THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION: NO. 0041 OF 2008

(Arising from HCT - 01 - CV - MA - 0019 OF 2008)

ATTORNEY GENERAL …… APPLICANT

VERSUS

DAN RUBOMBORA & 4 OTHERS …….. RESPONDENTS

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY - DOLLO

RULING

The Attorney General, the Applicant herein, has moved this Court seeking for grant of orders, inter alia, for leave to file a notice of appeal out of time; and that the suit – presumably the intended appeal – be heard inter partes; and further, that no order be made as to costs of this application.

The grounds on which the application is founded, and which are elaborated in the supporting affidavit deposed by one Angela Kiryabwire Kanyima, the Acting Commissioner - Civil Litigation, in the Directorate of Civil Litigation of the Attorney General's Chambers, are that: due to the movement of the Applicant's file from Mbarara to Kampala, regarding the matter intended to be appealed from, the time within which to file a notice of appeal elapsed. The Applicant also pleaded further that it would suffer injustice if the leave sought is not granted; and yet it has a strong and good case for the appeal. It then invoked the principle of justice and equity in further support of its case.

The Respondents herein (Applicants in the head-suit hereof), had successfully moved this Court to issue orders for the enforcement of their rights, and freedom of speech which they claimed had been infringed upon by the Respondent then (Applicant herein). The judgement and orders of the Court, made by The Hon Mr. Justice Rugadya Atwoki, was delivered by the Deputy Registrar of this Court. Upon the aforesaid delivery of the decision of Court, Counsel for the Respondent then (Applicant now), instantly made an oral application to the Deputy Registrar for leave to appeal against the said decision.

Counsel for the Applicants then (now Respondents) however pointed out, and the learned Deputy Registrar concurred with him, that the application for leave was unfounded since, he contended, an appeal against orders made for the enforcement of fundamental rights accrued as of right. Subsequent to this, counsel for the Applicant herein then applied in writing to the Deputy Registrar for certified copies of the proceedings and ruling.

It would appear it was after this that the Applicant's Mbarara file was forwarded to Kampala, and in the process of which it must have suffered the delay – one can safely assume from the bureaucracy that afflicts Government business – with the result that the 14 (fourteen) days provided for by law, within which the Applicant could have filed a notice of appeal elapsed. Ms. Peruth Nshemereiwe, who appeared for the Applicant here in, submitted that in failing to file a notice of appeal, and instead writing to Court for the certified records, the state attorney who had conduct of the matter had acted irresponsibly; but that this should not be visited on the Applicant who had manifested keenness to pursue an appeal from the Court decision.

Counsel cited and relied on the authority of **Godfrey Magezi & Brian Mbazira v Sudhir Ruparelia, S.C. Civ. Applica. No. 10 of 2002**; and also that of **A.G. v.**

A.K.P.M. Lutaaya, S.C. Civ. Applica. No. 12 of 2007. She concluded her argument by stating that under the Judicature (Court of Appeal Rules) Directions, S.I. 13-10, herein after referred to as the Court of Appeal Rules, the Court can extend the time for filing notice of appeal.

Mr. Bwiruka Richard, counsel for the Respondent herein, for his part opposed the application; contending that it is misplaced as it ought to be brought in the Court of Appeal. His contention was that there is no provision in the law granting this Court jurisdiction to grant the leave sought since it is Rules 5 and 76 (2) of the Court of Appeal Rules aforesaid, which provide for grant of the leave sought. He further submitted that 0.51 of the CPR cited in this application is only applicable where the enlargement of time being sought, is with regard to cases falling under the operation of the CPR; but, he contended, this was not one such instance.

On the issue of s. 98 of the CPA which the Applicants have also invoked, counsel countered that a party seeking redress can only have recourse to this provision of the law where there is no other specific legal provision for remedy available in the matter. He then argued that the Applicant had not shown sufficient cause for their failure to file the notice of appeal, so as to entitle it to the leave sought. Further, he pointed out that the Applicant had not made counsel's failure to act a ground for the application.

Finally, he contended that there was no important question of law to draw to the attention of the Court of Appeal since this matter was a simple one of determining whether a police officer could stop the activities of a radio station when such lawful authority lies instead with the Media Council. He concluded by urging Court to dismiss this application; but argued in the alternative that if the Court was inclined to allow the application, then it should do so but with a condemnation of the

Applicant herein to costs; as this application would have been unnecessary in the first place, had it not been for the blameworthy dilatory conduct of their counsel.

In her rejoinder, Ms Nshemereirwe countered that the issues for the intended appeal are about fundamental rights and freedom; and their enforcement. She reiterated that the CPR was the applicable law, as O. 44 thereof provides that an application such as this is to be brought, in the first instance, in the Court which made the decision from which the intended appeal arises. She then concluded by urging Court to give effect to the prayers in the motion.

The decision from which leave is being sought to extend time for the lodgement of notice of appeal resulted from a suit that had been instituted by notice of motion, invoking Articles 20, 29 (1) (a) (b), and 50 of the Constitution; and as well rule 3 of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, S.I. 13-14; hereinafter referred to as the Rights Enforcement Rules. Rule 8 of the said Rights Enforcement Rules states as follows:

*"**8. Civil Procedure Act, etc. To apply.***
Subject to these Rules, the Civil Procedure Act and the rules made under it shall apply to proceedings under these Rules."

The Civil Procedure Act (hereinafter the CPA), - Part VIII thereof - provides for appeals. Section 66 of the Act provides that except where there is express provision in the Act to the contrary, an appeal shall lie from a decree or order of the High Court to the Court of Appeal. Section 76 of the Act sets out the orders of Court from which an appeal shall lie. It expressly states that an appeal can only lie from such orders as is provided for by the Act, or any other law for the time being in force; and from no other order. The orders of this Court from which leave is being

sought to file a notice of appeal out of time, however, do not fall under any of the orders listed in the said provision of section 76 of the Act.

O. 44 r.1 of the Civil Procedure Rules (hereinafter the CPR), which are rules made under the said section 76 of the CPA, amplifies and extends the circumstances under which orders of Court are appellable from, as of right; and also provides for the ones which require leave of Court. The orders now intended to be appealed from are not any of the orders listed in the aforesaid rule of the CPR for appeal therefrom as of right. And with regard to the orders not appellable from as of right, rule 2 of Order 44 provides the manner in which such orders may nonetheless be appealed from as follows:

"(2) An appeal under these Rules shall not lie from any other order except with the leave of the court making the order or of the court to which an appeal would lie if leave were given."

Then rules 3 and 4 of the same Order set out, respectively, the Court in which such application is to be instituted and the manner of instituting such application, as follows:

"(3) Applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.
(4) Application for leave to appeal shall be by motion on notice."

The sum of the law reviewed above is that the orders of this Court, from which the Applicant herein seek to file a notice of appeal, are in fact not appellable from as of right. I can appreciate that counsel for the Applicant (Respondent then) who had instantly applied for leave to appeal, and indeed the Deputy Registrar of this Court, were unfortunately misled by the contention of the learned counsel for the

Applicants then (Respondents herein), that the orders of this Court in the head-suit herein were appellable from as of right; thus resulting in the former counsel abandoning his otherwise well founded application.

Be it as it may, this was however not the reason the Applicant's counsels – and I do, here, use the corporate term deliberately – failed to proceed with their pursuit of the appeal process, in not filing the prerequisite notice of appeal, as provided for by law. What happened with regard to the management of the file, vis-à-vis the requisite steps for instituting the appeal exhibited, to say the least, gross ineptitude on the part of those counsels.

Section 10 of the Judicature Act provides that an appeal from the decisions of the High Court shall lie to the Court of Appeal as prescribed by the Constitution, the Judicature Act, or any other law. As we have seen above, the CPA and the CPR provide for appeals to the Court of Appeal from the decisions of the High Court. Hence in looking at the issue of appeal herein all these provisions of the law are called into issue.

The Court of Appeal Rules give effect to the provisions of section 10 of the Judicature Act referred to herein above. Rule 75 of the Court of Appeal Rules provides that, part IV of those Rules – which caters for civil cases – shall apply to appeals from the High Court acting either in its original or appellate jurisdiction. Rule 76 of those Rules provides that a notice of appeal shall be filed in the High Court within 14 (fourteen) days from the date of the decision against which it is desired to appeal.

Rule 40 (2) of the aforesaid Rules provides that where formerly (before the Court of Appeal was put in place) an appeal lay from the High Court to the Supreme Court with leave either of the High Court or the Supreme Court, the same rules

shall apply to appeals to the Court of Appeal. This merely re-states the position in law that an application for leave, has to be brought first in the High Court. Rules 41(1) and 76 (4) provide that even in situations where an appeal lies only with leave of Court, the notice of appeal can nevertheless be lodged before such leave is obtained.

What emerges from the above is that there is no provision in the Rules aforesaid for leave to lodge a notice of appeal. What an intending appellant need do, where an appeal lies only with leave of Court, or where an appeal lies as of right, but the time for lodging notice of appeal has elapsed, is to lodge the said notice of appeal; and then proceed to apply for leave to appeal, or for the enlargement of time within which to lodge the notice of appeal, as the case may be. The counsels for the Applicant ought to have directed their minds to, and appreciated the provisions of the Judicature Act, and the rules made there under, in seeking to bring this application.

Had they paid attention to the relevant legal provisions they would have brought an application, not for leave to file a notice of appeal out of time as is the case now; but instead, for leave to appeal from the orders of this Court in the head-suit herein. The Applicant would then, subsequent to the grant of that leave, have filed a notice of appeal; and in the event of failing to do so within the prescribed time, it could nevertheless as pointed out above still have lodged the notice of appeal, and then applied in the right Court, for extension of time within which to lodge that notice.

Section 96 of the CPA empowers any Court exercising civil jurisdiction with the mandate to extend the time for doing any act prescribed by the Act. As pointed out above, section 76 of the CPA and O. 44 of the CPR, read together, clothe the Court, from whose decision an appeal is intended, with authority to handle applications for leave to appeal; with the primary responsibility for determining such application

lying with that Court. That Court would then, in the wording of section 96 of the CPA, be exercising civil jurisdiction. Section 79 of the Act provides for time limitations with regard to appeals; but also provides that where any other law makes specific provision for limitation for appeal, it is that other law that shall apply.

Order 51 rule 6 of the CPR limits its force only to the enlargement of time for the doing of acts provided for under those Rules. The time frame for lodging notice of appeal is neither provided for in the CPA nor the CPR. It is instead rule 5 of the Court of Appeal Rules which provides for extension of time limited by rule 76 of the said Rules, for the doing of any act provided for under the said Rules; and clothes the Court of Appeal with the mandate to extend such time. Nowhere is it provided that such jurisdiction to extend time is exercisable by any Court concurrently with the Court of Appeal.

In the result, for the extension of time for the lodgement of notice of appeal, it is the Court of Appeal to which recourse must be had. It follows then, that the Applicant cannot apply to this Court for the extension of time for lodging the notice of appeal; this being unnecessary in view of the provisions pointed out above for lodgement of such notice even where leave to appeal has not yet been obtained. In the premises, it is evident that this application for extension of time to lodge notice of appeal is misplaced.

It however remains for me to determine what to do with it. Authorities abound for the proposition of law that a suit instituted in a Court lacking the jurisdiction to entertain the matter cannot be dismissed, but instead struck out. This Court would be acting ultra vires in deciding on the merits of this application, which is the preserve of the Court of Appeal. I therefore, with great sympathy for the Applicant,

strike out this application; and urge the Applicant to exercise greater diligence and pursue the issue of leave to appeal first, from which then the rest will flow.

In view of the contributory blame attributable to counsel for the Respondents herein, albeit innocent, leading to the present confusion, I make no order as to costs of this application.

Alfonse Chigamoy Owiny – Dollo

JUDGE

19 – 11 – 2008