

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT KAMPALA

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CORAM: HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.N.B. KITUMBA,JA

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CIVIL APPLICATION NO. 75 OF 2004

BETWEEN

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HON. FRANCIS MUKAMA APPLICANT

AND

UGANDA WILD LIFE AUTHORITY RESPONDENT

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(Arising from Civil Appeal No. 78 of 2004 between Uganda Wild Life Authority, appellant and Hon. Francis Mukama, respondent).

RULING OF THE COURT.

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This application is brought under rules 43, 76 and 82 of the Rules of this Court. It seeks for an order of this Court to strike out the Notice of Appeal dated 30th April, 2004 which was lodged in the High Court on the 4th May, 2004 arising from H.C.C.S. No. 290 of 2002 whose judgment was delivered on the 30th April 2004.

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The grounds of the application are:

1. **THAT, the notice of appeal was not served on the applicant/respondent or his counsel within the requisite time.**

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2. **THAT, the respondent /applicant has failed to comply with an essential step in the proceedings within the prescribed time.**

3. **THAT, it is fair and equitable in the circumstances that the notice of appeal is struck out with costs.**

This application is supported by the affidavit of Ms Lydia Nakamalira deponed to on the 8th June 2004. It is to the effect that the applicant was the successful plaintiff in High Court Civil Suit No. 290 of 2002 in which the respondent was the defendant. Judgment was delivered on the 30th April, 2004. The respondent filed a notice of appeal against the decision of the High Court on the 4th May, 2004 but did not serve a copy of the same to the applicant or to his counsel within the requisite time.

On the 1st June, 2004, however, counsel for the respondent then served counsel for the applicant with Miscellaneous Application No. 399 of 2004 for staying execution of the judgment and decree in H.C.C.S NO. 290 of 2002. When counsel for the applicant read through the application he found that among the documents annexed thereto were the Notice of Appeal dated 4th May, 2004 plus a letter requesting for proceedings from the High Court.

Counsel for applicant thereafter carried out a search at the Court Registry and confirmed that the Notice of Appeal had been lodged on the 4th May, 2004 without court granting leave to the respondent for extension of time within which to serve the notice nor had the respondent applied for such extension. In the circumstances, counsel for the applicant filed this application to strike out the Notice of Appeal.

Mr. Magala pointed out that in paragraphs 3 and 4 of the affidavit in reply deponed to on 15th March, 2006 by Douglas Misango, indicate that he received notice of appeal and letter requesting for proceedings on the 5th May, 2004 and he served both documents on counsel for applicant on
5 the same day though service for notice of appeal was not accepted. In his affidavit in rejoinder dated 18th April, 2006, Mr. Enoth Mugabi stated in paragraph 5 thereof that he received a stamped copy of the letter on the 3rd May, 2004 but notice of appeal was received on 1st June 2004.

10 From the aforesaid circumstances, Mr. Magala submitted that the burden of proof is on the intended appellant to establish service by swearing an affidavit of service. He pointed out that according to rule 78(1) of the Rules of this Court, an intended appellant must before or within seven days after lodging the notice of appeal serve it on all persons directly
15 affected by the appeal. Counsel argued that the applicant was such a person directly affected by the intended appeal.

As there is no proof of service, counsel pointed out that the applicant was served on 1st June, 2004 whereas the notice of appeal was filed on
20 4th May, 2004. In his view, that was a considerable lapse of time in violation of the provision of rule 78 (1) of the Rules of this Court. In the premises, counsel contended that the notice of appeal is incompetent because it was served out of time. It should, therefore, be struck out with costs. In support of his argument, counsel cited and relied on the case of
25 **Francis Mutabazi & 3 others Vs Horizon Coaches Ltd, Civil Application No. 97 of 2000 (unreported).**

In his response, Dr. Byamugisha opposed the application. According to counsel, the burden of proof lies squarely on the applicant to show he or

she was not served. In counsel's view, the Judicature (Court of Appeal Rules) Directions, S.I. 13-10, do not require a party that has filed a notice of appeal to swear an affidavit of service that it has served the notice of appeal. According to counsel, the practice is that notice of
5 appeal is filed and a party requests for record of proceedings. In his view, until, a memorandum of appeal is filed it is when notice of appeal and a letter requesting for proceedings are required.

In his analysis to establish that the applicant was served with notice of
10 appeal, Dr. Byamugisha referred to the affidavit in support of notice of motion deponed to by Ms Lydia Nakamalira, dated 8th June, 2004. In paragraph 3 of that affidavit, it was stated **"THAT on the 5th day of May 2004 Ms Mugerwa & Maseembe Advocates served upon us a copy of a letter to the High Court Registrar, expressing their intention to
15 appeal against the aforementioned judgment. (A copy of the letter is attached hereto and marked "(Annexure "B:)"**.

Looking at letter "B", Dr. Byamugisha pointed out that Ms Kituuma-Magala & Co. Advocates, now counsel for the applicant, actually
20 received that letter on 3rd May, 2004, according to a stamp of the firm. Counsel further pointed out that an observation of notice of appeal, marked "C2" reveals that counsel for applicant received it on the 1st June, 2004. This was because, Douglas Misango, in his affidavit in reply, stated in 4th paragraph thereto that Ms Kituuma-Magala & Co. Advocates
25 acknowledged service of the letter requesting for proceedings by stamping it but omitted to stamp the notice of appeal which Mr. Kituuma told the deponent to collect later. However, in paragraphs 4 and 5 of his affidavit in reply, Douglas Misango deponed that documents marked "A"

(Notice of Appeal) and “B” (Letter requesting for proceedings) were served on 5th May, 2004.

In the circumstances, therefore, it was the contention of Dr. Byamugisha
5 that the respondent has proved that the applicant was served with both the notice of appeal and a letter requesting for proceedings. Having complied with legal requirements, Dr. Byamugisha prayed for the dismissal of this application with costs.

10 It is clear from the notice of appeal and letter requesting for a typed copy of proceedings that both documents attached and marked “A” and “B” respectively, were filed in court on the 4th May, 2004. This evidence is in the affidavit in reply by Douglas Misango deponed to on 15th March, 2006. Mr Misango then served both documents on Ms Kituuma-Magala
15 & Co. Advocates, counsel for applicant, on 5th May, 2004. One day after lodging the same documents in court.

Mr. Douglas Misango stated in his affidavit that counsel for the applicant then stamped the letter requesting for proceedings. This information is
20 true according to annexure “C2”. Ms Kituuma-Magala & CO. Advocates received that letter on 5th May, 2004. On that day, according to Douglas Misango, counsel for the applicant omitted to stamp the notice of appeal and asked him to collect it later.

25 According to Douglas Misango, he went on numerous occasions to M/s Kituumma-Magala & Co. Advocates to collect a stamped copy of the notice of appeal but in vain. It was, however, stamped on 1st June, 2004 according to Annexure “C1”. In our view, it is more probable than not that counsel for applicant were served with the notice of appeal on 5th

May, 2004 rather than on 1st June, 2004. We hold so because applicant's counsel omitted to stamp the notice of appeal on 5th May, 2004 and asked Douglas Misango to collect it later. We find that explanation plausible and we accept it because the notice of appeal was stamped
5 belatedly by counsel for applicant on 1st June, 2004.

We further find that the letter requesting a typed copy of proceedings (Annexure "B") was not served on M/S Kituuma-Magala & Co Advocates on 3rd May 2004. It is inconceivable that it was served on that day before the same was filed and received in court on 4th May, 2004. We,
10 therefore, find the affidavit in rejoinder sworn by Enoth Mugabi, in paragraphs 5, 6 and 7 thereto untruthful.

In the premises, we agree with Dr. Byamugisha that the respondent has proved that applicant's counsel were served with both the notice of
15 appeal and a letter requesting for proceedings within the prescribed time. This was one day after both documents were filed in court on 4th May, 2004. Having complied with legal requirement under rule 78 (1) of the Rules of this court, we are unable to strike the notice of appeal. Rule 78(1) states:

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**"78(1). An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal, but the court may, on application, which may be made, ex parte, direct that service need not be
25 affected on any person who took no part in the proceedings in the High Court".**

It is clear to us that, the applicant was such a person directly affected by the appeal. Service of the notice of appeal was effected on counsel for

the applicant before or within seven days after lodging notice of appeal on 4th May, 2004. In the circumstances, an order to strike the notice of appeal is unsustainable.

- 5 In the result, we dismiss this application with costs to the respondent, dated at Kampla this ...15th day of ...January..... 2008

10 **A.E.N. MPAGI-BAHIGEINE**
JUSTICE OF APPEAL

15 **S.G. ENGWAU**
JUSTICE OF APPEAL

20 **C.N.B. KITUMBA**
JUSTICE OF APPEAL