

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL APPEAL NO. 0011 OF 2018

ODONGO ALI:..... APPELLANT
VERSUS
AMONDI EMUKHRA:.....RESPONDENT

RULING BEFORE JUSTICE GADENYA PAUL WOLIMBWA

The applicant raised a preliminary objection on the basis that the appeal be struck out for offending Section 79 of the Civil Procedure Act, Cap 71.

Briefly, the Appellant filed a suit in the Chief Magistrate's Court against the Respondent for trespass. Upon hearing the matter to conclusion, the Court decided that the Respondent's evidence was, well corroborated showing that the Appellant had divided the land into two portions and allocated 4 acres of the said land to the Respondent, which he started utilizing without any interference.

The Trial Magistrate entered judgment for the Respondent on 30/03/2017 upon which the Appellant decided to appeal to this Honorable Court since he disputed the judgment of the lower Court.

Respondent's counsel, Mr. Richard Akugizibwe filed submissions on the preliminary point of law on 16/04/2019. However, the Applicant's counsel was unable to file his submissions. The Applicant's counsel stated in a letter filed in Court on 30/04/2019 that he was never served with the Respondent's submissions, which they were to file by 16/04/2019, and for that reason, he was unable to file a reply. That the Respondent is guilty of abusing this Honorable Court is order and should not benefit from such illegality. He also stated that they were never served with the certified copy of the lower Court record and invited Court to scrutinize the record and overrule the intended

objection or to accommodate it in the appeal so that the matter is heard on its merits and be disposed of.

I have decided to resolve this objection notwithstanding that there is no reply from the Applicant.

Submissions for the Respondent in regards to the point of law.

The Respondent's counsel submitted that the Appellant filed a Memorandum of Appeal on 24/03/2018 a year after the judgment was delivered in the lower Court. He further submitted that the Appellant failed to take an essential step in the prosecution of his appeal within the prescribed time. That the Appellant's failure to comply with the mandatory requirement under Section 79(1) (a) of the Civil Procedure Act, Cap 71 means that there is no competent appeal before Court.

Counsel further submitted that the Appellant has not shown any special circumstances that prevented him from pursuing the appeal in time. That the proceedings were received by this Honorable Court on 01/12/2018 however, the Appellant elected to file the Memorandum of Appeal on 24/03/2019.

Counsel further argued that the appeal has to be lodged within 30 days of the decree and that whereas an extension is possible in the discretion of this Court, good cause shown by the Appellant. He cited the case of **Uganda Revenue Authority vs Uganda Consolidated Properties Ltd (1999-2001) UCL 149** where Justice Twinomujuni JA stated,

“Time limits set by statutes are matters of substance and not mere technicalities and must be strictly complied with.”

Counsel for the Respondent submitted that there is an illegality on the face of the record, which has to be dealt with immediately. That the appeal is caught up by time and prayed that it should be struck out for being incompetent with costs awarded to the Respondent.

Resolution

Order 6 rule 28 of the Civil Procedure Rules provides that:

“Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the Court at or after the hearing; except that by consent of the parties, or by order of the Court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.”

A preliminary object is in substance an objection on point of law. The nature of a preliminary objection was discussed in the Court of Appeal decision of **Mukisa Biscuit Manufacturing Co. Ltd Versus West End Distributors Ltd [1969] EA 696**, where Sir Charles Newbold at P. 701, held;

“.....A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”

The Respondent’s counsel raised the objection stating that the appeal is incompetent and should be struck out for offending Section 79(1) (a) of the Civil Procedure Act.

Section 79 of the Civil Procedure Act states that:

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

(a) Within thirty days of the date of the decree or order of the Court;

Or

(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”.

From the law as provided, every appeal should be filed within thirty days from the date of the decree or order of the Court, except where it is otherwise specifically provided in any law. These time specifications are aimed at avoiding delays. The subsequent provisions hence are designed to dictate a time schedule within which certain steps ought to be taken. And as such, as was held in **Njagi vs Munyiri (1975) EA 179**, for any delay to be excused, it must be satisfactorily explained. **Order 43 rule 1 of the Civil Procedure Rules states that;**

- “1. Every appeal to the High Court shall be preferred in the form of a memorandum signed by the Appellant or his or her advocate and presented to the Court or to such officer as it shall appoint for that purpose.
2. The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively”.

It is clear from the record that the Trial Magistrate gave judgment on 30th March 2017 in favour of the Respondent. On 17 May 2017, the Appellant instructed his lawyer to file an appeal and requested for a certified copy of the lower record to enable him prepare the Memorandum of Appeal. No action was taken by the court in calling for the record. Then on 8th August 2017, the Court received yet another letter from the Appellant's Advocates requesting for the same certified copies of the proceedings. No action was again taken by the court. On 14th March 2018, the Appellant filed a Memorandum of Appeal. On 1st December 2018, the record of the lower court was forwarded to the Assistant Registrar of the High Court.

From these facts, there were delays in processing and giving the Appellant the record of the lower court despite several attempts and requests made to the court by the Appellant for the record. However, these efforts to get the record of the lower court were made belatedly after the expiry of the required 30 days from the date of judgment within which the Appellant should have filed the appeal. According to the record, the Appellant should have filed his appeal within the first week of April 2017. The Appellant filed neither a notice of appeal nor a Memorandum of Appeal until after more than one month when he instructed his Advocate to appeal against the decision of the Magistrate. Therefore, by the time, the Appellant asked for the lower record, he was already out of time for appealing. If the Appellant was caught up by time, as he was in the present circumstances, he should have applied for leave to extend the time within which to appeal instead of trying to get the record of the lower court. The Appellant did not do this and I am unable to admit his appeal.

Before taking leave of this matter, I should mention that the Appellant requested for the record of the lower court and only got the same after more than one year. Ordinarily, section 79(2) of the

Civil Procedure Act, would have saved his appeal, as the days for filing the Memorandum of Appeal would have been computed from the time he received the record of the lower court. But this would have only been applicable if the appellant had applied for the lower record within 30 days from the date of judgment . This point was emphasized and considered in **Kellia Obaya and Pacurayana Margaret vs. Ovuru Stephano HCCA 2 of 2015**, where Justice Mubiru held: **that although the provisions of section 79(2) of the Civil Procedure Act does not specify the timeframe within which the record of proceedings has to be applied for, it is only logical that the application for the record of proceedings has to be done before the expiry of the 30 days from the date of judgment.** In this matter, however, the instructions to file an appeal were given after the 30 days within which the Appellant should have filed the appeal. That being the case, the Appellant cannot therefore benefit from this provision to keep his appeal alive.

In the result, there is no valid appeal before the court and I accordingly strike it out with costs to the Respondent. The Appellant is well advised to ask for leave to file his appeal out of time.

Decision

The Appeal is struck out with costs for being incompetent.



Gadenya Paul Wolimbwa

JUDGE

14th July 2020

The Registry will email and avail the parties the judgment on 14th July 2020.



Gadenya Paul Wolimbwa

JUDGE

14th July 2020

*Gadenya Paul Wolimbwa
Judge*