

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NUMBER 0172 OF 2010

IN THE MATTER OF AN INTENDED APPEAL

**(Arising from the judgment in High Court, Mbarara Civil Suit No. 20
of 1984 (Justice V.F. Musoke Kibuuka) delivered on 08.10.2003)**

PIO KABINENDA:APPLICANT

VS.

ANTHONY MUGISHA & 17 ORS: RESPONDENTS

CORAM: HON. MR. JUSTICE. REMMY KASULE, JA

HON. MR. JUSTICE. RICHARD BUTEERA, JA

HON. MR. JUSTICE. CHEBORION BARISHAKI, JA

REASONS FOR COURT'S DECISION

This is an application brought by way of Notice of Motion under rules 82 (2), 43 (1) and 44 (1) of the Rules of this court for orders that a Notice of Appeal filed by the respondents on the 31st of December 2003 be struck out with costs. The grounds of the application are contained in the affidavit of the Applicant. The Respondents did not file an affidavit in reply.

The facts giving rise to the Application are as follows;

The Respondents sued the Applicant in Mbarara High Court vide Civil Suit No. 20 of 1984 seeking to recover land comprising Rwampara, Block 3, Plot 91, which was registered in the Applicant's name. The Respondents also sought a declaration that the land belonged to them, an order directing the Commissioner for Land Registration to cancel or rectify the Respondent's Certificate of Title, general damages and costs of the suit. Judgment was delivered against the Respondents on the 8th of October 2003. The respondents



being dissatisfied with the said judgment lodged a Notice on Appeal on the 31st day of December, 2003.

Subsequently, the Respondents filed an Application for extension of time vide Civil Application No.66 of 2005 which was disposed of by consent of both parties and the Respondents were allowed to file the Record of Appeal within 15 days from the 28th day of May, 2010. The Record of Appeal was meant to have been filed on the 14th day of June, 2010 but since then, the Respondents have not taken any other step to prosecute the Appeal hence this Application.

At the hearing of the Application, the Applicant was represented by John Mary Mugisha while the Respondents were unrepresented. Counsel Benson Tusasirwe of Tusasirwe and Co. Advocates was served and he indicated on the Notice of Motion that the firm no longer had instructions to represent the Respondents.

We ruled that since Counsel who are on record as representing the Respondents never notified Court and the Applicant's Counsel that they no longer represented the respondents and only endorsed the Notice of Motion when the same was served upon them so without coming to court to explain further their relationship with their client, that service upon them was effective service under Rule 50 sub rule 3 of the Rules of this court. We accordingly ordered the hearing to proceed.

Counsel for the Applicant informed court that the Applicant passed away 2 years ago and appointed him as one of his executors of his will (he availed court with a copy of the grant). He therefore prayed that he and Mr. Bibangamba his co executor be made parties to the Application as legal representatives of the applicant's estate under Rule 97 and rule 2 of the Rules of this Court, which prayer was granted. Court also allowed him to proceed with the Application as a party to it.

He submitted that the grounds of the application were contained in the affidavit of the applicant but briefly they were that; Civil Suit No.20 of 1984 was decided on the 8th of October 2003, The respondents being dissatisfied, lodged a Notice of Appeal on the 31st of October, 2003 83 days after the judgment had been delivered without seeking the leave of this court and they did not even seek extension for service of the notice upon the applicant. Since then, the respondents have never taken any step to lodge their memorandum of appeal. Subsequently they filed an application for extension of time vide Civil Application No.66 of 2005 to which the parties consented on 28.05.2010 and

The image shows several handwritten signatures and initials in black ink. At the top is a large, stylized signature that appears to be 'J. Mugisha'. Below it are the initials 'BP' and another signature that looks like 'B. Benson'. At the bottom is a long, horizontal signature that is mostly illegible but appears to be 'Benson Tusasirwe'.

the Respondents were allowed to file the Appeal within 15 days from the date of consent.

It was now more than 5 years since the consent date of 28.05.2010 and the respondents had never taken any step which was an exhibition of dilatory conduct on their part. Therefore, it was in the interest of justice that Court allowed the application and struck out the Respondents' appeal with costs.

Mr Mugisha drew the attention of court to the annexures to the Affidavit in support of the Application to wit; a copy of the judgment, a copy of the Notice of Appeal, a copy of the Notice of Motion and a copy of the consent order and he submitted that the Respondents obtained an order for stay of execution of the judgment of the High Court and as a result, the Applicants have failed to realize the fruits of the judgment of the High Court and yet it was 12 years without the Respondents prosecuting the Appeal.

He submitted that this was a proper case for this court to exercise discretion under Rules 82 (2) (2) by striking out the respondents' Notice of Appeal with costs.

We allowed the Application and struck out the Notice of Appeal filed by the Respondents on 31st December 2003 and promised to give reasons in a detailed ruling on 24th March 2016 which we now do.

We find it relevant to reproduce the provisions of the law under which this Application was brought.

Rule 82 of the Rules of this 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".

Rule 2 (2) of the Rules of this Court provides:

"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been

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proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay”.

Rule 43 (1) of the Rules of this Court provides:

“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”.

Rule 44 (1) of the Rules of this Court provides:

“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”.

We agree with Mr JM Mugisha’s submission that the Notice of Appeal was lodged 83 days after judgment was delivered which offended ~~Section~~ Rule 76(2) of the Rules of this court which provides that *“Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal”.* However, this defect was cured when the Respondents applied for extension of time to file their Appeal vide Civil Application No.66 of 2005 which was granted on 28/5/2010 by consent of the parties.

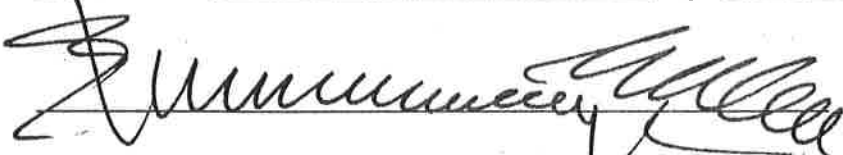
The position was different after the Application was granted and the Respondents were given 15 days within which to file their Appeal and they did not abide by the terms of the Consent Order. Further, no step has been taken towards prosecution of the appeal since 28.05.2010 which is dilatory conduct on the part of the Respondents. Matters were made worse when neither the Respondents nor their Lawyer appeared in court on the day this Application was fixed for hearing to advance any reason for their failure to take any step at all this while. In **Gaba Beach Hotel Ltd v Cairo international Bank Ltd CACA No 34 of 2003**, this Court held that *“We do not regard the rules relating to the institution of appeals in this court to be mere technicalities that parties can dispense with under Article 126(2)(e) of the Constitution. They go to the root of substantive justice and the doctrine of fair trial. They are intended to protect both parties from possible abuse of court process to the prejudice of proper administration of justice”.* In **Dr S.B. Kinyatta & Anor v Subramanian Gopalan & Anor CACA No 108/2003**, this court made reference to the case of

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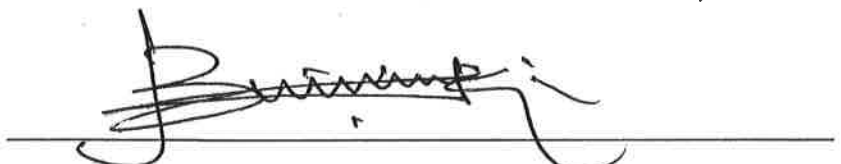

Utex Industries Ltd v Attorney General SCCA No 52/1995 (Unreported), where it was held that *"It is the duty of the intending appellant to actively take necessary steps to prosecute his appeal. It is not the duty of the respondent or the court to do it for him"*. It was further held that *"It is now settled law that failure to take an essential step in the process of prosecuting an appeal renders the appeal incompetent. Even failure to do so within the prescribed time has the same effect"*. We are persuaded by the above decisions.

We therefore find that the respondents have been of dilatory conduct in prosecuting the intended appeal. Accordingly, the Notice of Appeal filed in court on 31.02.2003 is hereby struck out with costs to the Applicant.

Dated this 24th day of March 2016


HON. MR. JUSTICE. REMMY KASULE, JA


HON. MR. JUSTICE. RICHARD BUTEERA, JA


HON. MR. JUSTICE. CHEBORION BARISHAKI, JA

Delivered by  Reg -
