

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT KAMPALA**

**[Coram: Nshimye, Mwangusya, Opio-Aweri, Mwendha, Tibatemwa-Ekirikubinza, JJSC]**

**CIVIL APPLICATION NO. 23 OF 2014**

*(Arising from Supreme Court Civil Appeal No. 05 of 2013, itself arising from Court of Appeal Civil Appeal No.42 of 2008 arising from HC Misc App NO. 1216 of 2006 and HCCS No.280 of 2003)*

**BETWEEN**

**MUHAMAD**

**KASASA.....:APPLICANT**

**AND**

**JASPHA BUYONGA SIRASI BWOGI**

**GODFREY KIWANUKA**

**(purported .....:RESPONDENTS**

**Attorney of Josepha Buyonga Siras Bwogi**

***Representation:***

*At the hearing of the application, the Applicant was represented by Mr. Kiiza Kabundama whereas the 2<sup>nd</sup> respondent was represented by Mr. Nakweira Musa.*

**RULING OF COURT**

This is an application by a Notice of Motion for an order to strike out the Notice of Appeal filed by the 2<sup>nd</sup> respondent among other grounds that it was served on the applicant out of the prescribed time without leave of court.

It was brought under the provisions of **Rules 2 (2), 42, 43, 50, 78, 79, 80** and **83** of the Supreme Court Rules on the following other grounds:

1. That this Honourable Court be pleased to strike out Civil Appeal No. 5 of 2013 on account that:

**(i) No appeal lies**

**(ii) The purported Appeal is incompetent and constitutes an abuse of the process of this honourable Court.**

**(iii) The purported Appeal was filed by the 2<sup>nd</sup> respondent herein on behalf of the non-living appellant and is a nullity.**

**(iv) The 2<sup>nd</sup> respondent filed the Appeal without any lawful authority from the unsuccessful party in the Court of Appeal.**

**(v) The purported appeal was filed outside the requisite time under the law, without leave of Court.**

2. That the 2<sup>nd</sup> respondent, who on a frolic of his own orchestrated the purported appeal without any authority, be condemned in costs.

The above grounds were expounded in the Applicant's affidavit in support of the Motion.

### **Background:**

The background facts that led to these applications could be discerned from the applicant's affidavit were that:

The 1<sup>st</sup> respondent who is now deceased, instituted a suit in the High Court vide HCCS No. 280 of 2003 against the applicant and two others. The suit was a claim for recovery of land comprised in Block No.10 Plot No. 147 situated at Namirembe. In the process of

hearing the suit, the 1<sup>st</sup> respondent applied to court for an amendment to his plaint in HCMA 1216 of 2006. The prayer to amend the plaint was granted by the presiding judge- Monica Mugenyi J. Aggrieved with the order, the applicant challenged the grant in the Court of Appeal vide Court of Appeal Civil Suit No. 42 Of 2008.

The applicant *inter alia* contended that the amendment had the effect of altering the time when the cause of action arose and yet a suit for recovery of land was 12 years and thus time barred. Furthermore, he contended that when a suit is instituted after the limitation period, the plaint is incurably defective and therefore the application for amendment should have been rejected.

On 19th October 2009, the Court of Appeal held in favour of the applicant and set-aside the High Court orders that granted the amendment and substituted it with one dismissing the original suit vide **HCCS No. 280 of 2003**. Following those orders, on 28<sup>th</sup> August 2013, the High Court closed the file.

On 6<sup>th</sup> September 2013, the 2<sup>nd</sup> respondent instructed **M/S OdekelOpolot& Co. Advocates** to lodge an appeal against the Court of Appeal decision in this Court. By that time the 1<sup>st</sup> respondent was dead. On the record there is a letter written by the 2<sup>nd</sup> respondent- Godfrey Kiwanuka dated 9<sup>th</sup> September 2013 informing his lawyers- OdokelOpolot& Co. Advocates as follows:

***“You may recall that after we completed the whole Supreme Appeal process, I was compelled to call MR. Bwogi to brief him as per his instructions on his sisters phone number at around 9:00p.m on 4<sup>th</sup> September***

**2013 only to be told that Bwogi whom I last saw early this year (April/May) passed away mysteriously on June 10, 2013 and was buried on June 11, 2013.”**

5

On the strength of an earlier Power of Attorney and the said letter, the 2<sup>nd</sup> respondent lodged Civil Appeal No.5 of 2013 in this Court.

10 The applicant then instituted the present application challenging the 2<sup>nd</sup> respondent's authority to (commence) file the appeal in this Court.

***Applicant's submission:***

At the outset counsel for the applicant objected to a  
15 surrejoinder that the 2<sup>nd</sup> respondent had filed in court without leave of court.

The first ground of the application is that, there was no valid appeal before the Court. The applicant submitted that the appeal was filed by the 2<sup>nd</sup> respondent on  
20 behalf of a dead person without any lawful authority.

It was further argued on his behalf that, at the time the Appeal was lodged on 6<sup>th</sup> September 2013; the 1<sup>st</sup> respondent had long died and could not have instructed  
25 the lawyers or the 2<sup>nd</sup> respondent to appeal based on the purported Power of Attorney. Counsel for the applicant contended that the suit which is brought without proper instructions and Powers of Attorney was a nullity. In support of this submission, counsel relied on

the authority of ***Kabale Housing Estates Tenants Association vs. Kabale Municipal Local Council, Supreme Court Civil Application No. 15 of 2013***

wherein the court found that the application having  
5 been filed by counsel without instructions was incompetent in law.

The second argument for the applicant for striking out the appeal, was that the appeal was filed outside time  
10 prescribed by **Rule 79 (1)** of the **Rules of the Supreme Court**. The Rule requires an appeal to be instituted within sixty (60) days after the date when the Notice of Appeal was lodged. In this regard, the applicant argued that, the record of proceedings was  
15 availed to the 2<sup>nd</sup> respondent's lawyers on 27<sup>th</sup> July 2010. However, the Memorandum of Appeal was filed on 6<sup>th</sup> September 2013, three years after the 60 days had elapsed. Counsel prayed that the application be granted with an order striking out the said appeal.

20  
***Reply by the 2<sup>nd</sup> Respondent:***

The 2<sup>nd</sup> respondent through his counsel opposed the application. In regard to ground 1 he submitted that by virtue of a valid and irrevocable power of attorney, he had  
25 authority to lodge the appeal in this Court. That the Power of Attorney was given to him by the 1<sup>st</sup> respondent on 18<sup>th</sup> may 2007 and was not revoked by the time the 1<sup>st</sup> respondent died. He contended that the Power of Attorney granted him authority to represent the 1<sup>st</sup> respondent in court in respect  
30 of all matters connected with the suit land.

With regard to the second ground, he submitted that he was disappointed by the first law firm of (M/S Lutaakome & Co. Advocates) who abandoned him in the middle of lodging the appeal. He explained that his former lawyer's encountered difficulties of obtaining a typed record of proceedings to enable them lodge the appeal. That on 12<sup>th</sup> November 2012, he wrote a letter to the Chief Justice then, requesting for his intervention in the matter. On 22<sup>nd</sup> November 2012, he received a response from the Registrar of the Court of Appeal apologizing for the delay in availing the typed proceedings because the Court of Appeal was relocating files to new premises. Counsel submitted that the record was finally availed to the 2<sup>nd</sup> respondent in 2013. Thereafter, he instructed another law firm (M/S Odokel, Opolot & Co. Advocates) to lodge the appeal which was done on 2<sup>nd</sup> September 2013.

He pleaded that mistakes of his former lawyers of failing to lodge the appeal within the prescribed time, should not be visited on him.

The respondent prayed that the Court allows the appeal to proceed and on its own motion, substitute the deceased (1<sup>st</sup> respondent) with another person in the appeal file. The respondent also prayed that Court should not condemn him in costs because he was ignorant of the process of instituting an appeal.

### **Rejoinder:**

The applicant reiterated his earlier submissions and further pointed out that it was the 2<sup>nd</sup> respondent who had instituted the appeal without authority.

### ***Analysis of Court:***

At the hearing of this application, counsel for the applicant raised objection to the admission of the 2<sup>nd</sup> respondent's surrejoinder. He prayed that the surrejoinder be struck out of the record for having been filed without leave of Court. This Court upheld the objection and promised to give reasons in this ruling.

**Black's Law Dictionary 9<sup>th</sup> Edition page 1581** defines a sur rejoinder as a plaintiff's answers to the defendant's rejoinder.

In essence a surrejoinder or sur reply is a second answer or affidavit in response to the affidavit or statement in rejoinder.

There is no specific provision for surrejoinder under our Laws. However, **Order VIII rule 11 (3)** of the **Civil Procedure Rules** prohibits any other rejoinder [such as a surrejoinder] from being filed without the leave of court. Be that as it may, a careful reading of **Order VIII rule 11 (3)** shows that there are exceptions or circumstances where the court may grant leave to a party to file a surrejoinder. Order VIII rule 11 (3) provides as follows:

***No other reply or rejoinder shall, subsequent to sub-rule (1) of this rule, be filed without leave of court, the application for which must be filed within*** fifteen days from the date of the last service

No application for leave as required by the above rule was sought before smuggling the surrejoinder on the court file. We rejected it and it cannot be allowed to stay on the court record. It is hereby struck out.

We now turn to address the substantive issues raised in the application. Two major issues arise from this application;

***i) Whether the 2<sup>nd</sup> respondent had the locus to institute the present appeal in this Court.***

***ii) Whether the appeal was filed within the prescribed time.***

We will address the issue (i) first:

The argument of the applicant was that the 2<sup>nd</sup> respondent did not possess the requisite legal status to institute an appeal in this Court because he had no Letters of Administration. **Sections 180 and 192 of the Succession Act**, gives all rights accruing to an intestate, to a legal representative of a deceased person. The legal representative is the person who is mandated to deal in the property of the deceased's estate and where necessary institute a suit or continue with an existing one in respect of that property. Such a person is an Administrator (having obtained Letters of Administration) or an Executor (having obtained Probate) named in the deceased's will.

In addition, **Section 191 of the Succession Act** provides that ...

***no right to any part of the property of a person who has died intestate shall be established in any court of justice unless Letters of Administration have first been granted by a court of competent jurisdiction.***

From the above provisions of the law, the 2<sup>nd</sup> respondent's right or locus standi to institute the appeal in this court could only be founded in the grant of Letters Of

Administration. There is no evidence on the record that the 2<sup>nd</sup> respondent was granted Letters Of Administration to the estate of the 1<sup>st</sup> respondent. What is on record there is a letter written by the 2<sup>nd</sup> respondent dated 9<sup>th</sup> September, 2019 addressed to *M/s Odokel, Opolot & Co. Advocates* in which he informed the said lawyers of the death of the 1<sup>st</sup> respondent.

The 2<sup>nd</sup> respondent further informed the lawyers that the deceased had given him authority to pursue the appeal in this Court. The 1<sup>st</sup> Respondent could not do so when he was dead. The Power of Attorney dated 18<sup>th</sup> May 2007 in which the 1<sup>st</sup> respondent granted powers of attorney to the 2<sup>nd</sup> respondent to represent him in court regarding the suit land, lapsed upon the 1<sup>st</sup> Respondent's death.

**Rule 81(1) and (2)** of the Rules of this Court give guidance on appeals instituted in the name of a deceased appellant. The Rule provides as follows:

**Death of party to intended appeal.**

**(1). *An appeal shall not be instituted in the name of***

***a person who is dead but may be instituted in the name of his or her legal representative.***

**(2). An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted; but the court shall, on the application of any interested person, cause the legal representative of the deceased to be**

**made a party in place of the deceased.**

*(Emphasis ours).*

Although the letter and Power of Attorney on record show that the 2<sup>nd</sup> respondent was granted authority to represent  
5 the 1<sup>st</sup> respondent in court, with respect to land comprised in Kibuye Block 10 Plot 147, this did not grant the 2<sup>nd</sup> respondent locus to institute an appeal in this Court even after the demise of the donee. The Rules of this Court specifically stipulate the legal representative as the only  
10 person entitled to institute an appeal on behalf of a deceased litigant. Such a “**legal**” representative acquires the locus to pursue the appeal through the force of law obtained by grant of Probate or Letters of Administration. Needless to say that the Power of Attorney donated to  
15 someone during the life of the donor is not donated in perpetuity for the donee to continue acting as the donee is alive.

We therefore find that the 2<sup>nd</sup> respondent did not have the locus standi to institute the appeal in this court. We hold  
20 that ground 1 of the application succeeds.

Having held that the 2<sup>nd</sup> respondent was not the legal representative and therefore had no locus to institute the appeal, we need not resolve the issue whether the appeal  
25 was lodged within the prescribed time. The answer to the issue 1 resolves ground 2 too.

**Conclusion and orders of Court:**

The application to strike out Civil Appeal No.5 of 2013 lodged by the 2<sup>nd</sup> respondent is hereby allowed. The appeal  
30 is struck out.

**Costs:**

The general rule is that costs follow the event. However considering the peculiar circumstances surrounding the lodging of the appeal and the mistaken but honest belief of the 2<sup>nd</sup> respondent that he still had Powers under the powers of Attorney of the 1<sup>st</sup> Respondent, even after his death, we order that each party bears their own costs.

We so order.

Dated at Kampala this ...22<sup>nd</sup> .... day of .....March...2018.

.....  
15 **HON. JUSTICE AUGUSTINE NSHIMYE,  
JUSTICE OF THE SUPREME COURT.**

20  
.....  
25 **HON. JUSTICE ELDAD MWANGUSYA,  
JUSTICE OF THE SUPREME COURT.**

.....  
30 **HON. JUSTICE RUBBY OPIO-AWERI,  
JUSTICE OF THE SUPREME COURT.**

.....  
35 **HON. JUSTICE FAITH MWONDHA,  
JUSTICE OF THE SUPREME COURT.**

.....  
**HON. JUSTICE PROF. LILLIAN TIBATEMWA- EKIRIKUBINZA**  
**JUSTICE OF THE SUPREME COURT.**