THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. MG.2 OF 1990

1. BOARD OF GOVERNORS 2.
HEADMASTER GULU S.S : ::::::::::::::::::::::::::::::::::APPELLANTS

VERSUS

PHINSON E. ODONG::RESPONDENT.

BEFORE: THE HONOURABLE MR. JUSTICE G.M. OKELLO.

RULING:

This ruling is in respect o a Preliminary Objection which was raised by Mr. Orach counsel for the Respondent contending in effect that this appeal is incompetent and that it should be struck out. He advanced three grounds to support his views.

The first of his grounds was that the decree or order of the lower court against which this appeal has been lodged was not extracted and filed together with memorandum of Appeal as is required by law. He argued that it is a legal requirement that a decree or order appealed against must be extracted and filed together with the Memorandum of Appeal. He relied on section 232 (1) of the M.C.A 1970 and on the case of Zakaliya Muwonge .vs. Sulemani Mwanje (1978) HCB vol 10 page 49 Counsel argued that failure to comply with the above legal requirement renders the appeal incompetent and must be struck out. He pointed out that in the instant appeal the appellant did not extract a decree or order of the lower court against which the appeal is lodged. That the appellant merely filed a Memorandum of Appeal without attaching to it the extracted or order appealed from. He submitted that this non compliance with the above legal requirement tendered this appeal incompetent and prayed that it must be struck.

For the appellant, Mr. Atare replied that the legal requirement fully complied with by the appellant enumerating in the Memorandum of his appeal all the irregularities in the order of the lower court against which the appeal was lodged as required by section 78 (1) of the Civil Procedure Act. That this is exactly what the appellant did in this appeal and he prayed that the argument of the Respondent on this point should be dismissed and the court should that this appeal is competent.

Having heard the arguments of both counsels on this point and having carefully perused the authorities cited and the relevant law in this regard, I am of the view that Mr. Atare dismissed one vital point here, this point is the meaning of the words "decree" or "order" is used section 232 (1) of the Magistrates Courts Act. Under' section 232 (1) of the M.C.A 1970 an appeal lies to the High Court not from the judgment or ruling but from a "decree" or any part thereof and from the "orders" of a Chief Magistrate or Magistrate Grade I. What then does a "decree" or "order" as used in that section mean? Section 2 of Civil Procedure Act has defined these two words. Under these definitions, "order" is analogous to a decree. It is used to mean a formal order of court, This is a different document from a Memorandum of Appeal, What Mr. Atare laboured to explain as a compliance with the provision of section 78 (1) of the Civil Procedure Act are what must be contained in the Memorandum of Appeal. It is not a decree or order referred to.

It is a requirement of the law that these documents, (decree or order and Memorandum of Appeal) must be filed together when an appeal is lodged. A decree or order from which appeal is preferred must be extracted and tiled together with the Memorandum of Appeal. Failure to do so renders the appeal incompetent.

In the case of Mukasa –vs- Ocholi (1968) EA 89 at 90 Justice Sheridan as he then was when dealing with a case which was almost on fours with the instant one said:-

> *"There are ample authorities, for saying that a court has no jurisdiction to entertain an appeal where a decree embodying the terms of the Judgment has not been drawn up."*

He relied for that proposition on the cases of **Alexander Morrison –ys- M.S. Versi and Anor (1953) 20 EACA 26.** He also cited the case, of **Kiwege and Mgude Sisal Estate Ltd -vs- M.A.**

Nathwani (1952) 19 EACA 160 where it was held that without a decree an appeal is incompetent and premature. Since then this court has consistently been holding that appeal without a decree is incompetent. It is the duty of the appellant or his counsel to ensure that such a decree or order is extracted and made available when he files his Memorandum of Appeal. (**See Kisule —vs Nampewo (1984) HCB 55; Kyomutali -vs- Zirondumu (1979) HCB 219)**

In the instant appeal, no decree or order from which the appeal was lodged was at all extracted and filed with the Memorandum of the Appeal. The appellant filed only a Memorandum of Appeal. This is not enough. It does not fully comply with the requirement of the law. On the authorities cited hereabove, this appeal is clearly incompetent on this ground. This is enough to throw out the appeal.

The second point which Mr. Orach raised is that the order of the Chief Magistrate against which the purported appeal was lodged is an order which is not automatically appealable from. He relied on section 77 (1) of the Civil Procedure Act and order 40 r 1 of the Civil Procedure Rules. He pointed out that the Ruling which is the subject of this appeal is excluded from the categories of orders which are automatically appealable from. That on this ground this appeal is incompetent. For the appellant, Mr. Atare did not answer this point.

O.40 r 1 of the Civil Procedure Rules and section 77 (1) of the Civil Procedure Act have listed the orders from which appeal lie automatically as of right. These lists exclude the order under which, this ruling, was made. The application the ruling on which is the subject matter of this Appeal was made under O.48 r 1 of the Civil Procedure Rules and sections 220 of the Magistrates Courts Act and Section 101 of the Civil Procedure Act.

O.48 r 1 of the Civil Procedure Rules is excluded from the list under O.40 r 1 of the Civil Procedure Rules and also from the list under section 77 (1) of the Civil Procedure Act. It follows that appeal from order made under that order 48 r 1 of the Civil Procedure Rules which is excluded from the above list can only lie with leave of the court making the order sought to be appealed against or of the court to which an appeal would if leave were given lie. The procedure for applying for such leave is provided for under O.40 r 1 (4) of the Civil Procedure Rules.

In the instant case no such leave was even sought and was therefore not granted. Under those circumstances the appeal is once again on this ground incompetent. I have noted the procedure in which the original application the ruling in which is the subject of this purported appeal was brought. I will revert to it later in this ruling.

The third ground on which Mr. Orach challenged this appeal as being incompetent was that it is time barred. He cited section 80 (1) of the Civil Procedure Act and O.39 r 8 of the Civil Procedure Rules to support his contention. He argued that section 80 (1) of the Civil Procedure Act stipulates that all appeal to the High Court must b lodged within 30 days from the date of the decree or order appealed from. That O.39 r 8 of the Civil Procedure Rule provides the procedure in which such an appeal to the High Court should commence. That it should commence by filing Memorandum of the Appeal signed by the appellant or by his advocate but not by a Notice of Appeal. He pointed out that in the instant Appeal the Memorandum of the Appeal was filed on 31-5-1991 marking the commencement of this appeal almost one year from the date when the order against which the appeal is lodged was made. This order was made on 3-4-1990. Counsel submitted that the purported filing of the Notice of the Appeal within 30 days from the date of the order is of no legal consequence since the filing of the Notice did not signal the commencement of the Appeal. From the above counsel prayed that the appeal should be struck out as being incompetent for being filed out of time without leave of extension of time.

For the appellant, Mr. Atare replied that although there is no legal requirement for commencing a Civil Appeal to the High Court by filing a Notice of Appeal, the court nevertheless takes judicial Notice that such a Notice must be given. He relied on the case of Sulemani –vs- Byekwaso H.C.C. Appeal No. 4/86. In that case, the appeal was commenced by a Notice of Appeal which was filed within 30 days from the date of the decree appealed from. The Memorandum of Appeal was filed six months later. At the hearing, a preliminary point was taken for the respondent arguing that the appeal was fatally irregular it having been instituted by a Notice of Appeal instead of by a Memorandum of Appeal. For the Appellant it was contented that the appeal was competent and that the procedure he adopted was the correct one. That if that was irregularity, the rule of procedure being the handmaid of justice should not operate to defeat it. Justice Bahigeine held in favour of the appellant that since courts have to be moved to get the records of the proceedings ready, the moving of the court may be done by way of notice of Appeal or by

ordinary letter. That in these circumstances the filing of Notice of Appeal does not render the subsequent Memorandum of Appeal a nullity. Relying on the above ruling Mr. Atare urged this court to follow it and to hold that the present appeal is not time barred.

The procedure of presenting a civil appeal to the High Court is covered under O.39 r 8 of the Civil Procedure Rules. This rule appears to me quite clear Civil Appeal is commenced in the High Court by lodging with its Registry a Memorandum of Appeal but not a Notice of Appeal. Notice of Appeal is not at all a legal requirement in the procedure of commencing a Civil Appeal in the High Court.

In my view the case of **Sulemani .v. Byekwaso** above is distinguishable from the case before me in that in **Byekwaso's case**, the issue was that the institution of the appeal in High Court by a Notice of Appeal was fatally irregular whereas in the instant case the issue is that filing a Notice of Appeal within the 30 days from the date of the decree appealed from does not save the appeal from being time barred if the Memorandum of the Appeal was not filed within the time allowed by law.

In computing the time for lodging an appeal the time lost in obtaining records of the proceedings of the lower court must be excluded. **(See J.A. DIAS –vs- AHMED S.S. SWEDAN (1960) EA 984)**. The limitation time begins to run immediately after the decree from which appeal is lodged, was passed.

Such a limitation time would stop to run as soon as a request in writing is made for copies of the proceedings of the lower court and resumes to run when copies of the proceedings are sent to the Appellant. The argument that a Notice of Appeal serves to move, the lower court to supply the intended Appellant with copies of the proceedings of the lower court is in my view not wholly satisfactory because such a Notice 'does not make request for copies of proceedings of the lower court to be sent to the intended appellant. Such a request has to be implicit. Only then can the limitation period stop running against the intended appellant as from the date of the letter requesting for copies of the proceedings of the lower court.

In the instant case, the order against which the appeal was lodged was passed on 3-4-1990 and the Notice of Appeal was filed seventeen days later on 20-4-1990. This is followed on 5-11-1990

by a specific request in writing for copies of the lower court's proceedings. This was about six months after the order appealed from was made. In my view the limitation period had stopped running against the intended appellant on 5-11-1990, six months later when a written request for copies of the proceedings of the lower court was made. While I do admit that rules of procedure are handmaids of justice but not to defeat it, they must prima facie be obeyed and the time prescribed for a, particular step must be complied with unless otherwise extended. **(A. Kaliwin Mukaya -Vs- J Kasigwa (1978) HCB 251)**. A distinction must be drawn between a case where a litigant is being represented by an advocate and one where he is not. In the former, courts should be more strict to ensure adherence to the rules of procedure because an advocate is a professional man. He professes and indeed is deemed to possess the requisite professional experience and skills. He is thus expected to employ those experience and skills in handling his clients' cases. Undue general laxity in enforcing the observance of such rules of procedure by courts are apt to produce injustice. For this ground I hold the view that this appeal in the circumstances was filed out of time. As such it is time barred aid, incompetent.

Mr. Orach further, challenged the 4th item in the Memorandum of the Appeal as being also incompetent because it did not comply with section 63 (1) of the Civil Procedure Act. This section requires the consent of the Attorney General for anyone person to bring an action for a public nuisance. Item 4 of the Memorandum of Appeal was seeking a relief for an alleged public nuisance but the requisite consent of the Attorney General was not obtained. Mr. Atare conceded to this error and withdrew this item.

For the Respondent a Notice of Cross-Appeal was placed on the court file but no fee was paid for filing it. Mr. Atare attacked the Notice of Cross-Appeal as being incompetent for non payment of appropriate filing fee. He argued that Cross- Appeal is a suit within section 2 of the Civil Procedure Act and that filing fee must be paid on filing it. That no document is properly filed in court until appropriate fee is paid.

He relied on the cases of **Babizahirwa Francis -vs- Bayanja Twenyo Co. LTD. HCCS No.10781/88 and UNTA EXPORT LTD –vs- CUSTOM (1970) EA 648** and prayed that the Cross-Appeal be struck out.

Mr. Orach replied for the Respondent that a Notice of Cross-Appeal is not a suit within section 2 of the P.C.A and therefore that no fee is required for filing it. That there is even no procedure has been provided under our Civil Procedure Rules for instituting a Cross—Appeal and that in the circumstances recourse must be made to section 17 (2) of the Judicature Act 1967. This section empowers High Court cases where no procedure is laid down, to adopt a procedure which is justifiable by the circumstances of the case. He referred me to **S.M. HeMani .vs. Mawjiwalji Civil Appeal No. 73/59, (a) case No.10 reported in Digest of Uganda High Court Cases vol.3 cases on Civil Procedure and Evidence**. In that case the Respondent cross-appealed by filing a Notice thereof. Appellant argued that the Cross-Appeal was incompetent for failure to comply with O.39 regulating the rules of filing appeal by Memorandum of Appeal and section 80 regarding the period when an appeal should he lodged. It was held that there is no procedure laid down under our Civil Procedure Rules for instituting a Cross-Appeal. A procedure applicable in U.K under RSC O.58 r 6 was followed. Under this rule it is permissive not mandatory for a respondent to file a Notice of appeal but not a Memorandum of Cross-Appeal. Under O.58 r 7 of that RSC it was sufficient if such Notice was given within 8 days of the appeal being heard.

In my view the issue raised by Mr. Atare still stands. It is the question of payment of fee in filing such a Notice. Section 2 of the Civil Procedure Act defines suit so widely as to cover even Notice of Cross-Appeal. As such payment of appropriate fee on filing it is necessary. It is an established law of this country that no document is properly filed in court until appropriate filing fees have been paid. See **UNTA Export Ltd –vs- Custom (1970) EA 648 : and Margaret Musango -vs- Francis Mugongo (1979) (HCB) 226**. In **Margaret Musango's case**, the appellant who was allowed to appeal out of time, lodged his Memorandum of the appeal in time but due to lack of Receipt book with the court Registry, be did not pay the filing fee until two days out of time. It was held that the appeal was not properly filed until when the fee was paid. Hence that appeal was out of time.

In the instant case, Notice of the Cross-Appeal was lodged with the court on 26.6.1991 and because the file was already with the Judge, filing fee was not paid on the Notice.

Following the authorities cited above, the Respondent who decides to file a Notice of Cross-Appeal must pay the necessary filing fee for it. Considering the fact that the Respondent was

served with the Memorandum of the appeal when the hearing of the appeal had started thus necessitating the late presentation of the Notice of cross-Appeal, the Respondent is allowed under section 100 of the Civil Procedure Act to pay the appropriate filing fee on the Notice.

I now revert to consider the procedure in which the original application the ruling in which is the subject matter of this appeal was brought to court. There was a dispute between the appellant and the respondent as to which the two is the rightful allocatee of a D.A.P.C.B building on Plot No.M35B on Atwal Road in Gulu Municipality. The Applicant/Respondent brought an application by a Notice of Motion under O.48 r 1 C.P.R; section 220 of the M.C.A, 1970 and under the inherent jurisdiction of the court under section 101 of the Civil Procedure Act. In the application the applicant sought a declaratory ruling determining the dispute between the parties. I am of the view that the procedure adopted in bringing this application to court was fundamentally wrong as O.48 r 1 C.P.R was used as if it was an originating Motion and the section 101 of the Civil Procedure Act was called to play in a situation where the law provides a remedy. This in my view is illegality.

It is the right and duty of a court to consider illegality at any stage. It is true an appellate court must be cautious and consider whether the illegality is sufficiently proved. **(See Halram Singh vs. S. Singh Dhiman (1955) 18 EACA 75).**

I think it is also the duty of the court as the legal protector of all persons and legal custodian of the rights of all persons in its jurisdiction consider illegality which could be exploited by a Party to result into unfair enrichment. On this principle, despite the in competency of the appeal I am inclined to have both counsels to address me on the propriety of the procedure in which, the original application was brought to court.

G.M. Okello

Judge

3.7.1991