

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL MISC. APPLICATION NO.20 OF 2017
(Arising from Civil Appeal No.2 of 2017)

EB NYAKANA & SONS LTD.....APPLICANTS

VERSUS

1. MRS. BEATRICE KOBUSINGYE 2. MR. KIZZA SAMUEL 3. RODEMAY BALINDA 4. TEREZA KAAHWA 5. SAM IRUMBA 6. MARY LEEKI & OTHERS	}RESPONDENTS
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RULING OF MWONDHA JSC

This is an application by Notice of Motion brought under Section 11 of the Judicature Act, Rule 2(1) & (2) and 5 of the Judicature Supreme Court Rules (Directions) and Rule 30 of the Judicature Act (Court of Appeal) Rules seeking for orders that:-

- a) Leave be granted to the applicant to enlarge time to serve the Notice of Appeal and validate the record of Appeal
- b) Costs of the application be provided for.

The application was supported with the affidavit deposed by Kate Nyakana of C/o Mugenyi & Co. Advocates, Kampala dated 20th June 2017. The grounds were:

- 1. That the Court delivered its judgment on the 14th day of December 2016 and a Notice of Appeal was lodged in on 29th December 2016
- 2. That the said Notice of Appeal was not served on Victoria and Legal Consultants as they had not filed a notice of change of address and counsel for the appellant were not duly notified and instead served the

said notice of Appeal on Muhimbura & Co Advocate who refused to receive the notice.

3. That the appellant has already lodge in the record of appeal and has served all the counsels representing the respondents and is seeking to set a date for hearing of the main appeal.
4. That thence the respondents will not suffer any injustice if this application is allowed and the Notice of appeal/record of Appeal service of proceedings is validated

In reply to the application, Mr. Keneth Kabwisa deponed an affidavit that the application should be dismissed on the grounds as follows:-

1. That at all times from the High Court at Fort portal to the Court of Appeal, the respondent's lawyers have been M/S Victoria Advocates & Legal Consultants and that the applicant together with their lawyer of Mugenyi & Co. Advocates are aware of this position
2. That this application is an afterthought and brought in bad faith to defeat an earlier application vide No.17 of 2017 pending the hearing before this Honourable Court seeking to have the applicant's appeal struck out for non-compliance with the rules of this Honourable Court
3. That the applicant having served the documents in annexure 'A" which is the supplementary record of appeal, it still failed to serve the 13th, 12th, 14th to 17th respondents with Misc. Application No. 13 of 2017 which was heard by this Honourable court and dismissed as against the 12th to 17th respondent herein
4. That the applicant has not shown any sufficient ground to warrant enlargement of time and validation of the record of appeal but its application is intended to defeat Misc. Application

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REPRESENTATION

At the hearing of the application, Mr. Yesse Mugenyi & Mr. Bukenya of Messrs Mugenyi & Co. Advocates appeared for the applicant while Mr. Geoffrey Komakech appeared for the respondent.

APPLICANT'S SUBMISSION

At the hearing of the application, Mr. Mugenyi submitted that the application is brought under Rule 2(2) of the Judicature (Supreme Court) Rules seeking for enlargement of time as stated in the Notice of Motion. That the applicant already filed a record of appeal Civil Appeal No. 02 of 2017 and has paid all the requisite fees. That the Record of Appeal has been served on all the parties. The lawyers for the applicant never served the Notice of Appeal to Victoria & Legal Consultants. That the reason why they did not serve was that the said firm of lawyers had not served an address of service on the Court record and when the Notice of Appeal was extracted, it was served on former lawyers Muhimbra & Co. Advocates. This is an application in which they seek to be allowed to serve Notice of Appeal out of time. Counsel relied on Rule 5 of the Judicature (Supreme Court) Rules and the decision of **Crane Finance Co. Ltd Vs Makerere Properties Ltd SCCA No. 1 of 2007** in which Court quoted the obiter dictum by Odoki JSC (as he then was) in the case of **The Executrix of the estate of Christine Mary N. Tebajjukira & another Vs Noel Grace Shalita Civil Application No. 8/88** where he said:

“The legal effect (of extending time for filing) is therefore to validate or excuse the late filing of documents. The applicant need not file fresh documentsif those already filed are complete and in proper form.”

Counsel further submitted that the legal effect of extending time for filing is therefore to validate late filing of documents and reiterated his earlier prayers as contained in the Notice of Motion.

RESPONDENT'S SUBMISSIONS

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Counsel submitted that the applicant's application is brought in bad faith, misconceived and the same should be dismissed with costs for the following reasons:-

The affidavit filed by EB Nyakana & Sons Ltd in support of this application is full of falsehoods and these falsehoods are narrated in the affidavit of Kenneth Kabwisa in reply to this application

That the applicant in para.2 of the affidavit in support alleges that they never served the respondents herein because the lawyers were Muhimbra & Co. Advocates and not Victoria & Legal Consultants. Counsel then referred to Para 4 of the respondent's affidavit. That the said paragraph imports four annexure B, C, D, E and also makes reference to Annexure C of the applicant's affidavit. That Annexure B is a letter written by the applicant's lawyer then to the firm Tibajuka & Co. Advocates. That the same was copied to Victoria & Legal Consultants who are the lawyers of the 12th to 16th respondents. That Annexure "C" is an order from Court containing all the lawyers who appeared in this matter. That Victoria & Legal Consultants is on record in the High Court. That the order is referring to Mr. Geoffrey Komakech who represents the 12th to 16th respondents. That Annexure D is a hearing notice of the Court of Appeal where the current appeal is arising from. That Victoria & Legal Consultants is firm No. 2 on record and they represent the respondents herein. That Annexure E which is a judgment/ruling Notice, Victoria & Legal Consultants still appears as firm No. 2 and Mugenyi & Co. Advocates is firm No.1 appearing for the applicant.

Counsel submitted that Annexure C of the applicant's Annexure in the applicant's documents is the judgment of the Court of Appeal. The judgment brings out all the lawyers who appeared in this matter at page 9. Counsel Tibajuka appeared for the 1st to 5th respondent, Counsel Oscar Kihika appeared for the 6th to 11th respondent and Mr. Geoffrey Komakech for the 12th to 17th respondent.


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He wondered why the same advocate who is on record appearing before this Court alleges that he did not serve the 12th to 16th respondent because the firm never served its address to Court despite all the evidence on the annexure.

Counsel further submitted that even if they were to go by the argument that the applicant served Muhimbira & Co. Advocates which is not on record, considering Annexure A to the application, there is no proof that Muhimbira was served. Annexure A is the Notice of Appeal that the applicant herein are now trying to validate. That the only person that received the document is Ministry of Justice & Constitutional Affairs. That none of the respondents herein appear to have been served. That there is also Annexure B, the only party served is Byenkya Kihika & Co. Advocates. There is nowhere Muhimbira & Co. Advocates were served.

He argued that paragraph 6 of the respondent's affidavit in reply is to the effect that the applicant filed this application upon learning that there is an application No. 17 of 2017 pending in this Court to strike out the appeal for noncompliance with the rules of this Court.

He referred to Para. 7 of the affidavit in reply in which they appeared before this Court in Misc. Application No. 13 of 2017 which was heard by this Honourable Court and struck out respondents 12th to 17th respondent herein for non-compliance with the rules of this Court because they had not been served. He contended that the applicant is coming to Court in another way to pre-empt hearing of the application which intends to strike out the whole appeal.

He referred to the case of **Edward Rurangaranga & Mbarara Municipal Council Vs Horizon Coaches Limited Civil Application No. 21** of 2008 and submitted that in that case, Court was looking at Rule 42(1), 74 and 78 of the Judicature (Supreme Court) Rules and stated that failure to comply with any essential step especially like this one where Notice of Appeal was not served, the same  cannot be remedied

Counsel averred that the applicant cannot come to this Court and apply to validate what is already bad and especially like this one where there is a pending application to have the appeal struck out.

He concluded by praying that the application be dismissed with costs

APPLICANT'S REPLY TO THE RESPONDENT'S SUBMISSIONS

Counsel for the applicant submitted that they are not aware of any application pending in this Court. That all the documents emphasized by counsel for the respondent are documents in the High Court and yet they were given instructions while the case was in the Court of Appeal half way. That Annexure B was authored by M/s Kaggwa -Owoyesigire & Co. Advocates, Annexure C, D& E were authored by Court not Mugenyi & Co. Advocates who are now the current lawyers.

That under Rule 19 & 24 of the Court of Appeal Rules, when a person changes his advocate, he is required to serve his address of service. That when you look at the affidavit, there is no address of service on the Court record. That Muhimbira & Co. Advocates refused service. The judgment has the name of Geoffrey Komakech but doesn't provide which law firm he is coming from. The applicant's lawyers were left to speculate as to who to serve. That they served Muhimbira because they thought Mr. Komakech is from Muhimbira & Co. Advocates. Annexure D which is the Hearing Notice was served to the former lawyers and they are not aware of its content. That Annexure E which is the ruling Notice is extracted by this Court and served by this Court it does not actually disclose the address of service.

In the application which struck out the 13th to 17th respondent, was about service, it's not about validating appeal.

Counsel further submitted that when you look at the affidavit of the respondent, it does not show how the respondents will be prejudiced. Counsel averred that this Court is enjoined by Rule 2 to exercise its inherent powers to

ensure that the ends of justice are met. He prayed that the Notice of Appeal be validated.

COURT RESOLUTION

I have perused the pleadings of both parties and I have considered the submissions of both counsel, the applicant's case is based on the fact that the respondents and or their counsel did not file an address of service.

Rule 76 of the Judicature (Supreme Court) Rules which corresponds with Rule 80 of the Judicature (Court of Appeal) Rules stipulates as follows:

Respondent to give address for service

- (1) Every person on whom a notice of appeal is served shall-
 - (a) Within fourteen days after service on him or her of the notice of appeal, lodge in the registry, and serve on the intended appellant, notice of full and sufficient address for service; and
 - (b) Within a further fourteen days, serve a copy of the notice of address for service on every other person named in the notice of appeal as a person intended to be served.
- (2) A notice of address for service shall be substantially in Form E in the First schedule to these Rules and shall be signed by or on behalf of the person lodging it.
- (3) The lodging and service of an address shall not operate or be construed as an admission that the appeal is incompetent or a waiver of any irregularity.

Mr. Komakech argued that considering the documents on record both in the High Court and Court of Appeal, his address was well known and therefore the applicant should not hide behind the fact that he did not furnish an address of service.

The above Rules are couched in mandatory language. They should be strictly adhered to ensure easy correspondence of all documents relating to the appeal between counsels and or the parties to the appeal.

Counsel for the respondent did not furnish an address of service in the Court of Appeal. He left the applicants with the choice of conjecture as to which law firm he is coming from. This is not acceptable. Court cannot render the above Rule redundant by creating an exception to it that where counsel's name and or his firm appears on some documents on Court record, it is not necessary for him or her to furnish an address of service. Mr. Komakech therefore lost his right to complain of late service once he failed to furnish an address of service.

Counsel for the respondent's other argument was that this application was brought in bad faith to defeat an earlier application vide No.17 of 2017 pending hearing before this Honourable Court seeking to have the applicant's appeal struck out for non-compliance with the rules of this Honourable Court. I find no merit in this argument. The applicant had a right to file this application and it would be a denial of justice to draw an adverse inference against them on the ground that the application was brought after institution of an application to strike out the appeal. Needless to say, it was fair and just and in accordance with the right to a fair hearing that before the application to strike out is heard, the current application of validating the late service of the Notice of Appeal is heard and disposed of. The existence of an application to strike out the appeal cannot therefore be used against the applicants.

Counsel for the respondent also referred to the case of **Edward Rurangaranga & Mbarara Municipal Council Vs Horizon Coaches** (supra). I find it distinguishable with the instant case. In that case, Court was dealing with an application to strike out the respondent's notice of appeal. In the instant case, we are dealing with an application to validate late service of a Notice of appeal.



I also agree with counsel for the applicant that the respondent's counsel has not shown Court any prejudice that would be suffered by the respondents should this application be granted.

Under Article 126(2) (e) of the 1995 Constitution of the Republic of Uganda as amended, this Court is enjoined to administer substantive justice without undue regard to technicalities.

Under **Rule 2(2) of the Rules of this Court**, the Court has inherent power to make such orders as may be necessary for achieving the ends of justice and under **Rule 5**, Court has the discretion to extend the time prescribed by the Rules for the doing of any act.

Rule 2(2) stipulates as follows:

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and the Court of Appeal, to make such orders as may be necessary for achieving 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 proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any Court caused by the delay.”

Rule 5 provides as follows:

The Court may for sufficient reason, extend the time prescribed by these Rules or by any decision of the Court or of the Court of Appeal for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to the time as so extended.

In the case of **The Executrix of the Estate of the late Christine Mary N Tebajjukira & another Vs Noel Grace Shalita Civil Application No. 8 of 1988(SC)**, Odoki JSC (as he then was) held as follows:



It seems to be the legal position that when the time for lodging a document is extended, the document is duly lodged if lodged within the time so extended whether the actual lodging is before or after the order of extension. The legal effect is therefore to validate or excuse the late filing of documents. The applicant need not file fresh documents if those already filed are complete and in proper form.

It underscored the effect of (extending time for filing) as being to validate or excuse the late filing of those documents...if those already filed are complete and in proper form.

Exercising the inherent power of this Court under Rule 2(2) of the Rules of this Court, I am of the view that this is a fit and proper application to be granted as prayed. The same is granted. Each party to bear its own costs.

Dated at Kampala this.....^{19th}.....day of.....July.....2017

.....Mwondha.....

MWONDHA
JUSTICE OF THE SUPREME COURT