

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

CIVIL APPLICATION NO. 40 OF 1995

CORAM: (MANYINDO, DCJ, ODOKI, JSC, & TSEKOOKO, JSC)

BETWEEN

KANOBOLIC GROUP OF CO. (U) LTD. : : : : : : : : : : :

APPLICANT

AND

SUGAR CORPORATION OF (U) LTD. : : : : : : : : : : :

RESPONDENT

(Appeal from the Ruling of the
High Court of Uganda at Kampala by
the Hon. Kikonyogo L.E. dated 20/7/95
in Misc. Application No. 274/95
arising out of Misc. No. 17/94).

RULING OF THE COURT

This is an application, brought under Rules 80, 81 and 42 of the Rules of the Supreme Court for an order striking out the Notice of Appeal filed in this court by the respondents on 21/7/1995, on the ground that the record of appeal was filed out of time.

The brief background to the case is this. The applicant and the respondent entered into a contract whereby the applicant undertook to repair houses used by the respondent's workers. The applicant claim that they carried out the repairs but the respondent failed or refused to pay to them the full contract sum. The matter was then referred to an Arbitrator, under the terms of the contract. The Arbitrator made ^{an} ~~of~~ award in favour of the applicant but the respondent filed an application in the High Court for an order setting aside that award. The application was dismissed with costs.

The applicant then applied for execution of the award but the respondent applied for review and for stay of execution. Before the applications were heard the respondent changed counsel.

Their new counsel put in another application to have the award set

aside and execution stayed. Both applications were dismissed by the High Court on the ground that the matter was (a) res judicata and (b) incompetent as counsel who had filed the applications did not have a valid practicing certificate at the time.

The respondent applied for leave to appeal to this court. Leave was granted, hence the Notice of Appeal now challenged. The Ruling of the High Court was delivered on 20/7/95. The Notice of Appeal was filed in the High Court on 21/7/95 and in this court on 31/7/95. Under rule 81 (1) the appeal must be filed within 60 days of the filing of the Notice of Appeal. And so in this case the record of Appeal should have been filed by 22/9/95, excluding the day on which the Notice of Appeal was filed. But the record of Appeal was not filed until 15/11/95, about 53 days out of time.

The respondent relies on the exemption in the proviso to Rule 81 (1) which states:-

"Provided that where an application for a copy of the proceedings in the superior court has been made within thirty days of 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 superior court as having been required for the preparation and delivery to the appellant of such copy."

✕ The respondent claims that their Counsel applied for the record of proceedings in the High Court on 21/7/95. The record was sent to the lawyers who received it on 19.9.95. It is argued therefore that time began to run against the respondent on that date. Therefore the respondent had to file the appeal by 15/1/96 at the latest.

✕ For the applicant it is contended that the respondent can not invoke the proviso to Rule 81 (1) as they did not comply with the provision in Rules 81, (2) which states that an appellant shall not be entitled to rely on the said proviso unless his application for such copy

was "in writing and a copy of it was sent to the respondent". The applicant denies the claim by one James Kalende in his affidavit sworn on 24.11.95 that a copy of the letter applying for the record of the proceedings was served on the applicant's counsel on 31.7.95, together with the Notice of Appeal. Clearly the case turns on this point. If Rule 81 (2) was complied with then this application must fail; if it was not then the respondent has no appeal in this court, for the principle is that if the prospective appellant does not apply in writing within 30 days and copy the request to the respondent then the time taken by the High Court to prepare the proceedings will not be deducted from the time taken to obtain the record of proceedings. Rule 81 (2) is mandatory; see Delia Almeida vs. Dr. Carmo Rui Almeida, Civil Application No. 6 of 1990, Supreme Court (unreported). Robert Kitariko v. David Twino-Katama, Civil Application No. 6 of 1982, Court of Appeal of Uganda (unreported) and Kasule and Another vs. Tomson Muhwezi, civil Application No. 5 of 1990, Supreme Court (unreported.)

The burden is on the respondent to show that a copy of the letter to the High Court requesting for the record of proceedings was in fact sent to and received by the counsel for the applicant. For the respondent it has been submitted that the affidavit evidence of Mr. Kalende shows that the letter was served on the counsel for the applicant and, in the alternative, it is argued that if Kalende is not to be believed, then the fact that the record of appeal which contained inter alia, a copy of the letter in question was served on the counsel for the applicant on 29/11/95, satisfied the requirement of Rule 81 (2) as that rule does not set a time limit when the letter should be sent. It is also argued that under that same provision there is no need for **physical** service. It is enough for the intending appellant to show that the copy of the letter was sent some how.

^{WR}
I do not think that that would be sufficient. In ^{our}~~my~~ judgment the purpose of Rule 81 (2) is to put the respondent on Notice that the record of proceedings has been requested for by the intending appellant in which case the respondent would not take any further steps in the matter until after the record of the proceedings has been served to the intending appellant, together with the Registrar's certificate in case of delay. In ^{our}~~my~~ view the letter must be copied to the respondent at the time it is served on the Registrar of the High Court. It is not enough to show that the letter was sent. It must be shown that the counsel for the respondent received it.

It is now necessary to examine the evidence to ascertain whether or not the respondent's letter of 21/7/95 was served on counsel for the applicant. As noted above, the respondent relies on the claim by their clerk, Mr. Kalende in his affidavit that he served the letter in question on the Advocates of the applicant. Kalende's claim is contained in paragraphs 4 and 5 of his affidavit which state as follows:-

4. "THAT on or about the 31st July, 1995 I obtained from the respective courts copies of both the letter requesting for the record and the Notice of Appeal which had been duly received and signed by Deputy Registrar of the High Court and Supreme Court Registrar respectively.
5. THAT on the same date as above I proceeded to the chambers of Ms. Barya - Byamugisha & Co. Advocates counsel for the Applicant at Africa House, City Square, 3rd Floor, Kampala Road and served upon them both the letter requesting proceedings and the Notice of Appeal and they duly accepted service of both documents (which were appended together) by signing a copy of the Notice of Appeal".

There is no affidavit in reply from the respondent's side so that Kalende's claim regarding service of the letter to the Advocates for the applicant stands unchallenged, ^{it was contended.} ~~it was contended.~~ The affidavit of Anatoli Kamugisha (Managing Director of the Applicant Company) is silent on the point. Dr. Barya counsel for the Applicant has attacked the affidavit of Kalende on two accounts; first, that it does not show that Kalende is a process server and second, that the affidavit is fatally defective in that it does not state in the JURAT or attestation at what place and on what date it was sworn.

^{We} I do not see any merit in the objections. It is clearly stated in Kalende's affidavit that he is a clerk employed by counsel for the respondent. It is common knowledge that Advocates's clerks do serve court process. It is true that the affidavit of Kalende does not state, in the Jurat, that it was sworn in Kampala but the point is academic as the stamp of the Commissioner of Oaths who administered the oath has his address as P.O. Box 6952 Kampala. There can be no doubt that the affidavit was sworn in Kampala.

^{our} In ~~my~~ opinion the points complained of are minor technicalities which should not be allowed to stop this court from proceeding to hear the appeal on its merits. The affidavit of Kalende has established that counsel for the applicant were in fact served with the letter requesting for the record of proceedings. That is the real point in the case. In the result we dismiss this application with costs.

Dated at Mengo this...¹⁵... day of March, 1996.

S. T. Manyindo
S.T. MANYINDO
DEPUTY CHIEF JUSTICE.

B. G. Oduki
B. G. ODUKI
JUSTICE OF THE SUPREME COURT

J. N. N. N. N. N. N.
J. N. N. N. N. N. N.
JUSTICE OF THE SUPREME COURT

15/3/96

Mr. Kamughe for the app.

None for the resp.

Mr. Enno Manane Court Clerk

Whip delivered

Large handwritten signature and date 15/3/96

Faint, mostly illegible typed text, likely a court order or judgment.

Dated at Mombasa this ... day of March, 1996.

Handwritten signature and stamp: DEPUTY CHIEF JUSTICE, S.T. MOMBASA