

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL APPLICATION NO.04 OF 2015.**

(CORAM: *KATUREEBE CJ, TUMWESIGYE, KISAAKYE, ARACH-AMOKO, NSHIMYE, MWONDHA, TIBATEMWA, JJ, SC.*)

**BETWEEN**

**EDWARD KIWANUKA SSEKANDI.....APPLICANT**

**AND**

**MBABALI JUDE..... RESPONDENT**

**RULING OF THE COURT**

The applicant moved this court by notice of motion under rules 42(1), 43(1), 78 and 79 (4) and 5 of the Judicature (Supreme Court Rules). S.1 (13-11) for an order that the Respondent's Constitutional Appeal No 1 of 2015 be struck out with costs.

**The main grounds for the application are:**

- a. That the Respondent failed to take an essential step in the appeal process.
- b. That the Respondent failed to file the appeal in this court within 50 days prescribed by the law and,
- c. That the delay by the Respondent to file the appeal was dilatory conduct, inordinate and without reasonable excuse.

The background to the application, according to the supporting affidavit of the applicant dated 18<sup>th</sup> May 2015 is that, on 19<sup>th</sup> September 2014 the Constitutional Court dismissed the respondent's petition No.28 of 2012 against the applicant. The respondent being dissatisfied with the decision lodged a Notice of Appeal to this court. His lawyers wrote a letter on 19<sup>th</sup> September 2014 to the Registrar of the Constitutional Court requesting for a copy of court proceedings. On the same day, the applicant's lawyers were served with a copy of the said notice of appeal and letter.

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In his supporting affidavit, the applicant stated that the Registrar of the Constitutional Court certified the record of proceedings on 3<sup>rd</sup> October 2014. However, the judgments of JJA R.Kasule, R. Opio Aweri, Solomy Bossa and that of Kenneth Kakuru were certified on 15<sup>th</sup> October 2014. That on 12.2.2015, the Registrar wrote to both counsel for the parties informing them that the remaining certified copy of the judgment of Hon Justice Mwangusya was ready for collection. Exhibit "G" being a copy of the said Registrar's letter shows that the respondent collected and acknowledged the remaining certified judgment on 5.3.2015.

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The applicant stated deponed the respondent did not file his appeal in 50 days, contrary to rule 79(4) of the rules of this court requiring him to do so, but instead filed the appeal on 21/04/2015 outside the appeal period.

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- 5 The applicant further states that the conduct of the respondent and his lawyers was dilatory and the delay to collect Hon Justice Mwangusya's certified judgment was, inordinate hence resulting in failure to take an essential step in filing the appeal within 50 days from 12.2.2015 when the said judgment was available for collection.
- 10 According to applicant, the respondent failed, ignored and or neglected to file the memorandum of appeal and record on time thus failed to take an essential step in filing the appeal in accordance with the law.
- 15 Lastly the applicant deponed that the appeal purportedly filed was out of time and there was no valid appeal. He prayed that it be struck out.

**In response**, the respondent also swore and filed an affidavit in reply on 28<sup>th</sup> day January 2016.

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He deponed that he lodged his appeal on 19/9/2014 and requested for a copy of proceedings and judgments of the learned justices. All the proceedings save the judgment of Hon Justice Eldad Mwangusya JA (as he then was) were supplied.

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On 18/11/2014, the respondent's lawyers wrote a letter to the Registrar, pointing out the omission. A reminder was sent to the Registrar on 2/2/2015.

5 The respondent emphasized that, the purpose of the numerous requests was to get a complete record of proceedings to enable him to appeal to this court.

10 The respondent stated further that as per the annexure G on the applicant's affidavit, on 5<sup>th</sup> March 2015 that the Registrar of Court of Appeal served a notice through a letter dated 12.2.2015 stating that Hon Justice Eldad Mwangusya's Judgment was certified and ready for collection.

15 That, then his lawyers filed his appeal on 21<sup>st</sup> April 2015; within in 47 days out of the 50 days he was required by law to file his appeal.

Lastly the respondent deponed that he was not dilatory in requesting court to give him a complete record of proceedings in pursuit for his appeal to this court.

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He contended that the application was mala fide and was an abuse of court process and intended to delay the hearing of the main appeal.

25 At the hearing of the application, the applicant was represented by Mr. Kiryowa Kiwanuka, while Mr. Balondemu and Mr. Alex Cadia appeared for the respondent. Both counsel filed and relied on their written submissions.



5 Counsel for the applicant submitted that, the respondent's appeal ought to be struck out because he failed to take necessary steps to ensure that his appeal was filed on time as required by law. It was further submitted that, despite the respondent knowing that he was out of time, he failed to apply for extension of time within which to  
10 file his appeal.

It was contended for the applicant that, the court record was certified by the Registrar on 3<sup>rd</sup> of October 2014 and was ready for collection, but the respondent did not bother and as result failed to  
15 appeal on time.

Counsel submitted that, the Registrar wrote to the respondent a letter dated 12<sup>th</sup> February 2015 in which he was calling upon him to pick the remaining judgment of Hon Justice Eldad Mwangusya  
20 which originally was not certified, when the rest of the record was collected.

Counsel prayed that the application be granted by striking out the appeal with costs

25 In response, counsel for the respondent stated that his client received communication of the Registrar's letter of 15<sup>th</sup> October 2014 through his lawyers informing him that the judgments of Hon Justices Remey Kasule, Solome Balungi Bossa, R.Opio Aweri and Kenneth Kakuru JJA had been certified and ready for collection.

5 That his lawyer collected the said court documents, but realised that the judgment for Justice E. Mwangusya was missing. His lawyers wrote a letter on the 18<sup>th</sup> of October 2014 requesting the Registrar for the remaining judgment to enable them prepare and file the appeal. It was contended for the respondent that, the Registrar did  
10 not reply the letter until 12<sup>th</sup> February 2015, when he wrote to the respondent's lawyer that the remaining judgment of Hon Justice E. Mwangusya was certified and ready for collection.

5 However, counsel explained, that although the letter from the Registrar was dated 12<sup>th</sup> February 2015, it was not served on him until 5<sup>th</sup> March 2015. He filed the appeal on 21<sup>st</sup> April 2015 which was within the period allowed to file the appeal.

20 Counsel contended that the crux of the application was when does one start counting the period within which to appeal. According to counsel, the applicant insists it is 12<sup>th</sup> February 2015 the date on the Registrar's letter while the respondent contends it is from 5<sup>th</sup> march 2015. Counsel for the respondent relied on rule 4(1) of the rules of this court which was cited with approval in *Civil Application No*  
25 *3 of 2012*.

*The Tropical African Bank Limited Vs Grace Were Muhwan* (SC) in which Hon Justice B.M Katureebe (JSC) (as he then was) stated:

30 "... the failure to file within 60 days was the fault of Court of Appeal which failed to prepare and deliver the copy of proceedings. This applicant cannot have filed the appeal



5 *without the copy of proceedings and judgment this could  
leave the applicant totally denied of his right to have his  
appeal heard and substantially determined by Court."*

Counsel for the respondent relying on the above authority argued  
that, the delay by the Registrar cannot be visited on the Respondent  
10 but rather on the Court of Appeal which took a very long time to  
prepare the necessary documents required to file his appeal.  
According to counsel, it would be unfair to expect his client to have  
filed the appeal without the necessary documents.

15 He disagreed with the assertion by the applicant and his counsel  
that the respondent did not take necessary steps to file his appeal  
on time.

Counsel pointed out that they wrote a letter on 18<sup>th</sup> October 2014 on  
behalf of their client requesting for the judgments and record of  
proceedings. All judgments were supplied except that of Hon Justice  
20 E. Mwangusya, which was availed after a reminder to the Registrar  
on 2<sup>nd</sup> February 2015.

Counsel referred to the Court Judicature (Supreme Court) Rules S.1  
13-11 rule 79 (4) which requires that when computing time, the  
25 period taken by court to prepare the record of proceedings and the  
judgment should be excluded. As such, if one exclude the time as  
envisaged by the above provision, the time started running from 5<sup>th</sup>  
March 2015. On 21st April 2015 when the respondent filed his  
memorandum and record of proceedings only 47 days had passed  
30 out of the 50 days provided by law.

## CONSIDERATION AND DECISION

The issue before this court for determination is;

*Whether the respondent failed to file the memorandum of appeal within time and as such warranting this court to strike out his appeal with costs?*

- 10 1. From the pleadings and evidence from both parties, there is no contention that the respondent filed his notice of appeal on time.
2. It is also agreed that he applied for proceedings and served a copy of the letter to that effect on the applicant's counsel.
- 15 3. Between 3<sup>rd</sup> and 15<sup>th</sup> October 2014, the respondent was supplied with all the record of proceedings save a certified copy of Hon Justice E. Mwangusya judgment.
- 20 4. It is not in dispute that, the Registrar wrote a letter dated 12<sup>th</sup> February 2015 informing counsel for the respondent that the remaining judgment of Hon Justice E. Mwangusya was ready for collection. Except that the respondent claims to have received the letter on 5<sup>th</sup> March 2015
- 25 5. To quote the respondent from his affidavit in reply:

*Para 7. "That as per annexure G to applicant's affidavit, on March 5, 2015, the Registrar of Court of Appeal served a notice through a letter dated February 12,2015*



5                    *stating that Hon. Justice Eldad Mwangusya's judgment  
was ready for collection. (Underlining is ours)*

10                    *Para 8.    That on receiving the Registrar's letter above, my  
lawyers aforesaid collected Hon Justice Eldad  
Mwangusya's judgment and filed Constitutional Appeal  
No.1 of 2015 in this court on April 21, 2015."  
(Underlining is ours)*

15                    In conformity with Article 137(7) of the Constitution which requires  
that constitutional matters ought to be accorded a guarantee of  
expedition, rule 79(5) directs the Registrar to supply to the  
appellant with a record of proceedings with 10 days from the date  
of the notice of appeal.

20                    The above rule, in our view does not only impose a duty on the  
Registrar to deliver the proceedings expeditiously to the appellant,  
but it also imposes a corresponding duty on the appellant to be  
alert to expeditiously receive the proceedings from the Registrar at  
the court where the letter requesting for them was delivered.

25                    6. The uncontested evidence on the record is that the applicant  
and the respondent had by 15<sup>th</sup> October 2014 received from  
the Registrar nearly all of the requested record of proceedings  
and judgments, save a certified copy of Hon Justice  
Mwangusya's judgment.

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The first question now to consider is why a party needs the record of proceedings. In our view, is to enable him or her to ascertain the decision of the court and the proceedings leading to that decision so as to be able to formulate and file his grounds of appeal.

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The second question is would it require a party to first receive the entire record to the very last page before he/she can file the appeal?

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In our view, once a party receives such major part of the record as can enable him/her to ascertain the decision of the court, he/she is duty bound especially in a constitutional matter to file his/her appeal within the time stipulated by the law.

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The final question should be whether there was a decision of the court ascertainable from all the proceedings and the four judgments obtained. In our view, it was fully ascertainable, and the party who failed to file his appeal on time was guilty of dilatory conduct. We are not sure we want to set a precedent that actually there is no need for rules regarding filing a supplementary record because the entire record of proceedings must first be obtained.

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7. The above situation of partial delivery should however be distinguished from a situation when a Registrar delivers



5 proceedings out of which the decision of the court intended to  
be appealed could not be ascertained.

10 8. We have perused the said judgment of Hon Justice Eldad.  
Mwangusya JA/CC (as he then was). It is in the same language  
and in consonance with the remaining four judgments of the  
Court that were supplied to the respondent on 15<sup>th</sup> October  
2014.

15 9. We prefer to believe the applicant that the respondent was not  
serious and was dragging his feet to appeal because if he  
wanted, he would have done so and filed the judgment of  
Justice Mwangusya later as a supplementary record. We are  
satisfied that based on the above dilatory mode, he or his  
counsel did not bother to file the appeal on time.

20 10. Several authorities were referred to us, but they are  
distinguishable in that they were not of a constitutional nature  
and dealing with a situation where proceedings were not  
supplied at all. In the instant case proceedings were requested  
for on 19<sup>th</sup> September 2014 and in a record time of less than a  
month (15<sup>th</sup> October 2014) all but one concurring judgment  
were supplied.

30 In the case of Utex Industries ltd Vs Attorney General Civil  
Application No. 52 of 1995 (SC).

*COURT NOTED THAT..... it is the bounden duty of the  
intending appellant to ask for such a certificate in as much*

5        *as it is his duty to actively take steps necessary to prosecute an appeal.*

It follows from the above authority that the prospective appellant ought to have actively taken necessary steps to ensure that his appeal is filed within the time prescribed by law.

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This court is of the view that the respondent was not vigilant when he failed to file his appeal when he got all of the record and later file the remaining concurring judgment as supplementary record as we have alluded so above.

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It is our opinion that it is the constitutional duty of the respondent who is also an advocate to act with vigour in the process of collecting the remaining judgment.

20    The above opinion notwithstanding, the submissions of the parties were focussed on the question of "*when does time of 50 days start to run*" against the respondent within which to file an appeal. The case for the applicant was that time started running against the respondent on 12/02/2015 when the Registrar wrote to the parties  
25    indicating that the remaining judgment of Justice Eldad Mwangusya JA (as he then was) was ready for collection.

On the other hand the respondent's case was that he received the said letter of 12.2.2016 on 3.5.2016 when the said judgment of Justice Eldad Mwangusya was delivered to him.



According to him, time of 50 days started running from then. And that when he filled his appeal on 21/04/2015 he was still in time and actually filed his appeal on the 47<sup>th</sup> day thus leaving 3 days ahead of time.

- 10 The judgment from the pleadings and evidence on record both parties, seem to have missed the point. The point is when nearly all the proceedings were and decision of the Court of Appeal ascertained and delivered.
- 15 It is our view that all the proceedings less the concurring judgment of Justice E. Mwangusya were delivered by 15<sup>th</sup> October 2014. It is our decision that subsequent requests regarding Justice Mwangusya's certified judgment were supplementary which could be dealt with under the rule dealing with supplementary record as we indicated above.
- 20 We bear in mind, that when the rule of this court dealing with request for proceedings was made, Judges were recording proceedings manually compared to the present times when it is digitalised and instant. The experience of waiting for the months to receive a court record is now history.
- 25 Time is now to interpret rule 79(4) of the rules of this court strictly. "A record of proceedings" should mean such proceedings that would enable an appealing party to ascertain what transpired in the lower court and the decision of the court appealed from.

By the majority of 6 to 1 we would allow the application and strike out the notice of appeal of the respondent with costs.

Dated at Kampala this 17<sup>th</sup> day of March .....2017

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B.M Katureebe

CHIEF JUSTICE

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J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

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E. KISAAYE

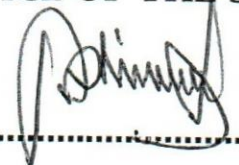
JUSTICE OF THE SUPREME COURT

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S. ARACH AMOKO

JUSTICE OF THE SUPREME COURT

  
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A.S NSHIIMYE

JUSTICE OF THE SUPREME COURT



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F. MWONDHA

JUSTICE OF THE SUPREME COURT

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L. TIBATEMWA - EKIRIKUBINZA

JUSTICE OF THE SUPREME COURT