THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: ODOKI, CJ, ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA JJSC]

CIVIL APPEAL NO. 20 OF 2001

BETWEEN

HORIZON COACHES LTD::APPELLANT

AND

FRANCIS MUTABAZI}

KAMARA DEODOTA MUTABAZI} :: RESPONDENTS

SHARON MUTABAZI }

HABAKURAMA MUTABAZI }

[Appeal from the ruling of the Court of Appeal at Kampala (Mukasa Kikonyogo, DCJ, Twinomujuni and Kitumba JJA) dated 4 September 2001 in Civil Application No. 97 of 2002]

JUDGMENT OF THE COURT

This is an appeal against the ruling of the Court of Appeal whereby the Appellant's notice of appeal was struck out for having been served on the Respondents out of time.

The brief back ground to this appeal is as follows. In 1997, the Respondents filed a suit in the High Court against the Appellant claiming special and general damages for negligence. On 23 June 2000 judgment was entered against the Appellant. On 7 July 2000 the Appellant filed a notice of appeal against the decision of the High Court. On the same day the Appellant wrote a letter to the Registrar of the High Court requesting for a copy of the proceedings. The letter was not copied to the Respondents. On 4 December 2000 the Appellant filed an application for stay of execution and served it on the Respondents. The notice of appeal and the letter requesting for proceedings were attached to the application.

On 8 December 2000, the Respondents filed a notice of motion to strike out the notice of appeal on the ground that the notice of appeal had been served out of time since they were only served on 4 December 2000. The notice of motion was supported by an affidavit Sworn by the first Respondent Francis Mutabazi to the effect that the Appellant did not serve a copy of the notice to the Respondents or their counsel. Francis Mutabazi deponed further that he found the notice of appeal attached to the application for stay of execution, which was served on him on 4 December 2000. He also stated that the letter addressed to the Registrar requesting for proceedings was also attached to the application for stay, but was not copied to him, nor received by his Counsel.

An affidavit in reply was sworn by Geoffrey Nangumya, Company Secretary of the Respondent, to the effect that on 10 July 2000 counsel for the Applicant had duly served the notice of appeal and the letter requesting for the record of proceedings to counsel for the Applicant at Counsel's Chambers. Adroni Wilfred, a clerk in the chambers of counsel for the Appellant, swore an affidavit of service on 23 February 2001 to the effect that on 10 July 2000 he went to the Chambers of Counsel for the Respondents and served the notice of appeal and the letter requesting for proceedings on Robert Okis the law clerk of the Respondent's Counsel who was known to him but who refused to endorse upon the copy of the notice of appeal and the letter requesting for a copy of proceedings, though he retained both documents.

Richard Okis, the Process Server and Clerk in the Chambers of Counsel for the Respondents swore an affidavit dated 16 May 2001 in which he averred that his name is Richard Okis and not Robert Okis, and denied that he was ever served with a notice of appeal and a copy of the letter addressed to the Registrar requesting for the record of proceedings. He denied refusing to endorse the documents.

The Court of Appeal held that the Appellant had failed to comply with the mandatory Provisions of Rules 77 (1) of the Rules of the Court of Appeal requiring the intended Appellant to serve notice of appeal to the Respondents within seven days after lodging the notice of appeal. The Court also held that the Appellant had failed to comply with Rule 82 of the Rules of that Court in that it had failed to copy and serve the letter requesting for a copy of the proceedings on the Respondents, and therefore could not be entitled to rely on the provision of Rule 82 (1) which would entitle it to lodge the appeal within sixty days after receipt of the record of proceedings.

The Court therefore upheld the application for striking out the notice of appeal as incompetent, under Rule 81 of the Rules of that Court.

The Appellant has appealed to this court on four grounds stated as follows:

1. The learned Justices of Appeal erred to hold that the Appellant's notice of appeal was served on the Respondent out of time;

2. The learned Justices of Appeal erred to hold that the affidavit of Adroni Wilfred was suspect;

3. The Learned Justices of Appeal erred to have relied on the Respondents' Affidavits, which contained falsehoods;

4. The learned Justices of Appeal erred to hold that the Appellants' () appeal had not been lodged within the prescribed time when:

(a) The issue whether the appeal was lodged out of time or not was neither one of the grounds in the application nor was it made an issue in the pleadings of the parties.

(b) There was no evidence to support such a holding.

Counsel for both parties filed written submissions in this appeal. Learned counsel for the Appellant argued the first three grounds together. The Appellant's main complaint in these grounds was that the Justices of Appeal erred to hold that the Appellant's notice of appeal was served on the Respondents out of time. Learned counsel for the Appellant first referred to paragraphs 5, 7 and 8 of the affidavit of the Respondent and submitted that what was served on the Respondents on 4 December 2000 was a notice of motion for stay of execution and not a notice of appeal as claimed by the first Respondent. It was the contention of learned counsel that the notice of appeal, which was annexed to the notice of motion, was incorporated in the notice of motion. Counsel supported his argument by citing the case of ***Castelleno vs Rodridgues (1972) EA 223.*** Learned counsel for the Appellant submitted that there was no evidence to prove that the Respondents were served with a notice of appeal out of time and therefore they failed to discharge the burden of proof to that effect. Counsel also submitted that the only evidence of service of notice was the affidavit of Adron Wilfred who deponed that on 10 July 2000 he served notice of appeal on the Respondents' counsel who refused service, It was the contention of counsel that this evidence was wrongly rejected by the Court of Appeal, which held that a

prudent counsel should have filed an affidavit of service immediately after refusal of service. Learned counsel argued that the Court of Appeal Rules 1996 do not prescribe the time within which an affidavit of service may be sworn and filed. He cited Rule 17 (4), which provides,

> ***"Proof of service may be given where necessary by affidavit, unless in any case the court requires proof by oral evidence."***

Counsel submitted that proof of service was only necessary at the hearing and therefore it does not matter when the affidavit of service was filed, Counsel further argued that the fact that a lawyer is imprudent should not affect the merits of the affidavit of service since imprudence does not mean untruthfulness. Therefore the affidavit of Adroni Wilfred was improperly rejected. Finally counsel submitted that the affidavit of Francis Mutabazi was false and misleading and a decision based on it must be set aside. He cited the case of ***Nordglimt (1988) 2 All ER 531*** in support of his submission.

In reply learned counsel for the Respondents submitted that the. Appellant had served the notice of appeal and the letter requesting for proceedings in the manner described in the affidavit of the 1st Respondent. He argued that there was no person called Robert Okis employed in his chambers whom Adroni Wilfred Claimed in his affidavit to have served with the two documents. A prudent Counsel, according to learned counsel for-the Respondent would have sworn a affidavit to rebut the above facts. He contended that the statement of learned counsel for the Appellant that the error in the name of Richard Okis may have been a mistake, Was not evidence Furthermore Counsel for the Respondent submitted that the Appellant took a period of seven months before preparing an affidavit of service. Instead of filing the affidavit in court immediately and not merely attaching it to the affidavit of another person namely Mr. Nangumya. In these circumstances learned counsel argued, the affidavit of Adroni Wilfred was suspect and the Appellant failed to discharge the burden of proof imposed upon it by Rule 82 (3) of the Court of Appeal Directions.

Rule 77 (1) of the Rules of the Court of Appeal Directions provides,

> ***"An intended Appellant shall before or Within seven days after lodging a notice of appeal*** **serve** ***copies of it on all persons directly affected by the appeal but the court***

may on application which may be exparte direct that service need not be effected on any person who took part in the proceedings in the High Court."

The Court of Appeal rightly held that the above provisions are mandatory. On the other hand Rule 81 of the same Rules states,

"A person on whom a notice of appeal has been served may at any time either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal as the case may be, on the ground that no appeal lies or that* some *essential step in the Proceedings has not been taken or has not been taken within the prescribed time."

The application for striking out the notice of appeal had been brought under the above rule and the Court of Appeal observed that it had to decide whether the above conditions were satisfied.

In coming to its conclusion that the Appellant did not comply with the requirement of Rule 77 *(1)* the Court of Appeal said,

"In the instant application we have the first Applicant who has deponed in his affidavit that neither their Applicants nor their counsel were served with either the notice of appeal or the letter requesting for record* of *proceedings until 4 December 2000. Robert Okis, Counsel for the Respondents' law clerk has in his affidavit denied that service was effected on him on* it) *July 2000 as alleged by the affidavit in reply. We agree with the submission of Mr. Omunyakol that if counsel for the Respondent had refused to endorse the notice of appeal and the letter, a prudent counsel would have immediately filed an affidavit of service. Waiting for a period of seven months before the affidavit of service is sworn and filed makes the affidavit of service of Adroni Wilfred suspect. As was said by the Supreme Court in (sic) "We expect the written request to indicate on its face that it had been copied to the intended Respondent' In this application there is no indication on the face of the letter of request that it was copied to the Applicants. In our view the Respondent has not discharged the burden of service and retention of proof of service imposed upon it by Rule 82(3)."

The passage quoted by the Court of Appeal is from the decision of this Court in *Utex Industries Ltd. vs. Attorney General,* Civil Application No. 52/95. It is clear that the Court of Appeal based its decision on the requirements of Rules 77 (1) and 83(3) of the Rules of that Court when it concluded,

> ***"For the above reasons we are satisfied that the respondent did not comply with the requirements of Rules 77 (1) and 83(3) of the Rules of this Court. The notice of appeal is incompetent as it was served out of time. That notwithstanding the appeal has not been lodged within the prescribed time and cannot be lawfully lodged because the letter of request was not served on the applicants. The application must therefore succeed."***

The complaint in the fourth ground of appeal is based on Rule 82 (3) and we shall deal with it later. The issue whether the Respondents were served in time was a question of fact to be decided on the evidence adduced before the Court. The Court of Appeal accepted the evidence of the Respondents that they were served out of time on 4 December 2000 when they were served with a notice of motion for stay of execution. It is doubtful whether this amounted to service of the notice of appeal. But if it did, it was clearly out of time. The Court of Appeal rejected the Appellant's evidence based on the affidavit of Adroni Wilfred which was held to be suspect, It was so held because of the mistake in the first name of the Law Clerk of the Respondents' counsel, which was Richard Okis, not Robert Okisi, and secondly, it was sworn seven months after the alleged service.

In our view the mistake in the name does not necessarily point to a deliberate lie. It could have been an innocent mistake. However the failure to swear an affidavit of service immediately after the refusal to accept service and the attachment of the notice of appeal and the letter requesting for proceedings seems to cast doubts on the claim by the Appellant that it served these documents to the Respondents earlier than 4 December 2000. If those documents had been served earlier on the Respondents why were they annexed to the notice of motion for stay of execution? The justification for this course of action was not explained. Although there is no time limit for filing an affidavit of service, we think that it ought to be sworn immediately the service is rejected as evidence of service. The burden was upon the Appellant to prove that

service was effected within the prescribed time. The Appellant failed to do so. We are therefore unable to fault the conclusion of the Court of Appeal that the Appellant failed to comply with the requirement of Rule 77 (1) of the Rules of that Court. Accordingly grounds 1, 2 and 3 must fail.

The complaint in ground 4 is that the Court of Appeal erred to hold that the Appellant's appeal had not been lodged within the prescribed time when it was not an issue in the pleadings and when there was no evidence to support the finding. Learned counsel for the Appellant submitted that the application to strike out the notice of appeal was based on one ground only namely that the Notice of Appeal was served out of time. He contended that nowhere in the accompanying affidavit of Francis Mutabazi was it stated that the appeal was out of time. The issue was only alluded to in the submissions of learned counsel for the Respondents, but this was not evidence On the other hand, learned counsel for the Respondents submitted that the learned Justices of the Court of Appeal were entitled to hold that the appeal could not lawfully be lodged in time because the letter of request was not served on the Respondents and the Appellant's lawyer had informed the court that the Appellant had lodged the appeal. It was his contention that the ground was misconceived. The issue of failure to serve the notice of appeal and letter of request on the Respondents was canvassed in both the affidavits of Francis Mutabazi, the first Respondent, and Geoffrey Nangumya, the Company Secretary of the Appellant. The notice of appeal and letter requesting for proceedings were attached to the application to strike out the appeal. The information whether the appeal had been filed was volunteered by counsel for the Appellant. Therefore the Court of Appeal was entitled to consider the issue since it had a significant bearing on the effect of the decision in this application.

The Respondents' contention was that the Appellant was also out of time in filing the appeal since it had not served them with a copy of the letter requesting for proceedings to entitle it to benefit from the provision of Rule 82 of the Rules of the Court of Appeal. Rule 82 (1) requires that an appeal be instituted by lodging a memorandum of appeal and the record of appeal within sixty days after filing a notice of appeal. Under Rule 82 (2) where an application for a copy of proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, in computing time within which the appeal is to be instituted, there shall be excluded such time as may be certified by the Registrar of the High Court u having been required for preparation and delivery to the Appellant of that copy. But Rule

82 (3) provides that an Appellant shall not rely on sub-rule (2) unless his or her application for a copy of proceedings was in writing and a copy was served on the Respondent, and the Appellant has retained proof of that service.

In the instant case, the Appellant's letter requesting for proceedings was not copied to the Respondents nor was it served on them until after four months when the application for stay of execution was made. Clearly the Appellant failed to comply with the provision of Rule 82 (3) and (he Court of Appeal was correct in so holding with the result that the appeal could not be filed in time. Therefore ground 4 must also fail.

In the result we find no merit in this appeal. It is accordingly dismissed with costs here and in the court below.

Dated at Mengo this 4th day of September 2002

B. J. Odoki
CHIEF JUSTICE

A.H.O. Oder
JUSTICE OF SUPREME COURT

J.W.N. Tsekooko
JUSTICE SUPREME COURT

J. N Mulenga
JUSTICE OF SUPREME COURT

G.W. Kanyeihamba
JUSTICEOF SUPREME COURT