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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
MISCELLANEOUS APPLICATION NO.021 OF 2021
(Arising from Civil Appeal No.007 of 2018)

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KATSIGAZI BENSON===== APPLICANT
VERSUS
LORNA MUSANYUSA KAMAU===== RESPONDENT

BEFORE: HON.JUSTICE MOSES KAZIBWE KAWUMI

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JUDGMENT

By a Notice of Motion with a supporting Affidavit the Applicant seeks orders of the court for the Memorandum in Civil Appeal No.007 of 2018 to be struck out and for Costs of the Application.

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The grounds of the Application also set out in the Affidavit deposed by the Applicant are that the Respondent filed a Memorandum of Appeal on 16th March 2018 but had not served it on the Applicant by the time the Application was filed.

The Applicant further contends that the Respondent had not taken any necessary steps to prosecute her Appeal and that it is fair and just that the application be allowed and the Civil Appeal No.007/2018 be struck out with costs.

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The Respondent on the other hand contends that service of the Memorandum of Appeal was effected on Counsel for the Applicants by Counsel for the Respondents on 26th April 2018. It is further contended that hearing notices for 20th June 2019 were thereafter secured by Counsel on 25th January 2019 but the court never sat on the scheduled date.

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On 13th February 2020 Counsel secured another hearing date being 3rd April 2020 but the country was plunged into a Covid 19 lock down before service of the hearing notices could be effected on Counsel for the Applicant.

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Later on 11th January 2021 Counsel for the Respondent wrote to the Registrar for leave to file submissions in the Appeal. The Respondent contends that efforts to prosecute the Appeal were made but she was unable to have it done on justifiable grounds and it would be in the interest of justice to have the application dismissed and the Appeal heard on its merits.

5 **Decision.**

I have considered the submissions of counsel and perused the case law cited in support of both positions.

As correctly observed by Counsel for the Applicant, an Appeal is a suit within the definition in section 2(x) of the Civil Procedure Act. The same position was enunciated by Madrama J (as he then was) in **Orient Bank Ltd V Avi Enterprises Ltd.HC Civil Appeal No.002 of 2013.**

It is also correct to state that much as the mode of service of Memoranda of Appeal is not specifically laid out in **Order 43** of the Civil Procedure Rules, recourse is to **Order 49 Rule 2** which provides:-

15 *“All orders, notices and documents required by the act to be given to or served on any person shall be served in a manner provided for the service of summons.”*

The implication of **Order 49 rule 2** is that a Memorandum of Appeal has to be served within 21 days following the dictates of **Order 5 rule 2 of the Civil Procedure Rules.**

20 **Lubega Robert Smith & Others V WalonzeMalaki.HC Civil Application No.036/2016;Nakirabi Agnes & Others V Kalemera Edward &Another HC Misc. Application No.403/2018.**

The Respondent contends that she was told by her Counsel that service of the Memorandum of Appeal was effected on Counsel for the Applicant on 26th April 25 2018.That evidence of service was left in the office Counsel previously worked.

Evidence of service of any court documents is by way of filing an Affidavit of service and there appears none on the court file. Even counsel who claims to have effected service did not believe in herself to swear to what she alleges to have happened but conveniently chose to tell it to the Respondent yet she stands in the 30 position of a witness in regard to the alleged service.

I find no convincing proof to show that service of the Memorandum was effected on Counsel for the Applicant who in any case would have no reason to deny having received the Memorandum. Even then service on 26th April 2018 was after the expiry of the 21 days stipulated in Order 5 rule 2 of the Civil Procedure Rules.

35 The Respondent further took a nine months unexplained period to acquire hearing notices for the hearing scheduled for 20th June 2019.No reason for the failure of the fixture is mentioned in the Affidavit sworn by the Respondent. A

5 mere statement that the court did not sit is not sufficient and it does not explain why another hearing date was secured on the day of the aborted sitting of the court.

The Respondent further took seven months from 20th June 2019 to acquire hearing notices for 3rd April 2020. This was beyond the six months threshold for abating all stale actions under Rule 4 of the Civil Procedure (Amendment) Rules 2019. SI No. 33 of 2019.

The 11th January 2021 letter to the Registrar for directions was still filed after nine months from the aborted 3rd April 2020 hearing and was affected by Rule 4 of the 2019 Civil Procedure (Amendment) Rules.

15 The court at Kabale was operational even during the Covid lock down periods. The Registrar could have been approached to guide on the filing of submissions during the lock down periods and the Resident Judge was at the station from October 2020 to date.

I find no reason to depart from the dictates of the 2019 Civil Procedure (Amendment) Rules. The implication of the delays by the Respondent is to frustrate the fruits of the Applicant's litigation in the lower court. Appeals should not be used as a tool to frustrate justice and clog the court system. Time lines set out in the Rules have to be abided by for the expedited disposal of matters before the Court.

25 The application is allowed with costs to the Applicant. Civil Appeal No. 007/2018 is hereby struck out.

30 **Moses Kazibwe Kawumi**
Judge
3rd March 2022