

**THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISC. APPL. NO. 44 OF 2021
(ARISING FROM LABOUR DISPUTE APPEAL NO. 43/2019)**

MAKERERE UNIVERSITY.....APPLICANT

VERSUS

FRANK KITUMBA.....RESPONDENT

BEFORE

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

PANELISTS

1. Mr. Ebyau Fidel
2. Ms. Mugambwa Nganzi Harriet
3. Mr. F. X. Mubuke

RULING

Background

According to the Award of the Labour Officer, the respondent filed a complaint of breach of employment contract seeking a declaration that his termination was unjustified, unfair, unlawful and compensation arising therefrom; salary arrears and other prayers.

The labour officer decided in favor of the respondent and delivered the Award on 16/12/2019.

A notice of appeal was lodged by the applicant on 20/12/2019 by the Directorate of legal affairs of the applicant.

A memorandum of Appeal containing 8 grounds of Appeal was filed on 20/12/2019 by the same Directorate.

The gist of the application is that the applicant having founded the grounds of appeal on matters of law and facts should be allowed leave to so file the same and thereby validate the appeal that was filed without such leave. The application also seeks orders that the applicant be granted leave to amend the memorandum of Appeal so as to include the matters of law and fact.

This application was filed on 25/03/2021 ten days before both counsel appeared in court and were given time lines to file written submissions on the appeal. The appellant (applicant) was to file written submissions on 21/4/2021 while the respondent was to file on 28/4/2021. Rejoinder if any was expected to be filed by 06/05/2021. The Award in the appeal was set to be delivered on 14/07/2021.

It is the applicant's case that a lawyer instructed by the applicant to file the appeal filed it negligently contrary to the law by including grounds on matters of law and fact without seeking leave of the court and that such negligence should not be visited onto the applicant. It was also the applicant's case that soon after filing the appeal both counsel in personal conduct of the matter resigned from the service of the applicant university and there was an outbreak of Covid-19 leading to lockdown of the country that further impeded the applicant from pursuing the appeal.

Counsel relied on the authorities of Andrew Bamanya Vs Shamsheera Zaver SCC A 70/2001 and Eriga Jos Peind Vs Vuzzi AZZA Victor & 2 others HCMA 009/2017. Counsel argued that the applicant gave clear instructions to its counsel to file and pursue the appeal and trusted that the said counsel would execute the said instructions professionally which unfortunately was not the case. Relying on the case of ABC Capital Bank Ltd. Vs A-1 Industries Ltd & 2 Others HCMA 1058/2016 and Hajati Safina Nababi Vs Yafesi Lule, Civil Appeal 09/1996, counsel argued that if a party instructs counsel, he assumes control over the case to conduct it throughout, and the party cannot share the conduct of the case with his counsel. According to counsel, failure of counsel to adhere to the relevant legal requirements coupled with their withdrawal and resignation from the service of the applicant as well as the outbreak of covid-19 encumbered the applicant's pursuit of its appeal and therefore caused the delay to bring the lapses to the attention of court.

In opposition to the application, counsel for the respondent argued strongly that the application was an abuse of court process which according to counsel was defined in the case of **Uganda Land Commission Vs James Mark Kamoga & Another SCCA 08/2004 as involving use of process for improper purpose**. Counsel also relied on Black's law dictionary definition 6th Edition which according to him defines the same as **"A malicious abuse of the legal process when the party employs it for some unlawful purpose, not the purpose which it is intended by the law to effect, in other words a pervasion of it."**

Relying on **Equity Bank Uganda Limited Vs Mugisha Musimenta Rogers, LDA 26/2017**, counsel argued that it was mandatory that leave be sought from the court before an appeal was lodged on questions of fact. He strongly asserted that failure by the applicant to seek leave to appeal on matters of mixed law and fact as required by **Section 94(2) of the Employment Act** amounts to an illegality which cannot be validated 16 months after filing.

After pursuing carefully both submissions of counsel on the question whether or not to grant leave to the applicant to argue matters of fact and law in the appeal, we have the following to say: --

There is no doubt that the applicant appreciates the legal provision that an appeal founded on issues of law and fact or on fact only can only be sustainable if filed after obtaining leave of the court. This is the position as annunciated by this court in **Equity Bank Uganda Limited Vs Mugisha Musimenta (supra)** where this court clearly stated:

"The grounds of Appeal were drafted by counsel and as such he appreciated that the said contested grounds constituted both factual and legal issues and this having been the case, the same was against the spirit of Section 94(2) of the employment Act and we do not subscribe to the view of counsel for the appellant that the provision of Article 126(2)(e) would save the said grounds of appeal."

Would the fact that the appeal was drafted by another lawyer who was negligent be persuasive enough for this court to go against the spirit of **Section 94(2) of the Employment Act**?

Whereas it is true as held in the cases cited by counsel for the applicant that mistakes, faults and lapses or dilatory conduct of counsel should not be visited onto

the litigant, it is not true that this principal applies without limitation in every situation that arises. When this court was considering the same question in Nile Breweries Ltd Vs Isabirye David, Misc. Appln. 130/2020, it relied on the authority of Honondi Daniel Vs Yolamu Egondi, court of Appeal, Civil Appeal 67/2003 which in agreeing with the trial judge as to the duty of counsel also made comparison with that English System which the court stated was in Halsbury's laws 4th Edition, Vol 3(1) paragraph 518 as:

"Counsel has, with regard to all matters that properly relate to the conduct of the case, unlimited authority to do whatever he considers best for the interest of his client. This authority extends to all matters relating to the actions, including the calling and cross-examination of witnesses, challenging a Juror, deciding what points to take, choosing which of two inconsistent defenses to put forward and even agreeing to a compromise of the action, or to a verdict, order or judgement."

The court of appeal also quoted Mulenga JSC (as he then was) in the case of Capt. Philip Ongom Vs Catherine Nyero Owota (SCCA 14/2001 – unreported, as having said in the lead judgement at Page 9:

"It is an elementary principle of our legal system, that the gaps and omissions of the advocate in the course of the representation bind a litigant who is represented by an advocate. However, in applying that principal, the court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. To my mind, a proper guide in applying the principal is its premise, namely that the advocate's conduct in the pursuit of and within the scope of what the advocate was engaged to do."

In the instant case, the Notice of Appeal, the memorandum of Appeal as well as this application were all filed by the same chambers – M/s. Makerere University Directorate of Legal Affairs. Nothing in the affidavit in support of the application mentions the names of the particular advocates who initially had instructions to appeal against the decision of the labour officer and who negligently executed the instructions. We therefore agree with the submission of counsel for the respondent while relying on Matovu Charles Kidimbo Vs Lukwata Yusuf & 2 Others HCMA 40/2017 that

“This makes it unclear whether the delay can be attributed to mistake of former counsel or the applicant himself who now wants to take over under mistake of negligent of counsel.”

We are of the strong and firm view that in order for a party to succeed on a plea of negligence of counsel, such party must show court a clear distinction between the former advocate and the current advocate both of whom should not ordinarily be from the same firm of Advocates. The court would demand exceptional reasons and justification as to why an advocate in the same firm instructed to take a particular step in prosecuting or defending a matter would be blamed by another advocate in the same firm for negligence thereby justifying correcting a mistake done by the same firm of Advocates.

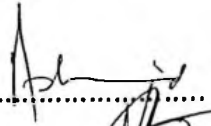
In the instant case the court is not in the know as to when exactly the negligent advocates resigned from the applicant's services so that the court is able to squarely put the blame on the Advocates.

As we write this ruling, we keep wondering as to why the applicant did not point out the issue of the former advocates having been negligent on 15/03/2021 before this court gave directions as to the dates of submissions and of delivering an Award. It is not farfetched to suggest that the applicant realized the need to file this application after counsel started writing submissions or as he perused the grounds just before he sat down to write submissions. It cannot therefore be correct to state that covid-19 had a part to play in the applicant's failure to pursue the appeal. It is our view that neither could the fire outbreak at the University be reason for such failure as counsel seeks the court to believe. No exceptional reason or justification has been offered by the applicant for blame of the advocates in the same firm.

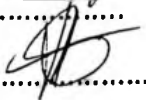
Accordingly, we do not find merit in this application to justify filing of the memorandum of Appeal C/s. 92(2) of the Employment Act. On perusal of the memorandum of Appeal, and in accordance with the case of **Baingana John Paul Vs Uganda Cr. Appeal 068/2010**, only the 1st ground can be saved in the same way such a ground was saved in the Baingana case and as applied by this Court in *Netis Uganda LTD VS Charles Walakira L.D.Apeal 22/2016*. The application is dismissed with no orders to costs.

Delivered & signed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye


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2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha


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PANELISTS

1. Mr. Ebyau Fidel

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2. Ms. Mugambwa Nganzi Harriet

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3. Mr. F. X. Mubuke

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Dated: 20th April 2021