THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI CJ, TSEKOOKO JSC, KAROKORA, JSC MULENGA JSC, AND KANYEIHAMBA JSC)

CIVIL APPEAL NO.18 OF 2001

BETWEEN
BEATRICE KOBUSINGYE*::*APPELLANT

VERSUS

FIONA NYAKANA:*::* RESPONDEFJTS
GEORGE NYAKANA

(Appeal from the judgment of the Court of Appeal (Okello, Twinomujuni and Kitumba JJCA) dated 12 April 2001 in Civil Appeal No.29 of 2000)

RULING OF THE COURT

This is a third appeal from the judgment of the Court of Appeal whereby that court overruled a preliminary objection that as a second appellate court, it had no jurisdiction to entertain grounds of appeal based on matters of fact.

The brief background to this appeal is that the Respondents filed a Civil Suit against the Appellant in the Chief Magistrate's Court, Fort Portal for malicious prosecution and false imprisonment, seeking special and general damages. The Grade I Magistrate who heard the case dismissed it with costs. The Respondents appealed to the High Court sitting at Fort Portal which also dismissed the appeal in the main, holding that the Appellant had not been activated by malice in instituting the criminal proceedings.

The Respondents being dissatisfied with the decision of the High Court lodged a second appeal in the Court of Appeal, complaining that the High Court erred in law and fact in failing to properly re-evaluate the evidence as a first appellate court, and in holding that the Respondents failed to prove malicious prosecution.

When the appeal came before the Court of Appeal for hearing, the appellant raised

preliminary objection that Court as a second appellate Court had no jurisdiction to entertain the two grounds of appeal since they were based on matters of fact, contrary to sections 74 and 75 of the Civil Procedure Act.

The Court of Appeal overruled the objection holding that sections 74 and 75 of the Civil Procedure Act were not applicable to that Court and that section 11 of the Judicature Statute was wider than section 5 of the Judicature Statute, and that therefore the Court of Appeal had jurisdiction to entertain the two grounds of appeal.

The appellant appealed to this Court on the following ground:
The learned Justices of Appeal erred in law in that they wrongly held that:
(a) Sections 74 and 75 of the Civil Procedure Act (Cap. 65) are not applicable to the Court of Appeal;

(b) Section 11 of the Judicature Statute 1996 is wider than Section 5 thereof; and

(c) They had jurisdiction over grounds 1 and 2 of the appeal before them.

Both parties submitted written submissions. However, when Counsel appeared before us at the hearing of the appeal, Mr. Babigumira, learned counsel for the Respondents, applied for leave to address court and raised a preliminary objection under rule 95 of the Rules of this Court that the appeal was incompetent for failure to comply with rule 82 of the Rules of the Court, as to contents of the record of appeal. He pointed out that this being a third appeal the appellant had not, as required by the rules, filed a certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance or an order of this Court granting leave to appeal in the interests of justice.

Mr. Babigumira explained that when he received the record of appeal he was involved in a long election petition in Mbarara and had no time to peruse the record. But when he looked at the record subsequently he found that there was no certificate given by the Court of Appeal or leave of this Court allowing the Appellant to proceed with the appeal. Therefore, Counsel submitted, the appeal lacks an essential document, which cannot be lodged as a supplementary record.

In reply Mr. Tibaijuka, learned counsel for the Appellant, opposed the application for leave to raise a preliminary point as misconceived and an abuse of the process of the Court. He submitted that the Respondents should have raised the objection in the written submissions, which would have had the same effect as oral submissions, under rule 97 (d) of the Rules of this Court. Counsel argued that the Respondents should have filed an application to strike out the appeal under r. 77 of the Rules of the Court, soon after the expiration of 14 days within which the Appellant had to apply for a certificate from the Court of Appeal in accordance with rule 38 (1) of the Rules of this Court.

Mr. Tibaijuka pointed out that the notice of appeal was served on the Respondents' Counsel on 17 April 2001 and the memorandum of appeal and record of appeal on 13 November 2001. The Appellant filed written submissions son 23 November 2001 but the Respondents did not make the application to strike out the appeal until the time of lodging in their written submissions. Counsel submitted that the Respondents were estopped by rule 97 (b) from raising the objection because they did not deserve to be granted leave, having been at liberty to make the application as from 26 April 2001 when the time for seeking the certificate elapsed, and had not accounted for their default.

Rule 93 (1) of the Rules of this Court allows a party who does not intend to appear in person or by advocate to lodge in the Registry, a written statement of the arguments in support of or in opposition of the appeal or cross-appeal, and thereafter serve the statement to the other party within seven days of lodging it. Under rule 93 (4), no party who has lodged written arguments shall, except with leave of the Court, address the Court at the hearing of the appeal. In the present appeal, the Court granted leave to counsel for the Respondents to address court at the hearing, in order to raise their preliminary objections.

The issue is whether the Respondents are entitled to seek leave to raise the preliminary objection. Rule 77 of the Rules of the Court provides,
'A person on whom a notice of appeal has been served, may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, 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."

On the other hand rule 97 (b) of the same Rules, states,
"(b) a respondent shall not without the leave of the Court raise any objection to the competence of the appeal which might have been raised by application under rule 77."

It seems to us that an application to strike out a notice of appeal or an appeal should ordinarily be made under rule 77 at any time before or after the appeal has been instituted. There is no specific time limit. But rule 97 (b) appears to require the application to be made before the hearing of the appeal so that the matter can be canvassed and resolved before the hearing of the appeal, to save time and expense.

However, rule 97 (b) gives a wide discretion to the Court to grant leave to a respondent to raise any objection which could have been raised by application under rule 77. The rule does not require proof of sufficient cause, but it is assumed that the discretion must be exercised judiciously and upon reasonable grounds.

In the present appeal, the Respondents have waited for over eight months to present their objection. No application was filed, but the objection was first raised in their written submissions. The objection could not be raised before the court without leave. Mr. Babigumira

pleaded that he had delayed in making the application because he was engaged in a long election petition in Mbarara. Mr. Tibaijuka for the Appellant did not challenge this claim. It seems to us that the failure to make the relevant application was due to the inadvertence of counsel for the Respondents. However, when he realized that the appeal was incompetent he raised the objection in his reply to the written submissions of counsel for the Appellant. Counsel for the Appellant responded to the preliminary objection. In these circumstance we are of the opinion that it would be fair and just to grant leave to the Respondents to raise the preliminary objection since counsel for the Appellant has had sufficient notice of the intention to raise it and has duly responded to it.

Has the preliminary objection any merit? Mr.Babigumira's objection is that the appeal is incompetent because the Appellant has not taken some essential step in the proceedings, namely, the inclusion of the certificate from the Court of Appeal in the record of proceedings. Section 7 (2) of the Judicature Statute 1996 provides for the certificate as follows:

"Where an appeal emanates from a judgment or order of a Chief Magistrate or Magistrate Grade I in the exercise of his or her original jurisdiction but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter or matters of law of great public importance, or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard."

A certificate by the Court of Appeal is one of the essential documents required to be included in the record of a third appeal. Rule 82 *(1)* provides that the record of appeal shall contain the records of appeal in the Court of Appeal, the High Court, and in case of the third appeal the record of appeal from the trial magistrate's court in addition to the records listed in the subsequent sub-rules.

The list of documents to be included in the record of appeal from the Court of Appeal is provided for under rule 82 (2) of which paragraphs (c) and (h) state,

"(c) the order, if any, giving leave to appeal……

(h) in case of a third appeal the certificate of the Court of appeal that a point or points of law of great public or general importance arise."

Subsection (9) of rule 82 clarifies,
"Where leave to appeal or a certificate that a point of law of great public or general importance has been granted or refused by the Court of Appeal immediately after the delivery of that Court's decision against which it is desired to appeal, a statement that leave or a certificate has been granted or refused shall be included in the order."

In this appeal, Mr. Tibaijuka did not contend that the record of appeal contained the missing documents listed under rule 82, namely either leave to appeal or a certificate from the Court of Appeal or from this Court. Indeed none of the documents are contained in the record. We think these documents are essential documents because they indicate that the appeal merits consideration by this Court. Their absence makes this appeal incompetent.

An appeal, which is incompetent, ought to be struck out. But Mr. Tibaijuka contended in his written submissions that even if the appeal is incompetent the court should not be precluded from interfering with the decision of the Court of Appeal on the authority of ***Makula International v His Eminence Cardinal Nsubuga & Another,*** Civil App. No.4 of 1981 CA which held that a court of law cannot sanction that which is illegal.

Mr. Tibaijuka argued that the illegality committed in this appeal was the holding by the Court of Appeal that section 74 of the Civil Procedure does not apply to the Court of Appeal contrary to 49 (b) of the Judicature Statute. He submitted that section 49 (b) provides for the continued application of section 74 as well as section 74 A of the Civil Procedure Act. Counsel further contended that the present appeal does not in any way touch on the merits of the case decided by the Magistrate Grade I, and confirmed by the High Court, and therefore it cannot be regarded as a third appeal.

We are unable to accept the submissions of learned counsel for the Appellants that this court should deal with the merits of the appeal. Whether the court of Appeal in erred in law in its interpretation and application of the various sections of the relevant law is a matter of law that would be determined upon when the court is considering the merits of appeal. The appellant has failed to take the necessary steps to enable the court to deal with the merits of the appeal.

We therefore uphold the preliminary objection that the appeal is incompetent. It accordingly struck out with costs.
Dated this 23rd day of May 2002

J.B.Odoki

CHIEF JUSTICE

J W N Tsekooko
JUSTICE OF THE SUPREME COURT

A.N Karokora

JUSTICE OF THE SUPREME COURT

J N Mulenga
JUSTICE OF THE SUPREME COURT

G.W Kanyeihamba

JUSTICE OF THE SUPREME COURT