Ruling to read

"D"

I CERTIFY THAT THIS IS THE EXHIBIT/ANNEXTURE MARKED .....ON THE AFFIDAVIT SWORN ON ..... A COMMISSIONER FOR OATHS

REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJSC)

CIVIL APPLICATION NO. 14 OF 2000

BETWEEN

EGYPT AIR CORPORATION
T/A EGYPT AIR UGANDA ---------- APPLICANT

AND

SUFFISH INTERNATIONAL FOOD PROCESSORS Ltd.)
PAN WORLD INSURANCE Co. Ltd.) ----------RESPONDENT

(Application to Strike out Notice of Appeal).

RULING: - Egypt Air Corporation t/a Egypt Air Uganda, the applicant, has instituted an application by motion under rule 77 of the Rules of the Court seeking for an order to strike out a notice of appeal filed on 30/6/1999 by the two respondents, Suffish International Food Processors Ltd. and Pan-World Insurance Co. Ltd. The motion is supported by grounds contained in an affidavit-sworn on16/6/2000 by Mr. Enoch Rukidi, an Advocate in the firm of Kasirye, Byaruhanga and Co., Advocates, who represent the applicant in this application. In reply to that affidavit, the respondents filed two affidavits the first of which was sworn on 17/7/2000 by Alan Shunobi, an advocate in the firm of Shunobi, Musoke & Co, Advocates, and the lawyers representing the two respondents. The second affidavit also in reply was sworn on14/7/2000 by James Otimeri, a Court Process server in the firm of the same advocates.

We now set out the background to this application. The respondents instituted a suit in the High Court (HCCS No. 270/1997) against the applicant and won the suit. The applicant successfully appealed to the Court of Appeal. As a result the respondents wanted to appeal to this court against the decision of the Court of Appeal. Therefore, on 30/6/1999, the respondent filed a notice of appeal in the Court of Appeal and at the same time lodged an application, dated 29/6/1999, asking for a copy of proceedings in the

Court of Appeal. The rest of the story is set out in Enock Rukidi's affidavit, paragraph 2,3, 4 and 5 which are relevant read as follows:-

"2 That on the 5th day of July 1999 Counsel for the respondents served our firm with a copy of a Notice of Appeal indicating that the Respondents were intending to appeal against the decision of the Court of Appeal in Civil Appeal No. 2 of 1999. (A copy is hereto attached and marked "N").

3 That the Applicant filed a Notice of Address of Service in the Supreme Court and a copy of the same was served on the Respondents.

4 That our legal clerk Emily Kirungi established from the Court of Appeal registry in March 2000 that the respondents applied for a copy of the proceedings in the Court of Appeal in a letter dated 29th June 1999. However our firm was never served with a copy of that application. (A copy of the said letter is hereto attached and marked "L").

5 That I believe that the Respondents are guilty of undue delay and cannot have been prevented by reasonable cause since July 1999 up to today."

In the two affidavits of Shunobi and Otimeri, referred to already, the respondents attempted to assert that in their bid to institute the appeal, they have take necessary steps to that end. The applicant reasserted its original position by lodging a supplementary affidavit in rejoinder sworn on 19th July, 2000 by the same advocate, Enoch Rukidi, who had earlier sworn the afidavit supporting this application. In the rejoinder affidavit Mr. Rukidi denies receipt of service of the copy of the respondent's application for the proceedings of the Court of Appeal. He further swore that if the respondents had instituted the alleged appeal the record of appeal had not been served on his firm in time or at all.

Mr. Kasirye, counsel for the applicant, in his submissions before us contended that the respondents have not taken essential steps in the proceedings within the permissible time. He conceded that the respondents filed the notice of appeal in time and also made an application for a copy of the proceedings of the Court of Appeal in time. However he contended that the respondents failed to serve his firm or his clients with a copy of the letter applying for the said proceedings as required by rule 78(2) of the Rules

of this Court. He contends that a document annexed to the affidavits of Shunobi and Otimeri purporting to be a copy of the application for proceedings, and marked as annexture "L" to the affidavit of Shunobi, is false in the first place because it does not match with its alleged copy (annex) on the Court file and secondly that because it does not bear the seal of the Commissioner for Oaths and is not serialised or marked as required respectively by section 6 of the Commissioner for Oaths (Advocates) Act and Regulation 8 of the schedule thereto, that document is unreliable. Mr. Kibuka-Musoke, for the respondent, conceded, quite properly, that the document does not bear the Commissioners' seal but he says that that is not fatal. He claimed to be aware of decided cases to show that serialising or marking and numbering of the document in this case was unnecessary since the document is on the record of the appeal. However Mr. Kibuka-Musoke never furnished us with the authorities nor did he cite their references in the first instance. Unfortunately we did not see the record of appeal at the time of hearing the application because the appeal was not before us. Mr. Kibuka-Musoke wanted us to look for the record to peruse what is there.

We would like to point out that sealing and marking of annextures to an affidavit is a legal requirement, which, inter alia, facilitates the easy identification of annextures, and in our view the procedure must be adhered to. We do not accept Mr. Kibuka Musoke's argument that when such documents are on the appeal court record, leave alone on a court record not yet placed before the court, such document need not be marked. This would amount to asking the court hearing an application, such as this one, to stop hearing the application mid-way so as to enable a court clerk, or Registrar or another official of the court to dash to wherever the record bearing the required document may be for purposes of procuring the document for mere sight by the court after which sight the document would have to be returned to where it resides. This is wholly unacceptable as it and would amount to shoddy preparation by advocates of pleadings filed in this court. We discourage this practice which must be discontinued.

Be that as it may, on the peculiar circumstances of the proceedings before us, we will reluctantly treat the omission by Mr. Kibuka Musoke to comply with the

requirements of the Commissioner for Oaths (Advocates) Act and its scheduled regulations as a technicality curable under Article 126(2)(e) of the Constitution, since we do not think that the failure occasioned any injustice. We will therefore accept the two documents and act on them.

Mr. Kasirye tenaciously argued that the purported copy of annexture "L" is fake and was never served upon nor receipted by his firm. With respect we think that Mr. Kasirye's argument's on the point are untenable. We have examined the document in question, and now under consideration, and compared it with annexture "L". We note that the hand written instructions appearing at the bottom of annexture "L" were administrative instructions written by the Registrar of the Court of Appeal and therefore they are internal to the Court of Appeal civil registry. There is no basis for saying that those instructions should have appeared on the questioned copy. Mr. Kasirye attempted to pointed out some differences. He said that whereas annexture "L" is on the letterhead paper of the advocates' firm, its purported copy is on a plain paper. We think that whilst it would be preferable that a copy of a letter to be served upon counsel for the opposite party should be on the letterhead paper of the firm authoring it, the absence of letterheads is not proof that the document is not an authentic copy of the original nor that the copy is fake. We think that the copy is authentic and therefore this argument fails.

There are three distinctive features which show that the two documents are one and the same document or have the same original copy. Firstly, the typed contents on each copy are exactly the same, word for word, including the spacing of the words and the sentences. Secondly the signatures of the author on the two documents appear to the naked eye of a lay person to be the same. Thirdly the notice of appeal which was served on Mr. Kasirye's firm, bears a stamp of Kasirye's/firm and has the signature of somebody called Mr. Herbert Kigundu who was at the material time an advocate in the firm of Kasirye, Byaruhanga & Co, Advocates. That stamp and the signature therein bear remarkable resemblance to the stamp appearing with the same signature on the document now questioned by Mr. Kasirye. Without scientific evidence to the effect that there was forgery of the stamp and that of the signature thereon, we find as a fact that in fact the

questioned document is a copy of annexture "L" and we further hold that the same document was duly served and accepted by the firm of Messrs Kasirye, Byaruhanda Co, Advocates as evidenced by their stamp. In conclusion on this point, we are satisfied that Shinobi, Musoke & Co, Advocates, applied for the proceedings in time and we find and hold that the questioned document is a copy of annexture "L" and that it was served upon Messrs Kasirye, Byaruhanga & Co, Advocate, in accordance with the requirements of Rule 78(2) of the Rules of this Court. This however does not dispose of this application.

Mr. Kasirye contended that the respondents have not disclosed the date when they obtained the proceedings so as to enable us to determine whether or not the respondents took essential steps within time in instituting any appeal. We were told from the bar by Mr. Kibuka-Musoke that he obtained proceedings on 30//5/2000 and that he instituted the appeal on 17/7/2000, which date is exactly the same date when Shunobi swore the affidavit in reply. In paragraph 6 of his affidavit in reply, Mr. Shunobi states in part that-

"As it stands the record of appeal has already been filed on the court record and it is only the date of hearing the appeal which is awaited."

What is remarkable about this statement is that Mr. Shunobi deliberately avoided to mention the day when the record was filed thereby establishing the date of instituting the appeal. He also could not allude to the registry number of the alleged appeal presumably because he had not filed it. Mr. Kibuka Musoke wanted us to call for the record and peruse it to discover the number of the appeal and the certificate of the Registrar of the Court of Appeal indicating when the record was ready. We find this submission strange. We must insist that parties that are called upon to resist applications to strike out a notice of appeal, such as this one, must file complete pleadings and must be candid with the court in the affidavits which are lodged in court to support the opposition to the application. Vague and evasive references will not do. The rules are very clear. It is the responsibility of the intending appellant when faced with an application to strike out either a notice of appeal, or the appeal itself, to ensure that:

(a) a valid copy of the application for proceedings is available before the notice of motion (application) is heard;

(b) the registrars' certificate indicating the date when the proceedings were ready and available for collection by the intending appellant;

(c) the date when the proceedings were actually collected; and

(d) the date when the appeal was filed, if at all it was filed.

Since we were informed that the record of appeal had been filed, in order to do justice we reluctantly decided on our own to peruse the record of appeal. The record shows that the appeal was actually instituted on 18th July 2000 and not 17/7/2000 as stated by Kibuka-Musoke. On this record we found that the request for the proceedings of the Court of Appeal was received in the registry on 30th June 1999, that is one day after delivery of the decision of the Court of Appeal. We have also noted that the certification of the Registrar that proceedings were ready was made on 30/5/2000 and the proceedings were "supplied" to the present respondents on that day. This certification is not terribly helpful. Rule 77(2) so far as is relevant states that-

"------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 Court of Appeal as HAVING BEEN REQUIRED FOR PREPARATION AND DELIVERY TO THE APPELLANT of that copy". (Emphasis added.)

The so-called certificate of the Registrar is thus far far short of the requirements of Subrule (2). Therefore we are unable to say that the period between 30/6/1999 and 30/5//2000 was all devoted to preparing the proceedings so as to entitle the respondent in this application to benefit from the Subrule.

Mr. Kibuka-Musoke could have taken advantage of Rule 4 of the Rules of the Court and could have made an alternative submission asking for leave to file the record out of time. He did not do this. This means that this application succeeds. It is allowed with costs to the applicants. The notice of appeal and any purported appeal are struck out.

Delivered at Mengo this day 10th *of* October *2000.*

A. H. O. Oder

Justice Supreme Court

J. W. N. Tsekooko

Justice Supreme Court

A. N. Karokora

Justice Supreme Court

G. W. Kanyeihamba

Justice Supreme Court

E. L. M. Mukasa-Kikonyogo

Justice Supreme Court