HCB 229***, a decision appears to have caused a miscarriage of justice where there is a *prima facie* case that an error has been made.

In the instant case, the Learned Chief Magistrate erroneously struck out the appeal that it was filed out of time whereas not. This evidently occasioned a miscarriage of justice, and it ought not to be left to stand. Ground 3 of the appeal succeeds.

The net effect is that the entire appeal succeeds and it is allowed with the following orders:-

- 1. Appeal No. MBR – 00 – CV – CA – 0005 – 2007 be set down for hearing before the Chief Magistrate's Court at Mbarara.***
- 2. The Appellant is awarded costs of this appeal.***

BASHAIJA K. ANDREW

JUDGE

22/07/2013