

IN THE COURT OF APPEAL

AT MENGO

(CORAM: MANYINDO V-P, LUBOGO AG. J.A., & ODOKI)

CIVIL APPEAL NO. 1 OF 1987

BETWEEN

GEORGE LUBEGA AND OTHERS::: APPELLANT AND

UGANDA TRANSPORT CO. (1975) LTD AND ANOTHER:::::::::::::::::RESPONDENT

(Appeal from judgment and decree of the High Court of Uganda (Opio) J. dated

17th March 1986.

Civil Suit No. 2112 of 1978)

RULING OF LUBOGO AG. J.A.

This is an appeal in respect of the amount of damages that were awarded by the trial judge. When the appeal came up for hearing Mr. Mugenyi, Counsel for the Respondent informed us that Counsel for the Appellant, Mr. Mugabi who was absent had been served with the hearing notice. His firm had been served through Mr. Kiyingi advocate. Mr. Mugenyi further informed us that he (Mr. Mugenyi) had earlier on instructed the said Kiyingi to appeal on his behalf in the lower court. When Mr. Kiyingi was practicing from the Chambers of Mugabi, & Co., Advocates.

As Counsel for the Appellant had been served and at the request of Counsel for the Respondent, we granted leave for the appeal to proceed ex-parte. It was at that juncture that Mr. Mugenyi made a preliminary point of objection, namely; that the appeal should be struck out for incompetence as the notice of appeal was filed out of time. He also submitted that as the decretal amount and the costs of the suit had been paid to Counsel for the appellant, the appeal should not have been filed.

On the first ground of preliminary objection he submitted that Judgment was delivered on 17th March, 1986. The Notice of Appeal was filed on 16th April, 1986. This meant that it was 15 days out of time contrary to Rule 74 (2) of the Court of Appeal Rules which provide that such notice should be filed within 14 days of the date of the decision against which it is desired to appeal. Mr. Mugenyi went on to say that the Record of Appeal was filed on 20th

Feb. 1987. Again this offended Rule 81(1) (b) which provides that the record of appeal should be filed within 60 days of the date when the Notice of Appeal was filed. Therefore, the filing of the Record was 149 days out of time and no certificate had been issued by the Registrar.

I uphold those submissions by learned counsel especially when I take into account that no Record of Appeal was served on Counsel for the respondent nor the memorandum of appeal despite his letter dated the 9th April, 1987 to Mugabi & Co., advocates to that effect.

The second leg of his preliminary objection is most disturbing. On 3rd April, 1986 Mugabi & Co., Advocates wrote to Mugenyi & Co., advocates as follows:-

“We refer to you to the above suit where judgment was entered against your client in the sum of shs. 360,000/= general damages on 17/3/86. A copy of the judgment is attached”.

We suggest costs of shs. 45,000/= being the statutory 12% plus shs. 10,000/= DR’S fee making a total in all of shs. 55,000/= Kindly write for payment of total sum of Shs. 455,00/= with a copy to us.”

This letter was signed by Mr. Mugabi for Mugabi & Co., On 10th April, 1986 Mugenyi & Co., Advocates wrote to the Secretary of their clients, Uganda Transport Co., (1975) Ltd. for payment of shs. 475,000/= inclusive of their fee for full and final settlement. Two cheques were made by Uganda Transport Co. (1975) Ltd. one for Mugabi & Co., and the other for Mugenyi & Co. I have no reason to disbelieve that those sums were paid on or about 15th April, 1986.

It transpired, however, that on 16th April, 1986 a notice of appeal was filed though belatedly. I am of the opinion that Counsel or the appellant was not entitled to approbate and reprobate

the same breath. Accordingly, I am satisfied that coin
counsel for the appellant had no instructions to file the appeal.

Accordingly the Notice of Appeal would be struck out as incompetent with costs. This appeal
could have been dismissed on other ground as well, although it is a pity the appeal was not
heard substantively on the principles to be applied on awarding general damages.

It was suggested by learned counsel that Mugabi should pay the costs personally. I feel that
Mugabi should not be condemned to ay costs personally. He did not appear at the hearing and
so he could not avail himself of the opportunity to show cause why he should not pay costs
personally.

Now I would like to revert to the information by Mr. Mugenyi that he had instructed Mr.
Kiyingi of Mugabi & Co., Advocate s to appear on is behalf in a case in which Mugabi &
Co., Advocates had interest. This was most deplorab1e and most unethical. It was revealed by
counsel that there was a growing tendency among practising lawyers to have letters designed
on their behalf by the next door practicing Lawyers even if the signatory is on the opposite
side, as it was in this particular case. This practice must be condemned in no uncertain terms.
It is not only deplorable and unethical, but also goes to the foundation of the administration
of justice in this country. I hope Magistrates and Judges would be on the look out for this
kind of practice.

Sgd. D.L.K. LUBOGO

AG. JUSTICE OF APPEAL

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RULING OF MANYINDO, V-P

I have read the judgment of Lubogo Ag. J.A. and agree that the appeal is incompetent. This is an unusual appeal in that the appellant was the successful party in the lower court. He sued the respondent company for general damages for pain and injuries resulting from a motor accident involving the respondent's motor vehicle. He was awarded shs. 360,000/= general damages. He appealed to this court against the quantum of damages.

When the appeal came up for hearing Mr. Mugabi, counsel for the appellant did not show up although his firm had been duly served with the hearing notice. Service had been effected through Mr. Kiyingi, an advocate who was practising in the chambers of M/s. Mugabi and Cc., Advocates. Apparently the former was cooperating with the latter.

In my judgment the conduct of the counsel for the appellant, Mr. Mugabi leaves a lot to be desired. He personally prosecuted the suit in the lower court. As his client's suit succeeded, his firm collected the decretal sum from the respondent company. Having done that, the appellant and his counsel should surely have held their peace. Instead Mugabi belatedly filed this appeal, which he did not bother to prosecute. It is a pity that this matter must fail due to the incompetence of counsel for the appellant because the damages awarded to the court were clearly inadequate.

The role played by Mr. Kiyingi, advocate, in this case is also very questionable. I agree with Odoki J.A. that the matter should be investigated by the Law Council.

I also agree with Lubogo Ag. J. that Mr. Mugabi should not be condemned to pay the costs of the appeal personally on legal grounds although his conduct was improper. And as Odoki J.A. agrees, this appeal is struck out with costs to the respondent.

Dated at Mengo this 2nd day of July 1987.

Sgd. S.T. MANYINDO
VICE-PRESIDENT

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RULING OF ODOKI J.A.

I have had the benefit of reading in draft the ruling prepared by Lubogo Ag. L.A. and I agree with him that this appeal is incompetent having been filed out of time, and must be struck out with costs. I also agree that Mr. Mugabi counsel for the appellant would not be ordered to pay costs personally because he has not been given an opportunity of answering the complaint raised against him that he filed the appeal without instructions. See Kohli V. Popatlal (1964) 219 Abraham V. Jutsun (1963) 2 All ER 402.

However, I wish to comment briefly on another aspect of professional conduct which was brought to our attention at the hearing of this appeal. Mr. Mugenyi, learned counsel for the respondent informed us that he had briefed another advocate, Mr. Kiyingi, to represent his client at the hearing of the suit in the lower court. He also informed us that Mr. Kiyingi was at material time working in the chambers of Mr. Mugabi counsel for the appellant.

The Advocates (Professional Conduct) Regulations 1977 require an advocate to appear personally in court to represent his client and here this is not possible to brief another advocate to appear on his behalf, provided his client has accepted that advocate. In this connection r. 4 of the said Regulations provides,

“(1) Every advocate shall in all contentious matters appear in court personally or brief a partner or a professional assistant employed by his firm to appear.

(2) Where it is not possible for the advocate so to appear personally or to brief a partner or professional assistant employed by his firm, he shall brief another advocate

acceptable to the client so to appear.

Provided that where the advocate considers the proceedings in question to be of minor decisive value to the final outcome of the case, he shall not be required to obtain the clients acceptance of such other advocate.”

A contract of retainer for legal services is a personal one and therefore it cannot be lightly assigned to another advocate whom the client has not instructed or consented to his acting for him. In the present case, if Mr. Mugenyi did not seek and obtain consent of his client, he would be in breach of sub-rule. (2) of r. 4 unless the proviso applies. The proviso could only apply if the matter handled by Mr. Kiyingi was not of a decisive value to the outcome of the case. The matter handled by Mr. Kiyingi was a contentious one involving the assessment of quantum of damages. It was not merely an application for an adjournment or appearance to receive a judgment which seem to be covered by the proviso.

Moreover, Mr. Kiyingi was working in the chambers of Mr. Mugabi who was acting for the opposite party. It is not clear whether he was merely sharing chambers or working in the firm of Mugabi & Co., Advocates. This raises problems of disclosure of confidential information and conflict of interests. It seems to me questionable if not improper for the same firm of advocates to represent both parties in a contentious matter as it may be difficult for the advocates to avoid conflict of interests, thus jeopardizing the interests of the parties.

As the disciplinary jurisdiction over advocates is now, under the Advocates Act 1970, vested in the Law Council I would direct that copies of the ruling of the court in this case be forwarded to the council for their consideration and appropriate action.

Dated at Mengo this 2nd day of July 1987.

Sgd. B.J. ODOKI
JUSTICE OF APPEAL

Mr. Mugabi for the appellant absent.

The Appellant absent.

Mr. Mugenyi for respondent present.

I certify that this is a true copy of the Original.

R.I.S. OYOIT

REGISTRAR OF COURT OF APPEAL