THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISC. APPLN. NO. 175 OF 2019
[ARISING FROM MISC. APPLN. NO.146 OF 2018]

BETWEEN

ELGON TERRACE HOTEL LIMITED.....APPLICANT

VERSUS

NYINAKIZA LOY RHINA.....RESPONDENT

BEFORE
1. Hon. Chief Judge Ruhinda Ntengye

2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS
1. Mr. Ebyau Fidel
2. Mr. Micheal Matovu
3. Mr. Wanyama Anthony

RULING

This is an application by chamber summons for an order that execution of the ruling in Misc. Appl. 146/2018 be stayed pending the applicant's intended appeal and that costs of this application be provided for.

The applicant was represented by Mr. Pearl Bakunda of M/s. Muwema & Co. Advocates while the respondent was represented by Mr. Johnan Rwambuka of M/s. Rwambuka & Co. Advocates.

Both the applicant and the respondent filed affidavits supporting and in opposition (or in reply) respectively.

The affidavit sworn by one Yusuf Ndawula for the applicant is to the effect that this court having determined Misc. Appl. 146/2018 in favor of the respondent and

having ordered the applicant to pay 10,778,000/= to the respondent, the applicant was dissatisfied and filed an appeal against the decision of this court to the court of Appeal which is yet to be fixed and determined. The affidavits state that the applicant has lodged a notice of appeal and applied for a record of proceedings, that this application was filed without any delay and that the appeal has a high likelihood of success.

An affidavit in reply deponed by one Tumwesigye Evaristo of M/s. Rwambuka & Co. Advocates states that the notice of appeal was served onto the respondent 20 days after filing it instead of 7 days prescribed by law and that the application was served onto the respondent on 27/8/2018 having been issued on 6/8/2018 and this was out of time; that the claim of the applicant is to waste courts time and to delay the respondent from enjoying the fruits of her ruling; that the notice of appeal was filed out time, that the applicant has not explained how she will suffer substantial loss if the application is allowed.

Submissions

The applicant was expected to file submission by 12/09/2019 which they did not comply with and instead filed submissions on 25/09/2019 after the respondent had filed submissions on 19/9/2019 as directed by this court.

The applicant having not complied with the timeliness set with their participation, we shall consider submissions filed by the respondent on 19/9/2019, submissions filed by the applicant in reply on 25/09/2019, and respondent's submissions in reply of 10/10/2019. We shall not consider the submissions of the applicant filed in rejoinder on 13/11/2018. We shall not consider an affidavit filed in rejoinder on 20/9/2018 instead of 5/9/2019 as a preliminary point of law. The respondent argued that the application was incompetent having been served out of the prescribed time without leave of court, having been endorsed by the registrar on 6/8/2018 but served onto the respondent on 27/8/2019.

He relied on order 5 rule (1)(2) of the Civil Procedure Rules and **Micheal Mulo Muleggusi Vs Peter Katubalo H.M.A o6/2016.**

In reply, counsel for the applicant relying on **M/s. Simon Tendo Kabenge Advocates Vs Mineral Access System HCMA 70/2011** submitted that days could

only be counted excluding the date the event took place. Therefore counting in the instant case would start with 7/8/2019 which would bring the time within 21 days.

Counsel also argued that the notice of appeal was only endorsed by the registrar on 11/6/2019 and served on 12/6/2019. He argued that if this court was to reject this argument, the court would note that this as a mistake of counsel which should not be visited onto the applicant. He relied on the authority of **Godfrey Magezi and Anor Vs Sudhir Ruparelia, CA 10/2002.**

In rejoinder (which ordinarily should have been in reply but for the applicant having failed to file submissions in time and therefore allowed the respondent to file submissions first) the respondent insisted that both the notice of appeal and the application was filed out time. He argued that the appeal had no chances of success since 60 days had elapsed without filing the appeal and no copy of a letter requesting for proceedings was ever served on the respondent as required by Rule **83 (3) of the court of Appeal Rules**.

We have perused carefully the affidavits competently filed in this court. We have also perused the submissions competently filed by both counsel.

We agree with counsel for the applicants that counting of dates begins with the next day after the event. We have counted the dates from the date after the registrar issued this application and we find that the application was filed within 21 days which is not outside the prescribed time.

However we find difficulty in agreeing with the submission of counsel for the applicant that the notice of appeal was served within the prescribed time. The notice of appeal on the file was received by the court on 22/5/2019 and received by the respondent's counsel on 12/6/2019. There is nothing to suggest that the registrar endorsed the notice of Appeal on 11/06/2019 as counsel for the applicant wants the court to believe. Neither is there any requirement that the registrar or any officer of court had to endorse on the notice of appeal before it is served onto the affected person.

We therefore agree with counsel for the respondent that the notice of appeal was serve 20 days after being filed instead of 07 days prescribed by law under **Rule 78(1) Judicature (Court of Appeal) rules**.

We have not found any evidence on the record to support the 2nd ground of the application that the applicant has written a letter requesting for a typed record of proceedings and served it onto the respondent.

Given the laxity of the applicant to serve the notice of Appeal in time and given no evidence of the request of proceedings for purposes of facilitating the appeal, we are tempted to accept the submission of counsel for the respondent that the intention of the applicant is to frustrate the respondent from enjoying the fruits of her Award. For the same reasons we are reluctant to invoke **Article 126(2)(e) of the 1995 Constitution** as prayed by counsel for the applicant. In **Athanasius Kivumbi Lule Vs Hon. Emmanuel Pinto, Constitutional Petition No. 5/1997**, the constitutional court had this to say

> **"a litigant who relies on the provision of Article 126(2)(e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126(2)(e) is not a magic wand in the hands of defaulting litigants. Neither are we convinced that the applicant should ride on the principle that a mistake of counsel ought not to be visited on the applicant.**

Consequently the application is not allowed as it has failed the test of rendering the appeal nugatory. No order as to costs is made.

BEFORE

1. Hon. Chief Judge Ruhinda Ntengye .....
2. Hon. Lady Justice Linda Tumusiime Mugisha .....

PANELISTS

1. Mr. Ebyau Fidel .....
2. Mr. Micheal Matovu .....
3. Mr. Wanyama Anthony .....

Date: 21/11/2019