

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0002 OF 2015**

1. KELLIA OBAYA }  
2. PACURYEMA MARGARET } ..... APPELLANTS

**VERSUS**

OVURU STEPHANO ..... RESPONDENT

**Before: Hon Justice Stephen Mubiru.**

**RULING**

When this appeal came up for hearing on 16<sup>th</sup> September 2016, counsel for the respondent, Mr. Richard Bundu raised a preliminary objection contending that the appeal be struck out for being incompetent by reason of having been filed out of time without any prior order of court enlarging the time for filing the appeal. He submitted that the appeal had been filed on 16<sup>th</sup> April 2015 yet the judgment appealed was delivered by the trial court on 5<sup>th</sup> January 2015. He said this contravened s 79 of *The Civil Procedure Act* which limits the time within which an appeal of this nature can be filed to a period of 30 days from the date of the judgment. He cited *Board of Governors and Headmaster of Gulu Secondary School v Phinson E. Odong H.C. Civil Appeal No. 2 of 1990* as authority for his submission that an appeal filed out of time is incompetent and ought to be struck out with costs. Counsel for the respondent, Mr. Paul Manzi sought and was granted an adjournment in order to reply to the preliminary objection.

In his reply made on 30<sup>th</sup> September 2016, counsel for the respondent argued that although Order 43 rule 1 of *The Civil Procedure Rules* provides that a civil appeal is commenced by way of filing a memorandum of appeal, it was decided in *Alcon International Limited v Kasirye, Byaruhanga and Company Advocates [1995] III KALR 91*, that it can as well be commenced by a Notice of Appeal. The judgment of the trial court was delivered on 5<sup>th</sup> January 2015 and the Notice of Appeal was filed two days later, on 7<sup>th</sup> January 2015.

He submitted further that according to s 79 (2) of *The Civil Procedure Act*, the period of time it takes the court to prepare a certified copy of the record of appeal is not reckonable in computation of the thirty days within which the appeal should be filed. This provision is invoked by compliance with O 43 r 10 (3) of *The Civil Procedure Rules* which requires an intending appellant to write to court requesting for certified copies of the record. He submitted that this requirement was complied with when counsel for the appellant wrote such letters on 6<sup>th</sup> January 2015 and 2<sup>nd</sup> February 2015, only that they were inadvertently not included in the compiled record of appeal. He cited *Julius Rwabinuuni v Hope Bahimbisomwe [2009] HCB 23*; *Godfrey Magezi and Brian Mbaziira v Sudhir Ruparlelia [2005] ULSR 82* and *Mukasa Anthony Alice v Baiga Lulume H.C. Election Petition No. 18 of 2007*, in support of his submission that there is no legal provision, similar to the one in appeals to the Court of Appeal, requiring service on the opposite party, of a letter requesting for a record of appeal in an appeal lying to the High court and that non compliance with the practice is not fatal. Lastly, he argued that the appellant had filed a provisional memorandum of appeal filed on 4<sup>th</sup> February 2015, which was filed within time, and for all those reasons court should overrule the objection with costs.

An appeal filed out of time without the leave of court is incompetent and will be struck out as incompetent (see *Maria Onyango Ochola and others v J Hannington Wasswa [1996] HCB 43* and *Haji Mohammed Nyanzi v Ali Ssegane [1992 – 1993] HCB 218*). From the submissions of counsel for both parties, it is common ground that the law regulating the time within which an appeal to the High Court is to be filed is embodied in Order 43 *The Civil Procedure Rules* and Section 79 of the *The Civil Procedure Act*.

Order 43 rules 1 and 10 (3) of *The Civil Procedure Rules* 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

On the other hand, the relevant provisions of section 79 of *The Civil Procedure Act* are as follows;-

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.”

The undisputed fact is that the judgment appealed was delivered by the trial court on 5<sup>th</sup> January 2015 and that the memorandum of appeal was filed three months later, on 16<sup>th</sup> April 2015. This was clearly out of time. However, counsel for the appellant contends that prior to that a notice of appeal had been filed on 7<sup>th</sup> January 2015 and this together with the letters requesting for a certified copy of the record of proceedings filed on 6<sup>th</sup> January 2015 and 2<sup>nd</sup> February 2015, as well as the provisional memorandum of appeal filed on 4<sup>th</sup> February 2015 are sufficient to trigger s 79 (2) of *The Civil Procedure Act* so as to suspend the commencement of the thirty days to such a time as it took the trial court to avail the appellant a certified copy of the record of proceeding requested for ( see *Ephraim Ongom and another v Francis Binega Donge, S.C. Civil Appeal No. 10 of 1987* and *Asadi Weke v Livingstone Oala [1985] HCB 50*). Although the provision does not specify the time frame within which the record of proceedings has to be applied for, it is only logical that the application for the record of the proceedings has to be made before the expiry of the thirty days from the date of judgment.

The documentation on the court record indicates that this was done. Although learned Counsel for the respondent argued that the respondent and counsel were never copied any of the letters or the provisional memorandum of appeal, neither Order 43 of *The Civil Procedure Rules* nor s 79 of *The Civil Procedure Act* expressly require an intending appellant to copy and serve such letters. It may be done out of courtesy, prudence and practice but not as a legal obligation. Therefore, I find that, there is no legal requirement that obliged the appellant to copy and serve

his request for a certified copy of the trial Court's record of proceedings to the respondent this being an appeal to the High Court, rather than from the High Court. He should however as a matter of courtesy and practice, have copied the same to counsel for the respondent, or at least included the same in the record of appeal, in which case perhaps this objection would not have been raised.

The decision in *Maria Onyango Ochola and others v J. Hannington Wasswa* [1996] HCB 43 supports the submissions of counsel for the appellant because it was held in that case that all the intending appellant needed to do was to formally and specifically request for a certified copy of the proceedings in order to benefit from the exemption under section 79 (2) of *The Civil Procedure Act*. Once that is done, the computation of the 30 days prescribed within which to file an appeal should be reckoned from the date the court notifies the litigant that the certified copy of the court record is ready for collection (see *James Mutoigo t/a Juris Office v Shell (U) Ltd, H.C. Misc Civil Application No. 0068 of 2007* and *Tuwangye Kazzora v Georgina Katarikwenda* [1992 – 93] HCB 145).

Regarding the argument by counsel for the appellant that the Notice of Appeal was sufficient to commence the appeal, it was decided in *Maria Onyango Ochola and Others v J. Hannington Wasswa* (*supra*) 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. In that case, the court observed that the notice of appeal filed did not specifically state that the appellants desired to obtain a certified copy of the proceedings before instituting their appeal or filing a memorandum of appeal. Secondly the memorandum of appeal did not state that the delayed filing was caused by the non-availability of a copy of the proceedings of the Chief Magistrate and for those reasons the court found that the appeal was incompetent.

From the record of appeal, there is no indication as to when specifically the certified true copy of the record of proceedings and judgment was provide to the appellant or his counsel to enable them take appropriate action. This is ordinarily evidenced by a certificate of the trial court included in the record of appeal indicating the date upon which such a record was availed to the

appellant. In the instant case, the record of proceedings was availed to the appellant without evidence of when it was availed. The record bears an undated certification stamp of the Chief Magistrates Court of Nebbi. For the Appellant to rely on section 79 (2) of *The Civil Procedure Act* it is absolutely necessary to specify when the record was supplied. Without such evidence, the provision cannot be invoked for purposes of excluding the time taken for preparation of the record. For the appellant to rely on the time to be taken for preparation of the record of proceedings, it is incumbent upon it to supply the court with the time when the record was availed (see *Tight Security Ltd v Chartis Uganda Insurance Company Limited and another, H.C. Civil Appeal No. 14 of 2014*). In absence of such evidence, there is no material presented to this court on basis of which it can be decided that the memorandum of appeal filed on 16<sup>th</sup> April 2015 was filed within 30 days from the date the appellant was availed a certified copy of the record of proceedings, since that date is unknown. The appellant has failed to discharge the burden of proving this as a fact.

In absence of such evidence, what then is left for the appellant is the provisional memorandum of appeal which was filed 28 days after the judgment, on 4<sup>th</sup> February 2015. Unfortunately for the appellant, a provisional memorandum of appeal is not a document capable of commencing a civil appeal since it is “unknown” to the law. In *Mayanja Grace v Yusufu Luboyera [1977] HCB 133* where the appellant purported to lodge and appeal by filing a "provisional Memorandum of appeal" and later filed the Memorandum of appeal but out of time, the court held that the provisional memorandum of appeal was not a proper document to be considered in computing the time. Similar decisions can be found in *Muhutu George v Mpengere Bulasiyo [1982] HCB 55* and *Westmont Land (Asia) BHD v The Attorney General [1998-2000] HCB 46*.

However considering the peculiar facts of this appeal, the appellant having taken all reasonable steps to take benefit of the exception in s 79 (2) of *The Civil Procedure Act* and the only lacuna being his failure to disclose the date when the certified copy of the record of proceedings was availed to him, rather than strike out the appeal on that account I am inclined instead to invoke the power of this court under s 79 (1) (b) of *The Civil Procedure Act* for good cause, to admit the appeal though the period of limitation prescribed elapsed and it has not been proved that the appeal was filed within thirty days of the record being availed to the appellant.

The good cause justifying allowing the appeal to proceed in this case is that the subject matter of the dispute being land, it is in the best interests of both parties that it is decided on its merits, considering that the appellant did everything necessary to ensure that he was not caught by limitation, but for the minor slip.

Because of appellant's procedural slip in not including in the record of appeal documents showing steps he took in availing himself of the provisions of section 79 (2) of *The Civil Procedure Act*, yet he had them save for the certificate of time it took the trial court to prepare the record of appeal, which slip has necessitated this objection, the costs incidental to the objection shall be met by the appellant. The appellant is further directed to file a supplementary record of appeal incorporating the missing documents, and to serve the same on counsel for the respondents, before the next date fixed for the hearing of this appeal.

Dated at Arua this 13<sup>th</sup> day of October 2016.

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Stephen Mubiru,  
Judge