

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

(CORAM: MANYIDO, D.C.J., ODER, J.S.C. , AND SEATON, J.S.C.)

**CIVIL APPLICATION NO.5 OF 1990**

**BETWEEN**

ABUBAKARI KATO KASULE..... APPLICANTS

SAFUYA BABIRYE KASULE

**AND**

TOMSON MUHWEZI ..... RESPONDENTS

(Application arising from the Ruling of the High Court  
of Uganda at Kampala ( Ntabgoba P.J.) dated 5.1.1990

**IN**

**MISCELLANEOUS APPLICATION NO.49 OF 1989**

**RULING OF THE COURT**

This is an application by Abubakari Kato Kasule and Safuya Babirye Kasule (the applicants) under rules 80 and 81 of the Rules of this court for an order for striking out a notice of appeal filed by the respondent, Tomson Muhwezi, on the ground that the appeal has not been instituted within the prescribed time.

The background to the application is as follows:-

On 30<sup>th</sup>/4/1954 one Musa Kasule (the lessor), father of the two applicants, leased a parcel of land at Wandegeya, Kampala (the premises) to two Asians. On 2.2.1959 the lease changed hands and on 28.11.1974 one Yusufu Muhwezi

(The lessee), the father of the respondent, took over the lease. Subsequently, the lessee transferred the premises to the respondent, his son. The respondent registered his interests in the

premises on 10.5.1989 and became the new lessee. In due course, the appellants also became the successors in title and therefore, transferees of the lessor over the premises.

Both the applicants and the respondent were bound by the terms of the original lease agreement 30.4.1954.

On 18.8.89 the applicants re-entered upon the premises and registered their interests with the Registrar of Titles. The ground for the re-entry was that the lessee defaulted in payment of rent for twelve years, contrary to one of the covenants in the lease agreement, which gave only six months of default before a re-entry could be made.

The respondent by a notice of motion applied in the High Court miscellaneous application no .49 of 1989 for an order declaring null and void the termination of the lease and for an order directing the chief Registrar of Titles to cancel the applicants' re-entry .The application was heard by Ntabgoba P.J., who dismissed it in his ruling of 5.1.1990.

On 16.1.1990, the respondent filed in this court a notice of appeal to appeal against the ruling of Ntabgoba, P.J. The applicants also took steps to assert their rights over the premises. Consequently on 1.3.1990, a firm of bailiffs served a notice to the respondent, requiring him to vacate the premises. The move apparently prompted him to apply to the High Court for a stay of threatened eviction. An order for the stay was granted by Kityo, J., on 11.4.1990. But it was conditional upon a review, after 30 days "in order to find out whether there is in fact, any appeal pending and the justification to extend the order on appropriate conditions to govern the stay of execution".

Rules 80 and 81 of the Rules of this Court in so far as they relevant to this case read as follows :-

"80. A person on whom a notice of appeal has been served may at any time, either before or after the institution of at the appeal, apply to the court to strike out the notice of appeal ..... On the ground 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.

81. (1) Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- a) a memorandum of appeal , in quadruplicate;
- b) the record of appeal of appeal , in quadruplicate;

- c) the prescribed fee; and
- d ) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the provision to sub-rule (1) unless his application for such copy was in writing and a copy of it is sent to the respondent.

(3) .....

The present application is supported by several affidavits from one of the applicants and from their learned Counsel Mr. Augustine Lubega Matovu . Their position as stated in the Affidavit is to the effect that since the filing of his notice of appeal, the respondent has not lodged his memorandum of appeal; nor sought for an extension of time in which to do so; and that on a perusal of the High court file on the matter, it was found that the respondent had not requested for a copy of the court proceedings to enable him to file a memorandum of appeal in time. Instead of pursuing his appeal the respondent had filed an application for a review of the ruling of Ntabgoba P.J.

The respondent does not dispute these allegations. Infact he admits them. His position is explained in several affidavits from him and from his learned Counsel, Mr. John Kityo. It is to the effect that the delay on his part is due to non- production of a copy of the proceedings for which an application was made in writing on 22.1.1990. He also blames his failure to make progress in his intended appeal on the fact that there are applications in the suit which have not been heard by the High court. Such applications are the respondent’s application for a review of the ruling of 5.1.1990, and the applicant’s application for a review of the conditional order for a stay made by Kityo, J on 11.4.1990.

With respect, we find no merit in the respondent’s explanation for having been what can only be described as dilatory in this matter. First, because it is doubtful whether an application was, in fact, made for a copy of proceedings as required by rule 81. Admittedly a letter to that effect was purportedly written to the Registrar and copies to a “M/S Mukasa and Company Advocates “, who at the time were acting as counsel for the applicants . But according to the affidavit of

Mr. Matovu, whose evidence in this regard is not challenged, M/S MUKASA and Company advocates, say that they did not receive a copy of such a letter, implying that a copy was not sent to them. Mr. Kityo's own affidavit in which he states that he wrote the letter of 22.1.1990 to the Deputy Chief Registrar is silent on whether a copy thereof was forwarded to the applicants or their counsel. Further, it appears that though such an application is available in the record of the High Court, it does not bear a mark of endorsement of the Registry of that court as it is required by rule 10 of the rules of this court. We think that evidence by affidavit from the High Court and from M/s Mukasa and Company advocates in this regard ought to have been produced as further proof of the applicants' claims, but nevertheless the available evidence raise serious doubts about such a letter having been written. In the circumstances, therefore, the respondent is not in a position to benefit from the proviso to sub- rule 1 of rule 81.

Secondly, as we have already mentioned, the respondent purports to justify his lack of action on the multiplicity of applications in the suit and on the apparent delay in typing the High Court Proceedings. Mr. Kityo's affidavit in reply dated 28.9.1990 in this regard reads as follows:

“9. That after the ruling for stay of execution had been delivered the court file was not returned to the registry but it was kept in the Judge's chambers for several weeks and when it was returned to the registry counsel for the applicants filed another application in the same file and the application was set down for hearing on 11<sup>th</sup> July 1990.

10. That on the 11<sup>th</sup> day of July, 1990 the application was not heard because the court file was missing. This application is still pending in Court and the applicants have not fixed it for hearing again.

11. That Counsel for the applicants decided to come to this court instead of prosecuting this application in the High Court.

12. That because of these two applications in the court file, typing of the proceedings could not commence because the court file was being moved from the Deputy Registrar's office to the Judge's Chambers from time to time.

13. That the preparation of the record of appeal has been delayed due to the hearing of the applications and I cannot be blamed for failing to file the appeal in time.”

All this was countered by what was stated in Mr. Matovu's affidavit in reply on 10.10.1990. The relevant paragraph of the affidavit reads as follows:

“6. That court proceedings in miscellaneous cause no 49/89 are so short as they involved a notice of motion with supporting affidavit , an affidavit is rebuttal , the trial proceedings could not with due diligence take more than sixty days to be produced in court.

9. That from the time counsel for the respondent purported to request for court proceedings i.e. on 22<sup>nd</sup> January 1990 the court file miscellaneous cause no. 49 of 1989 was free and available to the parties and was only presented to the judge on or around 4<sup>th</sup> April 1990 to adjudicate upon the respondent’s application for stay of execution and the file was again free for reference of Mr. Kityo after 11<sup>th</sup> July ,1990 up to date to enable him ; procure the proceedings but he chose not to use all this time to present the appeal within the statutory time.”

Both these affidavits testify to what may or may not have happened in the High Court registry with regard to the movement or availability of the court file in the matter. The deponents of the affidavits are outsiders and cannot be expected to have proper knowledge of what transpires in the High court registry. For that reason, as we have already said before in this ruling, evidence ought to have come from the High court registrar on this matter. However, that weakness notwithstanding, we think that evidence as given in Mr.Matovu’s affidavit appears to represent a more credible picture than by Mr.Kityo’s.

It would appear that if more diligence was put in the respondent’s efforts to have the record of proceedings produced the present application might not have been necessary. We tend to agree with Mr. Motiva’s contention that the respondent may have been playing a game of delaying tactics. The following incidences appear to be indicative of such an attitude: obtaining an order for stay on the basis of an appeal when none had been instituted; failure to comply with the condition of 30 days attached to the order for stay granted by Kityo, J., making an application for a review of the ruling against which it was intended to appeal instead of proceeding with the appeal; and failure to apply for extension of time within which to institute the appeal. As the affidavits we have referred to show, the respondent appears to be more concerned with the proverbial mole in the applicant’s eyes than with the beam in his own.

In the circumstances, we think that this application is justified. It I should, therefore, succeed .It is accordingly allowed with costs to the applicants. The respondent’s notice of appeal is struck out also with costs to the applicants.

Dated at Mengo 18<sup>th</sup> day of April 1991.

S.T. MANYIDO  
**DEPUTY CHIEF JUSTICE**

A.H.O. ODER  
**JUSTICE OF THE SUPREME COURT**

E.E. SEATON  
**JUSTICE OF THE SUPREME COURT**