

**THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT
MENGO**

**(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA,
MULENGA, JJSC)**

**CIVIL APPLICATION NO. 4 OF 2001 (ARISING IN THE MATER OF
CIVIL APPEAL NO. 9 OF 2000)**

BETWEEN

HUSSEIN ABDALLA HAMDANAPPLICANT

AND

HUSSEIN THAREL AMUHI MALKAN.....RESPONDENT

(Application arising out of Supreme Court Civil Appeal No. 9 of 2000 against the Court of Appeal Judgment in Civil Appeal No. 35 of 1999 before the (Hon. Okello, Berko, and Twinomujuni, JJJA) dated 18th October, 2000 arising from HCCS No. 912 of 1998 before Ag. Justice Okumu Wengi).

Reasons of the Court's Decision.

The applicant, Hussein Abdalla Hamdani, filed this application by Notice of Motion under Rules 41 and 77 of the Supreme Court Rules Directions 1996 seeking for the following order:

1. That the respondent/appellant's Notice of Appeal filed on 20th October, 2000 intended to appeal against the Court of Appeal judgment dated 18th October 2000 in Civil Appeal No. 35 of 1999 be struck out.
2. That the respondent/appellant's civil appeal No. 9 of 2000 filed in this court on the 12th December 2000 be struck out.
3. That the costs of this application be borne by the respondent/appellant.

There are seven grounds in support of the motion:

1. That there is no decision of the Court of Appeal against which civil appeal No. 9 of 2000 was instituted and or has been instituted.
2. That without such decision, no appeal lies against the judgment of the Court of Appeal No. 35 of 1999 to the Supreme Court.
3. That the notice of appeal filed on 20/10/2000 by the respondent/appellant through M/s Muhwezi, Bamwite & Co. Advocates against the judgment in civil appeal No. 35 of 1999 was filed by Counsel for respondent/appellant without instructions from the client
4. That the absence of instructions from respondent/appellant (as the dissatisfied and aggrieved party by the decision in civil appeal No. 35 of 1999) to counsel to lodge and file a notice of appeal and or otherwise generally appeal renders such a notice of appeal a nullity and the subsequent appeal filed thereafter on the basis of such notice of appeal is incompetent and barred by the law.
5. That the filing of a notice of appeal by dissatisfied party i.e. the respondent/appellant herein is essential step in an appeal which has never been duly and properly taken by the respondent/appellant.
6. That the Record of Appeal filed is incompetent as it lacks the essential documents for the proper and effectual determination of the appeal.
7. The certification of correctness by the Counsel for the respondent/appellant dated 6/12/2000 is false and incorrect as the Record of Appeal lacks the stipulated essential documents and which certification is an essential step in the appeal.

Mr. Richard Kiboneka of M/s Nyanzi, Kiboneka and Mbabazi Advocates swore affidavit in support of the applicant's application. There are annexures "Not/App, Bam/AFF/Repl, 'Proceeds' attached to Kiboneka's affidavit. On the other hand, Mr. Hussein Taherali Amji Malkan, the respondent, made an affirmation in reply to the affidavit of Richard Kiboneka. The affirmation and affidavit are on the record. We see no need to reproduce their contents here.

When the application came up for hearing on 13/11/2001, we dismissed it. We reserved our reasons to be given on notice. We now give the reasons.

The brief facts of the application are that the respondent/appellant had filed a suit under section 15 of the Trustees Incorporation Act (Cap. 147) Laws of Uganda, challenging the respondent's membership of the Registered Trustees of Dawoodi Bohora Jamaat Corporation, Kampala, hereinafter referred to as the corporate body.

The issue at the trial was whether the appellant was a member of the corporate body, having been duly elected by the members of the Association at a general meeting held on 7/12/91. The trial Judge held that the respondent was not a member of the corporate body. The respondent was dissatisfied and appealed to the Court of Appeal. His appeal was dismissed. The respondent filed the Notice of Appeal and the appeal to this court. The applicant filed Notice of Motion, seeking to strike out the Notice of Appeal and the appeal. As we have already held, we dismissed the application and reserved our reasons which we now give.

Mr. Mbabazi, Counsel for applicant in his submission, relied on the contents of the Notice of Motion and the affidavit of Kiboneka and referred to the annexures thereto and contended in support of the 1st ground of the application that although the Court of Appeal gave its judgment on 18/10/2000, there was no decision/decreed extracted and filed together with the Notice of Appeal. He contended that without that decision/decreed extracted and filed, no appeal exists. He cited and relied on Article 132(2) of the Constitution, section 5 of the Judicature Statute and Rule 33(1) of the Rules of this court.

Mr. Muhwezi Counsel for respondent conceded that the decree was not extracted and filed in the record of appeal, because it was not a basic document required by Rule 82(2) of the Rules of this court, which the record of appeal must contain. He contended that a judgment of the Court of Appeal was included in the record of appeal but not the decree, because a decree was none of the essential documents that must be filed. He referred us to the Court of Appeal decision in *Kibuka Musoke v Apollo Kaggawa (CA) Civil Appeal No. 46 of 1997* (unreported) as a persuasive authority for the proposition that the extraction of

a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal to the Court of Appeal.

Clearly, for the purpose of this appeal, sub-rule (2) of Rule 82 of the Rules of this Court prescribes documents which must form record of appeal from the decision of the Court of Appeal to the Supreme Court. According to sub-rule (2) of Rule 82 of the Rules of this Court, the record of appeal from the Court of Appeal to the Supreme Court must contain the following documents:

- (a) an index of all the documents in the record, including the records of the courts below, with the number of the pages at which they appear;
- (b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service, then as required by rule 75, his or her last known address and proof of service on him or her of the notice of appeal;
- (c) the order, if any, giving leave to appeal;
- (d) the memorandum of appeal;
- (e) the record of proceedings;
- (f) the order or judgment;
- (g) the notice of appeal; and
- (h) in case of a third appeal the certificate of the Court of Appeal that a point or points of law of great public or general importance arise.

Clearly, a decree is not one of those documents that must form part of the record of appeal from the decision of the Court of Appeal to the Supreme Court. Therefore, since Rule **82(2)** of the Rules of this Court does not require a decree to be part of the Record of Appeal, Mr. Muhwezi is right in his contention that absence of the decree does not perse affect the validity of the appeal. This holding disposes of the complaint concerning lack

of decree. We therefore saw no need to discuss either Article 126(2)(e) of the Constitution or Section 5 of the **Judicature Statute** 1996 or Rule 33(1) of the Rules of this Court. In the result this complaint had fail.

The second complaint was that the notice of Appeal filed on 20/10/2000 was filed by Counsel without instructions of the client as an aggrieved party and that such absence of client's instructions renders the Notice of Appeal a nullity and therefore the subsequent appeal filed thereafter on the basis of such Notice of Appeal is incompetent and barred by the law.

Mr. Mbabazi for applicant submitted that this complaint was brought out in grounds 3, 4 and 5 of the Notice of Motion and was supported by paragraphs 3 of Kiboneka's affidavit in which he averred as follows:

"3 That from the available documents and records, the said notice of appeal was drawn and field by M/s Muhwezi, Bamwite and Co Advocates without instructions from the Respondent/Appellant. The documents and records in support thereof are hereunder:

(a) *Affidavit of Edward Bamwite dated 10th November, 2000 filed in Court of Appeal Civil Application No. 87 of 2000 with especial reference to paragraph 5 thereof. Copy of the Notice of Motion, Affidavit and Affidavit in reply filed in Civil Application No. 87 of 2000 are annexed hereto as annexes "NOT/MOT", "BAM/AFF" and "AFF/REPL" respectively.*

(b) *The record of the taxation proceedings in Court of Appeal Civil Appeal No. 35 of 1999 wherein Mr. E. Muhwezi stated that he had no instructions from the Respondent/Appellant."*

Mr. Mbabazi further observed that during the taxation proceeding on 2/11/2000 in the Court of Appeal Mr. Muhwezi stated that he had no instructions from his client to "conduct" the taxation. Mr. Mbabazi, therefore contended that if by 2/11/2000 Mr. Muhwezi had no instructions from his client, the client could not have been aware of the judgement of the Court of Appeal and therefore could not have instructed M/s Muhwezi,

Bamwite & Co, Advocates to file the Notice of Appeal on 20/10/2000 and the subsequent appeal.

On the other hand, Mr. Muhwezi for respondent submitted that the application was incompetent, because the affidavit of Kiboneka supporting the application was sworn by him as a person who did not have knowledge of the facts he was swearing to. He submitted that Mr. Kiboneka's affidavit offended Rule 42(1) of the Rules of this court and contended that this was reflected in paragraph 3(b) of Mr. Kiboneka's affidavit, where he relied on Mr. Muhwezi's statement he made before Mr. Ssegirinya, the taxing officer. Counsel then submitted that he had the instructions from the respondent to file notice of appeal and the appeal. He further contended that this was reflected in the respondent's affidavit, paragraphs 4, 5, 6, 7, 8, 9 and 10 in which he averred that before he left for the United Kingdom, he (respondent) gave instructions to Mr. Muhwezi to file the notice of appeal and the appeal as he had anticipated to lose the appeal.

Clearly from the affidavit of the respondent/appellant which was not challenged, we found merit in Mr. Muhwezi's submission, that before the respondent left for England, he gave instructions to Mr. Muhwezi to file Notice of Appeal and to appeal to the Supreme Court.

In the circumstances, the application grounded on such affidavit and Mr. Muhwezi's statement could not stand.

It was because of the above reasons that we dismissed the application with costs.

Dated at Mengo this 27th February 2002.

B.J. ODOKI
CHIEF JUSTICE

A.H.O. ODER,
JUSTICE OF THE SUPREME COURT.

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.