

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO 0035 OF 2010

(FROM RUKUNGIRI CS NO. 165 OF 2008)

KATWATEKI ERIASAFU :::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

INGRID TURINAWE :::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE THE HON. MR. JUSTICE J.W. KWESIGA.

R U L I N G

This Ruling is on two preliminary objections raised by the Respondent's Advocate when the above Appeal came for hearing. Mr. Wilfred Murumba, Respondent's Advocate raised objections, namely;

- (a) That this Appeal was filed out of time.
- (b) That the Appeal was filed without first extracting a decree being appealed from.

Mr. Ben Agaba who appeared for the Appellant contended that the Appeal was within time. That the Judgment and decree appealed from was passed by Her Worship Wanume Deborah, Chief Magistrate of Rukungiri on 8th September, 2010 and the Appeal was filed on 17th September, 2010 through a Notice of Appeal. However the Memorandum of Appeal was filed on 13th October,

2010 because the typed copy of the proceedings had not been supplied. I have found on the court record a letter dated 17th September, 2010 where the Appellants applied for a copy of the proceedings to formulate grounds of Appeal. There is no record to show when the proceedings were supplied. Considering the circumstances of this case, the Appeal appears to have been commenced with a Notice of Appeal and its against this document that the Appeal Number was allocated. I find that between 8th September 2010 and 17th September, 2010 only NINE days had elapsed and therefore The Appeal was not out of time. Between the Judgment date and the filling of Memorandum of Appeal there were weekends and a Public holiday of 9th October, 2010 which ought to be deducted from the number of days that were available.

Appeal to the High Court are commenced by filing a memorandum of Appeal but considering the fact that the typed Judgment and proceedings were needed to formulate the grounds of Appeal this delayed filing of the Memorandum was not, in my view, fatal given the fact that it had been pre-ceeded by a Notice of Appeal.

The second preliminary objection seeks to have the Appeal struck off for being incompetent because the Appellant did not extract a decree in the original suit. Who had the duty to extract the decree? In my view when it is for the purposes of Appeal it is the duty of the

unsuccessful party to extract the decree. The decree Appealed against must be filed with the memorandum of Appeal because that is what is being appealed against. In absence of a decree there is no basis of the Appeal, failure to include a decree or formal order in the records of Appeal is a fatal irregularity. It can not be cured by amendment or filing supplementary record. Mr. Agaba conceded that the Decree was never extracted and he applied for adjournment to amend the Record of Appeal which request was rejected. Adjournment can not be granted to cure the dead but the sick pleadings. The remedy does not lie in amending pleadings that are incompetent from the start. The only remedy available for incompetent Appeal is to strike it out. It can not even be validated by extracting and filing the decree or formal order which did not exist when the Appeal was first filed. Appeals to The High Court from Magistrate's Court are governed by Section 220 of The Magistrate's Court Act. The Section specifically provides for Appeals from Decrees and Orders which must be formal and which must be filed with the Appeal which was not the case. Reference has been made to **Kabwimukye Vs Kasigwa 1978 HCB 252,** **Commissioner of Transport Vs A.G. of Uganda & Another (1999)** **E.A 329.**

Considering the above position, not even an application to reinstate the Appeal would cure the irregularity because one can not

re-instate what never existed. It would appear the option would lie in extracting the decree and seeking leave to file the appeal out of time as opposed to Mr. Agaba's erroneous submission and request for adjournment to amend what was invalid abnatio.

I uphold the second objection and strike out the Appeal on the ground that it is incompetent. I award costs to the Respondent.

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J.W. KWESIGA

JUDGE

29-11-2011

In the Presence of :-

Mr. Wilfred Murumba for Respondent.

Mr. Ben Agaba for Appellant.

Appellant present.

Respondent Absent.

Mr. Turyamubona Milton-Court Clerk.