

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 92 OF 2022
*(Arising From Labour Dispute Appeal No. 099 Of 2021 and Labour Complaint
No. KCCA/CEN/LC/238/2017)*

AUTO TUNE ENGINEERING LTD:::APPLICANT

VERSUS

BAROZI SWALDO & 2 OTHERS:::RESPONDENT

BEFORE:

1. THE HON. JUSTICE ANTHONY WABWIRE MUSANA

PANELISTS:

1. Ms. ADRINE NAMARA,
2. Ms. SUSAN NABIRYE &
3. Mr. MICHAEL MATOVU.

RULING

Introduction:

- 1.0. This ruling is in respect of an application brought under Section 33 of the Judicature Act Cap. 13, Section 98 of the Civil Procedure Act Cap.71 and **Section 8(2) and 40 of the Labour Disputes (Arbitration and Settlement) Act 2006** seeking orders that the Notice of Appeal lodged in this Court on 5th November 2021 and served on the Applicant on 17th January 2022, be struck out and costs of the application be provided for.

Grounds

- 2.0. The grounds in support are set out in Chamber Summons and elaborated in the affidavits in support and rejoinder sworn by Ms. Sheila Nabbale. She deposed that:
 - (i) the Respondent did not comply with the statutory requirement to file the memorandum of appeal within 30 days and thus there was no substantive appeal on the record,
 - (ii) that the record was received on 29th March 2022 and time for filing the memorandum of appeal lapsed on 29th April 2022,

- (iii) that the errors alluded to were an afterthought and the purported extensions of time were a nullity,
- (iv) that the plea of mistake of counsel was not tenable and that therefore, the purported appeal was illegal.

3.0. The 1st Applicant deposed that:

- (i) Ms. Nabbale's affidavit in support was defective for want of authority,
- (ii) that the Honorable Panelists of this Court had granted extensions of time to file the Record and Memorandum of Appeal owing to errors,
- (iii) that upon receipt of a verified record on 29th June 2022, the memorandum was duly filed on 28th July 2022,
- (iv) that the applicants attended Court and were in the know of the delays and;
- (v) that any mistakes of Counsel ought not to be visited on the litigants.

Preliminary objections

4.0. In their written submissions, Counsel for the Respondent opted to deal with the preliminary objection relating to Ms. Nabbale's affidavit, first. Counsel submitted that an affidavit without authority is defective and cited several authorities in support of that proposition. The applicant countered, citing the case of **Namutebi Matilda Vs Ssemanda Simon & Others H.C.M.A No 0430 of 2021** that the law, as it now stands, is that precedent rendering affidavits without authority defective, has no basis in the rules of evidence and procedure.

5.0. We agree with the proposition of the expansion of the law on affidavits as submitted by the applicant. Modern precedent has now distinguished the decisions requiring an affidavit to bear authorization. It is now posited that an affidavit in support is evidence and does not require authorization but rather knowledge of the deponent.¹ Miss Nabbale who deposed to the affidavit in support has had personal knowledge of these matters as Counsel in conduct of the suit. She is, in our view, very well placed to render an account of what transpired in Court. Her evidence would be first hand. We find that the objection is without merit and is overruled.

Merits of the Application, Analysis and Resolution

¹ In **H.C.M.A No. 645/2020 Bankone Ltd vs Simbamanyo Estates Ltd** Mubiru J posits that *what is required in affidavits is the knowledge or belief of the deponent, rather than authorisation by a party to the litigation.*

- 6.0. We now turn to the merits of the application and the sole question for determination is whether the Notice of Appeal filed in this Court on the 5th of November 2021 should be struck out. There was a common position on the following:
- (i) The labour officer delivered her ruling on the 29th day of October 2021,
 - (ii) A Notice of Appeal was filed on 5th November 2021.
 - (iii) A typed copy of proceedings and the lower record were forwarded to the Industrial Court on 24th November 2021
 - (iv) The Respondent requested the typed and certified record of proceedings on 27th January 2022.
 - (v) The Respondent filed their memorandum of appeal on 28th July 2022.
- 6.1. The Applicant submitted that there is a lacuna in the **Labour Disputes (Arbitration and Settlement) Industrial Court Rules, 2012**(LADASA Rules) in respect of time and form of an appeal. Counsel contended that when faced with a lacuna in the law, this Court has adopted the standards under the Civil Procedure Act Cap. 71(CPA) and Rules made thereunder. The Memorandum of Appeal ought to have been filed within 30 days from the time the record of proceedings is made available.
- 6.2. The respondents countered that the panelists of the Court granted several extensions in the absence of a presiding Judge. Alternatively, the respondents invited this Court to consider substantive justice and that any mistakes of Counsel should not be visited on the client.
- 6.3. In resolving the issue, we wish to revisit the law on appeals before this Court. First, it is trite that appeal is a creature of statute. The right of appeal is provided for under **Section 94 of the Employment Act 2006**. A person dissatisfied with a decision of a labour officer on a complaint made under the Act may appeal to the Industrial Court; as of right on a question of law, and with leave on a question of fact forming part of the decision of a labour officer. Rule 24 of the LADASA Rules provides for a right of appeal from a decision of a labour officer on a complaint made under **Section 13 of the Employment Act**² and **Sections 4 and 5 of the LADASA**³. As rightly pointed out by Counsel for the Applicant, the LADASA and LADASA Rules appear to be silent on the procedure to follow when filing the appeal. This Court has adopted the procedure for appeals under the

² The section relates to investigation, conciliation, arbitration or adjudication of a complaint by a labour officer.

³ The sections relate to conciliation and reference of disputes to the Industrial Court

CPA⁴ requires the Appellant to file the memorandum of appeal within 30 days from the date of receipt of the record of proceedings.

- 6.4. By the respondent's own admission, the record of proceedings was received on the 29th of March 2022. If it were indeed true that a correct record of proceedings was received on that date, then the cutoff date for filing the memorandum of appeal was the 29th day of April 2022. The memorandum of appeal was filed on the 29 of July 2022, a full 90 days after the lapse of time for filing. On a strict construction of the provisions of the CPA as applied in the case of **Nakiriba Agnes & Others Vs Kalemera Edward and Another**⁵ the present application would succeed. The memorandum of appeal filed by the Respondents would be out of time, rendering the appeal incompetent.
- 6.5. The Respondents suggested that there had been extensions of time during the time the matter was mentioned before a panel of this Court. The respondents' chronology of events was that following the decision of the labour officer on 29th October 2021, they filed a notice of appeal and were given a reference number Labour Dispute Appeal No. 19 of 2021. Thereafter, they applied for a certified copy of the record of appeal to formulate their grounds of appeal. It is their case that during the hiatus following the retirement of the Presiding Head Judge, they appeared before the panel of members of the Industrial Court where the matter was mentioned several times. The applicants contend that by updating the court of the delays in obtaining the record, they were granted "*extensions*" of time to file the Memorandum of Appeal. In their view, this court did "visibly sit". We think this proposition to be without sound legal foundation. It is not a realistically arguable proposition for two reasons:
- (i) This court would not be have been duly constituted between March 2022 and August 2022. **Section 10B of the LADASA (Amendment) Act 2020** provides that the court is duly constituted where at any sitting there are four members including a Judge, an independent member, a representative of employers and a representative of employees. In our view, the Respondents contention of a visible sitting of the Court is not a legal sitting of the Court. The court was not duly constituted to grant any extension of time whereas not and;

⁴ Section 79 CPA

⁵ H.C.M.A No. 403 of 2018

- (ii) The law and procedure for seeking extension of time is set out in Rule 6 of the LADASA Rules⁶ which enables a party that has failed to file documents in time to seek extension of time. It is important that a party whose documents are out of time seeks validation. The applicant submitted that the prayer for validation ought to have been properly made and not by way of submissions. We agree with this proposition as the right to seek extension of time is statutory. In **Red Concepts (U) Ltd vs Uganda Revenue Authority**⁷, the Honourable Lady Justice Abinyo held that failure by an appellant to file an application for leave to file the appeal out of time and extension of time within which to file the amended notice of appeal renders the appeal incompetent. We find this authority persuasive an appeal is a creature of statute. The right exists by virtue of statute and the appeal subsists by virtue of statute. Absent of validation, there is no appeal. The memorandum of appeal filed on 28th July 2022 was filed out of time and without leave of court. This renders the appeal incompetent. Accordingly the notice of appeal filed in court on 5th November 2021 would be struck out.

- 6.6. The respondents' plea is that while they attended court at each time that the matter was called for mention, the mistake in filing the memorandum in time was of their advocates and as such should not be visited on the litigants. This position has been subject to expansive judicial consideration. The respondents cited the case of **Banco Arabe Espanol vs Bank of Uganda**⁸ in support of the proposition that a mistake of counsel ought not to be visited on a litigant. In that case, counsel was under a mistaken belief that a bank guarantee would suffice as a deposit for security. In the present case at paragraph 13 of the affidavit in reply, the 1st respondent deposes that he believes that his lawyers had obtained extensions of time and this not being the case, the mistakes of counsel ought not to be visited on the Respondents. In terms, the Respondent's Counsel are said to have believed the court to be duly constituted and that the extensions of time were valid decisions of the court. We do not think this to be very believable. The attendance before court by the Respondents and their counsel on several occasions when the matter was mentioned, makes for clear notice of the proceedings and the need to

⁶ This court has ruled that time may be extended for “sufficient cause”. See *Amony Harriet vs Madhvani Group Ltd* LDMA 066 of 2019.

⁷ H.C.C.A No. 28/2020. See also *Dr. S. B Kinyatta & Anor Vs Subramania Gopalan & Anor* [2001-2005] HCB (Vol 2) 95 and *The Environment Action Network Ltd vs Joseph Eryau*[2008] ULR 314 “**Failure to take an essential step renders the purported Appeal, no Appeal in fact**”

⁸ S.C.C.A No 8 of 1998

take necessary steps. It does not engender ignorance of the law or procedure. There was vigilance in filing the notice of appeal but clearly a less industrious approach in filing the memorandum of appeal. We were provided with the case of **Kateyo Eliezer Mujugwa vs Makerere University**⁹ in support of the proposition that mistake of counsel is not absolute. In that case, the applicant attended Court on a date when directions for filing submissions were given. This Court held that the applicant ought to have been vigilant to follow up his advocate to ensure filing the submissions. In the present case, to this Court's mind, the mistake of not filing the memorandum of appeal in time, is not very well explained. It was suggested that there were errors in the initial record of proceedings but no evidence of what these mistakes were was put before this Court. The respondents did not also provide evidence of correspondence with the labour officer seeking to correct the record of proceedings. The initial record was forwarded to the Registrar of this Court on the 24th November 2021. The 1st Respondent's affidavit in reply did not contain any attachment showing when the corrected record of proceedings was received. Absent of cogent evidence, we do not think that these facts make an arguable case falling within the confines of the dictum that a mistake of Counsel ought not to be visited on the litigant. We are unable to accept this proposition.

- 6.7. As a final proposition, the respondents appealed to the call for substantive justice without undue regard to technicalities. Accepting this proposition in light of an incompetent appeal would be a tall order. When this application to strike out the notice of appeal was filed, the Respondents had a clear opportunity to move this Court for extension of time under the provisions of Rule 6 of the LADASA Rules. Under that rule, this Court may determine an application as it deems fit. The Respondents did not make use of the opportunity even after it became apparent to them that the Applicant (*Respondent in the Intended Appeal*) was seeking to strike out their intended appeal. And through the affidavits and conduct of this application, the Respondents have not made a justiciable case for invoking the judicious discretion of this Court to attend to their plea. They have not placed before this Court material that might invite the exercise of discretion. In the case of **Kajara Aston Peterson Vs Mugisha Vincent**¹⁰ the Court of Appeal emphasized the duty of an intending appellant to take every necessary step in prosecuting their appeal and

⁹ LDMA No. 147 of 2021

¹⁰ C.A. C.M.A No. 58 of 2016

placing before the court, special circumstances, that might invoke the Court's jurisdiction to expand time. In the present case, the appeal is incompetent and we are unable to find and consider any circumstances that suggest the administration of substantive justice.

- 6.8. Accordingly, and in all circumstances, the application to strike out the notice of appeal in LDA No. 019 of 2021 is allowed. LDA No. 019 of 2021 is struck out with no order as to costs.

Dated at Kampala this 13th day of December, 2022

Signed by:

1. ANTHONY WABWIRE MUSANA, Judge

PANELISTS

1. Ms. ADRINE NAMARA,

2. Ms. SUZAN KAGOYE &

3. Mr. MICHAEL MATOVU.

Ruling delivered in open Court.

c.c Mr. Samuel Mukiza.