THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO

(CORAM: ARACH-AMOKO, OPIO-AWERI, MWONDHA, TIBATEMWA-EKIRIKUBINZA MUGAMBA. JJ.SC.)

CIVIL APPEAL NO. 11 OF 2016

BETWEEN

1. **DR. JOTHAM MUSIIME**
2. **DR. ENOCK TUMUREEBIRE**
3. **MR. GERSHOM TWESIGYE**
4. **MR. JOHNSON MUHEIRWE :::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

M/S PEARL ADVOCATES & SOLICITORS ::::::::::::::::::::::::::RESPONDENT

[Appeal from a ruling of the Court of Appeal at Kampala (Kasule, Buteera and Cheborion, JJ.A.) dated 31st May 2016 in Civil Application No.300 of 2012]

JUDGMENT OF MUGAMBA.JSC

This appeal arises from a ruling of the Court of Appeal which dismissed the applicants' application for leave to appeal against the decision of Hon. Justice Vincent Musoke Kibuuka in High Court Miscellaneous Application No.333 of 2009.

Background

The facts of this appeal are that the applicants filed Miscellaneous No. 515 of 2008 in the High Court at Kampala seeking to appeal against the order of the Deputy Registrar awarding shillings 4,964,000/= (four million, nine hundred sixty four thousand) to the respondent. The order itself resulted from taxation of an advocate/client bill of costs, whereby the respondent had

represented the applicants through Dr. Andrew K. Bashaija in Miscellaneous Application No.793 of 2003 and Civil Suit No.488 of 1999. The two causes ended in a consent judgment and parties were to bear their own costs. The taxed bill of costs was duly paid to the respondent by the appellants.

Miscellaneous Application No.515 of 2008 was dismissed by Hon. Justice Vincent Musoke Kibuuka on ground that it was filed outside the 30 days stipulated under section 62 of the Advocates Act.

The applicants then filed Miscellaneous Application No.333 of 2009 on 29/06/2009 seeking for orders of review of the decision given in Miscellaneous Application No.515 of 2008 but that attempt suffered the same fate as it was dismissed on 9/9/2009.

The applicants filed an omnibus Miscellaneous Application No.479 seeking for leave to appeal against the orders made in previous applications, namely Miscellaneous Application No.333 of 2009 and Miscellaneous Application No.515 of 2008.

Further the applicants filed Miscellaneous Application No.480 of 2009 seeking for stay of execution pending the hearing and disposal of Miscellaneous Application No.479 of 2009. The application was dismissed by the Hon Justice Vincent Musoke Kibuuka on 25/05/2012.

Not to be deterred, the applicants filed Miscellaneous Application No.116 of 2010 on 17/06/2010 in the Court of Appeal seeking for extension of time to file and serve notice of appeal in Miscellaneous Application Nos.333 of 2009 and 515 of 2009. That application too was dismissed on the 17th of June 2009 on the ground that it had been filed out of time and as such was time barred by section 62(1) of the Advocates Act.

The applicants then filed Miscellaneous Application No.300 of 2012 in the Court of Appeal seeking for leave to appeal against the decision

in Miscellaneous Application No.333 of 2009, where the judge had refused to review his decision in Miscellaneous Application No.515 of 2008. The Court of Appeal dismissed the application on the ground that the applicant had failed to demonstrate that his appeal had a likelihood of success. The appellants, being dissatisfied with the above ruling of the Court of Appeal, have now appealed to this Court. Their amended memorandum of appeal has three grounds of appeal which appear as follows:

1. **The Learned Judges of Court of Appeal erred in law and fact when they held that the applicant's application for leave to appeal against the decision of Honorable Justice Musoke Kibuuka in Kampala Miscellaneous Application No.333 of 2009 had been filed in the Court of Appeal 167 days after receipt of the Ruling instead of the mandatory 14 days provided for under the law, whereas not and was therefore time barred thereby dismissing the application when the applicant had not been served with a ruling Notice and had previously unsuccessfully attempted to know when the same was to be delivered.**

2. **The Learned Justices of appeal erred in law and fact when they held that the applicant's counsel did not act diligently in getting the ruling in Miscellaneous Application No.313 of 2009 in time thereby filling the application for leave to appeal 167 days from the date when the ruling was delivered and dismisses their application thereby punishing them for the alleged lack of diligence or mistake of their counsel.**

3. **The Learned Justices of appeal erred in law and fact when they held that the applicants and their counsel had not shown that prema facie there were grounds of appeal which merit serious consideration on appeal while the prema facie**

grounds are contained in the 4th Appellant's affidavit in support of the application particularly paragraphs 2,6,7 and 8 and their Counsel read them to Court in his submissions.

Representation

At the hearing of the appeal Mr. Kwesiga Bateyo appeared for the appellants while Mr. Evans Rushegyera Tusiime appeared for the respondent. Both counsel filed written submissions which they adopted at the hearing.

Appellant's submissions

Counsel for the appellants in his written submissions stated the issues at hand to be the following:

1. **Whether Court of Appeal Civil Application No.300 of 2012 was filed outside the 14 days allowed by the law and hence was time barred.**
2. **Whether the appellants' advocate did not act diligently in getting the ruling in Misc. Application No.333 of 2009 and whether the alleged lack of diligence by the advocate should be meted on his clients.**
3. **Whether the appellants did not show in Court of Appeal Civil Miscellaneous Application No.300 of 2012 that there were prema facie**(sic) **grounds necessitating appeal.**
4. **Remedies**

On issue one which concerns limitation of time, counsel for the appellant contended that the appellants filed Court of Appeal Civil Application No.300 of 2012 on the 13th November 2012 within the mandatory 14 days provided for by Rule 40(1) of the Judicature (Court of Appeal) Rules and Directions. He submitted that the decision of the High Court in Miscellaneous Application No.333 of 2009 was availed to applicants' advocates on 31/10/2012 by the

Deputy Registrar of the High Court and that they proceeded to file the above application.

Counsel submitted that they got correspondence from the Deputy Registrar of the High Court on 31st October 2012, in which they were informed that notice of delivery of the ruling in Miscellaneous Application No.333 of 2009 was served to the secretary by the court's clerk. Counsel averred that there was no proper service since neither the advocate, his clerk nor the appellants were served personally. Counsel added that there was no affidavit of service on record to prove service of notice of the ruling to the appellants' advocates or to the appellants themselves.

On issue two, concerning failure by counsel to act diligently, counsel submitted that the learned Justices of the Court of Appeal erred in law and fact in holding that the appellants' counsel did not act diligently to file the application in time. He argued that they acted diligently. Counsel contended that the file of Miscellaneous Application No.515 of 2008 went missing for more than a month until the advocate for the appellant wrote to the Principal Judge and the Deputy Registrar complaining. Counsel submitted further that the file was recovered following that correspondence. According to counsel there was no lack of diligence by counsel and that even if negligence occurred it should not be meted on his clients.

Counsel cited the cases of **Joseph Muluta v Sylvano Katama, Supreme Court Civil Application No. 2 of 1999** and **F.L.Kaderbhai & Another v Shamsherali Zaver Virji & Others, Supreme Court Civil Application No. 20 of 2008.**

On issue three, concerning failure to show the existence of a prima facie case, counsel for the appellants submitted that the affidavit of the 4th appellant (Mr. John Muheirwe) particularly in paragraphs 2,5,6,7 and 8 show the grounds which the appellants intended to

raise in the appeal. He contended that the appellant had a prima facie case.

Regarding issue four, on remedies, counsel prayed that orders of the learned Justices of the Court of Appeal in Miscellaneous Application No.300 of 2012 be set aside and that the appellants be granted leave to appeal against the ruling of the High Court in Miscellaneous Application No.333 of 2009. He prayed for costs here and in courts below.

Respondent's submissions

Counsel for the respondent submitted that the appellants' application was filed on the 13th November,2012 after the ruling of the High Court in Miscellaneous Application No.479 of 2009 was delivered on the 29th May,2012. Counsel contended that the advocate for the appellants did not apply to court for leave to file their application out of time after lapse of 167 days. Counsel argued however that the date of delivery of the ruling was different from the date of its receipt. He contended that the date to be considered was the date of delivery and not any other.

Counsel further emphasized that counsel for the appellants ought to have sought for extension of time upon realizing that the ruling had been delivered without proper service of the notice of ruling. Counsel contended that where a period is laid out in a statute, court has no residual or inherent jurisdiction to enlarge it automatically. He submitted that leave ought to be sought first.

On issue two concerning the advocate's failure to act diligently, counsel contended that this was an afterthought by counsel for the appellants. He submitted that the Justices of the Court of Appeal did not comment on it and that it appears nowhere in their ruling. According to counsel the Justices of Appeal only commented on failure by counsel to act diligently in filing the application for leave to

appeal out of time and not acting diligently in getting the ruling as was being argued by counsel for appellants.

Counsel averred that counsel for the appellants did not act diligently when he did not seek the leave of court to extend the time within which to file an application to appeal the decision of the High Court.

Counsel argued that the mistake of counsel was different when counsel breaches the rules. According to him courts are mandated to observe rules of procedure and law.

On failure to show a prima facie case, counsel for the respondent contended that paragraphs 2,5,6,7 and 8 of the affidavit of the 4th appellant do not disclose any grounds or serious aspects of the appeal. He submitted also that the paragraphs did not show the likelihood that if leave was granted the appeal would succeed. Counsel averred that this is what the High Court and Court of Appeal rightly considered and that both courts had found no prima facie case shown by the appellants.

Counsel finally prayed that the judgment of the Court of Appeal be upheld and that this appeal be dismissed with costs to the respondent.

Appellant's submission in rejoinder

Counsel for the appellants reiterated his earlier submission and further contended that the respondent had failed to show that the appellants were guilty of dilatory conduct in filing the application. He added that even if they were to bear the blame the alleged negligence or mistake of counsel should not be meted on the clients. Counsel contended that this is a legal technicality which could be cured under Article 126 (2) (e) of the Constitution.

Consideration of the court.

Before I go into the merits of the appeal, I should comment on the way the grounds of appeal were formulated in the amended memorandum of appeal lodged in this court on 21st August,2019.

Rule 82(1) of the Judicature (Supreme Court Rules) Directions provides:

"82. Contents of memorandum of appeal.

(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make. Underlining for my emphasis

The appellants' memorandum of appeal offends Rule 82(1) as it is both argumentative and narrative. Furthermore, the grounds are not set forth concisely.

In **Hwan Sung Ltd v M&D Timber Merchants and Transporters Ltd, Supreme Court Civil Appeal No. 02 of 2018,** this Court observed that:

"This ground offends Rule 82(1) of the Rules of this Court, which provides that

82(1) *'A Memorandum of Appeal shall set forth concisely under distinct heads without argument or narrative, the grounds of objection to the decision appealed against specifying the points which are alleged to have been wrongly decided and the nature of the order which it proposes to Court to make.'*

Ground three of this Memorandum of Appeal does not say in which way the Court of Appeal decision was wrong. In my view,

it is not enough for counsel to simply complain and state that the Justices erred in law. He has to specify the error they committed."

Having found that the appellants' grounds offend Rule 82, the competence of this appeal should be moot. This court on its own motion under Rule 2(2) of the Rules of this court can strike out this appeal on that basis alone. However, since the respondent did not raise the objection on grounds, it is in the interest of justice that the appeal be determined on merit. Fortuitously this court has submissions of both counsel to go by.

The duty of this court as an appellate court has been defined in several cases. In **Administrator General vs Bwanika James and Others, Supreme Court Civil Appeal No.7 of 2003,** Justice Oder, JSC, held:

"It is a well-settled legal principle, embodied in Rule 29 (1) of the Court of Appeal Rules, that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inferences and conclusions: See Coghland Vs. Cumberland (1898) 1 ch. 704 (Court of Appeal of England): and Pandya V R. (1957) E.A 336)... The authorities also state that a second appellate court will not interfere with the findings of fact by the first appellate court. It will do so only where the first appellate court has erred in law in that it has not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect. See also Shartilal M. Ruwala Vs R (Supra) Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10/97 (SCU) (unreported) Bogere Moses Vs. Uganda, Criminal Appeal 1/97 (SCU) (unreported)."

Reference can be made also to **Fr. Narsensio Begumisa and Others v Eric Tibebaga Supreme Court Civil Appeal No.17 of 2002** and **Goustar Enterprises Ltd Vs Oumo [2006] EA 77.**

According to the record the ruling in Miscellaneous Application No.333 of 2009 was delivered on 21st May,2012 in the absence of the appellants and their lawyer. Counsel for the appellants made inquiry to the Deputy Registrar of the Civil Division by a letter dated 3rd October 2012. The Registrar gave his response in a letter dated 31st October ,2012 where he stated that the ruling had been delivered and that the requisite notice of the ruling had been served to counsel's secretary. The Registrar availed a copy of the said ruling to counsel.

I agree with counsel for the appellants that there was ineffective service of notice of the ruling when it was allegedly served on the secretary of the appellants' counsel. This is highly deplorable on the part of the court as it offends Order XXI Rule (1) of the Civil Procedure Rules which provides:

"ORDER XXI—JUDGMENT AND DECREE.

1.Judgment when pronounced. In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates".

The emphasis above is added.

After obtaining the ruling on 31st October,2012 counsel for the appellants proceeded to file Civil Application No.300 of 2012 in the Court of Appeal on 13th November 2012. Counsel contended that thus they were still acting within the mandatory 14 days provided by Rule 40(1) of the Judicature (Court of Appeal) Rules and Directions. In this connection counsel for appellant argued that the time does not start to run until counsel has been served.

Rule 40(1) of the Judicature (Court of Appeal) Rules and Directions states:

"40. Application for certificate of importance or leave to appeal in civil matters.

(1) In civil matters—

(a) where an appeal lies if the High Court certifies that a question or questions of great public or general importance arise, application to the High Court shall be made informally at the time when the decision of the High Court is given against which the intended appeal is to be taken; failing which, a formal application by notice of motion may be lodged in the High Court within fourteen days after the decision, the costs of which shall lie in the discretion of the High Court; and

(b) if the High Court refuses to grant a certificate under paragraph (a) of this subrule, an application may be lodged by notice of motion in the court within fourteen days after the refusal to grant the certificate by the High Court for leave to appeal to the court on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done."

The underling above is added for emphasis.

My understanding of Rule 40(1) of the Judicature (Court of Appeal) Rules and Directions is that the application for leave is supposed to be made informally after the decision of the High Court is made. However, in the instant case the appellants were absent. The appellants should have filed their current application within fourteen days of their receipt of notice of the existence of the ruling and that application should have been by Notice of Motion. Suffice to say that the period of fourteen days starts to run from the date of the delivery of the ruling or judgment of the court, not when the parties or counsel

get a copy of the ruling or judgment as claimed by counsel for the appellants. In their circumstances the appellants should have expeditiously sought for leave to appeal the ruling out of time.

Under rule 40(1)(b) of the Judicature (Court of Appeal) Rules and Directions, the appellants are required to show the Court of Appeal the grounds they intend to rely on in the proposed appeal. The Court of Appeal found that the appellants had failed to demonstrate to them that their appeal had a likelihood of success in order to qualify them for leave to appeal against the decision of the trial judge.

Having perused the affidavit of the 4th appellant particularly paragraphs 2,5,6,7 and 8 which the appellants submitted as manifesting probable grounds of appeal, I find it fitting to reproduce the excerpt for due scrutiny. They relevantly state:

"2. THAT the applicants filed Misc. Application 333 of 2009 on 22nd sept.2009 seeking a review of the orders made in Misc. Application No.515 of 2008 because the Learned Judge was led into giving a wrong decision because there was an error apparent on the record which he did not address himself to.

5.THAT on the 21 May,2012, the learned Judge dismissed our application for leave to appeal much to our dissatisfaction.

6.THAT the ruling mentioned in paragraph 5 above was not availed to our lawyer until the 31st October 2012.

7.THAT I have been advised by our advocates, Ms Kwesiga Bateyo & Co. Advocates, which advise I verily believe to be true, that the trial Judge erred both in law and in fact by failing to appreciate that there was an error apparent on Misc. Application No.515 of 2008 and thereby wrongly dismissing our application for review of the decision and subsequently dismissing our application for leave to appeal.

8.THAT the applicants have very strong and credible grounds of appeal and their intended appeal has great chances to succeed."

The affidavit in support of the application is self evident. The grounds above state that there is an error apparent on the face of the record. It is not apparent what error there is. This leaves court to do the guess work of what the error is likely to be. The Court of Appeal found that no grounds of appeal were put forward and it went on to state that the appellants appeared to be on a fishing expedition following what they have been doing in filing various applications. Respectfully, I share the same view. This in an exercise in abuse of court process by the appellants. Evidently for years they have filed a series of meaningless applications.

In all this I do not find any basis for the success of the hoped for appeal, which I dismiss with costs here and in courts below.

Dated at Kampala this .....24th.....day of .....April.....2020.

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PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT

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

(*CORAM:* Arach-Amoko, Opio-Aweri, Mwondha, Tibatemwa-Ekirikubinza, Mugamba; JJSC.)

CIVIL APPEAL NO. 11 OF 2016

BETWEEN

1.DR.JOTHAM MUSIIME
2.DR.ENOCK TUMUREEBIRE } **::::::::::::::::::::::::APPELLANTS**
3.MR.GERSHOM TWESIGYE
4.MR.JOHNSON MUHEIRWE

AND

M/S PEARL ADVOCATES & SOLICITORS::::::::::::RESPONDENT

{Appeal arising from the Ruling of the Court of Appeal at Kampala (Kasule, Buteera and Cheborion, JJA), in Civil Application No. 300 of 2012 dated 31st May, 2016}

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice Mugamba, JSC, and I fully agree with his decision that this appeal has no merit and should be dismissed for the reasons he has given in his Judgment.

As the majority of the members on the Coram agree, this appeal is dismissed with costs to the respondent.

Dated at Kampala this ..24th...day of.....April.....2020

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M.S. ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM; ARACH–AMOKO; OPIO-AWERI; MWONDHA; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; JJ.S.C)

CIVIL APPEAL NO. 011 OF 2016

BETWEEN

1. Dr. Jotham Musiime}
2. Dr. Enock Tumureebire} :::::::::::::::::::::::::::::::: APPELLANTS
3. Mr. Gershom Twesigye}
4. Mr. Johnson Muheirwe }

AND

Ms. Pearl Advocates & Solicitors:::::::::::::::::::: RESPONDENT

[Appeal from the ruling of the Court of Appeal before Hon Justice Kasule, Hon Justice Buteera Richard, Hon Justice Cheborion dated 31st May, 2016 in Civil Application No. 300 of 2012].

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Paul Mugamba, JSC, and I respectfully agree with his decision that this appeal has no merit and should be dismissed for the reason he has given in his judgment.

Date at Kampala this.....21st.....day of.....Sept.....2020.

Opio-Aweri
JUSTICE OF THE SUPREME COURT.

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

CORAM: ARACH-AMOKO, OPIO-AWERI, MWONDHA, TIBATEMWA-EKIRIKUBINZA, MUGAMBA, JJSC

CRIMINAL APPEAL NO.011 OF 2016

Between

1. Dr. Jotham Musiime
2. Dr. Enock Tumureebire
3. Mr. Gershow Twesigye .....Appellants
4. Mr. Johnson Muheirwe

And

Ms Pearl Advocates & Solicitors.....Respondent

(*Appeal arising from the ruling of the Court Appeal at Kampala, before, Kasule, Buteera and Cheborion; JJA in Civil Application No. 300 of 2012 dated 31st May, 2016*)

JUDGMENT OF MWONDHA, JSC

I have had the opportunity of reading in draft the judgment of my brother Hon. Justice Mugamba JSC. I agree with the decision and the reasons therein that this appeal has no merit and should be dismissed with costs.

Mwondha
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ARACH-AMOKO; OPIO-AWERI; MWONDHA; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; JJ.S.C.]

CIVIL APPEAL NO. 11 OF 2016

BETWEEN

1. DR.JOTHAM MUSIIME
2. DR.ENOCK TUMUREEBIRE ::::::::::::::: **APPELLANTS**
3. MR.GERSHOM TWESIGE
4. MR.JOHNSON MUHEIRWE

AND

M/S PEARL ADVOCATES & SOLICITORS :::::::: RESPONDENT

[Appeal arising from the Ruling of the Court of Appeal in Civil Application No. 300 of 2012 before (Kasule, Buteera and Cheborion, JJA) dated 31st May 2016.]

JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.

I have had the benefit of reading the judgment of my learned brother, Hon. Justice Mugamba, JSC. I agree with his analysis and decision that this appeal should be dismissed with costs to the respondent.

Dated at Kampala this 24th day of Sept. 2020.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT