THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL APPLICATION NO. 036 OF 2016

1. **LUBEGA ROBERT SMITH**
2. **MUWANGA JAMES KIRONDE……..APPLICANT**
3. **WAMALA SAMUEL KIRONDE**

VERSUS

WALONZE MALAKI…….RESPONDENT/APPELLANT

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

This application was brought by notice of motion under Order 49 rule 2, Order 52 rule 1of the Civil Procedure Rules SI 71-1 and Section 98 of the Civil Procedure Act Cap 71 in which the applicant seeks an order to strike out Appeal No. 44 of 2014 (hereinafter referred to as the appeal), and for costs to be provided for.

The grounds of the application are briefly that:-

1. The appeal is bad and incompetent for being served outside the prescribed time.
2. The appellant did not seek an extension to serve the appeal before the memorandum of appeal expired.

The respondent did not respond to the application, and having been satisfied with service, on 13/7/16, I allowed exparte proceedings against him. Counsel for the applicants` opted to rely on the strength of the application and supporting affidavit but made brief oral submissions on the law.

The application was supported by an affidavit sworn by the three applicants stating that they represent the estate of the late Polikapo Kironde, the respondent in the appeal. That judgment was entered in favour of the deceased in Wakiso Civil Suit No. 046/2009 on 19/6/14 and an appeal was preferred against that decision by the respondent by memorandum of appeal on 9/7/14. That the appeal was served on the applicants 7 months and 10 days outside the prescribed time with no extension being sought. They thereby seek dismissal of the appeal.

With due respect, the applicants opted for the strange procedure of swearing one affidavit between them. In my view, affidavit evidence contemplated under Order 19 CPR, should be by an individual and not a group. However, that anomaly should not invalidate the application especially when the matters being raised are those on law and when the grounds of the application are clearly stated in the motion itself.

I will therefore proceed to consider the merits of the application.

True to record, the memorandum of appeal against the decision in Wakiso Civil Suit No. 46/09, was lodged in this court on 9/7/14. It is deemed to have been filed in line with the provisions of Order 43 rule1 CPR. However, that law omitted to provide for the procedure to be followed in service of the memorandum against the respondent. It only mentions, in rule 11, that service of the **hearing notice** of the appeal is to be made in accordance with service of summons in an ordinary suit. In the absence of an enabling provision, counsel for the applicant guided court to the provisions of Order 49 Rule 2 CPR which provides as follows:-

> *"All orders, notices and documents required by the Act to be given to or served on any person shall be served in the manner provided for the service of summons".*

An appeal is a creation of statue and would under the provisions of Section 2 of the Civil Procedure Act be regarded a suit. A respondent has the constitutional and ordinary right to have knowledge of any proceedings against him which means that they are entitled to be served with a memorandum of appeal just as much as a defendant or respondent in any other type of civil proceedings would. I would thereby be justified to follow the quoted law to find that the provisions of Order 5 with respect to service of summons, would apply to service of a memorandum of appeal against the respondent, even before service of a hearing notice of the appeal is served upon him/her.

Order 5 rule 1 (1) (a) CPR provides that "*when a suit has been duly instituted a summons may be <u>issued</u> to the defendant ordering him or her to file a defence within a time to be specified in the summons."*

*Under **sub rule 2***of the same order"……*service of summons issued under sub rule (1) of this rule shall be effected within 21 days <u>from the date of issue</u> except that the time may be*

extended on application to the court, made within 15 days after the expiration of 21 days, showing sufficient reasons for the extension. (Emphasis mine).

Further, Order 5 rule 1(3)CPR stipulates that "*where summons have been instituted in this rule and service has not been effected within 21 days from the date of issue and there is no application for an extension of time under sub rule (2) of this rule or the application for extension has been dismissed, the suit shall be dismissed without notice."*

I have confirmed from the record that the memorandum of appeal was filed on 9/7/14. Service should have been effected at least by 31/7/14, and that failing, an extension sought by 15/8/14. The applicant averred, and it has not been contested, that his advocate was served on 19/2/15 which would be 203 days after the due date. It would be true therefore that the service was done outside the prescribed time.

Even if it were to be argued that a memorandum of appeal is a special genre of proceedings, under Order 43 Rule 11, it is incumbent upon the appellant to take out a notice of the hearing date of the appeal and served, it upon the respondent in the same manner as one would serve summons in an ordinary suit as quoted above. Indeed it has been previously held by the Supreme Court in **Kanyabwera Vs. Tumwebaze (2005) EA 86**quoted with authority in**Orient Bank Ltd Vs. AVI Enterprises HCCA 2/2013** that service of hearing notices should follow the provisions of Order 5 CPR. The respondent has since filing her appeal, never fixed it for hearing or taken out a notice for its hearing.

Order 5 rules 1 and 3 CPR appear to have been couched in mandatory terms and I am aware that this court has on several previous occasions chosen to treat it as much. See for example **Orient Bank Ltd Vs. AVI Enterprises (supra).**I would have no reason to depart from that decision. The memorandum of appeal which was clearly served out of time, is liable for dismissal without notice.

I thereby do agree with counsel for the applicant that service upon his client was effected out of the prescribed time and no extension was sought before the late service was actually effected.

The appeal thereby stands dismissed with costs to the respondent.

I so order.

EVA K. LUSWATA

JUDGE

14/07/2016