THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: MWONDHA, TIBATEMWA, CHIBITA, MUSOKE & MADRAMA, JJSC)

CIVIL APPLICATION NO 23 OF 2021

(ARISING FROM COURT OF APPEAL CIVIL APPEAL NO. 52 OF 2018)

KANSIIME K. ANDREW} ..... APPLICANT

VERSUS

1. HIMALAYA TRADERS LTD}
2. KAMUKAMU ASSOCIATES LTD}
3. TREASURE TROVE (U) LTD}
4. JETWANT SINGH}
5. GULZAR SINGH}
6. JAMIL KIYEMBA} .....RESPONDENTS

RULING OF COURT

The applicant brought this application under the provisions of rule 2 (2), 78, 42 & 43 of the Judicature (Supreme Court Rules) Directions, for orders that the notices of appeal and the appeal, if any, filed by the respondents be struck out. Secondly, the applicant prays that the respondent to the application pays the costs of the application and of the appeal, if any.

The grounds of the application briefly are that:

1. The 3rd, 4th and 5th respondents' notice of appeal was served out of time.

2. No appeal has been filed within the prescribed time.

3. Failure to file the appeal is dilatory, inordinate and inexcusable conduct.

4. In the alternative to 2 – 3 above, the appeal, if any, has never been served on the applicant at all as required by law.

5. The orders sought are necessary to prevent abuse of court process and to meet the ends of justice.

The application is supported by the affidavit of Mr Kansiime K. Andrew, the applicant herein who deposed that on 1st March 2018 he filed Court of Appeal Civil Appeal No 52 of 2018 where he appealed against the Judgment of the High Court declaring him a trespasser on the suit land. Secondly, on 3rd December 2019 the Court of Appeal fixed the appeal for hearing. On the 23rd of December 2019, he attended the hearing of the appeal and the court directed the parties to file written submissions. As far as is relevant to the application, he deposed that on 1st April 2021, the Court of Appeal delivered its Judgment in his presence and in the presence of counsel for the 3rd, 4th and 5th respondents Ms Sarah Kisubi, Mr Albert Byamugisha, counsel for the first respondent and Mr Lwanyaga Counsel for the 2nd and 6th respondents. Thirdly that the judgment that was read in court on 1st April 2021 was a typed and not a handwritten one. He later saw copies of notices of appeal and letters requesting for the record of proceedings filed by the respondents on 6th April 2021 and on 12th April 2021 respectively. On the basis of advice of his lawyers Messrs Waymo Advocates Mr. Kansiime deposed that an intended appellant ought to file an appeal within 60 days after filing the notice of appeal. That since the filing of the notice of appeal more than 60 days have elapsed without the respondents filing their appeals yet they have always had all the necessary materials to do so. That the respondents' failure to file the appeals within 60 days is due to inordinate, inexcusable and dilatory conduct because they have all the necessary materials for filing the appeal.

Further and in support of the notice of motion Mr. Oundo David Wandera deposed an affidavit in which he stated that he was one of the applicant's lawyers in Civil Appeal No 52 of 2018 and was conversant with the facts of the case. He also had an opportunity to peruse the file of the High Court and that of the Court of Appeal. As far as is relevant, Mr. Oundo David Wandera deposed that on 1st of April 2021, the Court of Appeal delivered its typed judgment in his presence and in the presence of Sarah Kisubi, Mr Albert Byamugisha, holding brief for Mr Swabur Marzuq and Mr. Lwere. The applicant was also present. A copy of the judgment dated 1st

April 2021 is attached to the affidavit as annexure "B". Further, he deposed that his firm was served with a notice of appeal and a letter requesting for the record of proceedings which notice and letter were filed in court on 6th April 2021 by the 1st, 2nd and 6th respondents. Further on 20th of April 2021, his firm was served with the notice of appeal and a written request for record of proceedings filed in court on 12th April 2021 by the 3rd, 4th and 5th respondents' counsel and copies thereof attached to the affidavit. That the 3rd, 4th and 5th respondents notice of appeal was served on them outside the seven days prescribed by the rules of this Court. Further Mr. Oundo David Wandera deposed that the respondent at all times had the record of appeal filed in the Court of Appeal, the written submissions and judgment in Civil Appeal No 52 of 2018 to enable them formulate any grounds of appeal and expeditiously file the appeal in this court within 60 days. However, since the filing of the written notices of appeal, 60 days have elapsed without the respondents filing an appeal in the court and no record has been served on him to date despite the respondents having in their possession all the necessary materials. Further the transcribed proceedings of 28th January 2021 when the Court of Appeal granted leave for the parties to address court by way of previously filed written submissions is not a necessary material to facilitate and enable the respondents formulate grounds of appeal. That the said proceedings could have been filed as a supplementary record of appeal. Finally, that the respondent's failure to file the appeal within the prescribed time is inordinate, inexcusable and dilatory on their part as they have always had all the necessary materials for filing an appeal.

The 3rd, 4th and 5th Respondents opposed the application on the grounds deposed to in the affidavit of Mr. Dick Steven Mubiru – Kalenge, their counsel. Mr. Dick Steven Mubiru – Kalenge deposed that he had read and understood the application and affidavit of the Applicant and that of Mr. Oundo David Wandera and was conversant with the facts therein and his reply is that: In his opinion, the applicant's application is incompetent, frivolous, vexatious, irregular, incurably defective and amounts to an abuse of the court process and is intended to frustrate the respondents' efforts to expeditiously prosecute the substantive appeal and also intended to deprive them of their right to recover and enjoy their

property. That the application has already been overtaken by events and its filing is a gambling and speculative exercise which ought not to be condoned by this court because at the time of filing the affidavit on 29th March 2022, the 3rd, 4th and 5th respondents had already filed a substantive appeal in Supreme Court Civil Appeal No 19 of 2021 and attached a copy of the front pages of the record of appeal. He admitted that judgment was delivered by the Court of Appeal on 1st April 2021 and the 3rd, 4th and 5th respondents were aggrieved by the Judgment and filed a notice of appeal together with a letter requesting for proceedings on 12th April 2021. These documents were served on the applicant immediately according to the Annexures "B" and "C". That the 3rd, 4th and 5th respondents filed their notice of appeal within the prescribed 14 days and the applicant's allegations are baseless and untenable in the circumstances. Further Mr. Dick Steven Mubiru – Kalenge deposed that the notice of appeal was endorsed and sealed by the court on 14th April 2021 and accordingly served upon the applicant's lawyers on 20th April 2021. That the 3rd, 4th and 5th respondents requested for certified and typed record of proceedings which was prepared and availed on 3rd May, 2021 according to letter of the registrar availing the record of proceedings; annexure "D". Further, he deposed that that from the time the certified and typed record of proceedings was availed, an intending appellant has 60 days within which to file the appeal and the appeal was indeed filed on 2nd July 2021 within the prescribed time.

Mr Dick Steven Mubiru Kalenge further deposed that the 3rd, 4th and 5th respondents have no control over the time taken to prepare the record of proceedings and they cannot be penalised for any delay resulting from the preparation thereof.

Representation:

At the hearing of the application learned Counsel Mr. Alex Candia represented the applicant while learned Counsel Mr. Albert Byamugisha, represented the 1st respondent. Learned Counsel Mr. Swabur Marzuq represented the 2nd and 6th respondents while learned Counsel Ms Sarah Kisubi represented by the 3rd, 4th and 5th Respondents. With leave of court,

the court was addressed in written submissions that had been filed on court record and ruling reserved to be delivered on notice.

The applicants case.

The applicant's counsel raised three issues for resolution by court namely:

1. Whether the third, fourth & fifth respondents' notice of appeal was served out of time?
2. Whether the 3rd, 4th and 5th respondents failed to institute their appeal as required by law?
3. Whether the applicant is entitled to the remedies sought?

The applicant's counsel relied on the affidavit of the applicant and that of Oundo Daniel Wandera the gist of which has been reproduced above. The gist of the submission is that service of the notice of appeal was made eight days after filing of the notice of appeal contrary to rule 74 (1) of the Judicature (Supreme Court Rules) Directions whose provisions are mandatory and that evaluation of the cited rule leads to the conclusion that failure to serve amounts to failure to take an essential step in the appeal process and therefore issue number 1 should be answered in the affirmative.

Further, the applicants counsel submitted on issue number 2 on whether the respondents failed to institute the appeal as required by law. I do not need to refer to these submissions for the reasons I will give in my ruling below.

We would therefore straightaway move to the submissions in reply of the respondent on the question of late service of the notice of appeal.

Submissions of the 3rd, 4th and 5th respondents in reply.

In reply, the 3rd, 4th and 5th respondents' counsel, on whether the respondents' notice of appeal was served out of time addressed the court and also submitted on the other two issues which include whether the respondents failed to institute the appeal in time as required by the rules. We however refer only to the reply which addresses the main issue in controversy as to whether the notice of appeal of the respondents was

served out of time and give our reasons for the restriction to issue 1 in the ruling below.

The 3rd, 4th and 5th respondents counsel submitted that the applicable rule is rule 74 of the Judicature (Supreme Court Rules) Directions which prescribes the rule that an intended appellant shall file the notice of appeal and serve copies of it on all persons directly affected by the appeal with seven days.

Counsel submitted that the provision is clear and provides for seven days within which to serve the notices of appeal. She submitted that the 3rd, 4th and 5th respondents filed the impugned notice of appeal on 12th of April 2021 and served the same on 20th August 2021. Further that the 3rd, 4th and 5th respondents' notice of appeal was clearly filed within the prescribed 14 days from date of judgment which was delivered on 1st April 2021. The respondent's counsel submitted that while the notice of appeal was filed on 12th April 2021, the respondents counsel waited for confirmation of its lodgement by endorsement of the court and this was not done until 14th of April 2021. After the court registrar had endorsed and sealed the notice of appeal, it was made available to the 3rd, 4th and 5th respondents for service on the applicant. The notice of appeal was served on the applicant on 20th April 2021 within the prescribed 7 days.

Further the respondents' counsel contended that the requirement for endorsement by the registrar certifying the date of lodgement and endorsement is a mandatory requirement and depends on the efficiency of the registrar. From the date of filing of the notice of appeal on 12th April 2021, the respondents had no control over the court to have the notice signed at their convenience. The notice of appeal was endorsed on 14th April 2021 and it was accordingly served within the prescribed time. Counsel relied on the decision of the Supreme Court in **Simon Tendo Kabenge vs Barclays Bank and another SCCA No. 17 of 2015** for the proposition that if a defence is filed on the court record but due to unexplainable delays on the part of the court, the defence was not signed and sealed by the court to enable service on the opposite party, the court may not allow entry of a default judgment against the defendant.

The respondent's counsel submitted that it was baseless for the applicant to state that the notice of appeal was served out of the prescribed time.

The respondents counsel also submitted on the issue of whether the respondents failed to file an appeal within time and as we stated earlier, we would deal with the aspect of striking out the appeal in the ruling before.

Consideration of the Application

We have carefully considered the applicant's application, the supporting affidavits and the submissions of counsel. We preliminarily found that the second issue set out by the applicant and addressed by both counsel for the applicant and respondent is not for consideration in this application. The issue is whether the 3rd, 4th and 5th respondents failed to institute their appeal as required by law. This issue is supported by the pleadings of the applicant and I would particularly like to refer to grounds 2, 3 and 4 of the application which states as follows:

2. No appeal has been filed within the prescribed time.

3. Failure to file the appeal is dilatory, in ordinate and inexcusable conduct.

4. In the alternative to 2 – 3 above, the appeal, if any, has never been served on the applicant at all as required by law.

The application was filed in the Supreme Court registry on 11th June 2021. On the other hand, in the reply of the respondent by affidavit in reply of Mr. Dick Stephen Mubiru – Kalenge, Counsel for the 3rd, 4th and 5th respondents, is that the appeal was filed in the court registry on 2nd July 2021. Clearly this was after the notice of motion of the applicant seeking to strike out the notice of appeal or the appeal was filed. Issue 2 which we deferred for ruling is on whether the respondent failed to institute an appeal as required by law.

As noted above, that issue cannot be the subject matter of an application that was filed before the appeal was lodged because it seeks to strike out a non-existent appeal. To make it part of the proceedings in this

application, there has to be an amendment to the notice of motion incorporating the ground that since the application to strike out the notice of appeal was lodged in the court, the respondent has since filed an appeal which appeal was also filed out of time. In the absence of that, the matter was prematurely filed at a time when there was no appeal for the court to deal with in terms of the remedy sought in the application to strike out the notice of appeal or the appeal. Where an appeal is not filed, it cannot be struck out because it does not exist on the court record and it was sufficient in the circumstances to proceed with the application to strike out the notice of appeal only. For emphasis, if there is no notice of appeal on record (after it is struck out) the appeal could not be validly filed. Similarly, if the notice of appeal is struck out, there would be no competent appeal on record if an appeal had subsequent to filing the application to strike out the notice of appeal, been filed. In any case it is our ruling that it would be premature to deal with an appeal which has not been filed as that would be speculative. A notice of appeal is not the appeal and therefore where the appeal has not been filed, it cannot be struck out.

Further and before taking leave of this matter, and for purposes of reckoning the time within which 60 days to file an appeal is to be determined; where an intending appellant indicates in writing in accordance with the Rules that he or she intends to formulate the grounds of appeal after getting the typed record of proceedings, the time of sixty days is reckoned from the time the registrar avails the record to the intending appellant as certified by the registrar under rule 79 (2) of the Rules of this Court which provides that:

> 79. Institution of appeals.
>
> (1) Subject to rule 109 of these Rules and subrule (4) of this rule, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged— ...
>
> (2) Where an application for a copy of the proceedings in the Court of Appeal 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 the appeal is to be instituted, be excluded such time as may be certified by the

registrar of the Court of Appeal as having been required for the preparation and delivery to the appellant of that copy.

It would be a novel, and contrary to the rules, approach to suggest that the intending appellant in any case does not need the record of proceedings as he already has written submissions of the parties and typed judgment and the proceedings before court were not necessary. In other words, the applicant is suggesting that this court should determine whether the intending appellant did not require the record and therefore he ought not to have applied for the record of proceedings and time should be reckoned from the time of delivery of judgment and not from the time the registrar avails the record where the intending appellant has applied for the same contrary to rule 79 (2) of the Judicature (Supreme Court Rules) Directions. We do not accept this approach without an amendment to the rules.

It can therefore safely be concluded that there was no appeal that had been filed by the time the application was filed in the court on 11th June 2021. At the point of filing the application, the prayer of the applicant and particularly the prayer that the notices of appeal and the appeal, if any, filed by the respondents, be struck out, cannot be granted in full because there was no appeal at that time. We further considered rule 78 of the rules of this court and state that the use of the disjunctive "or" between the sentence *"apply to the court to strike out the notice or the appeal, as the case may be,"* makes it clear that an applicant either proceeds in an application to strike out the notice of appeal or the appeal but not both.

In the circumstances of this application, the question of whether the appeal has been instituted in time does not fall within the parameters of rule 78 of the Judicature (Supreme Court Rules) Directions. Rule 78 provides that:

> 78.Application to strike out notice of appeal or appeal.
>
> 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 of 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.

The application envisaged under rule 78 is either an application to strike out the notice of appeal or the appeal. By use of the disjunctive "or", it is intended that either the applicant seeks the court to proceed to strike out the notice of appeal or the appeal, if one has been filed. Where the appeal has not been filed, there is no basis for filing an application on the ground inter alia that the appeal has not been filed. What is required is to deal with the notice before the court in terms of what has been filed on the court record. We would therefore proceed to deal only with the notice of appeal as it was at the time the applicants notice of motion was filed. The application was filed on 11th of June 2021 before any appeal of the 3rd, 4th and 5th respondents was ever filed which from the evidence adduced in the affidavit of the respondent was filed on the 2nd of July 2021. It could not practically be the subject matter of an application filed prior to the appeal being filed. No pre-emptive strikes are envisaged by the rules. It is either an application to strike out an existing notice of appeal or an existing appeal already filed on record at the time of filing the application to strike it out.

To make it part of the application to strike out the appeal, the applicant's counsel ought to have sought leave of court to amend the grounds of the appeal and file an additional affidavit giving the facts to support it which facts incorporate the fact that the appeal has since been filed and to permit the court to consider whether the subsequently filed appeal was filed out of time to bring the application within the purview of rule 78 of the Rules of this court.

When should time for service of notice of appeal be reckoned under rule 74 (1) of the Judicature (Supreme Court Rules) Directions?

For purposes of the application to strike out the appeal, the only controversy relates to the issue of which date the time can be reckoned from. Should it be reckoned from the time the notice of appeal was filed in the registry or from the time indicated by the registrar as to when the notice was lodged. As a matter of fact, the time the notice of appeal was filed has a different earlier date from the time indicated by the registrar for lodgement of the notice of appeal and which is a later date than that indicated at filing. A perusal of the notice of appeal shows that it was filed

in the registry of the Court of Appeal on 12th April 2021. The notice discloses that judgment was delivered on the 1st of April 2021 and this was within 14 days prescribed by rule 72 (2) of the Judicature (Supreme Court Rules) Directions which stipulates that:

> (2) Every notice under subrule (1) of this rule shall, subject to rules 80 and 91 of this Rules, be lodged within 14 days after the date of the decision against which it is desired to appeal.

The notice of appeal was filed within the prescribed time of 14 days from 1st April 2021. However, the notice of appeal was not endorsed by the registrar on 12th April 2021. Instead, it was endorsed by the registrar on 14 April 2021. It shows that it was lodged in the registry of the court on 14th April 2021. By use of the word "lodged" the question is whether the notice of appeal was not lodged on 12th April 2021. As a matter of fact, it is not in dispute that the notice of appeal had been served on the applicant's counsel by the 20th of April 2021. If time is reckoned from 12th April 2021, seven days thereafter would be the 19th of April 2021 and therefore out of time. However, if time is reckoned from 14th April 2021, seven days thereafter would be the 21st of April 2021 and that would render the service of the notice of appeal on the applicant's counsel on 20th April 2021 within the prescribed period of seven days.

In the premises, the only question to be considered is a question of fact as well as of law as to when to begin reckoning the seven days' time within which to serve the notice of appeal as prescribed by the mandatory provisions of rule 74 of the Judicature (Supreme Court Rules) Directions. For purposes of interpreting rule 74 of the rules of this court, we would set it out in full:

> **74. Service of notice of appeal on persons affected.**
>
> (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may on application, which may be made ex parte, direct that service need not be effected on a person who took no part in the proceedings in the High Court or Court of Appeal.

The phrase "lodging of documents" was recently considered by the Court of Appeal in **Kasibo v Mboizi and Another (Election Petition Application 6 of 2021) [2022] UGCA 134 (06 May 2022)** where the court stated that:

If this rule is read in harmony with the Judicature (Court of Appeal Rules) Directions, the filing of documents should be evidenced by the endorsement of the registrar indicating the date and time when they were lodged or filed with the registrar. Under rule 3 (d) of the Parliamentary Elections (Interim Provisions) Rules, the word "registrar" means the registrar of the court. If this is read in harmony with the Judicature (Court of Appeal Rules) Directions, the expression "registrar" under rule 3 (n) means the registrar of the court and includes a deputy and an assistant registrar of the court. On the other hand, under rule 3 (p) the word "registry" is separately defined to mean the registry of the court.

The ramification of the definitions is that filing a document with the "registrar" does not mean an endorsement generally by the registry but must specifically mean an endorsement reflecting the filing with the "registrar". This can be seen by perusal of rules 10 & 11 of the Judicature (Court of Appeal Rules) Directions where under rule 10 (3) it is provided that:

> (3) Every civil appeal shall be given a serial number in the registry, which number shall be allotted as soon as the memorandum of appeal is received; and for that purpose, a series of numbers shall be maintained for each calendar year.

Rule 9 (1) (b) provides that the registrar of the court shall maintain a register of applications in civil matters wherein shall be entered particulars of every application lodged in the appropriate registry or sent to the registrar by any deputy registrar relating to a civil appeal. Similarly, a register of civil appeals is maintained under rule 9 (1) (d) of the Judicature (Court of Appeal Rules) Directions. With regard to documents which are provided for under the Judicature (Court of Appeal Rules) Directions, documents have to be endorsed after they are lodged. Rule 11 of the Rules of this court provides that:

> Whenever any document is lodged in the registry or in a sub registry or in the registry of the High Court under or in accordance with rule 10 of these rules, Rules, the registrar or deputy registrar or registry of the High Court, as the case may be, shall immediately cause it to be endorsed showing the date and time when it was lodged.

With regard to the applicant's application, which is under consideration in this ruling, it is governed by rule 46 of the Judicature (Court of Appeal Rules) Directions which provides that:

> 46. Applications to be lodged in the registry.
>
> (1) An application to the court shall be lodged in the registry, except that where the matter is one of urgency, an application may be lodged either in the registry or a subregistry notwithstanding that the subregistry is not the appropriate registry.

(2) All subsequent documents required to be lodged in relation to an application shall be lodged in the registry.

Further, 43 (1) and (2) provides that all applications to the court shall be by motion and the motion shall substantially be in Form A. For ease of reference it provides that:

43. Form of applications to court.

(1) Subject to subrule (3) of this rule and to any other rule allowing informal application, all applications to the court shall be by motion, which shall state the grounds of the application.

(2) A notice of motion shall be substantially in Form A in the First Schedule to these Rules and shall be signed by or on behalf of the applicant.

What is material in that Form "A" in the First Schedule to the Rules of this court shows in the form of the motion are included the words "lodged in the registry/sub registry at – on the – day of -20 – ". Most importantly, the motion is endorsed by the registrar. The form shows that a document is properly lodged when it is endorsed by the registrar. When this is read in harmony with the rule 30 of the Parliamentary Elections (Interim Provisions) Rules, the memorandum of appeal shall be filed with the registrar. In the circumstance of this appeal, the applicant filed an application by motion which is provided for under the Judicature (Court of Appeal Rules) Directions, which has to be lodged in the manner provided for as set out above and it has to be endorsed by the registrar. I do not accept the applicant submissions that documents are filed and not lodged. It is not sufficient to file a document commencing an application or moving court as such a documents is prescribed and has to be filed with the registrar of the court who is required under the rules to endorse the document. That means that after the document is received by the registry, it has in addition to be endorsed indicating the date and time when it was lodged in the registry. This is proved by rule 11 of the Rules of this court which require the document to be endorsed showing the date and time when it was lodged. Unfortunately for the applicant, Form A referred to above requires the lodgement of the document to be endorsed by the registrar. In other words, it is not sufficient to merely file a document and leave it at the registry. The document in addition must be forwarded to the registrar for endorsement.

The above rules considered by the Court of Appeal are in *pari materia* with the Judicature (Supreme Court Rules) Directions which has similar rules and the interpretation is persuasive and also supported by the decision of this court. It is obvious then that the word "lodged" embodies in it the endorsement of the registrar which endorsement completes the

process of lodgement of documents. Rule 11 of the Judicature (Supreme Court) Rules) Directions provides that:

> 11. Endorsement of documents lodged.
>
> Whenever any document is lodged in the registry or the registry of the Court of Appeal under or in accordance with rule 10 of these Rules, the registrar or deputy registrar or registrar of the Court of Appeal, as the case may be, shall immediately cause it to be endorsed showing the date and time when it was lodged.

The rule envisages that upon a document being lodged in the registry or the registry of the Court of Appeal in accordance with the rules, the registrar shall immediately cause it to be endorsed showing the date and time when it was lodged. Obviously, the notice of appeal could not be served without being lodged and it can only be lodged with the endorsement of the registrar.

Rule 11 envisages that the notice would be endorsed immediately after filing of the document in the registry. However, where it is not endorsed by the registrar immediately as required by the rules, the litigant should not be held liable for any delays between the filing of the document and endorsement of the registrar before the document can be made available for service on other parties. To hold so would be to the prejudice of a litigant as the time ought to be reckoned from the time the document was practically made available to the litigant for service. If time is reckoned from the time the document is filed and the registrar does not endorse the document immediately, any delay of 5 days for instance would be to the extreme prejudice of the litigant who may not be unable to comply with the rules for service of the notice of appeal in terms of rule 74 of the Judicature (Supreme Court Rules) Directions which gives a maximum of seven days within which service should be made on the persons affected.

Further such a rule for reckoning time would create an absurd outcome where, without any fault of the litigant, the time prescribed for service would expire or the litigant would have less time than the seven days prescribed by the rules within which to serve the notice of appeal on the respondent. In our ruling, a litigant who files a notice of appeal is entitled

to the full benefit of the seven days prescribed under rule 74 of the Rules of this court for service of the notice of appeal.

This conclusion is buttressed by the decision of this court in **Simon Tendo Kabenge vs Barclays Bank (U) Ltd and Philip Dandee; Supreme Court Civil Appeal No. 17 of 2015** where Opio - Aweri JSC considered as relevant, the mode of filing a defence under Order 9 rule 1 (1) of the Civil Procedure Rules which rule requires the officer receiving the defence to seal the WSD with the official seal showing the date on which it is sealed, and then return it to the person filing the defence and "the copy of the defence so sealed shall be a certificate that the defence has been filed on the date indicated by the seal".

On the question of delays in sealing by the officer, Opio – Aweri JSC stated that:

> "The part of the filing process which requires the registrar or magistrate to first sign and seal is completely beyond defence counsel yet it is only after that process is done that he may be able to file and serve the WSD on the opposite party. It therefore follows that the WSD as of the 15 days could not be served on the opposite party not because counsel deliberately failed to do so but because of the delays on the part of the court. It should be noted that this case is a peculiar one and is distinguishable from cases where even on the 15th day mark, defence counsel has not initiated the process of filing....
>
> From the foregoing therefore, instances where by the 15th day, a defence is on court record but for unexplainable delays on the part of the court, the WSD is not signed and sealed to enable service on the opposite party, then the court may not allow a default judgment against the defendant. The unexplainable delays must however be subject to proof and the burden is on the defence counsel".

In the circumstances of this appeal, it is clear that the counsel for the 3rd, 4th and 5th respondents filed the impugned notice of appeal on the 12th of April 2021 but the notice of appeal was not endorsed immediately by the registrar as required by the rules. Subsequently, and two days later, the registrar on 14th of April 2021, endorsed the notice of appeal and indicated the date of endorsement as 14th April 2021. Clearly it is on that day of endorsement or thereafter that the respondents' counsel had access to

copies of the notices of appeal for purposes of service thereof on the applicant.

The appellant was duly served with the impugned notice of appeal on 20th April 2021 within seven days. The delay between 12th of April 2021 and the 14th April 2021 cannot be used to reckon the prescribed seven days and the delay of the registrar cannot be visited on the litigant. In the premises, time should be reckoned from the 14th of April 2021 and that means that the notice of intended appeal of the 3rd, 4th and 5th respondents was served on the applicant within seven days as required by rule 74 (1) of the Judicature (Supreme Court Rules) Directions.

As we have indicated above, the other grounds of the notice of appeal and particularly on the question of whether the appeal would be filed out of time cannot be considered in this application. The final result is that application fails and stands dismissed with costs.

We noted that the first respondent's counsel filed written submissions opposing the application. A perusal of the applicant's notice of motion discloses that the applicant only seeks to strike out the notice of appeal of the 3rd, 4th and 5th respondents in terms of the order sought in the notice of motion. Therefore, even though the first respondent's counsel was served and participated in the proceedings, it would be sufficient to find that the application as against the first respondent in this application is incompetent and is hereby struck out with costs to the first respondent.

Similarly, the 2nd and 6th respondents were served with the application and counsel appeared in court. The application against the 2nd and 6th respondents is also struck out with costs.

In the premises, the following orders hereby issue:

1. The applicant's application as against the 3rd, 4th and 5th respondents stands dismissed with costs to the 3rd, 4th and 5th respondents.

2. The applicant's application as against the first respondent is struck out with costs to the first respondent.

3. Then applicant's application as against the 2nd and 6th respondents is struck out with costs to the 2nd and 6th respondents.

Dated at Kampala the 6th day of May/June 2023

Mwondha

Justice of the Supreme Court

In absentia.

Lillian Tibatemwa – Ekirikubinza

Justice of the Supreme Court

Mike Chibita

Justice of the Supreme Court

Elizabeth Musoke

Justice of the Supreme Court

Christopher Madrama Izama

Justice of the Supreme Court

Delivered by the Registrar 6/6/23