THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE A.S. NSHIMYE

CIVIL APPLICATION NO.109 OF 2004

AMRIT GOYAL……..APPLICANT

V E R S U S

1. HARICHAND GOYAL
2. SUBASH GOYAL
3. ASHOK GOYAL
4. ROAD MASTER CYCLES (INDIA) LTD…RESPONDENTS

RULING OF THE COURT:

This is an application by Notice of Motion brought under rules 82, 42(1) and 42(2) of the Court of appeal Rules seeking for orders that:-

1. The Notice and Memorandum of Appeal in Civil Appeal No.10 of 2004 Hari Chand Goyal and 3 others vs Amrit Goyal be struck out.

2. Costs of this application be provided for.

The brief background to the application is that the applicant successfully obtained a judgment against the respondents in High Court Civil Suit No.432 of 2001. The respondents filed Civil Appeal No.10 of 2004. The applicant applied to this court for an order that the respondents pay further security for costs as they did not have property within the jurisdiction of our courts. Hon. Justice C.K. Byamugisha, JA ordered that they deposit Ug.shs.80,525,500/= as security for costs within 30 days from the date of her order and in any event before the hearing date of the appeal. This ruling was delivered on 29th April 2004. By that date, the appeal was already fixed for hearing on 18th May 2004.

This application is supported and opposed by a number of affidavits sworn on behalf of both parties. The gist of the applicants' affidavits is that they understood the order of the learned single justice of appeal to mean that security for costs which was ordered had to be paid within 30 days from 29th April 2004. To them, the money was to be paid on or before 29th May 2004. The single justice, however, indicated that the money had to be paid before 18th May 2004 when the case was already scheduled for hearing. The affidavits in support of the opposition to the motion, on the other

hand, assert that according to them, the single justice ordered them to pay within thirty days or if they failed, at any time before the appeal was heard. Since they deposited the money in court on 20th August 2004 and the appeal had not been heard, they complied with the court order. The case for the applicant is that since the respondents failed to deposit the money by 29th May 2004, they failed to comply with the court order and the appeal should be struck out under rule 82 of this Court's Rules.

At the hearing of the application, the parties through their counsel re-iterated these positions. Mr. Masembe Kanyerezi who represented the applicant pointed out that the respondents failed to deposit the money in court within 30 days as ordered by the court. Therefore, the only option available to them would be to apply for enlargement of time to enable them to deposit the money out of time. He submitted that up to this day and despite numerous correspondences over the matter and the fact that this application was made in September 2004, no application for enlargement of time has been made. In his view, the attempt to deposit the money in August 2004 was of no consequence since it did not comply with the terms of the court order. He asked us to strike out the Notice of Appeal and the Memorandum of Appeal in Civil Appeal No.10 of 2004.

Mr. Oscar Kambone, learned counsel for the respondents made a spirited defence against the application to strike out the appeal. He relied on three main arguments namely that:-

(a)
The security for costs which was deposited in court on 20th August 2004 was deposited within the terms of the order of the single justice of this court dated 29th April 2004.

In his view, the order meant that the respondents could deposit the money in 30 days from the date of the order or at any other time before the appeal was heard. Since the deposit was made before the appeal was heard, then there was due compliance with the court order.

(b)
Even if it was found that the deposit was made outside the time ordered by the single judge, this court has the power to hold that subsequent payment rectified non-compliance. He cited the case of Winnie Babihuga vs Winnie Matsiko Election Petition No.13 of 2002 where it was held that non-payment was rectified by subsequent payment.

(c)
The purpose of security for costs is to secure the interests of the applicant should the respondent loose the appeal. In the instance case, the appeal has not yet been heard although the deposit was made four years ago.

He submitted that non-payment of the security is a mere technicality and has not prejudiced the applicant in any way. In his view, the irregularity is curable under rule 2(2) of the Rules of this Court and Article 126(2)(e) of the Constitution. He requested the court to dismiss this application and proceed to entertain the appeal on its merits.

We wish now to dispose of Mr. Kambona's points in the order in which they have been made. The first matter to be decided is: What did the order of the learned single justice mean? To understand the meaning, one has to read the context and the facts of the application which was before her. She found that the case before her presented a suitable situation in which security for costs should be ordered. She was aware that the appeal giving rise to the application was already fixed for hearing on 18th May 2004. She considered the submission that reasonable time was required to enable the respondents organise shs.80 million. She ordered that thirty days would be adequate. Therefore in

any event, the money had to be deposited by 29th May 2004. Because she was aware that the case was already fixed for hearing on 18th May 2004, she was anxious to inform the parties that the court may refuse to hear the appeal if the respondents did not deposit the money before or on that day. In that event, the respondents would still have up to 29th May 2004 to deposit the money. We do not agree with Mr. Kambona that the order of the single justice could by any stretch of imagination mean that the respondents could deposit the money at any other time before the appeal was heard. This would be very absurd. It would mean that the respondents were given permission to indefinitely delay the hearing of the appeal thus denying the applicant the benefits of the High Court decree in his favour. The only natural interpretation of this courts order is that security had to be deposited not later than 29th May 2004.

We observe that the date 18th May 2004 when the appeal was due to be heard is very important in interpreting the order of the learned single justice. On that day, the parties appeared in court and Mr. Kambona applied for adjournment on the grounds that his clients had not yet managed to comply with the 30 days order of this court. Since the court had no other time during that Session it adjourned the case till the next Civil Session of the court. However, Mr. Kambona did not apply for, nor did the court consider varying the 30 days order. In these proceedings, however, there is deliberate suppression by Mr. Kambona of any mention of the 18th May 2004 presumably because it would shade some light on what the single justice meant when she said "in any event before the hearing of the appeal." In fact the respondent relied on the false affidavit of Tom Mbalinda dated 25th May in which he falsely deponed in paragraph 5 that:-

" It is true that appeal was fixed for hearing on 29th May 2004 and on that day the respondents advocate successfully applied for an adjournment to enable the respondents pay in court amounts ordered as further security for costs."

This was false because the case was never fixed for hearing on 29th May but on 18th May 2004. This falsehood was designed to conceal the fact that the appeal was to be heard on 18th May 2004. Again, paragraph 1.3 of the respondents conferencing notes filed on 26th September 2007 falsely claims that the hearing of the appeal had been scheduled for 29th May 2004 [not 18th May 2004] and that the respondents successfully applied for adjournment to pay in court the proper security for costs. This is extremely false because the parties never came to court on that day. The falsehood was deliberate and intended to hoodwink the court as to the exact meaning of the single judge's order of 29th April 2004. We condemn this attempt by counsel, an officer of the court, to mislead the court. Professionalism requires of him to assist but not mislead the court as he tried to do. We hold that the 29th May 2004 was the deadline for the security for costs to be deposited.

Mr. Kambona's second argument is that even if the court found that the depositing of the money in August 2004 was out of time, this court should hold that this was a minor irregularity which was rectified by the late payment. He relied on the case of Winnie Babihuga (supra). We have looked at this decision of this court. In that case which concerned the effect of non-payment of court fees in time accompanied by late payment, we held that:-

(a)
On the authorities available to us, non-payment of court fees is a minor technicality which can be cured by article 126(2)(e) of the Constitution because the Notice of Appeal was given orally in court which did not require payment of court fees.

(b)

In any case, omission to pay court fees by the respondent was rectified by late payment of the court fees.

The instant case is not about non-payment of court fees. It is about failure to deposit further security as ordered by this court. A payment of further security for costs was a condition precedent and had to be done before 29-5-04. A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart of all judicial systems. There was no condition precedent or court order in the Babihuga case. That decision is distinguishable. The respondents had sufficient opportunity to apply for enlargement of time to enable them comply with the court order. Despite information furnished by counsel for the applicant that they could do that, they stubbornly refused to do so. Despite the fact that this application was filed four years ago, the respondents stubbornly refused to consider making an application to extend time within which to comply with the court order. Court cannot condone such deliberate contempt of its orders.

Finally, we consider whether failure or refusal to comply with a court order is a technical irregularity which can be cured under article 126(2)(e) of the Constitution and Rule 2(2) of this Courts Rules. From what we have just stated above, we hold a firm view that a court order is not a mere technical rule of procedure that can be simply ignored. In our jurisprudence, court orders must be respected and complied with. Those who choose to ignore them do so at their own peril.

In the result, we hold that by refusing to obey the court's order dated 29th April 2004, the respondents failed to take an essential step as prescribed by Rule 82 of this Court's Rules. Therefore, we find merit in this application which we hereby allow, strike out Civil Appeal No.10 of 2004 and award the costs of this suit here and in the High Court to the applicant.

Dated at Kampala this…07th ……day of …August……2008.

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Hon. Justice L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE.

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Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

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Hon. Justice A.S. Nshimye
JUSTICE OF APPEAL.