

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

**(CORAM: ARACH-AMOKO, OPIO-AWERI, TIBATEMWA-EKIRIKUBINZA,
MUGAMBA, BUTEERA, JJSC.)**

CIVIL APPLICATION NO. 22 OF 2019
(Arising out of Civil Appeal No.9 of 2019)

B E T W E E N

1. HERBERT SEMAKULA MUSOKE
2. NANTANDWE JUSTINE KIZITO:.....: APPLICANTS
(Administrators of the estate of the late E. Nagadya)

A N D

1. LAWRENCE NABAMBA
2. JOSEPH MULIKA
3. IMELDA NANYUME KIBUKA :.....:RESPONDENTS
(Administrators of the estate of the late John Kibuuka)

**[An application brought under Rules 78, 72(1) & (2),
74(1),42 and 42 of the Rules of the Supreme Court].**

RULING OF THE COURT

This application was brought under rules 78, 72(1) & (2), 74(1), 42 and 42 of the Rules of this Court for an order to strike out the respondents' Appeal. The application is supported by an affidavit sworn by Mr. Ahumuza Edward, a Legal Assistant in the Chambers of M/s Tumwesigye, Baingana & Co. Advocates. The said affidavit was sworn on 27th September, 2019.

The respondent opposed the application and relied on the affidavit in reply sworn by the 1st respondent on 6th July 2020.

The background to this application is briefly that Mr. John Kibuuka, now deceased, instituted Civil Suit No.385 of 2008 at the High Court (Land Division) seeking for recovery of land from the applicants and others. In the course of time he died and the respondents became the administrators of his estate. The said respondents thereafter filed an amended plaint which included them as parties. The amended plaint also added two other persons to the defendants.

In the claim the respondents sought for a number of remedies. One such was a declaration against the applicants, jointly and severally, that the estate of the late John Kibuuka was the rightful owner of 3 acres of land that is part of land formerly known as Kyadondo Block 192, Plot 57. The second was an order that the respondents were entitled to possession and occupation of the said suit land. They wanted also court to declare that the alienation of the suit land by the applicants was illegal and therefore null and void. Finally, they sought an order for the cancellation of the titles comprised in the suit property and general damages.

The learned trial judge dismissed the respondents' suit with costs and went on to make an order that the respondents receive the certificate of title that belonged to the late John

Kibuuka which reflected the subdivision that took place with the full knowledge of the aforesaid John Kibuuka.

The respondents, being dissatisfied with the decision of the trial court, appealed to the Court of Appeal. The applicants opposed the appeal and filed a cross appeal as well.

On 6th June, 2019 the Court of Appeal dismissed the appeal with costs there and in the trial court stating that it found no merit in all the grounds of appeal. However, the Court of Appeal allowed the cross appeal with no order to costs.

The respondents were not satisfied with the decision of the Court of Appeal. They filed a Notice of Appeal in this Court on 22nd July, 2019. They also lodged a Memorandum of Appeal on 18th September, 2019 in this Court.

The applicants filed this application in Court on 12th March, 2020 seeking an order to strike out the respondents' appeal. They also sought for costs of the application.

At the hearing of the application, Mr. John Paul Baingana together with Mr. Edward Ahumuza appeared for the applicants whereas Mr. Issac Masanga represented the respondents.

Counsel for both parties filed written submissions which they adopted. They made brief submissions to highlight salient points.

In his submission, learned counsel for the applicants stated that the judgment of the Court of Appeal was delivered on 6th

June, 2019 as evidenced by the date of endorsement on the application's annexure "A". Counsel contended that the respondents did not file their Notice of Appeal until 22nd July 2019, forty-six (46) days after delivery of the judgment of Court of Appeal. He was emphatic that this was contrary to Rule 72(2) of the Rules of this Court. Counsel further contended that the Notice of Appeal was defective because it showed that it was filed in this Court rather than in the Court of Appeal as should have been the case.

Counsel submitted that the respondents did not serve the Notice of Appeal to the applicants within seven days as required by Rule 74 of the rules of this Court.

Counsel cited the cases of **Mariam Kuteesa vs Edith Nantumbwe & 3 Others, Supreme Court Misc. Application No. 20 of 2014** and **Kasule Samuel vs Mubeezi James & 2 Others, Supreme Court Misc. Application No. 24 of 2015** on the effect of failure to serve copies of the Notice of Appeal.

Counsel added that the respondents did not file and serve a letter requesting for proceedings from the Court of Appeal as is prescribed by Rule 79(2) of the Rules of this Court.

Counsel submitted further that the applicant did not apply for the proceedings of the Court of Appeal and that the purported record of appeal filed in this court on 18th September, 2019 did not contain the record of proceedings of the Court of Appeal. According to counsel that contravened Rule 83 of the Rules of this Court.

Counsel for the respondents opposed the application and contended that the respondents instructed their lawyers in time to institute an appeal. He argued that the failure to file a Notice of Appeal in time and serve a letter requesting for a typed and certified record of proceedings on the Applicants was an error, omission, negligence or mistake of their lawyers.

Counsel cited the case of **F. L. Khaderbhai & Another vs Shamsherali & 2 Others, Supreme Court Civil Application No. 20 of 2008** where this court stated that an error of counsel should not necessarily be visited on the counsel's client.

Counsel for the respondents prayed for Court to validate the Notice of Appeal filed out of time so as to enable the appeal to be heard on merit. According to him the respondents should not be driven out of the seat of justice because of errors, mistakes or negligence of their lawyers.

Counsel submitted that the respondent applied for a typed and certified record of proceedings from the Court of Appeal and that the Court of Appeal prepared a record of proceedings and availed it to the respondents. Counsel contended that the mistakes and errors relating to the proceedings of the Court of Appeal can be cured by filing a supplementary record of appeal.

Counsel contended that the heading of the Notice of Appeal with the heading "Supreme Court of Uganda" together with the inaccurate date of 16th June, 2019, were typographic errors.

Counsel submitted that the Respondents had demonstrated that there is sufficient cause for validation of the Notice of Appeal and the late service of the letter requesting for typed and certified record of proceedings in order to enable the appeal to be heard on merit in the spirit of substantive justice. Counsel reiterated his prayer for Court to find that the Respondents had demonstrated good and sufficient cause for validation of the Notice of Appeal filed out of time, for filing a supplementary record of appeal and for late service of the letter requesting for a typed and certified record of proceedings.

Counsel for the applicant in rejoinder submitted that it had been admitted by the respondent that the Notice of Appeal was filed out of time and that the Notice of Appeal was never served on the affected parties.

Counsel contended that the respondents' prayer to this Court to validate the Notice Appeal at such a late stage was an abuse of Court process and lack of respect for the Supreme Court.

We have perused the applicants' grounds in support of the application, the affidavits and submissions thereto as well as the respondents' reply and submissions

It is plain from the record, that the Judgment of the Court of Appeal was delivered on the 6th June, 2019. The respondents did not file their Notice of Appeal in this court until 22nd July, 2019.

Rules 72(1) and (2) of the Rules of the Court state that:

“(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Court of Appeal.

(2) Every notice under subrule (1) of this rule shall, subject to rules 80 and 91 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal.”

Our underlining for emphasis.

We find that the respondents filed their Notice of Appeal out of time on 22nd July 2019. This was 31 working days after the date of the delivery of Judgment of the Court of Appeal.

We find also that the respondents’ Notice of Appeal offended Rule 72(5) of the Rules of this Court as it was not in conformity with the First Schedule to the Rules. Form D in that schedule requires the heading to be as in proceedings appealed from. Properly it should have reflected the Court of Appeal and not the Supreme Court. We do not accept the submissions of the respondents that that was a typographic error and that as such not fatal.

Rule 72 (5) of the Rules states:

“(5) A notice of appeal shall be substantially in Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant.”

Our underlining for emphasis. Clearly the above rule is couched in mandatory terms and failure to comply with it impairs the competence of the Notice of Appeal.

Counsel for the respondent in his written submissions acknowledges the fact that the respondents' Notice of Appeal was filed out of time but prays that the same should be validated by this court on the oft used excuse that the negligence of counsel should not be visited on the clients. The cited case of **F. L. Khaderbhai & Another vs Shamsherali & 2 Others** (supra), the Notice of Appeal and the letter requesting for copy of the record of proceedings were filed in time, save that counsel did not serve them on the opposite party in time. That was clearly not the case in the instant matter where filing was done outside the period ordained by Statute. Accordingly, that case is distinguishable.

Consequently, the prayer by counsel for the respondents is not sustainable. The proper procedure available to the respondent is provided under Rule 5 of the Rules of the Court. It should be borne in mind that in **F. L. Khaderbhai & Another vs Shamsherali & 2 Others**, the application was directly for extension of time for instituting the appeal. The respondents should have filed an application before this Court under Rule 5 of the Rules of the Court giving reasons why it was not possible to file a Notice of Appeal in time and giving

justification why the application should be granted. This was not done.

We therefore strike out the respondents' Notice of Appeal filed in this Court on 22nd July, 2019 because it was filed out of time.

Having found the respondents' Notice of Appeal incompetent for being filed out time we do not find it gainful to go into the merits of submissions on whether the said Notice was served to the applicants, whether there was a letter seeking for the record of proceedings and if the same was served on the applicants. Suffice to say there was no valid Notice of Appeal to serve. Similarly, there was no prospect of an appeal for which a record of proceedings was to be requested for.

Consequently, we allow the application and strike out the appeal with costs to the applicants.

Dated at Kampala the.....24th.....day of *Sept*.....2020



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HON. JUSTICE STELLA ARACH-AMOKO
JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE RUBBY OPIO-AWERI
JUSTICE OF THE SUPREME COURT.

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

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HON. JUSTICE PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT.