IN THE SUPREME COURT OF UGANDA

AT MENGO

(Coram: MANYINDO, D.C.J., PLATT, J.S.C., AND SETON, J.S.C.)

CIVIL APPEAL NO. 3 OF 1992

BETWEEN

1. J. HANNINGTON WASSWA:: APPELLANTS
2. SSEMUKUTU & CO. LTD

AND

MARIA ONYANGO OCHOLA .&
3 OTHERS : : : : : : : : : : :: RESPONDENTS

(Appeal from Order of the in Court of Uganda at Kampala (Mr. Justice Okalebo) dated 10/5/1990).

JUDGMENT OF PLATT, J.S.C.

Mr. Justice Okalebo was asked to extend time for an appeal to be instituted. He decided that in the circumstances of the motion before him, good cause had been shown, and therefore he allowed the appeal to be entered within fourteen days of his decision; namely 21st January, 1992.

The appeal had been ex parte by Mukanza J. on 9th January, 1988. After several vicissitudes, it was set down for hearing inter parties before Mr. Justice Tsekooko. The latter, struck out the appeal as having not been instituted improperly. He construed the terms of Sec. 80 of the Civil Procedure Act & Order XXXIX of the Civil Procedure Rules rather strictly and decided that there had been no memorandum filed to institute the apea1, and such memorandum as there was, was filed out of time. Mr. Justice Okalebo held in effect that it was doubtful

whether the appeal had been wrongly instituted, having in mind the practice which obtained at that time. The practice might not have been entirely correct in view of the terms of Section 80 and Order XXXIX but had caused no injustice and was justified by events it that time in 1985.

The learned Judge set out his recollection of the way the procedure worked, a held that if blame was to be apportioned the advocates for the appellant were to blame and not their clients. The learned Judge further held that the Mengo Court had been at fault in taking so long to provide the copies of proceedings and judgment for the purposes of the appeal. High Court had accepted the appeal without the proper procedure having been adopted. But all this was not the fault of the applicants before Mr. Justice Okalebo. For their part the Applicants had acted with diligence and had shown good cause to extend time.

But Mr. Justice Okalebo has been taken to task on a number of matters as set out in the Memorandum of Appeal. As Dr. Byamugisha stated in his opening address, the complaints are intertwined.

Before they dealt with, it is wise to direct my attention to the principles involved in dealing with an appeal of this nature; an appeal against the exercise of a discretion to grant an extension of time. The discretion was exercise in favour of allowing the appeal to o forward in order that the merits of the dispute could at last be settled. But it is a discretion which must be exercise judicially on a proper analysis of the facts and the proper application of the law to those facts. The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it was manifest from the case as whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice. (Mbogo v. Shah, (1968) E.A.93 Evans V. Bartlam (1977) 2 All Er. 646)

In the first place, the period of limitation is that set out in Section 80 of the Civil Procedure act (cap 65) which provides as follows:

> “80 (1) except as otherwise specifically provided in any other law every appeal shall be entered -

(a) Within 30 days of the date of decree or order; or
(b) –

As the case may be appealed against; Provided that the appellant Court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.

2). In computing the period of limitation prescribed in this section the time taken by the Court or registrar in asking for a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be included."

Then one must read on at Order XXXIX rule (1) which provides that every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant and presented "to the court." This spelling of the word "court" indicates in this case, that presentation must be in the Court of the Chief Magistrate at Mango and not the High Court (see Section 1(2) of the Civil Procedure Act (cap 65). In view of those clear provisions, can it be true, as one High Court Judge seems to have thought, that every Court, of the several Courts involved in this case, forgot them? Of course not. The difficulty in carrying out these provisions was caused by the delay that might well be experienced in obtaining copies of the decision and proceedings, in order to present the memorandum of appeal. In an appeal where the intending appellant can present his memorandum at once, Section 80 (1) can be complied with without difficulty. When the proceedings and decision have to be obtained first, a long time might elapse before the memorandum can be presented. What would happen to the appeal, would it be forgotten? Was it possible for the Chief Magistrate's Court reduced after the wars to a shadow of its former self for lack of equipment and supplies of stationery, to get these copies quickly prepared? In this case, it took a year and a half. So a practice grew up, according to Mr. Justice Okalebo, whereby a Notice of estoppel was longed in both the High Court and Chief Magistrate's Court, and then the High Court supervised the production of the record. The Judges' forthright explanation of what and why it happened is greatly to be applauded. And for the benefit of those who think these matters strange, may I explain that very much the- same thing is happening to appeals from the High Court to this Court at the present time In order to speed up the appeal process, this Court is giving the High Court help in preparing records of appeal. I think that in the interests Justice a higher Court may

legitimately help a lower Court to surmount bottle necks which are being experienced in the lower Courts, I am surprised that this is not understood, having in mind the shortages which still plague the Courts at present. But to return to the instant case, Mr. Justice Okalebo's explanation of what happened in the difficult years between 1985 to 1987 explains the Notice of Appeal" given in this matter, to both the High Court and Chief Magistrate's Court. Of course no Notice of Appeal as such is prescribed for this appeal. It was clearly a notification that the intending appellant wished to appeal and would present his memorandum as soon as he obtained the copies of the decision and proceedings. That was obviously a demand, perhaps in an unusual form, for those copies. It says that the memorandum will be presented when copies are available. It was not understood. The Mengo Court began the work or preparing the copies of the decision and proceedings. The parties inquired from time to time without success as to the progress achieved. As far as the Mengo Court was concerned, it carried out its duty and sent the copies to the High Court as requested by the Court, The High Court may have acted prematurely in assigning a number to the appeal on receipt of the "Notice of Appeal", or may have intervened between the intending Appellant and the Mengo court, by itself calling for the copies and then making, the copies available. But it is clear from the affidavit and documentary evidence before this Court that its motive was to speed up the appeal process. The only difficulty was that the intending appellant, having tried to obtain the copies from the Mengo Court, apparently did not know that the copies had been sent to the High Court. I so, there was no fault on the intending Appellant's part in trying to secure the copies. On the other hand, if the procedure was understood to be one where the copies would go to the High Court, that; was not a matter which the intending Appellant could control. So it becomes a case of the intending Appellant's advocate being wrong in law in following the existing but alternative procedure to that laid down in the Civil Procedure Act & Rules and the Courts mistake in encouraging that alternative procedure and carrying it out. At no time did the Courts reject the "Notice of Appeal," or direct the intending appellant to follow the right procedure. It hardly seems possible for the intending Appellant to have done otherwise than follow the High Court's direction. Indeed one might say that the ambiguous terms of Section 80 (2), need filing out by some further procedure to make sure that an intended appeal is not forgotten, during the period that copies of proceedings are made avai1able before a memorandum is presented.

In these circumstances, the criticisms of Mr. Justice Okalebo's decision are not serious. On the first ground, he was within his right to hold that if the wrong procedure was adopted the high Court must have its share of the blame for allowing and operating an alternative procedure. As the learned Judge pointed out, it caused no injustice, and he particularly pointed out that Mukanza J. could hardly have heard the appeal ex parte, if by that time there were no memoranda of appeal. All that had happened in reality was that the memorandum was presented after a long time, due to delay in getting the copies of proceedings. Once the intending Appellant had obtained the proceedings, it is not argued that he presented his memorandum outside the period allowed by Section 80 (2) of the Act. For the purposes of this argument, it was accepted by both Counsel that Section 80 (2) should be read as giving the intended Appellant 30 days after receiving the copies, within which to present his memorandum of appeal. That he did.

Secondly, it is argued that the learned Judge was wrong to hold that good cause had been shown in extending, time. "Good Cause" means to be a less strict test than "sufficient reason" as is required in rule 4 of the Supreme Court Rules. Consequently the learned Judge had a free discretion. The truth of the matter is, that it is surprising that the "Notice of appeal" was not understood for what it really was: a holding Notice requesting copies of proceedings, upon receipt of which a memorandum could be presented. Further, it is said that the operative date for completing the proceedings was on 13th February, 1987 and not 29th April, 1987 when the High Court made the copies available. How was it possible for the intending appellant to got hold of proceedings, before the Mengo Court had sent them to the High Court? In reality it is strange that the appeal was struck out at all.

Thirdly it is said that the learned Judge was wrong to pray in aid Sec. 101 of the Civi1 Procedure Act. I agree. It is a firm principle that the inherent powers of the Court do not extend to altering a statutory period of limitation, except as the statute may provide for extending the period. But this misdirection did not affect the real basis of the decision, that good cause had been shown, and no miscarriage of justice occurred.

Fourthly, it is argued that the learned Judge ought not to have used his own knowledge of the procedure adopted by the Courts. Before the Court, there was a "Notice of Appeal" that

stemmed from the procedure adopted by the Courts without objection at the time from any Court of party Mr. Justice Okalebo ought to be congratulated for explaining what the Courts were doing. He was not usurping a function of the parties, or giving evidence on issues for trial, but explaining what the Courts in reality expected of parties as a matter of procedure.

Altogether, there were solid reasons for holding that good cause had been shown. We are grateful to counsel for having put a wealth of authority before the Court. This was a case, however, where possibly it could be said that Counsel had mistakenly entered a "notice of appeal". But it was the Court's own variations on the procedure which counsel was fo1lowing. The time taken to type out the decision and proceedings caused the greatest trouble. The intending appellant was not at fault. It was largely the High Court's initiative; but that caused no injustice. There was no unnecessary waste of time on the intending Appellant's part.

Consequently', the appeal stands to be dismissed. But there is one last round. In granting an extension of time, costs were ordered to be in the cause. The rule is that costs should follow the event, unless, inter alia, the Court itself has intervened.
It has been said that the court should not be blamed for Counsel's mistake. That may be so on some occasions. But if the Court has allowed an alternative procedure as Okalebo, A. J. has explained, then Counsel's actions must be judged in the light of the directions given at the time.

From that point of view the striking out was unnecessary. Accordingly the order for costs might have been that each party should bear its own costs. But the order given was not unreasonable and I decline to interfere.

I would dismiss this Appeal with costs to the Respondents.

Delivered at Mengo this 1st day of July 1992

H.G. PLTT

JUSTICE OF TE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE COPY
OF THR ORIGINAL.
B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT.

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JUDGMENT OF MANYINDO, D.C.J.

I agree with Platt, J.S.C. that 'this appeal ought to be dismissed for the reasons he has given. But I would not approve of a Judge importing into a case his personal knowledge or experience regarding matters of procedure. It would be better for the Judge to stick to the law regulating the matter at 1and. As Seaton, J.S.C. is also of the view that the appeal should fail the same is dismissed with costs to the respondents.

Dated at Mengo this 1st day July 1992

S.T.MANYINDO
DEPUTY, CHIEF JUSTICE
IN THE SUPREME COURT OF UGANDA
AT MENGO
(Coram: MANYINDO, D.C.J., PLATT, J.S.C., AND SETON, J.S.C.)

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JUDGMENT OF SEATON, J.S.C.

I agree with my learned brother Platt, J.S.C. that this appeal should be rejected. My reasons are a follows;

One of the considerations which influenced the learned Judge in the High Court to hold that "good cause" had been shown, within the meaning of s.80 of the Civil Procedure Act (Cap.65) ("C.P. Act") was that in his view the practice and procedure for filing an appeal to the High Court against a decision of the Chief Magistrate's Court, had been complied b the present respondents.

I believe, it is desirable to state the procedure that is laid down for appeals to the High Court. It is set out in 0.39, rr.1 (1), 8, 10(1) and (2) of the Civil Procedure Rules as follows: '

> "Order XXXIX
> Appeals to the High Court.

1 (1) Every appeal to the High Court shall be preferred in the form of a rnemorandum signed by the appellant or his advocate and presented to the court or to such officer as it shall appoint in that behalf.

.....

(8). Where a memorandum is lodged, the High Court then shall cause to be endorsed thereon the date of presentation, and the appeal shall be entered in a book to be kept for that purpose, to be called the register of appeals.

1. (1) When a memorandum of appeal is lodged, the High Court shall send notice of appeal to the Court from whose decree the appeal is preferred.

(2) The Court receiving such notice shall send with all practicable dispatch all material papers in the suit or such papers as may be specially called for by the High Court."

In the instant case, the present respondents on 11th December 1985 in and both Mengo Court and the High Court filed a notice of appeal wherein he stated that he would file the memorandum of appeal upon receipt of the record of proceedings in the Chief Magistrates Court. This was in violation of O.39, r.1 (I). Nevertheless in the High Court Registry a file was opened and titled Civil Appeal No. 37/85 arising out of original Mengo Suit No 1459/71.

Eventually on 27th May 1987 the present respondents filed a Memorandum of Appeal in the same file where the notice of appeal had been (For convenience I shall henceforth refer to the present respondents as "the Administrators").

On 9th February 1988, Mukanza J., in the High Court of Kampala heard and determined Civil Appeal No. 37/85 ex parte. The aftermath of that decision is described in the Judgment of my learned brother Platt J.C. The appeal was struck out by Tsekooko J., on the ground that by the time the C.A.37 was decided by Mukanza J., there was actually no appeal because the memorandum of Appeal had been filed out of time and without leave of court.

The limitation period for appeals is set out in S. 80 (I) of the Civil Procedure Act as follows:

> "80 (I) Except as otherwise specifically provided in any other law every appeal shall be entered-
>
> (a) Within thirty days of the date of the decree or order of the court; or
>
> (b) Within seven days of the date of the order of a register, as the case may be, appealed against."

There is a proviso to this sub-section which allows the period to be extended. It provides thus:

> "Provided that the appellate court may for good cause admit an appeal though the period of Limitation prescribed by this section has elapsed."

Then the section with Sub.S:2

> "(2) In computing the period of limitation prescribed by this Section the time taken by the court or the registrar in making a copy of the decree or older appealed against and of the proceedings upon which it is founded shall be excluded."

It will be seen from the affidavits filed by the administrators and their counsel Ochieng Oddi Osende filed on 19/8/1991 with the notice of motion before the High Court that the proviso to S. 80. (I) and the Subs. (2) were being invoked in the Misc. Application No. 45 of 1991.

Paras. 4, 5, 6, 8 and 9 of Advocate Ochieng Oddi Osende's affidavit are of particular relevance. They state as follows:

"4. That Ruling in the case was given by the Chief Magistrate at Mengo an 29/11/1985 and the late Ulwov Umudu holding b1ief for me duly applied for leave to appeal against the said ruling which leave was duly granted.

5.That on the 11/12/1985 I duly filed both in the Mengo Court and the High Court Registries a notice, of Appeal wherein I specifically stated that I would file the memorandum of appeal upon receipt of record of proceedings in the Chief Magistrate's Court.....

6. That I therefore instructed one of our clerks, Saulo Odongo together with our Mr.Serwanga to ensure that the record of proceedings in the case were duly obtained.

8. That it proved extremely difficult for, us to obtain the record of proceedings from the Chief Magistrates Court at Mongo a every time my clerk went there, he was always informed that the proceedings were not yet typed.

9.That it was not until towards the end of Apri1 1987, that I was informed by our Mr. Serwanga that he had at last managed to obtain a copy of proceedings and ruling from the High Court on or about 27/5/87, almost 11/2 years fter the date of the ruling."

It seems to me that in the above-quoted paragraphs of the affidavit, the Advocate far the Administrators in relying on s.80 (2) of the C.P. Act as justifying the delay in filing the appeal, from tie decision of the of the Mengo Court in C.S. No. 1459/71.

If the learned Judge had had only to determine the Misc. Application No. 45 of 1991 on the basis of the delay in getting the record of proceedings, it appears that he would have granted the extension of time. In his Judgment (at p.23) he referred to the case of BIKITARA Transport Bus Co. Ltd. v. Emmanuel Biribwona (1979) H.C.S. 95 and stated as Follows:

> "…. What I have decided to follow in this case is that the delay in getting the lower court proceedings, in the case before, was the fact of the lower court which took one year to send in their record of proceedings to the High Court which then pass the same to the applicants' counsel."

However the learned Judge also considered whether the procedure followed by the advocate for the administrators had been proper. This is contained in pp. 20-22 of the Judgment and I quote:

> "Another aspect I wish to consider in that of a memorandum being formulated and filed after receipt of proceedings of the court whose decision is appealed against. The question is, in practice, how are the proceedings normally obtained by the intending appellants?
>
> Having been a member of the lower bench for ten years as a Chief Magistrate with Appellate jurisdiction, I am in a position to tell what the procedure is. This knowledge is personal and, I do not know if I am free here, to use my such knowledge to enlighten all concerned, of what the position is. I do feel, and think it is fair to do so, that I give an outline of that procedure and I do so under the guidance of Ingram v. Percival (1968) W.L.R. 663 in which the appellant was charged with unlawfully using a net secured by weights in tidal waters for taking Salmon. C/s 11 of the B.K. Salmon and Fresh water Fisheries Act, 1923. There was no evidence whether the net was fixed in fact in tidal waters. The Justices convicted the appellant and an appeal to the Divisional Court, the Court held that the Justices were entitled to make use of their local knowledge on the matter that the waters were in fact tidal waters."

The learned Judge then went on in his Judgment to state what in his experience was the practice and procedure in use and the reasons why the practice was developed. He then stated (at p.22):

> "This practice therefore outs out the direct contact between the intending appellants and the trial courts. If this was the procedure followed by the applicants, which they say it was (paras.4, 5, and 6 of Ogola's affidavit), then I hesitate to say that the applicants "were not diligent."

Now it would seem to me that one must distinguish between two conceptions of what facts a Judge may or may not take note of. Under the one conception a Judge may take notice of facts not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Such, I apprehend, was the situation in the case cited by the learned Judge, Ingram v. Percival.

Under the other conception, a judge must normally act after the carefully controlled introduction of formal evidence, which ordinarily consists of the testimony of witnesses. In the instant case the learned Judge acted on matters which were not introduced by the evidence but were within his own knowledge. , According to this knowledge, the prevailing practice in Uganda is to ignore the 1aw as set out in p.39, r.1 (I) and "cut out the direct contact" prescribed by statute. If such a practice is being followed in all appeals to the High Court, one can perhaps suggest that the Rules are overdue for review.

But the question that poses itself is: What if all Judges of the High Court were to follows the practice which they recall from their own experience? and what if their experiences differ? Would it lead to Justice being administered, as some wag has put it, according to the length of the Judge's foot?

In the instant case, learned counsel for the administrators stated during the hearing of this appeal that his own experience was that some advocates do follow the practice described by the learned Judge; others follow the procedure laid down in 0.39, r.1 (i).

With respect to the learned Judge lam of the view that it would have been better if he had not in his judgment indicated his approval of the practice followed of filing a notice of appeal before the memorandum of appeal. It was not necessary for his decision. Even without the matter of the procedure of dealing with appeals to the High Court, there was enough to justify the holding that there was good cause shown under s.80 for admitting the appeal though the period of limitation prescribed by the section had elapsed.

For these reasons, I would agree that this appeal be dismissed. I would also agree with the order as to costs.

Dated at Mengo this 1st day of July 1992