

2. That the respondent pays costs of the appeal and this application.

Grounds

5 The grounds of the application set out in the Notice of Motion are that:

1. The Notice of Appeal being an essential step in filing Civil Appeal No. 10 of 2016 was filed out of time.

2. The appeal was only filed to circumvent execution of the decree of
10 the Court of Appeal in Civil Appeal No.42 of 2014.

Affidavits:

The application is supported by the affidavit sworn by the applicant on the 3rd April, 2017.

15 The respondent opposed the application through the affidavit sworn on 26th May, 2016 by Alexander Tuhimbise, his Counsel.

Background:

Briefly the background which led to this application is as follows:

Both parties were involved in business transactions from which a
20 dispute arose which culminated into the filing of **HCCS No. 90 of 2008** by the applicant in the High Court. Judgment was entered in favour of the applicant and the respondent was ordered to pay him U.shs.200,000,000 (two hundred million shillings only). The respondent successfully applied for review of the judgment and it

was set aside. The applicant was dissatisfied with that decision and appealed to the Court of Appeal vide **Civil Appeal No.42 of 2014** against it.

5 The applicant was successful at the Court of Appeal and judgment was delivered on 4th November, 2015 where the Court of Appeal ordered the respondent to pay the applicant 200,000,000 as earlier awarded to the applicant by the High Court.

10 The respondent failed to pay the said sum which prompted the applicant to execute the decree by way of an arrest warrant against him on the 21st July, 2016. The respondent then sought to settle the matter amicably and expressed the willingness to pay voluntarily but did not do so. Instead, on 28th July, 2016, he filed a
15 Notice of Appeal indicating his intention to appeal against the decision of the Court of Appeal and subsequently filed **Supreme Court Civil Appeal No.10 of 2016** in this Court on 27th September, 2016.

20 Upon realizing that the Notice of Appeal was filed out of the prescribed time, counsel for the respondent then filed **Supreme Court Civil Application No.11 of 2016** for leave to file and serve the Notice of Appeal out of time and or to validate the Appeal. Her Lordship Tibatemwa-Ekirikubinza, JSC, who heard the application
25 as a single Justice dismissed it with costs to the instant applicant for lack of sufficient reason.

The respondent was dissatisfied with the decision of Hon. Justice Tibatemwa-Ekirikubinza, JSC and filed Supreme **Court Civil Reference No. 15 of 2016** in which he challenged that decision and sought the same order before a panel of three Justices of this Court. However, the said Reference was also dismissed with costs on 20th March, 2017. Consequently, on 10th April, 2017, counsel for the applicant filed this application seeking the orders above mentioned.

On 8th May, 2017 counsel for the respondent on the other hand, wrote a letter to the Registrar of the Supreme Court applying for withdrawal of the **Notice of Appeal** and **Supreme Court Civil Appeal No. 10 of 2016** on grounds that the appeal was overtaken by events as a result of the dismissal of the application for extension of time as well as the Reference. Counsel for the applicant further stated in that letter that the issue of costs does not arise for the reason that the said appeal was neither heard nor responded to by the applicant.

Representation:

At the hearing of this application, Mr. Alex Candia and Mr. Akuku Saviour represented the applicant while Mr. Alexander Tuhimbise appeared on behalf of the respondent.

Submissions:

Both Counsel adopted their written submissions which they highlighted at the hearing of the application before this Court.

5 In his submissions, Counsel for the applicant cited Rule **78** of the Rules of this Court which deals with striking out of appeals which are invalid and are a nullity. He contended that the Notice of Appeal, being an essential step in commencing the appeal to this court was filed out of time, therefore, the Notice of Appeal together with the appeal are null and void *ab initio* since this court declined
10 to validate the same. That **Supreme Court Civil Appeal No. 10 of 2016** should therefore be struck out with costs. He relied on the decision of this Court in **Godfrey Magezi & Anor Vs Sudhir Ruparelia, SCCA No. 10 of 2002** and **Tropical Africa Bank Ltd v Grace Were Muhwana SCCA No. 3 of 2012** in support of his
15 submission on this point.

He further submitted that the application for stay of execution filed by counsel for the respondent that was pending before this court in **Supreme Court Civil Application No.9 of 2016** be struck out
20 with costs as well, since it has no legal foundation.

In his oral highlights before Court, counsel emphasized that the main bone of contention was about the costs of the appeal together with the costs of this application. He contended that the award of
25 costs is at the discretion of court and that the successful party is entitled to costs unless the court has a good reason for denying the same. That the applicant was thus entitled to costs.

He argued that the respondent was trying to circumvent the outcome of the instant application by filing the letter of withdrawal and contending that the applicant is not entitled to costs.

5

He submitted that withdrawal of appeals is governed by **Rule 90(4)**, it follows therefore that since the applicant did not consent to the withdrawal, the appeal stands dismissed with costs. In addition to that, Counsel submitted that an appeal which is struck out is
10 treated in the same way as if the appeal has been dismissed on merit. He relied on the case of **Goodman Agencies Ltd Vs Attorney General & Anor SCCA No.1 of 2012** in support of his submission on this point. For the foregoing reasons, Counsel prayed that this application should be allowed with costs to the applicant.

15

Counsel for the respondent on the other hand opposed the application and contended that it was frivolous and a waste of court's time, therefore, it ought to be struck out with costs to the respondent. He contended that Rule 78 only applies to situations
20 where parties file their Notice of Appeal or appeal out of time but fail to take steps to validate the same. This was not the case in this instant matter.

He submitted that having dismissed the application for leave to
25 validate the Notice of Appeal, the intended effect of validating the Notice of Appeal and appeal was therefore not achieved and in

essence, the Notice of Appeal was struck out. This application was therefore unnecessary.

5 He further pointed out that the applicant was awarded costs in **Supreme Court Civil Application No.11 of 2016** and in **Supreme Court Civil Reference No.15 of 2016**. The appeal was therefore of no consequence and had to be withdrawn as a formality since without a Notice of Appeal there is no appeal.

10 He further contended that no appeal was argued to warrant costs and wondered how the Court would grant costs to strike out a non-existent appeal. According to counsel, this application is therefore academic and should be dismissed with costs to the respondent.

15 **CONSIDERATION OF THE APPLICATION**

From the record of proceedings and the submissions of counsel, it is not in dispute that the Notice of Appeal was filed nearly 9 months out of time and that the application for leave to validate the Notice
20 of Appeal was denied by this Court and therefore **Supreme Court Civil Appeal No. 10 of 2016** is a nullity. The main contention between the parties is thus on the issue of the costs of the appeal and costs of this application.

25 The question therefore is whether the circumstances of the case warrant striking out of the appeal with costs.

Rule 78 of the Judicature (Supreme Court) Rules under which the application was brought empowers this court to strike out a Notice of Appeal or an appeal under certain circumstances.

5 **Rule 78 reads:**

10 ***“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.”***

15 It is the applicant’s contention that the respondent filed the Notice out of time and the application for extension of time was denied by this Court, therefore, the appeal should be struck out with costs under Rule 78 of the Rules of this Court since it is invalid.

20 Counsel for the respondent on the other hand contended very strongly that he had made an essential step to have the Notice of Appeal that had been filed out of time validated, however, this prayer was declined by court and therefore there is no appeal to strike out. He argued therefore, that Rule 78 does not apply in the
25 circumstances of this case.

We have carefully considered the submissions and the authorities cited. It is not in dispute firstly, that both the Notice of Appeal as

well as **Supreme Court Civil Appeal No 10 of 2016** were indeed filed out of the time prescribed by the rules. Secondly, all efforts made by counsel for the respondent to have them validated were disallowed by this Court. Thirdly, counsel for the respondent
5 withdrew the Notice of Appeal as well as **Supreme Court Civil Appeal No 10 of 2016** before the instant application came for hearing before us. In the circumstances, there was thus no Notice of Appeal or appeal to strike out by this Court.

10 The cases of **Godfrey Magezi & Anor Vs Sudhir Ruparelia, SCCA No. 10 of 2002** and **Tropical Africa Bank Ltd v Grace Were Muhwana SCCA No. 3 of 2012** are not useful to the application because the appeals in both cases had not been withdrawn by the appellant by the time the application seeking to strike out the
15 appeals in the said cases were determined by the Court. That is why the Court was able to strike out the appeals in question.

We accordingly agree with counsel for the respondent that Rule 78 of the Supreme Court Rules cannot not apply to this case. In the
20 result the order sought under number 1 is denied.

Regarding the second prayer, namely the costs of the appeal and of this application, Counsel for the applicant relied on the case of **Goodman Agencies** (supra), together with **Rule 90(4)** of the Rules
25 of this Court and argued that the respondent was trying to circumvent this application by filing the withdrawal and contending that the applicant is not entitled to costs. In the case of **Goodman**

Agencies (supra), this Court struck out the appeal for failure to take an essential step in the proceedings to wit, depositing security for costs.

5 Rule 90 is entitled “**Withdrawal of an appeal**”.

Rule 90(4) reads:

10 ***“(4) If all the parties to the appeal do not consent to the withdrawal of the appeal, the appeal shall stand dismissed with costs, except as against any party who has consented, unless the court on the application of the appellant, otherwise orders.”***

15 We have once again given due consideration to the submission by both learned counsel. Sub rule (4) of rule 90 of the rules of this court clearly applies in circumstances where parties to an appeal do not consent to the withdrawal of an appeal. The only exception is where the court, on the application by the appellant orders
20 otherwise.

In the instant case, it is not disputed that counsel for the respondent withdrew the appeal without the consent of the respondent. He simply wrote a letter of withdrawal to the Registrar
25 of this court informing him that his client was no longer interested in pursuing the appeal. There is no order from this court exempting the respondent from paying costs of the withdrawal. Technically therefore, the appeal stands dismissed with costs to the applicant

under sub-rule (4) of rule 90 of the rules of this Court. The applicant is therefore entitled to costs of the withdrawal.

5 The case of **Goodman Agencies (supra)** is, however, irrelevant to the resolution of the contentions under the second prayer, namely, the costs of withdrawal of the appeal because that issue did not arise in that case. As stated earlier, that appeal was struck out for failure to take an essential step in the proceedings.

10 The second order is accordingly granted to the applicant.

In the result and for the foregoing reasons, we grant this application in part and order that:

15 1) Supreme Court **Civil Appeal No. 10 of 2016** stands dismissed with costs to the applicant under the provisions of Rule 90(4) of the Supreme Court Rules.

2) The respondent pays $\frac{1}{2}$ the costs of this application.

20

Dated at Kampala this..... Day of.....2017

25

.....
TUMMWESIGYE
JUSTICE OF THE SUPREME COURT

.....

M. S. ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

5

.....

OPIO AWERI

JUSTICE OF THE SUPREME COURT

10

.....

MWONDHA

JUSTICE OF THE SUPREME COURT

15

.....

TIBATEMWA – EKIRIKUBINZA

JUSTICE OF THE SUPREME COURT

20

25

5

10

15

20

25

5

10

15

20

25