IN THE COURT OF APPEAL

AT MENGO

(CORAM: MANNYINDO V-F, LUBOGO AG. J.A. & ODOKI J.A.)

CIVIL APPEAL NO. 5 OF 1987

BETWEEN

BARCLAYS BANK OF UGANDA LTD::APPELLANT

AND

EDDY RODRIGUES :: RESPONDENT

(Appeal from ruling and order of High Court of Uganda (Kato J) dated 24th November, 1986 Civil Suit 153 of 1986

RULING OF ODOKI

This is an appeal against the ruling and order of the High Court whereby the trial judge rejected a preliminary objection raised by the appellant that the court had no jurisdiction to entertain the suit against the respondent on the ground that to do so would be to implead the Government of the United Kingdom which had diplomatic relations with Uganda and therefore enjoyed diplomatic immunity.

The brief facts of the case are that the respondent operated an account with the appellant Bank. On 13th October l985, the respondent issued a cheque in favour of the British High Commission in the sum of shs. 85,000,000/ being purchase price or property at Plot 17 princess Anne Drive Kampala, owned by the commission. The cheque was paid and the respondent's account was debited with the amount. On 27th November, 1983, on the instructions of the Commission the Bank credited the respondent's account with the same amount. The respondent instructed the Bank to debit his account with that amount and refund the money to the Commission but the Bank refused to do so.

The Bank denied liability and raised a defence of diplomatic immunity. At the commencement of the suit this preliminary objection was taken by the Bank, but the judge overruled the objection and ordered the suit to proceed.

The Bank applied for and obtained leave to appeal against the ruling of the trial and then filed this appeal.

At the commencement of the hearing of the appeal Mr. Nkambo Mugerwa, for the appellant, made an application to tender in court as part of the record of appeal Exh. D.l which had been received in evidence in the lower court but not reproduced as part of the record of appeal. Learned counsel argued that the omission was a printer's mistake Mr. Mugerwa contended, that under r. 89 of the Rules of the court there was no definition of a supplementary record.

Mr. Kayondo, learned counsel for the respondent, submitted that there was no basis for tendering in court the exhibit and that if counsel for the appellant wished to file a supplementary record he had to comply with the rules governing the matter.

The document sought to be added to the record of appeal was a letter dated 5th December 1985 containing instructions of the British High Commissioner to the appellant Bank to pay the money into one of it accounts. This letter had been exhibited at the hearing of the preliminary objection as Exh.D.l. It should therefore have formed part of the record of appeal filed by the appellant, as required by r.85 (l) (f) since it was one of the documents put in evidence at the hearing in the lower court. The document not listed in the index in the record of appeal as required by r. 85(l) (a) of the Rules of this court.

It seems to me that having failed to include this document in the record of appeal, the only way which the appellant could introduce it in the proceedings was by way of supplementary record under r.89 of the rules of his this court. Sub-rules (3) and (4) of r.89 provide,

> "(3) An appellant may at any tame lodge in the appropriate registry four copies of supplementary record of appeal and as soon as practicable thereafter serve copies of it on every respondent who has complied with the requirements of rule 78.
>
> (4).A supplementary record of appeal shall be prepared as nearly be in same manner as a record of appeal."

Mr. Mugerwa contended that the rules did no contain a definition of supplementary record. With respect, think Sub-rule (1) of r. 89 gives some guidance as to the meaning of supplementary record when it states,

> "If respondent is of opinion that the record of appeal is defective or insufficient for the purpose of his case, he may lodge in the appropriate registry four copies of supplementary record of appeal any further documents or any additional documents which are in his opinion required for the proper determination of the appeals."

In my opinion, that provision attempts to define what a supplementary record means. A supplementary record therefore means a record of any further documents or additional parts of documents which may be required for determination of the appeal. The words "further" and "additional" are intended to refer to documents which are part of the basic documents mentioned in r 85 as forming the record of appeal. A supplementary record therefore merely supplements a defective or insufficient original record of appeal, and cannot itself contain the basic documents required for the original record.

In Kiboro V. Posts & Telecommunication Corporation (1974) E.A 155, the court of appeal held that a supplementary record cannot contain one of the basic documents required by the Rules E.g. a decree or order where it is Omitted, and went on to discuss the meaning of a supplementary record. Law Ag. V-P said, at P. 156,

> "The meaning of a supplementary record of apea1 is made clear in r. 89 (1). It means a record containing copies of "further documents or of any additional part of documents which are required for the proper determination of the appeal". The word "further" must in my opinion mean further to the documents required by r. 85 (1) to be contained in the record of appeal. Any other construction would mean that any other appellant who has filed a record omitting one or more of the basic documents required by 85(l) could at any time before the hearing file afresh record, containing those documents, without
> having to apply to court for an extension of time under r.4. If Mr. Mwite is right, a

record of appeal could be filed in complete disregard of r. 85(1) and the matter put right by filing a new record complying with that rule at any time before the hearing."

Mustafa J.A: observed at P. 160,

"I am satisfied that a supplementary record in terms of r.89 of the Rules can only include additional any further documents which are in the opinion of an appellant or respondent required for a proper determination of appeal. It supplements the original record of appeal which has to be filed within the proscribed time, and which has to contain the basic documents as provided in r. 8 of the Rules. If a basic document like a copy of the decree is omitted from the original record of appeal, which cannot be introduced into the record by filing a supplementary record of appeal when the prescribed time has expired. In this case the appellant could only file the omitted decree out of time with leave".

I respectfully agree with those observations.

In the present case since the appellant has not complied with the provisions re1atizg to the filing of a supplementary record of appeal, his application to amend the record of appeal by introducing at the hearing the omitted document, must rejected.

Mr. Kayondo learned counsel for the respondent, however, raised a more fundamental preliminary objection.

He submitted that the appeal was incompetent on two grounds. The first ground was that the notice of appeal was filed out of time. He pointed out that the ruling and order for leave to appeal to court were granted on 24th November, 1986 while the notice of appealed was filed on 9th December l986, which was fifteen days after the date of the ruling and order appealed from. The notice of appeal was therefore filed one day out of time, and yet there was no leave

granted to file the notice out of time.

The second ground was that neither the order appealed against nor the order granting leave to appeal were extracted and filed with the record of appeal as required by r.85(l)(h) and (i) of the Rules of this Court.

As regards the first ground, it is clear from r.74 (2) of the Rules of this court that a notice of appeal must be lodged within fourteen days f the date of the decision against which it is desired to appeal. In the present case the decision of the lower court was made on 24th November, 1986 but the notice of appeal was filed on 9th December, 1986. It should have been filed on 8th December 1986 which was a Monday and not a public holiday, and therefore couldn't be excluded in computing time under r.3 of the Rules of the Court.

Accordingly, I accept the submission of learned counsel for the respondent and do hold that the notice of appeal was files out of time and since no leave to extend the time within which to appeal was granted, the appeal is incompetent. On this ground alone I would strike out the appeal as incompetent.

However, I shall deal briefly with the second ground of objection raised by counsel for the respondent. It is clear from the record of appeal that the appellant failed o
extract and file both the order appealed against and the order granting leave to appeal as required by r.85 (l) bf the Rules of this Court.

It is well settled that, no appeal lies to this court until the decree or order appealed from has, been extracted. See
Farrab Incorporated V. The Official Receiver and Provisional Liquidator (1959) E.A. 5; Commissioner of Transport V. Attorney General of Uganda (1959) E.A 329 and Kiboro v. posts and Telecommunications Corporation (1974) E.A 155. As the Court of Appeal said in Commissioner of Transport V. Attorney General of Uganda (l959) E.A.329, at page 332,

"By the municipal law of Uganda no appeal is competent until the formal decree or order embodying the decision complained of has come into existence. The matter is not therefore merely procedural and the defect cannot be waived under r. 72 of appeal Rules.

Farrab Incorporated V.Official receiver& Provisional Liquidation (1959) EA 5. The only, way in which this position can be cured is by extending the time for filing an appeal"

In the result I Would uphold the preliminary objection raised by learned Counsel for the respondent that this appeal is incompetent for the reasons already given, and I would strike it out with costs.

Dated at Mengo this 2nd day of July 1987.

Sgd. B.J Odoki
JUSTICE OF APPEAL

Mr.Mugerwa for the appellant.
Mr. Kayondo for the respondent.

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RULING OF LUBOGO, AG. J.A

I have had the opportunity of reading the ruling of Odoki J.A in draft I agree with it and I have nothing to add.

Dated at Mengo this 2nd day of July 1987.

Sgd: D.L.K. LUBOGO
AG. JUSTICE OF APPEAL

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JUDGMENT OF MANYINDO, V-P

I have read the judgment of Odoki J. and I agree that this appeal is incompetent as it was brought out of time, without leave of this court and that t should therefore be struck out. I also agree that the letter (exh. Dl) which was put in evidence in the lower court but omitted from the record of appeal could only be introduced in this court as a supplementary record of appeal under rule 89 of the Rules of this Court.

I would therefore uphold the preliminary objection and as Lubogo Ag. J., agrees with the judgment of Odoki J.A., the appeal is struck out with costs to the respondent.
Dated at Mengo this 2nd day of July 1987.

Sgd:

S. T.MANYINDO
VICE-PRESIDENT