

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO.274 OF 2014**

ANDREW MAVIRI

APPLICANT

VERSUS

JOMAYI PROPERTY CONSULTANTS LTD

RESPONDENTS

CORAM:

HON MR.JUSTICE A.S.NSHIMYE, JA

HON.MR.JUSTICE, RUBBY AWERI OPIO, JA

HON.MR.JUSTICE GEOFFREY KIRYABWIRE, JA

RULING OF THE COURT

This application was brought by way of Notice of Motion under Rules 43, 82, 83 and 84 of the Judicature (Court of Appeal) Rules, SI 13-10.

It is premised on two grounds namely:-

- 1. That some essential step in the proceedings was not taken by the respondent within the prescribed time.*
- 2. That the appellants failed to lodge the appeal within 60 days from the date of receipt of the record from the High Court.*

The application accordingly seeks for orders that:-

- (a) The Notice of Appeal filed in the High Court by the respondent on**

28/2/2014, be struck out or be deemed to have been withdrawn.

(b) Costs of this application be provided for.

The grounds upon which this application is premised are elaborated in the affidavit in support of the notice of motion deponed by Ms. Pamela Kansiiime, an Advocate with M/s KGN Advocates who also represented the applicant in the High Court.

The salient paragraphs in the above affidavit are paragraph 3-7:-

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- 3. Being dissatisfied with the decision of the High Court, the respondent filed a notice of appeal in the High Court on the 28/2/2014 and the same was transmitted to the Court of Appeal.*
- 4. M/S KGN Advocates was also served with a copy of the Notice of Appeal on 28/2/2014 and a copy of the said Notice of Appeal is attached and marked "A"*
- 5. Our firm was also served with a letter requesting for proceedings dated 25/2/2014 and a copy of the said letter is hereto attached and marked "B".*
- 6. Acting upon the said request for the record of proceedings, the Commercial Court prepared the record of proceedings in HCCS No. 334 of 2014 and the same was availed to the respondent on the 29* day of March 2014. A photocopy of the letter dated 2/2/2014 by the Registrar Commercial Division of the High Court confirming receipt of the proceedings by Golooba Mohamad, Advocate on behalf of Kavuma, Kabenge & Co. Advocate is attached hereto and marked "C" while our letter of insuring to the Registrar is attached*
- 7. That upon receipt of a confirmation of receipt of the proceeding by the Registrar of the Commercial Court, we wrote to the Registrar Court of Appeal to confirm whether an appeal had been filed by the*

respondent in the Court of Appeal. A photocopy of the letter is attached and marked "E".

8. *That when / delivered the letter to the Court of Appeal, / was availed a Register of Appeals and upon perusal of the same, / did not find any appeal filed by the respondent against the judgment of the High Court.*
9. *That as an Advocate of Courts of Judicature, / know that an appeal ought to be lodged within 60days from the date of receipt of the record of proceeding from the High Court".*

The salient paragraphs of Grace Nakalema's affidavit in reply are paragraphs 4-9.

The respondent defended the application relying on the affidavit in reply filed by M/S Grace Nakalema.

4. **That** record of proceedings in **Civil Suit No. 334 of 2011** was never availed to the respondent's counsel on 29/3/2014 as alleded in the affidavit of Pamela Kansiiime. The proceedings collected on 29/3/2014 **were** proceedings in respect of **Civil Suit No. 266 of 2009 ETATS Ltd VS Barclays Bank Ltd** (a copy of the letter is hereto attached and marked Annexure "A").
5. I am aware that Mr. Kintu collected the proceedings in **Civil Suit No. 334 of 2011 on 30/6/2014** for purposes of preparing and filing the record of appeal.
6. Upon perusal of the record, we discovered that the same had typing errors and we returned it to the Registrar for correction. The same letter was copied and served on the applicant's lawyers M/S
KGN Advocates who did not acknowledge service and is attached and marked annexure "B".
7. I am aware the edited version of the record of proceedings was later availed and collected by Mr. Kintu Nteza on 29/8/2014 (a copy of the Registrar's letter inviting the advocates for collecting the edited version of proceedings is attached hereto and marked annexutre "C").
8. In answer to paragraph 9 and 10 of the applicant's affidavit in support, am aware that the record of appeal was lodged on the 6/410/2014, after 37 days having received the record of proceeding from the lower court on 29/8/2014 as confirmed by the

Registrar's certificate hereto attached and marked annexure "D".

9. On account of the above, the appeal is properly before court having been lodged within the prescribed time".

REPRESENTATION

At the hearing of this application, Mr. Nuwagaba Gilbert appeared for the applicant while Mr. Felix Nteza and Mr. Nsimbe Musa appeared for the respondent.

CASE FOR THE APPLICANT

Mr. Nuwagaba submitted, inter alia, that in the affidavit deposed by Kansiime Pamela, a letter requesting for the record of proceedings dated 25/2/2014 was served on the applicant's counsel. Subsequently, the Commercial Court prepared the record and it was availed to the respondent on 29/3/2014. Sometime in July 2014 they inquired from the Registrar Court of Appeal where they were availed a register of appeals and upon perusal they discovered that the respondent had not filed the appeal. Mr. Nuwagaba

submitted further that by the time of filing this application on the 22/7/2014, one hundred and ten (110) days had since passed when the respondents were availed the record of proceedings. Mr. Nuwagaba contended that the allegation in Grace Nakalema's affidavit that when they collected the record of proceedings on 30/6/2014 and discovered that the same had errors prompting them to write to the Registrar on 25/8/2015 requesting for the same to be corrected, does not afford the respondent protection. This is because the procedure would have been that once the proceedings are provided and errors in them are discovered but time has caught them up, then the respondent would have sought leave of court to extend time and state the reason for the prayer for extension as the errors having been discovered in the record; which was not done in the instant case.

In conclusion, Mr. Nuwagaba emphasized that Rule 82, 83 and 84 of the Judicature (Court of Appeal Rules) Directions, herein after referred to as [CAR], are mandatory in nature and where there is failure to comply with the rules the notice of appeal ought to be struck out or the notice of appeal would be deemed to have been withdrawn on account that time was not complied with. He referred to the case of **NHCC Ltd VS Soleme Kyomukama, Civil Application No. 133 of 2009 and Reamtone Ltd VS Uganda Corporation Primaries Ltd Civil Application No 53 of 1997.**

CASE FOR THE RESPONDENT

Mr. Nteza strongly denied that the record of proceedings was availed to the respondent's counsel on 29/3/2014. He submitted that the record that was availed to counsel for the respondent on the above date was a record of **Suit No.266 of 2009 Etas Ltd v. Barclays Banks Ltd.** Counsel submitted that a proper record was availed to counsel for the respondent on 30/6/2014. However upon perusal of the said record, it was discovered that the same had typing errors and it was returned to the Registrar for correction in a letter dated 25/8/2014.

Subsequently an edited version was served on the respondent on 29/8/2014 and the same was received on 29/8/2014. Upon receipt of the same an appeal was then filed on 6/10/2014, 37 days after receipt of the record of proceedings from the lower court on 29/8/2014.

The learned counsel accordingly submitted that the appeal is properly before this court and that the respondent has been vigilant in pursuing this appeal. This is because the record shows the judgment was delivered on 17/8/2014. A tentative record was availed on 30/6/2014. A request was made to have it corrected which was done. After 37 days from receipt of the edited copy of the record and an appeal was filed which is pending before this court?

REJOINDER

Nuwagaba challenged the contention of the respondent's arguments that time was frozen on 25/8/2014 in order to have an edited version of the proceedings. Counsel submitted that Rule 83 (2) of the CAR required that proof of that should have been retained and produced in court. However, there was no such proof of service. Counsel contended that the authorities cited canvass the point that proof must be retained if counsel has to rely on the letter in question. Mr. Nuwagaba concluded that having seen the alleged errors as they claim, the respondent should have applied to this court for an extension of time which was not done. Counsel accordingly concluded that, this appeal is out of time and the notice of appeal ought to be struck out with costs.

COURT'S FINDINGS

Rule 82 of the CAR under which this application was lodged reads as follows:-

“A person on whom a notice of appeal has been served may at any time, either before or after institution of the appeal, apply to court to strike the notice or the appeal, as the case may be, on the grounds that no appeal

lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time”.

Rule 83 provides as follows:-

- 1) *. . an appeal shall be instituted in court by lodging in the registry within sixty days after the date when the notice of appeal was lodged.*
 - a) *a memorandum of appeal, in six copies, or as the registrar shall direct;*
 - b) *the record of appeal, in six copies, or as the registrar shall direct;*
 - c) *The prescribed fee;*
 - d) *security for the costs of the appeal.*
- 2) ***Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which to appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery of the appeal of that copy.***
- 3) *An appellant shall not be entitled to rely on sub rule (2) of this rule, unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of the service”.*

It is clear from the above provisions that rule 83 (1) provides that appeals must be filed within 60 days of the date of the initial decision. On the other hand Rule 83(2) and 83 (3) permit an appellant to exclude from the computation of the 60 days’ limit, the time taken by the Registrar to prepare and deliver copies of typed proceedings to the appellant, provided the application for the proceedings was in writing and that a copy of the said letter/application was served upon the respondent;

The above provisions have already been interpreted by this Court in a number of cases. See:- NHCC Ltd VS Salome Kyomuka Ma, Court of Appeal, Civil Application No. 133 of 2009 and Reamton Ltd VS Uganda Corporation Creameries Ltd & another Court of Appeal, Civil Application No. 53 of 1997.

In the instant case, it is the contention of the applicant that the respondent did not take essential step within the prescribed time in the proceeding and that the respondent failed to lodge the appeal within the 60 days from the date of receipt of the record from the High Court.

The respondent denied the above allegations and contended, inter alia, that the essential step in the proceeding was taken within the prescribed time and that they lodged the appeal within 60 days from the date of receipt of the record from the High Court.

The import of failure to take essential step in the proceeding was explained in **Bakaluba Mukasa Peter & another VS Nalugo Mary Margret Sekiziyivu, Court of Appeal Election Petition Application No. 24 of 2011**, where it was held inter alia, that taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by the court, if the action is not performed as by law prescribed, then whatever legal process has been done before, becomes a nullity, as against the party who has the duty to perform that act. It was further held in that case that delay in taking the right time hinders successful parties from enjoying the fruit of their judgment which was obtained in their favour. See also **Okwanga Valentino & others VS Gulu District Local Council Government, Court of Appeal Civil Appeal No. 265 of 2013**.

In the instant application, it is clear from the record that a letter requesting for the record of proceedings dated **25/2/2014** was served on the applicant's counsel. Subsequently, the Commercial Court prepared the record and availed to the respondent on **29/3/ 2014**.

However, the above record was in respect of a different case i.e. **Civil Suit No. 266 of 2009 Etas Ltd VS Barclays Bank Ltd**. A proper record of proceedings was availed to counsel for the respondent on **30/6/2014**. It was however, the contention of the respondent that after perusing the above record it was discovered that the said record had some typing errors, whereupon, in a letter dated **28/8/2014**, the same was returned to the Registrar for correction. The Registrar subsequently served the edited version on the respondent on **29/8/2014**. The same was received on **29/8/2014**. Upon receipt of the record, an appeal was filed on **6/10/2014**, which was **37** days after receipt of the record of proceedings from the lower court on **29/8/2014**. It was the contention of counsel for the respondent that the time within which the respondent was supposed to have lodged the appeal was frozen on **25/8/2014** when the respondent's counsel wrote to the

court requesting for an edited version of the record of proceedings.

In application of this nature, it is critical to establish as a fact when the record of proceedings was ready for collection and from there establish the legal time **lines: see Okwanga Valentino & others VS Gulu District Local Council Government, Court of Appeal Civil Appeal No. 265 of 2013 (Supra**

We are satisfied that the record of proceedings as availed to the respondent on **29/3/2014** was invalid as it was in respect of a different case i.e **Civil Suit No. 266 of 2009, Etas Ltd VS Barclays Bank Ltd.** The learned Registrar tried to justify his oversight by saying that the proceeding he availed to the respondent were the right one except that there was a typing error regarding the parties which were referred to as **Etas Ltd VS Barclays**

Bank of Uganda Ltd. We are unable to believe the above explanation in the absence of an attached copy of the said record for the avoidance of doubt. Consequently, we are in agreement with counsel for the respondent that the record of proceedings delivered on 29/3/2014 was a wrong one and that the proper record of proceedings was supplied and delivered on 30/6/2014.

As far as we are concerned the legal time line therefore started running from 30/6/2014 when the correct record of proceeding was supplied to the respondent. We do not agree with the respondent that time within which the respondent was supposed to lodge the appeal was frozen on 25/8/2014 when the respondent counsel wrote to the court requesting for an edited version of the record of proceedings. In the first place, there is no proof that the respondent served the said letter requesting for edited copy of the proceeding and retained them as required by rule 83 (3) and the authority in **NHCCL VS Kyomukama and Reamurtone Ltd VS UCP Ltd (Supra)**. Secondly, Rule 83 being mandatory should not be interpreted liberally. Therefore, it was incumbent upon the respondent, after receiving the record of proceedings on 30/6/2014, to take the necessary step to file the appeal immediately. Where they felt they had hit a snag in one way or another, the correct procedure would have been to apply to court to have the time enlarged. In the instant case, the respondent having received the proceedings and discovered errors, and since time was running out, they needed to seek leave of court to extend time and state the reason for the application as the errors having been discovered. We also find it absurd that it took the respondent nearly 60 days to detect the alleged typing errors in the proceedings.

It is highly probable that, the respondent could have realized that they were out of time and then decided to manipulate the record of proceedings more especially after realizing that the application to strike out the notice of appeal had already been lodged on 22/7/2014. In order to circumvent the

mandatory provisions of the rules, they had to claim that the proceedings had errors after warehousing the record of proceeding for nearly sixty days without taking the necessary steps to file the appeal.

We are of the firm view that allowing litigants to circumvent the rules would set a dangerous precedent in this court as it would lead to abuse of court process.

In the premises, we find that the respondent did not take essential step in the proceedings within the prescribed time. We hold that the appeal was not lodged within 60 days from the date of receipt of the record from the High Court.

We accordingly grant the application and order that the Notice of Appeal filed by the respondent on 25/2/2014 be and is hereby struck out with costs.

Dated this 7th Day of July 2015

Hon. Mr. Justice A.S. Nshimye, J.A

Hon Mr. Justice ,Rubby Aweri Opio, J.A

Hon. Mr. Justice Geoffrey Kiryabwire, J.A