IN THE SUPREME COURT OF UGANDA
HOLDEN AT MENGO

CORAM: ODOKI C.J., TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJ.S.C.

CIVIL APPEAL NO.1 OF 2001

B E T W E E N

CRANE FINANCE CO. LTD :: APPELLANT

A N D

MAKERERE PROPERTIES LTD ::: :::::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from Ruling and Order of Court of Appeal (Mpagi- Bahigeine, Engwau and Twinomujuni JJA) at Kampala in Civil Application No.88 of 2000, dated 23.3.01)

REASONS FOR THE COURT DECISION:

This appeal arose out of an order made by the Court of Appeal to strike out Civil Appeal No.50 of 2000 as incompetent. On 31st October, 2001, we heard and allowed the appeal with costs to the respondent. We reserved our reasons, which we now give.

The background to the appeal is simple. On 15.6.99, the High Court (Lugayizi J) in a ruling on a preliminary point of law, struck out High Court Civil Suit No.759 of 1998. The appellant who was the unsuccessful party decided to appeal to the Court of Appeal. Its advocates wrote to court on 18.6.98, requesting for copy of the proceedings in the High Court, for purposes of compiling the record of appeal. About the same time they filed a Notice of Appeal. Although they served the respondent's advocates with copy of the Notice of Appeal, they omitted to serve on them, or the respondent, copy of the request for the copy of proceedings. The record of appeal was lodged in the Court of Appeal more than a year later, on 14th September, 2000, and was registered as Civil Appeal No.50 of 2000. A

copy thereof was served on the respondent's advocates on 15th September, 2000.

Subsequently, the appellant's advocates realised that because of the omission to serve the respondent with copy of the request for proceedings, by virtue of provisions of r.82(2) and (3) of the Court of Appeal Rules, the time taken for preparation of the copy of proceedings was not to be excluded in computation of time for instituting the appeal. That meant that they had lodged and served the record of appeal out of time. Consequently, on 6th October 2000, they applied to the Court of Appeal under Misc. Application No.73 of 2000. for an order *"that time within which to file and serve the record of appeal be enlarged."* That application was heard and granted on 26.2.01, by Kitumba J.A. sitting as a single judge of that court. She reserved her reasons. She delivered the reasoned ruling on 16.3.01

In the meantime, after being served with the record of appeal through its advocates, the respondent, on 13th November 2000, applied under Misc. Application No.88 of 2000 for an order *"that Civil Appeal No.50 of 2000 be struck out for being incompetent."* That application was heard by a full bench of the Court of Appeal on 27.2.01, the day after Kitumba J.A had granted the enlargement of time. In its reserved ruling, which it delivered on 23.3.01, the court held that Civil Appeal No. 50 of 2000 was a nullity, and struck it out. It is against that decision that the appellant appealed to this Court.

Before us, Mr. Mukasa-Sebugenyi's contention, in a nutshell was to the effect that the enlargement of time granted by Kitumba J.A., had validated Civil Appeal No.50 of 2000. He submitted that the Court of Appeal was in error in holding that the said appeal was a nullity, incapable of validation,

and in striking it out as incompetent, when it had been duly validated. He relied on the provisions of r.4 of the Court of Appeal Rules, and on the decisions in **SHANTI vs HONDACHA & ANOTHER** (1973) EA 208, and **THE EXECUTRIX OF THE ESTATE OF CHRISTINE MARY TEBAIJJUKA & ANOTHER vs NOEL GRACE SHALITA** Civil Application No.8/88 (SC).

On the other hand, Mr. Nangwala, counsel for the respondent, pointed out that at the hearing of Misc. Application No.88 of 2000, the proceedings and ruling in Misc. Application No.73 of 2000, were not before the court. He maintained that although the court had been informed, that Kitumba J.A. had granted extension of time, it was not informed that she had validated Civil Appeal No.50 of 2000. He argued that the Court of Appeal should therefore not be faulted on basis of a record which was not before it. With due respect, we found that this argument was not sustainable. If the learned Justices of Appeal had been so inclined, they would have accessed the proceedings and ruling of Kitumba J.A. It is pertinent that in their reserved ruling they noted the argument by counsel for the appellant, thus:

> ***"He however submitted that the previous day they had been granted extension of time under Rule 4, within which to file and serve the appeal vide Civil Application (sic) No.50 of 2000. He argued that the time could be extended before or after the act and that it had been duly extended the previous day."***

His second point, was on the interpretation of provisions of r.4. He strenuously argued that the rule empowers the court to extend time, but does not empower the court to validate an appeal which is invalid by reason of having been filed out of time. He argued that where, as in the instant case, extension of time is granted after the record of appeal was filed out of time, the record has to be filed again in order to institute a valid appeal. This is

the same argument that appears to have been accepted by the Court of Appeal.

In their reserved ruling the learned Justices of Appeal considered in detail the fact that the appellant did not comply with provisions of r.82(2) and (3) of the Court of Appeal Rules, (a fact that had been conceded and was therefore, not in dispute). They observed that the provisions are mandatory, and after referring to several judicial precedents in which "*notices of appeal were struck out for non-compliance*" with those provisions, concluded rather summarily thus:

> "*In this case non-compliance with Rule 82(2) and (3) blows the bottom out of the appellant's arguments. Delay had rendered the appeal a nullity which could not be restated* (sic) *by applying to have the appeal extended. There was therefore no appeal when the time was extended. It is thus struck out.*" (emphasis added)

Although it may be inferred that the learned Justices rejected the appellant's argument which was centered on r.4, they did not discuss it in the ruling. It does not appear that they considered the import of the provisions of that rule. Nor did they advert to judicial precents on it. Rule 4 of the Court of Appeal Rules, reads:

> "*4. The Court may, for sufficient reason extend the time limited by these rules or by any decision of the Court or of the High Court for the doing of any act authorised or required by these rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these rules to any such time shall be construed as a reference to the time as so extended.*" (emphasis added)

The rule invisages four scenarios in which extension of time for the doing of an act so authorised or required, may be granted, namely -

(a) before expiration of the limited time;

(b) after expiration of the limited time;

(c) before the act is done;

(d) after the act is done.

The situation in the instant case is a combination of scenarios (b) and (d). The appellant applied for, and Kitumba J.A. granted, extension of time for filing and serving the record of appeal, long after the limited time had expired, and also after the acts of filing and serving the record of appeal had been done. The bone of contention, however, is in respect of scenario (d), namely the effect of such extention on the acts which had already been done.

We think that it is obvious that the intended effect is to bring that act within "*the time as so extended.*" There would have been no reason to include that scenario in the rule, if an act done out of time was an incurable nullity. It is because it is not such a nullity, that under r.12 of the same Rules, the Registrar is required to accept documents filed out of time, and only to endorse them to that effect. A reading of rr.4 and 12 together clearly indicates that while a document filed out of time is voidable, it may be validated by extention of time.

Secondly, we share the view that it would be futile to construe the provision otherwise. That view was succinctly expressed by the Court of Appeal for East Africa in **SHANTI vs HINDOCHA** (1973) EA 207. In that case the court considered r.9 of its Rules (which was in identical terms as r.4), and an argument, (similar to that of Mr. Nangwala in the instant case), that the rule empowered the judge to authorise a future act, not to validate a past one. The court held.

> *"We think that when the time for lodging a document is extended, the document is duly lodged if lodged within the time as so extended, whether the actual lodging is before or after the order of extension. To hold otherwise would serve no purpose and would merely result in further costs being*

> *incurred. It is not irrelevant in this connection to note that under r.11 the registrar has no power to refuse to accept an appeal on the ground that it is out of time, which clearly implies that the delivery of the appeal out of time may be excused or validated."*

In an orbiter dictum in THE EXECUTRIX OF THE ESTATE OF CHRISTINE MARY N. TEBAJJUKIRA & ANOTHER vs NOEL GRACE SHALITA (supra), Odoki J.S.C, (as he then was) referring to the same scenario, said;-

> *"The legal effect (of extending time for filing) is therefore to validate or excuse the late filing of documents. The applicant need not file fresh documents....if those already filed are complete and in proper form."*

Undoubtedly, if the attention of the learned Justices of Appeal, in the instant case, had been drawn to these precedents, they would have come to a different decision. It was for these reasons that we allowed the appeal with costs, and set aside the order striking out Civil Appeal No.50 of 2000.

Before leaving the matter, however, we are constrained to comment on proceedings before Kitumba J.A., which occurred about three months after she granted the extention, and two months after the full bench struck out Civil Appeal No.50 of 2000. The record shows that on 23.5.01, counsel for both parties appeared before the learned Justice of Appeal, because of disagreement on the order to be extracted from her ruling in Civil Application No.73 of 2000.

In the reserved ruling the learned Justice of Appeal had concluded thus:

> *"It was for these reasons that I allowed the application for extension of time within (which) to lodge the record of appeal in Civil Appeal No.50 of 2001 which had already been filed in this Court. Civil Appeal No.50 of 2001 is accordingly validated."*

We take it that the year "*2001*" stated therein, is a topographical error. Clearly what was meant was what was under consideration, namely Civil Appeal No.50 of 2000, out of which, according to all relevant documents, Application No.73 of 2000, arose. Apparently, when the appellant's advocates submitted a draft order for approval, the respondent's advocates objected to the order reflecting that Civil Appeal No.50 of 2000 had been validated, notwithstanding that it was so stated in the ruling. At the appearance on 23.5.01, counsel for the respondent, explaining the basis for refusing to approve the draft order, contended that the draft order extracted on 27.4.01 sought to validate the appeal which had been struck out on 23.3.01. He submitted that the validation could only be by the full Court. Of course that premise was inaccurate, because an order "*speaks*" from the date it is made, in this case 26.2.01, not from the date it is extracted. Be that as it may, the day's proceedings ended with Kitumba J.A., recording the following:

> "*Court:*
> ***By consent of both counsel for both parties it is agreed that the order shall refer to the extension of time within which to serve the notice of appeal and record of appeal be extended. It should not include validation.***"

We were informed from the bar, that as a consequence of this, the appellant, on 12th June 2001, lodged another record of appeal which was registered as Civil Appeal No.36 of 2001. With due respect we think all that was irregular.

In the first place, while parties to a case may resort to the presiding judge, for settlement of the terms of an order to be extracted from a judgment or ruling, the procedure cannot be used to modify, amend or otherwise alter the substance of the judgment or ruling. Even where a *slip order* is sought and made under r.35, (which was not the case here) the intention of the court

when the judgment or ruling was made, must be preserved. In the instant case, the intention of the learned Justice of Appeal, was to extend the time to when the record of appeal in Civil Appeal No.50 of 2000 was lodged and served so as to validate the same. That could not be altered, albeit with consent. The learned Justice of Appeal was *functus officio*. Secondly, the extension of time granted by Kitumba J.A., on 26.2.01 cannot be construed to have been so open ended as to extend to four months after it was made. In absence of express length of time being stated, the only plausible inference must be that time for filing and serving was extended to the dates when Civil Appeal No.50 of 2000 was filed and copy of the record was served, respectively. It was not extended to May or June, 2001.

Dated at Mengo the 12th day of February 2002

BJ.Odoki
Chief Justice

J.W.N. Tsekooko
Justice of the Supreme Court

A.N. Karokora
Justice of the Supreme Court

J.N. Mulenga
Justice of the Supreme Court

G.W. Kanyeihamba
Justice of the Supreme Court