

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO.72 OF 2022

5 ***(Arising from The Chief Magistrates Court of Kajansi Miscellaneous
Application No.104 of 2020)***

***(All arising out of the Chief Magistrates Court of Kajansi Civil Suit
No.32 of 2020)***

NDIWALANA GEORGE WILLIAM:::APPELLANT

10 **VERSUS**

NAMUTETE HENRY:::RESPONDENT

Before: Justice Alexandra Nkonge Rugadya.

Judgement

15 This an appeal from the ruling and orders of ***His Worship Gimugu K. K, the
Magistrate Grade 1 at the Chief Magistrates Court of Kajansi at Kajansi***
delivered on 11th March 2021 in ***Miscellaneous Application No.104 of 2020***
wherein the trial Magistrate dismissed the application and awarded costs to
the respondent herein.

Background.

20 The background of this appeal is that sometime in 2020, the respondent
herein filed ***Civil Suit No.32 of 2022*** against the appellant in the Chief
Magistrates Court of Kajansi seeking among others, a declaration that the
appellant who was the defendant is a trespasser on approximately 0.68
25 decimals on land comprised in ***Block 52 plots 24 & 25 land at Bukwe***, a
permanent injunction, an eviction order, general damages, mesne profits and
costs of the suit.



The matter proceeded *ex-parte* against the appellant who according to the court record was served with court process but did not file a defence. The trial court presided over by **Her Worship Nantege Christine** in its judgment dated 3rd December, 2020 found that the appellant was a trespasser on the suit land.

Court then issued a permanent injunction against the appellant, an eviction order, and the respondent was awarded general damages of **Ug.x 1,000,000/= (Uganda Shillings one million only)** as well as costs of the suit.

10 The appellant then filed **Miscellaneous Application No.04 of 2020** seeking to set aside the judgment and decree in the main suit on grounds that there was non-service on the appellant. He also sought an order permitting him to file a written statement of defence.

15 The trial court presided over by **His Worship Gimugu K. K** held that the appellant was properly served, and that evidence of service was uncontroverted, credible, believable and completely disproved the appellant's denial that he was never served. The application was dismissed.

The appellant being dissatisfied with the decision of the trial court, filed this appeal against the same. He listed 5 grounds to wit;

- 20 **1. That the learned trial Magistrate erred in law and fact when he ruled that the appellant was effectively served whereas not thus arriving at a wrong conclusion;**
- 25 **2. That the learned trial Magistrate erred in law and fact when failed to evaluate the evidence of illiteracy on the appellant leading to a miscarriage of justice;**
- 30 **3. That the learned trial Magistrate erred in law and fact when he failed to notice that the appellant was unrepresented leading to a miscarriage of justice;**



4. *That the learned trial Magistrate erred in law and fact when he failed to notice that appellant did not depone the affidavit in support of the application leading to a miscarriage of justice;*

5 5. *That the learned trial Magistrate erred in law and fact when he failed to notice that whole application was a sham intended to mislead court leading to a miscarriage of justice.*

The appellant then prayed that this appeal be allowed with costs and that the ruling and orders of the trial Magistrate in **Miscellaneous Application**
10 **No.104 of 2020** as well as the *ex-parte* judgement in **Civil Suit No.32 of 2020** be set aside and the suit be referred back to the Magistrates Court for re-trial and that he is allowed to file a written statement of defence.

In addition, the appellant sought further orders that the execution orders in **Miscellaneous Application No.104 of 2020** be set aside, the warrants of
15 attachment, arrest and detention in civil prison in **Execution Miscellaneous Application No.10 of 2021** be set aside, and Ms. Nagingo Prossy be released from civil prison, and that the contempt proceedings in **Miscellaneous Application No.154 of 2021** be terminated.

The appellant further prayed that the taxation proceedings in **Miscellaneous**
20 **Application 37 of 2022** be terminated, and the proceedings in **Criminal Case No.066 of 2022** with charges of disobeying lawful orders at the Chief Magistrates Court of Entebbe at Entebbe be terminated.

Representation.

The appellant was represented by **M/s Sebanja & Co. Advocates** while the
25 respondent was represented by **John F. Ssengooba & Co. Advocates**. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.



Consideration of the appeal by Court.

The duty of this court as a first Appellate Court was stated in the case of ***Kifamunte Henry V Uganda, S.C criminal Appeal No. 10 of 1997*** where court held that;

5 ***“The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”***

10 This court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion.

Points of law.

15 Counsel for the respondent in his submissions raised a point of law to the effect that the appeal is incompetent. This point of law emanated from ***Miscellaneous Application No.1777 of 2022*** which was filed by the respondent who sought orders that this appeal offends the provisions of ***Section 76 of the Civil Procedure Act Cap.71 & order 44 rules 1 & 3 of the Civil Procedure Rules SI 71-1***; and it is not only incompetent, barred in law, but also an abuse of court process.

20 The respondent further sought orders that the memorandum of appeal on record offends ***Order 5 rule 2 of the Civil Procedure Rules*** having been served when expired.

Determination of the points of law.

25 I have carefully perused the pleadings and submissions made either side. An appeal to the High Court is preferred in the form of a memorandum of appeal. ***(Ref. Order 43 rule 1).***

Section 79 of the Civil Procedure Act Cap.71 provides that an appeal shall be entered within thirty days of the date of the decree or order of court. Once the period as prescribed lapses, and good cause is shown, the appellate court has the power to admit the appeal.



Section 79 (2) of the said Act states that in computing the period, the time taken by the court in making the decree appealed against and of the proceedings upon which it is founded is to be excluded.

5 In this instance, the record indicates that the order of court which the appellant seeks to appeal against was made on 11th March, 2021. It was not however until 7th April, 2022 that he filed **MC No. 029 of 2022** for leave to appeal out of time the ruling and orders of the trial magistrate.

10 The order to file the appeal out of time was granted to him by HW Simon Kintu Zirintuusa on 1st September, 2022. He then filed a memorandum of appeal on 28th September, 2022.

In his objection to the competence of the appeal counsel for the respondent cited **Order 44 Rule 1 sub-rule 2 of the Civil Procedure Rules**. Going by that rule, prior leave of court is required for a party seeking to appeal against any orders which are not listed under that rule.

15 **Order 44 Rule 2** specifically provides that:

“an appeal under the Civil Procedure Rules shall not lie from any other order except with leave of court making the order or the court to which an appeal would lie if leave were given.”

20 The order by the trial court was made under **order 9 rule 12 of the CPR** which is not among the orders as listed thereunder, from which an appeal lies as of right.

25 The appellant filed **Miscellaneous Cause No.29 of 2022** before this court and obtained an order to file an appeal out of time against an order that falls outside the ambit of **order 44** or in respect of which prior leave of court had not been sought.

The order was made presumably under the belief that he had an automatic right of appeal, whereas not. This implies therefore that **Miscellaneous Cause No.29 of 2022** which was filed on 7th April 2022, heard and determined by the registrar was not properly before court.


In such a case where leave is required to file an appeal against an order which is not among those as listed in **order 44 of the CPR** and the same party is also intending to apply for leave to file the appeal out of time, it would make a lot of sense if the two prayers are made in a single application (as opposed to separate applications).

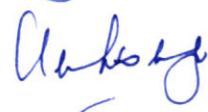
It also goes without saying that the matter ought to be heard by or before a court/ judicial officer who has the power to hear both applications. The reason, as noted earlier is that **section 79 of the CPA** sets a time limit within which every appeal, without exception, has to be entered. That way the matter would be dealt with expeditiously.

In this case however, under **MA No. 029 of 2022**, the Registrar could only deal with uncontested matters or formal interlocutory applications falling under **Order 50 rules 2 and 3 of the CPR** and, in the opinion of this court, an order falling under **Order 44 of the CPR** would not have been among them.

Since therefore the appellant did not make any attempt to seek prior leave of this court to file the appeal against the trial court's orders, this appeal struck out with costs as it is incompetently before this court.

I so order.

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Alexandra Nkonge Rugadya
Judge
18th April 2023.

Delivered by email

18/4/2023