

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NUMBER 0138 OF 2013

5 **STANDARD CHARTERED BANK (U) LTD ::::::::::::::: APPLICANT**
VS.
MWESIGWA GEOFFREY PHILLIP ::::::::::::::: RESPONDENT

CORAM:

10 **HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA**
HON. MR. JUSTICE STEPHEN MUSOTA, JA
HON. MR. JUSTICE REMMY KASULE, Ag. JA

RULING OF COURT

15 This application is brought under Rules 76(1), (2) and (4), 82, and 44(1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10) seeking for orders that

- 20 (a) A declaration that the Notice of Appeal filed in High Court Miscellaneous Application No. 477 of 2012 on 12th February, 2013 by the Respondent was filed beyond the time stipulated by the law.
- (b) An order striking out the Notice of Appeal filed by the Respondent.
- (c) The respondent pays costs of the application.

25 The Notice of Motion is supported by an affidavit sworn by Mr. Ernest Rukundo and the grounds as set out in the motion are that;

1. "The respondent filed HCCS No. 30 of 2010 against the applicant claiming loss of UGS 12,994,762/= arising out of the alleged breach of contract and negligence by the Applicant.
2. The applicant filed a Written Statement of Defence the gist of which was that the Respondent does not have a cause of action against the Applicant as alleged or at all.
3. The said Written Statement of Defence was struck out on ground that it had not been served within the time appointed by law.
4. The applicant filed Misc. App. No. 477 of 2012 for extension of time to file and serve the Written Statement of Defence but the Respondent raised several preliminary objections.
5. On the 9th of November 2012, the Court delivered a ruling in Misc. App. No. 477 of 2012 against the respondent.
6. On 12th February 2013, the Respondent filed a Notice of Appeal and Requested for a typed copy of the proceedings and served the Applicant's Advocates on the same day.
7. The said Notice of Appeal and Request for typed proceedings were filed beyond the time stipulated by law.
8. The proper and due adjudication of disputes and administration of Justice requires that parties follow and comply with the time set by the law.
9. In the premises, it is just, fair and equitable that the orders sought herein be granted."

The respondent filed an affidavit in reply sworn by Mr. Derrick Muhumuza in which he stated;

1. "That I am an adult Ugandan of sound mind and a Lawyer working with M/S Akampumuza & Co. Advocates, counsel for the respondent in this application and as such swear this affidavit.
2. That I am familiar with the facts in High Court Miscellaneous Application No. 477 of 2012 and I have also perused the Notice of Appeal filed by the Respondent in the High Court and before this Honourable Court on 12/2/2013.

3. That I have read and understood the Notice of Motion and the accompanying affidavit of Ernest Rukundo and in reply thereto state as follows.
4. That in reply to paragraphs 3, 4, 5, 6, 7 and 8, I am aware that the respondent rightly got judgment in his favour after interparties proceedings based on the facts before court and the matters therein became *res judicata* and the Judge *ex officio* and there was no basis for court to revisit a matter it had already determined with finality and struck out the WSD of the Applicant.
5. That in further reply, at the time of hearing Miscellaneous Application No. 477 of 2012, the court had already taken the evidence of the Respondent in the suit with the full participation and knowledge of the Applicant's lawyers and application was an abuse of court process, hence the basis for applying for leave to appeal.
6. That in further reply, there was no automatic right of appeal against the orders of the Judge in HCMA No. 477 of 2012 and leave of court which was first applied for and granted was necessary before the respondent could file a Notice of Appeal as clearly indicated in the Applicant's Annexure "E2" to Rukundo's Affidavit.
7. That in reply to paragraph 9, 10, 11, 12, 13, 14 and 15, the Notice of Appeal filed on 12/2/2013 was filed within the time prescribed by law following the obtaining of the leave of the High Court to appeal and this conformed to the stipulated timelines.
8. That in further reply, the Letter requesting for the record of proceedings was written in time as sworn in Applicant's Annexure "F" and to date the record of proceedings has never been availed by the lower court despite the continued physical and formal follow up we have made including writing Letters.
9. That I swear this affidavit in reply of the application.
10. That whatever is stated herein above is true to the best of my knowledge."

Representation

At the hearing of the application, Ms. Akantorana Kobusingye appeared for the applicant while Mr. James Akampumuza appeared for the respondent.

5 Background

The background to this application is that the respondent filed HCCS No. 30 of 2010 against the Applicant claiming loss of UGX 12,994,762/= arising out of the alleged breach of contract and negligence by the applicant. Summons were served onto the applicant on 4th February 2010. The applicant filed a written statement of defence on 19 February 2010, the gist of which was that the respondent did not have a cause of action against the applicant but the same was struck out on grounds that it had not been served within the time appointed by law. The applicant then filed M.A No. 15 477 of 2012 for extension of time to file and serve the WSD, and the court allowed the same in its ruling of 09 November 2012 marked as annexure "D" to the affidavit of Ernest Rukundo in support of the Application. The respondent filed a Notice of Appeal against this decision and a request for a typed copy of the proceedings on 20 February 2013.

Submissions of counsel

The applicant's counsel argued that the respondent's notice of appeal was lodged in court on 12th February 2013 yet the ruling in HCMA No. 477 of 2012 had been delivered on 9th November 2012 which was 25 3 months out of time. Counsel relied on this court's decision in **Kasibante Moses Vs Electoral Commission Election Petition No. 7 of 2012** in which it was held that it is the duty of an intending appellant to actively take necessary steps to prosecute his/her intended appeal.

30 Counsel relied on rule 82 of the Rules of this court which provides for applications to strike out notice of appeal or appeal and prayed that the notice of appeal in HCMA No. 477 of 2012 be struck out.

In reply, counsel for the respondent raised a preliminary objection and submitted that the application is incompetent because the applicant bank never authorised the institution of the application and the advocates who swore the affidavits in support of the application and in rejoinder do not work for the bank and did not have the requisite authority to bring such application. Counsel relied on the Supreme Court decision in **Banco Arabe Espanol Vs Bank of Uganda Civil Appeal No. 8 of 1998** on the notion that an advocate cannot swear to such contentious matters which are within the knowledge of the parties. In addition, that the affidavit in rejoinder sworn by Mr. Matsiko Joseph was not dated.

In addition, counsel argued that this application is misconceived and incompetent and seeks to punish the innocent litigant. The notice of appeal filed by the respondent in the High Court and before this court on 12/2/2013 was within time after the respondent got legal standing to appeal which did not exist prior. It was filed within the time prescribed by law following obtaining of leave of the High Court to appeal which conformed to the stipulated timelines. The High Court granted leave to appeal to the respondent on 6/2/2013 with a certificate that the matter was of general public importance and law as it involved the need to harmonize various conflicting decisions of the High Court on filing a defence.

Consideration of the application

The respondent raised a preliminary objection in regard to the advocates deposing an affidavit for the applicant bank. The applicant argued that Rule 9 of the Advocates (Professional Conduct) Regulations does not prohibit advocates from deposing affidavits on matters or facts within their knowledge.

The affidavits of Mr. Rukundo and Mr. Matsiko were sworn in the capacity of advocates instructed to represent the applicant and the facts of the matters as heard and determined in the High Court are within the knowledge of the deponents. **Rule 44 of the Judicature (Court of Appeal Rules) Directions** provides that;

“(1) Every formal application to the court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.”

5 The decision of **Banco Arabe Espanol Vs Bank of Uganda Civil Appeal No. 8 of 1998** is distinguishable from the instant application because it dealt with an affidavit sworn by counsel for a party in the case which it did not disclose the deponent’s means of knowledge. In the instant application, the deponents are advocates working for the firm in conduct of the matter in HCMA No. 477 of 2012. Therefore
10 the advocates for the applicant cannot be faulted for swearing to facts within their knowledge.

Regarding the undated affidavit in rejoinder of Joseph Matsiko, the copy on the court file received on 18th December 2017 is both signed and dated. The affidavit that was served on the respondent is however
15 not dated. This, in our view, was an oversight that can be cured by Article 126 (2) (e) of the 1995 Constitution.

The preliminary objections are accordingly over-ruled.

20 Rule 82 of the Rules of this Court under which the application was lodged provides as follows;

*“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
25 in the proceedings has not been taken or has not been taken within the prescribed time”*

The meaning of failure to take an essential step in the proceedings was considered in **Andrew Maviri v Jomayi Property Consultants Ltd CACA No 224 of 2014**, where it was held at page 8 that:

30 *“Taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by the*

Court, if the action is not performed as led by law prescribed, then whether legal process has been done before, becomes a nullity”.

5 The record in this matter shows that the respondent had no automatic right of appeal against the order of the judge in HCMA No. 477 of 2012 and leave of court had to be applied for before the respondent could file a notice of appeal. According to the respondent, leave of court was granted and the notice of appeal filed six days later.

Rule 76(4) states that;

10 *“(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain the leave or certificate before lodging the notice of appeal.”*

15 From the above rule, it is not a pre-requisite for an intending appellant to seek such leave of court before filing a notice of appeal. The notice of appeal should have been filed even without leave to appeal. It is our considered view that the notice of appeal filed by the respondent was filed out of time. This application is allowed and the Notice of Appeal lodged in the High Court and in this court on 12th February 2013 is hereby struck out by reason of being filed out of
20 time. Costs are awarded to the applicant.

We so order.

Dated this 23rd day of December, 2019

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HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA.

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HON. MR. JUSTICE STEPHEN MUSOTA, JA.

5 *Handwritten signature*

HON. MR. JUSTICE REMMY KASULE, Ag. JA.

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