**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT)**

**MISCELLANEOUS APPLICATION NO.727 OF 2011**

***(Arising from Miscellaneous Application No.412 of 2010)***

***(Arising from Civil Suit No. 133 of 2010)***

**MOHAMMED MAJYAMBERE:::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**BHAKRESA KHALIL:::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE THE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This ruling arises from a preliminary objection on points of law raised by Mr. Max Mutabingwa counsel for the respondent when this matter was called on for hearing. He challenged the competence of this appeal on two grounds. Firstly, that it is time barred and secondly, that it is incompetent because the signature of the deponent of the affidavit in support was either scanned or photocopied.

As regards the issue of time, he submitted that this appeal arises out of a ruling of the registrar in Misc. Application No. 412 of 2010 which was delivered on 30th November 2011. He noted that Order 50 rule 8 under which this appeal was brought gives the appellant the right of appeal to the High Court in case he is aggrieved by the decision of the registrar. He however, pointed out that section 79 (1) (b) of the Civil Procedure Act (CPA) provides that an appeal against the order of the registrar should be brought within seven days from the date of order. He then submitted that this application should have been brought within seven days from 30th November 2011 but it was brought after more than one month and therefore it was filed out of time.

He observed that under S.79 (2) of the CPA if the appellant applies for the record of proceedings the time taken by court to prepare the order and proceedings is excluded when reckoning the time within which to appeal. He contended that in the instant case, the appellant had never applied for the order and proceedings or if he did so, they had never been served with a copy of the letter requesting for it and yet this is an appeal which must be accompanied by an order and proceedings. He referred to the case of ***Asadi Weke v Livingstone Oola [1985] HCB 49*** (though a copy was not availed to court) and submitted that this appeal is incompetent in that the proceedings from which it arises are not there.

On the competence of the affidavit in support, he contended that the signature of the deponent on the copy that was served on them was either scanned or photocopied. This means that the deponent did not appear before the commissioner for oaths to swear the affidavit. He observed that the commissioner for oaths who commissioned the affidavit in the absence of the deponent should be reported to the Law Council. He relied on the authority of Joy ***Kaingana v Dabo Boubou [1986] HCB 59*** (which he availed to court later) to contend that thisappeal is not supported by a competent affidavit and should be struck out with costs to the respondent.

Mr. Ernest Rukundo for the appellant conceded that this appeal was not filed within seven days but submitted that it is not time barred. He contended that Order 50 r 8 under which this appeal was brought does not give a time frame. He pointed out that section 79 (1) (b) that provides for the seven days within which to appeal gives this court power to accept an appeal brought out of time if good cause is shown. Further that he had good cause which this court can consider and admit the appeal.

He contended that Misc. Application No. 412 of 2011 was heard ex parte before the registrar because he was prevented to appear in court on that day despite making every effort. Further that they were informed of the registrar’s ruling by an order served on them by the respondent on the 7/12/2011 and they diligently filed the appeal on the 14/12/2012 within seven days after being served with the order.

On the issue of attachment of record of proceedings, he submitted that he obtained the record of proceedings signed by the registrar but he neither filed it nor served a copy on the respondent’s counsel. He undertook to file it and serve a copy on the respondent’s counsel. He also contended that this appeal is not incompetent on the basis of that omission because the requirement that it should be accompanied by a copy of the decree or order appealed against and the proceedings upon which it is founded is not mandatory under the rules.

On the issue of photocopied signature, he conceded that it was a photocopied signature and that the deponent of the affidavit did not appear before the commissioner for oaths who commissioned it. He however, submitted that if the appeal against the order of the registrar is not heard on its own merit it would be a transverse of justice. He prayed that court allows him to file an application to file an appeal out of time so that this appeal is heard on its merits.

Mr. Mutabingwa in a brief rejoinder submitted firstly, that while this court has power to extend time, a good cause has to be shown by a separate application supported by an affidavit showing why appeal was not filed in time. He observed that the applicant had not made such an application for extension of time. Secondly, that counsel for the appellant cannot claim that he learnt of the court order late when he was aware of the hearing date and should have immediately checked the court record to see the fate of the case upon failure to attend court.

As regards failure to attach a record of proceedings, he submitted that it is a requirement of the law as per the provisions of section 79 (2) of the CPA. He contended that the fact that the time taken to prepare the record of proceedings and the order is excluded from the time within which an appeal is filed means that it is a mandatory requirement.

On the issue of photocopied signature, he submitted that since counsel for the appellant had conceded that the signature was photocopied and as such the deponent did not appear before the commissioner for oaths, the affidavit in support is incurably defective and the application is incompetent because it is not supported by an affidavit. He reiterated his earlier prayer that this application be struck out with costs.

This appeal was brought under Order 50 rule 8 of the CPR which gives the right of appeal against the registrar’s order but does not prescribe the time within which it should be made. The time within which an appeal against the order of a registrar, like in this case, should be brought is provided for under section 79 (1) (b) of the CPA as correctly stated by counsel for the respondent. The head note of that section is *“limitation for appeals”*. It provides that:-

S.79

*“(1) Except as otherwise specifically provided in any other law, every appeal shall be entered-*

*(a) ………………*

*(b) within seven days of the date of the order of a registrar,*

*as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed”.*

The order of the registrar appealed against was made on the 30th November 2011 and this appeal was filed on 14th December 2011, two weeks from the date the order was made. The issue is when did time start running?

According to Counsel for the appellant, time started running from the date the order was served on the appellant’s counsel since the application had proceeded ex parte. This argument, in my view, would probably be considered if the applicant was not aware of the hearing date. However, counsel for the appellant/applicant conceded that he was aware of the hearing date but was prevented from appearing on that date by good cause. If counsel had been prudent enough he would have checked the court records immediately he was able to do so in order to find out the fate of that application since it had been fixed for hearing on the fateful day. He should not have waited for the court order to be served upon him.

In any event, section 79 (1) (b) of the CPA talks of *“within seven days of the date of the order”* and not when the order is served on the other party. Besides, counsel for the appellant did not even state whether he applied for the record of proceedings and the order appealed against so as to take advantage of the provisions of section 79 (2) of the CPA. For that reason, I find that the time within which to appeal started running on 30th November 2011 when the order was made and so it is clear that the appeal was filed out of time.

The provision of section 79 (1) of the CPA is couched in mandatory terms and failure to comply with it affects the competence of the appeal that is filed out of time. There are a number of authorities where our superior courts have held that time limits set by statutes are not mere technicalities and must be strictly complied with. (See: ***Kasirye Byaruhanga & Co. Advocates v U.D.B., S.C.C.A No. 2 of 1997***; ***UTEX Industries v Attorney General, S.C.C.A. No. 52 of 1995;*** and ***Uganda Revenue Authority v Consolidated Property, Civil Appeal No. 31 of 2000***).

Be that as it may, counsel for the appellant has argued that this court has power to admit an appeal out of time provided good cause is shown. This is provided for under section 79 (1) of the CPA and I agree with counsel to that extent. However, the pertinent question is when and how is the good cause shown? Is the good cause shown at the time of hearing the appeal or before the appeal is even filed? I find it more logical that good cause should be shown before an appeal is filed as the provision of section 79 (1) of the CPA provides that “…*the appellate court may for good cause* ***admit an appeal****…”* which, in my considered opinion, can only be done at the stage of filing. I also want to believe that it would be most appropriate if good cause is shown by a formal application supported by an affidavit and not at the time of hearing when a preliminary point of law is raised like it was in this case.

However, I have considered a number of authorities that adopt a liberal approach to matters of procedure. Just to refer to one of them, in **Civil Application No. 24 of 2004** arising out of **Civil Appeal No. 95/2003** between **Juliet Kalema** and **William Kalema & Rhoda Kalema** the applicant was seeking orders for enlargement of time to validate Civil Appeal No. 95 of 2003 that was filed in the Court of Appeal without taking an essential step in time. ***C.K. Byamugisha, JA*** in her ruling observed as follows:-

*“In the instant application, the facts are such that the applicant has taken all the essential steps except one to prosecute her appeal. She did not or her counsel did not supervise his clerk adequately to ensure that all the necessary documents are served in time. The respondents were served with the notice of appeal after a period of one month. ……………..The applicant's appeal is ready and it came up for hearing on the 18th May 2004. It had to be adjourned pending the disposal of the instant application.* ***I think it was also another oversight on the part of this Court not to have enlarged time in favour of the applicant under Rule 41(2) of rules of this Court. This rule gives this Court wide and unfettered discretion to grant a consequential extension of time for doing any act as the justice of the case requires in order to safeguard the right of appeal****.* ***In my view, since the appeal was ready for disposal on the 18th May 2004, the* *court had discretion to enlarge time even on its own motion in order to safeguard the applicant's right of appeal****”.* (Emphasis added).

Indeed Rule 41 (2) (the current Rule 42 (2)) of the Court of Appeal Rules under which that application was brought gives the Court of Appeal wide and unfettered discretion to grant a consequential extension of time for doing any act as the justice of the case requires. As expressly provided for under that rule, the discretion is exercised by the Court of Appeal either on application or of its own motion.

I cannot compare the wide and unfettered discretion given by that rule to the discretion given to this court by section 79 (1) of the CPA. However, I am alive to the provisions of section 98 of the CPA that gives this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. I am also mindful of the provisions of section 33 of the Judicature Act which enjoins this court to grant all such remedies as any of the parties to a cause or matter is entitled to so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided.

In view of the above provisions, the dictates of justice would demand that an appeal like this one should not just be thrown out if this court can exercise its discretion to validate it by belatedly enlarging the time, the demand for form notwithstanding, and I would be inclined to do that. However, this appeal is also affected by a second mishap that offends the provisions of another substantive law. This leads me to consider the second ground for the preliminary objection on the issue of affidavit in support of the appeal.

It was conceded by counsel for the appellant that the signature on the affidavit in support was just photocopied and that the appellant did not appear before the commissioner for oaths who commissioned that affidavit. This clearly offends section 6 of the Oaths Act, Cap. 19 which is in pari materia with section 5 of the Commissioner for Oaths (Advocates) Act, Cap. 5. Both sections provide that:-

*“Every commissioner for oaths* ***before whom any oath or affidavit*** *is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.* (Emphasis added).

Clearly, these provisions require an affidavit to be made before a commissioner for oaths. This requirement is strengthened by rule 7 of the Commissioner for Oaths Rules which provides that:-

*“A commissioner before taking an oath* ***must satisfy himself or herself*** *that the person named as the deponent* ***and the person before him or her are the same and that the person is outwardly in a fit state to understand what he or she is doing****”.* (Emphasis added).

According to this rule, the requirement that a deponent of an affidavit should appear before a commissioner for oaths serves two very important purposes, namely; to identify the person named as the deponent and to assess his/her mental fitness. I believe an affidavit as a sworn document should not be treated lightly and the law that prescribes how it should be made must be complied with.

The practice where affidavits are not made before a commissioner for oaths was criticized by the Supreme Court in **Kakooza** ***John Baptist v Electoral Commission & Another, Election Petition Appeal No. 11 of 2007***, as per Katureebe ,JSC who stated that:-

*“The practice where a deponent of an affidavit signs and forwards the affidavit to a commissioner for oaths without him being present is, in my view, a blatant violation of the law regarding making affidavits and must not be condoned in any way. The deponent of an affidavit must take oath and sign before the commissioner for oaths as required by law. A commissioner who commissions an affidavit without seeing the deponent cannot say that the affidavit was taken or made before him or her, nor can he state truly in the jurat or attestation at what place or time the affidavit was taken or made. Equally the deponent cannot claim to have taken or made the affidavit before the commissioner for oaths ….”*

Courts have held that failure to comply with this mandatory requirement renders the affidavit incurably defective and must be struck out. Consequently, the application it purports to support becomes incompetent for lack of a supporting affidavit and it should also be struck out with costs. (See: ***Jayantilal Amratlal Bhimji & Another v Prime Finance Company Ltd, Misc. Application No. 467 of 2007;*** ***Kaingana v Dabo Boubou*** (supra) and ***Attorney General v Kilembe Mines Ltd & Another, Misc. Application No. 702 of 2008***)

In the instant case, the deponent of the affidavit in support of the appeal neither signed the affidavit nor appeared before the commissioner for oaths who commissioned it. His signature was either photocopied or scanned from a different document and “planted” on the affidavit. I have carefully looked at the copy on the court record and as conceded to by counsel for the appellant, there is no copy that bears the original signature. This, in my view, is double tragedy because it also shows dishonesty in the entire process. It means that the person who is alleged to be the deponent of the affidavit does not even know its contents let alone seeing and signing it.

Surely, this is a much higher level of blatant violation of the law regarding making affidavits than what was decried by the Supreme Court in ***Kakooza*** ***John Baptist v Electoral Commission & Another*** (supra). Such dishonest practices must not only be discouraged but advocates who facilitate them should be disciplined for professional misconduct.

In conclusion, I find that the affidavit in support of this appeal is incurably defective for the above reasons and I strike it out. In ***Kaingana v Dabo Boubou*** (supra) it was held that:-

*“Where an application is grounded on evidence by affidavit, a copy of that affidavit intended to be used must be served with the action. In such a case, the affidavit becomes a part of the application.* ***The Notice of Motion cannot on its own be a complete application without the affidavit****. Therefore in the instant case the Notice of Motion alone was not enough”.*

I am fully persuaded by this authority and the ones mentioned earlier in this ruling. In the result, I find this appeal incompetent since it is now left without any supporting affidavit and I have no option but to strike it out and I accordingly strike it out with costs.

Dated this 9th day of March 2012.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 10.00 am before Mr. Ernest Rukundo for the appellant and Mr. Max Mutabingwa for the respondent.

**JUDGE**

**09/03/2012**