

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL APPEAL NO. 23 OF 2020

[ARISING OUT OF CIVIL SUIT NO. 497 OF 2018]

**CHINA CIVIL ENGINEERING
CONSTRUCTION CORPORATION LTD:..... APPELLANT**

VERSUS

**BUBERA GENERAL
CONSTRUCTION LIMITED :..... RESPONDENT**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Appellant filed this appeal arising from the decision of Her Worship Nabaasa Ruth, the then Chief Magistrate of Nakawa in Civil Suit No. 497 of 2018 delivered on the 28th February, 2020 against the respondent for payment of Ugx. 38,855, 654/= general damages, interest and costs of the suit. The appellant filed its notice of appeal on the 10th March, 2022 with grounds for determination therein and prayed that the appeal be allowed, the chief magistrate's decision be set aside and the appellant awarded costs of this appeal and in the trial court.

When the appeal first came up for hearing before this court, the respondent raised preliminary points of law in regards to the matter for determination before this court that;

1. The appeal was commenced by a notice of appeal contrary to Order 43, Rule 1 of the Civil Procedure Rules S. I No. 71-1

2. The appellants filed a memorandum of appeal two years after the delivery of judgement contrary to section 79 (1) (a) of the Civil Procedure Act.

At the hearing, the parties were advised to file written submissions to the preliminary objections which I have had the occasion of reading and considered in the determination thereof.

The appellant was represented by *Ms. Nanyonjo Grace* whereas the respondent was represented by *Mr. Kamyia Stuart*

Whether the Appeal is competently before the court?

The respondent submitted that the Order 43, Rule 1 and 2 of the CPR require that every appeal be instituted by a memorandum of appeal in a prescribed form. Counsel relied on the case of Justice B. Kainamura in *Ogbuonye vs Kawooya Civil Appeal No. 40 of 2016* where it was stated that the mode of appealing from the magistrates court to the high court is clearly stated under Order 43, Rule 1 of the CPR and its by was of a memorandum of appeal. He further submitted that the commencement of the appeal by a notice of appeal offends Order 43, Rule 1 of the CPR, an abuse of court process and this court should be pleased to strike out the notice of appeal with costs.

On filing the memorandum of appeal out of time, counsel submitted that section 79 of the Civil Procedure Act is instructive as it provides that except as otherwise specifically provided in any other law, every appeal shall be entered within thirty days of the date of the decree or order of court. The only exception to the 30 days' rule is where good cause is shown for extension of time. The respondent submitted that in computing 30 days, the time taken by court in preparing the record of appeal shall be excluded.

Counsel relied on the case of **Miggadde Richard & Ors vs Nakibuule Sandra & Ors**, where it was held that appeals from the magistrate Grade one and chief magistrate shall be lodged in the High court within 30 days from the date of decree or order. He further relied on the case of *Ogbounye vs Kawooya Civil*

Appeal 40 of 2016 where court stated that the rationale for the timelines under section 79 (1) (a) is to avoid delays in administering justice and the subsequent provisions are designed to dictate a time schedule within which certain steps ought to be taken, the delays must be satisfactorily explained.

Counsel thereby submitted that the memorandum of appeal was filed as an afterthought after 2 years which is out of time. He further stated that the conduct of the appellant is not only dilatory but also inexcusable and delay defeats equity and equity aids the vigilant and not the indolent. Counsel submitted that the appeal process adopted by the appellant is marred by illegalities and once an illegality is cited, it overrides all questions of pleading including admissions therein as was stated in *Makula International Limited vs His Eminence Cardinal Nsubuga & Anor [1982] HCB at 11*. He therefore submitted that this appeal is incompetent and should be dismissed with costs to the respondents.

The appellants submitted that the former advocates of M/s A. Mwebesa & Co. Advocates had lodged a notice of appeal on the 10th March, 2020 as well as a request for the record of proceedings which was a clear error on their part and perhaps the reason why the appellant withdrew instructions from them.

Counsel relied on the case of *Godfrey Magezi & Anor vs Sudhir Ruparelia Civil Application No. 10 of 2002* where court noted that it is now settled that an omission or mistake or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of his appeal thereby denying him justice. Counsel submitted that this being the case where the former advocate's error of proceeding under a wrong procedure cannot be visited on the appellant who does not draft and file these documents. He therefore prayed that this objection be dismissed.

On the appellant filing a memorandum of appeal two years after delivery of judgement contrary to section 79 (1) (a) of the Civil Procedure Act, the appellant submitted that the firm KTA Advocates were instructed by the appellant and filed a notice of change of instructions on the 15th July, 2020 and served the same

on the respondent. This was to take over conduct of the matter from the former lawyers who had lodged a notice of appeal on the 10th March, 2020 as well as a request for the proceedings.

Counsel further argued that at the time, the record was not yet prepared and it was on further follow up in December, 2021 that they were informed that the file had been moved to the high court at the request of the respondent where counsel wrote to the registrar for the record of proceedings on the 14th March, 2022. It was upon this that the memorandum of appeal was filed even despite the fact that the record was not availed.

Counsel therefore submitted that it is not for lack of trying that a record of proceedings was not availed to the appellant and that the memorandum of appeal was later filed even without being availed the record. Counsel therefore submitted that the appellant's advocates exercised even reasonable effort to obtain the record but were frustrated and had to file none the less and therefore prayed that this objection is dismissed and the appeal proceeds.

Analysis

The law regulating commencement of appeals to the High Court is clearly stated under **Order 43 (1) of the Civil Procedure Act** where it is provided that;

- (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.*

In the case of *Maria Onyango Ochola and others vs J. Hannington Wasswa [1996] HCB 43*, this court noted 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.

From the record of proceedings before this court and from the submissions of counsel for the appellant, it is very clear that the appellant filed its appeal on the

10th March, 2020 by way of notice of appeal after judgement was delivered by the trial court.

However, as discussed above and as provided by **Order 43 (1) of the Civil Procedure Rules**, an appeal shall be commenced by a memorandum of appeal. This is so to say that upon the filing of the notice of appeal, there was in fact no valid appeal lodged before this court. As seen from the evidence on record, the supposed memorandum of appeal was only lodged by the appellant's counsel two years after the decision was made by the trial court.

The appellant's counsel submitted that the former advocate's error of proceeding under a wrong procedure cannot be visited on the appellant who does not draft and file these documents. Indeed, several courts have noted that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant. (see; *Andrew Bamanya vs Shamshendi Zaver C.A Applic. No. 7 of 2001, Nicholas Roussos v Ghulam Hussein Habib Virani, Civil Appeal 9 of 1993*)

However, it is important to note that the appellant's counsel; KTA Advocates were instructed by the appellant and filed a notice of change of instructions on the 15th July, 2020. Had the advocates been vigilant and prudent enough, they would have sought this court's leave to commence the appeal as provided for under Order 43 of the Civil Procedure Act or extension of time but this was not done until after two years.

The Supreme Court in *Capt Phillip Ongom vs Catherine Nyero Owota SCCA No. 14 of 2001* stated that:

"It would be absurd or ridiculous that every time an advocate takes a wrong step, thereby losing a case, his client would seek to be exonerated. This is not what litigation is all about. Counsel applied a wrong strategy....no sufficient cause has been shown to entitle the applicant relief sought."

In light of the above decision, the appellant's lawyer therefore not claim mistake of counsel where it had an opportunity to correct the said mistake upon

receiving instructions for the appellant. In my view, the law cannot be dispensed with to one's convenience; the law is put in place as a guiding tool on what the correct procedure in litigation is.

On the objection as to time within which an appeal can be lodged, **Section 79 (1) of the Civil Procedure Act** is very clear. It states that;

(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;
or*

b) within seven days of the date of the order of a registrar, 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.

From the evidence on record, it is very clear that the appellant filed their memorandum of appeal before this court on the 10th of March, 2022, two years after the judgement was delivered in 2020 and decree extracted. As earlier discussed, the appellant lodged its notice of appeal on the 10th March, 2020.

Unfortunately for the appellant, a notice of appeal is not a document capable of commencing a civil appeal before the High court.

It is also important to note that this court under **section 79 (1) (b) of the Civil Procedure Act** has the discretion to invoke its power for good cause, to admit the appeal though the period of limitation prescribed elapsed. However, in the circumstances of this case, the appellant has not advanced any good cause for the court to invoke its powers to have the appeal admitted out of time. Good cause must relate and include the factors which caused inability to file the appeal within the prescribed period of 30 days. (See: *Tight Security Ltd vs Chartis Uganda Insurance Co. Ltd HCMA 8 of 2014*)

Be as it may, the appellant filed its memorandum of appeal without seeking the leave of this court. An appeal filed out of time without the leave of court is incompetent and will be struck out as incompetent (see; *Hajji Mohammed Nyanzi v Ali Sseggane [1992 – 1993] HCB 218*). The applicant has failed to demonstrate that it has good cause to have the appeal admitted out of time. Good cause must relate and include the factors which caused inability to file the appeal within the prescribed period of 30 days.

The effect of limitation law is that legal proceedings cannot be properly or validly instituted after the expiration of the period prescribed by law. Leave to appeal out of time is not granted to a party as a matter of course. The power is exercisable at the discretion of court and the court is expected to bear in mind that the rules of court are meant to be obeyed and as such there must be materials before the court upon which to base the exercise of discretion.

Therefore, the objections are upheld and this Appeal is struck out with costs to the Respondent.

I so Order.

SSEKAANA MUSA

JUDGE

31st October 2022