THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KISAAKYE; OPIO-AWERI; TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; JJ, SC

CIVIL APPLICATION NO. 01 OF 2019

(Arising from C.A.C.A No. 39 of 2008)

TEBAJANGA TONY & ORS :::::::::::::::::::::::::::::::: APPLICANTS

VS

GUKINA SARAH :: RESPONDENT

RULING OF THE COURT.

This is an application, brought under Rules 42 (1&2), 44, 62 (1&5), 78, 79 and 80 of the Judicature (Supreme Court Rules) Directions, seeking the following orders:

(i) An order to strike out the Notice of Appeal that was lodged in this Court on the 25th June, 2015 arising from the decision of the Court of Appeal made on the 24th day of June, 2015 in Civil Appeal No. 39 of 2008.

(ii) Costs of the application be awarded to the applicants herein.

The Notice of Motion is supported by an affidavit which was sworn on 31st October, 2018 by Ssekamanje George, the 2nd applicant. He also deponed an affidavit in rejoinder dated 22nd July, 2020.

The respondent who swore an affidavit in reply on 6th July, 2020.

The background of the matter, briefly, is as follows:

Kiwalabye Edith Grace (now deceased) and Gukina Sarah, the respondent ran a business partnership until 2003 when they developed a misunderstanding.

The respondent filed Originating Summons seeking to dissolve the partnership and share some of the partnership assets due to the misunderstanding. Through a Consent Settlement certain properties of the partnership were shared by the parties. Such property included cash. The rest of the disputed assets were subjected to a full trial before Justice James Ogoola, the Principal Judge (as he then was) and judgment was entered on 25th January, 2008.

The trial judge found that all the disputed properties were owned by the business partnership and that they should therefore, be equally distributed between the two partners.

Being dissatisfied with the decision of the High Court, the respondent (then appellant) appealed to the Court of Appeal. Before the hearing, Kiwalabye Edith Grace died. Her name was substituted with the names of the applicants, being administrators of the deceased person's estate.

After the hearing of the appeal, the Court of Appeal dismissed the appeal and confirmed the decision of the trial court on the 24th June, 2015.

The respondent being dissatisfied with the decision of the Court of Appeal lodged a Notice of Appeal in the Court of Appeal on the 25th June, 2015, a day after the delivery of the Court of Appeal judgment. The respondent also applied for a certified copy of the proceedings and judgment of the Court of appeal on 27th June, 2015.

On 27th/10/2015, His Worship Deo Nizeyimana, Acting Registrar of the Court of Appeal wrote to the respondent's counsel M/S Bwango Araali & Co. Advocates informing them that the certified copies of the proceedings and the judgment of the Court of Appeal were ready for collection upon payment of the prescribed fees. Ms Bwango Araali & Co. Advocates acknowledged receipt of the said letter on 2nd November, 2015. To date, the respondent has neither filed a memorandum of appeal nor paid security for costs of the appeal hence this application to strike out the Notice of appeal.

Representation

The applicants were represented by Arinaitwe Law Advocates whereas the respondent was represented by M/s Tuhimbise & Co Advocates. Both counsel filed written submissions.

At the hearing, Nuwamanya Justus appeared for the applicants whereas the respondent's counsel was not in court.

The 2nd applicant was in court. The respondent was also in court.

Applicants case

Mr. Nuwamanya, counsel for the applicants submitted that this is a proper a case for the invocation of rule 80(a) of the rules of this court because the respondent had failed to lodge the memorandum of appeal, record of appeal, make payment of the prescribed fees and security of costs in accordance with rule 79(1) & (2) of the rules of this Court. He contended that rule 79(1) & (2) of the Court's rules require that an appeal be instituted within sixty days after the lodgement of a notice of appeal or sixty days after receipt of certified copies of the record of proceedings. He cited the cases of **Robert Kitariko vs. David Twino Katama,** Election Petition MKA No. 2 of 1981 (1982) UGSC and **Delia Almaida vs. Carmo Rui Almaida**, Civil Application No. 6 of 1990 to support the argument that the failure to institute an appeal within the prescribed time amounts to withdrawal of the appeal.

He thus submitted that since the respondent had not only failed to file her appeal within the prescribed time but had, for approximately 4 years after her counsel had been informed that the certified proceedings were ready, failed to take any steps, such as apply for the extension of time within which to institute the appeal, this, in counsel's view, amounted to withdrawal of the Notice of Appeal.

Counsel also contended that the inordinate delay by the respondent goes against the principle of greatest importance in the administration of justice that there should be an end to litigation.

He thus prayed the court to allow the application to strike out the Notice of Appeal for failure to take an essential step within the prescribed time.

Respondents case.

The respondent opposed the application. Counsel submitted that the court ought not strike out the respondent's notice of appeal for failure to take an essential step within the prescribed time because the respondent was prevented by sufficient reason to do so. Counsel relied on rule 5 of the rules of the court which allows court to extend the time within which to do an act for sufficient reason. Counsel further argued that the respondent's failure to file a memorandum and record of appeal in time and delay was perpetuated by her former counsel M/s Bwango Araali & Co. Advocates' negligence.

He contended that the respondent has always been interested in pursuing her appeal and that her instructions to her former counsel were to pursue the appeal and that the respondent was a lay person who should not be faulted for her counsel's failure to collect the certified copies of the record of proceedings albeit being informed by the learned registrar of the Court of Appeal.

Counsel also contended that the respondent had since parted ways with her former counsel and given instructions to M/s Tuhimbise & Co. Advocates to prosecute the appeal. Counsel relied on the cases of **F.L Kaderbhai & Anor vs. Shamsherali M. Zaver Virji Et. Al** SCCA NO. 20 OF 2008 and **Engineer Ephraim Turinawe & Anor& Molly Kyalimpa Turinawe** SCCA No. 1 of 2012 and **Godfrey Magezi & Anor vs. Sudhir Rupaleria** SCCA No. 10 of 2002 to support his arguments.

Counsel for the respondent also argued that another reason for the respondent's failure to institute her appeal was the Court of Appeal's failure to endorse the decree that arose from its judgment.

Counsel thus prayed the court not to strike out the respondent's notice of appeal and allow her more time to institute the appeal.

In his submissions in rejoinder, counsel for the applicants reiterated his earlier submissions for the most part but pointed out to court that the respondent had failed to discharge the burden of proving sufficient cause but merely stated in her affidavit in reply that it was a lapse on counsel's part that led to the failure to institute the appeal. He argued that the respondent did not present any proof of instruction to counsel nor did she present any documentation seeking an update on the progress of her appeal. Counsel further argued that even the respondent's new counsel, Tuhimbise & Co. Advocates had not taken any steps towards the lodgement of the appeal such as applying for extension of time and lodgement of a memorandum of appeal, etc.

He therefore reiterated his prayer for court to strike out the notice of appeal.

Resolution.

Before dealing with the merits of this application, we are forced to point out straight away that the Notice of Motion on which this application is based is dated **31st October, 2020** albeit being lodged in this Court's registry on 09 January, 2019, and endorsed by the Registrar on 11th March, 2020. The affidavit in support of the Notice of Motion is dated 31st October, 2018. The record clearly shows that both the Notice of Motion and affidavit in support were initially dated 31st October, 2018. However, the year, 2018 on the Notice of Motion was merely crossed out in blue ink and replaced with the year 2020. This seems like an inadvertent error that should not have happened. Pleadings should be drafted more carefully taking particular interest in the dating and other details.

We will now deal with the issue of whether or not this is a proper case for striking out a Notice of Appeal.

This court is empowered under rules 78 and/or 80(a) of the Judicature (Supreme Court) Rules to strike out a Notice of Appeal for failure to take an essential step within the prescribed time.

Rule 78 provides as follows:

"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 80(a) states as follows:

"If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time— (a) he or she shall be taken to have withdrawn his or her notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs arising from the notice of any persons on whom the notice of appeal was served;"

Rule 79 (1) of the Judicature (Supreme Court Rules) Directions requires that an appeal should be instituted within 60 days of the lodgement of a notice of appeal.

Rule 79(2) of the rules provides that where an application for a copy of proceedings is made within 30 days after the decision sought to be appealed against is made, 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 the preparation and delivery to the appellant of that copy.

The evidence on record vide the affidavit in support of this application, sworn by Ssekamanje George, one of the applicants, clearly shows that the Respondent filed a Notice of Appeal together with a request for a certified copy of the record of proceedings on 25th June, 2015, a day after the Court of Appeal delivered its

judgment in Civil Appeal No. 39 of 2008. The letter from the Registrar of the Court of Appeal dated 27th October, 2015 notifying counsel for the Respondent that the record of proceedings was ready for collection was received by M/s Bwango Araali & Co Advocates, who were counsel for the respondent, on 2nd November, 2015. The record of proceedings was however, not collected by counsel for the respondent.

The 60 days started running on 3rd November, 2015, the date after which the respondent's counsel received notice that the record of proceedings was ready. The days had expired by 7th January, 2016. At that point, the provisions of rules 78 and/or 80(a) could be invoked by the Court.

Counsel for the respondent prayed this court not to invoke the provisions of Rule 80 (a) of the court's rules. They argued that the respondent was prevented by "sufficient cause" from instituting her appeal in time. They cited the failure of the Court of Appeal to endorse on the decree arising out of the judgment sought to be appealed against and mistake of her former counsel who failed to collect the copy of the proceedings from the Court of Appeal.

They argued that the appeal could not be instituted because the Court of Appeal had failed to endorse the decree arising out of the Court of Appeal judgment. The applicants' counsel does not seem to address this issue in his submissions in rejoinder.

Rule 83(2) of the rules of this Court clearly stipulates the contents of a record of appeal. The rule states as follows:

83. "Contents of record of appeal.

(2) The record of appeal from the Court of Appeal shall contain—

(a) an index of all the documents in the record, including the records of the courts below, with the number of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service, then as required by rule 76 of these Rules, his or her last known address and proof of service on him or her of the notice of appeal;

(c) the order, if any, giving leave to appeal;

(d) the memorandum of appeal;

(e) the record of proceedings;

(f) the order or judgment;

(g) the notice of appeal; and

(h) in case of a third appeal the certificate of the Court of Appeal that a point or points of law of great public or general importance arise.

The provisions of this rule were considered in the case of **Hussein Abdalla Hamdan vs. Hussein Tharel Amuhi Malkan,** SCCA No. 4 of 2001, where the court dealt with an application to strike out an

appeal for failure to include a decree among the documents filed in the Supreme Court.

In that case, it was argued for the applicant that no appeal was duly instituted since there was no decision/decree extracted and filed together with the Record of Appeal.

The respondent on the other hand argued that the decree was not extracted and filed in the record of appeal, because it was not a basic document required by Rule 82(2) of the Rules of this court, which the record of appeal must contain.

The court after reproducing the provisions of rule 82(2) now 83(2) stated as follows:

"***Clearly, a decree is not one of those documents that must form part of the record of appeal from the decision of the Court of Appeal to the Supreme Court. Therefore, since Rule 82(2) of the Rules of this Court does not require a decree to be part of the Record of Appeal, Mr. Muhwezi is right in his contention that absence of the decree does not perse affect the validity of the appeal.***"

From the foregoing, counsel for the respondent's argument that the failure to file a memorandum of appeal was partly because of the failure of the Court of Appeal to endorse the decree of the Court of Appeal is devoid of merit because the lack of a decree does not perse affect the validity of an appeal. She relied on rule 5 of the rules.

Rule 5 provides as follows:

Extension of time.

"The court may, <u>for sufficient reason</u>, 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 authorised 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." *(Emphasis mine)*

What constitutes "**sufficient reason**" under rule 5 above was discussed in the case of ***Boney M. Katatumba vs. Waheed Karim, Civil Application No. 27 of 2007,*** Justice Mulenga, JSC, said:

"Under r 5 of the Supreme Court Rules, the court may, for sufficient reason, extend the time prescribed by the Rules. *What constitutes "sufficient reason"* ***is left to the Court's unfettered discretion. In this context, the court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than one that is brought after un explained inordinate delay.***

But even where the application is unduly delayed, the court may grant the extension if shutting out the appeal may appear to cause injustice."

The aforementioned case was referred to with approval in the case of **F.L Kaderbhai & Anor vs. Shamsherali Zaver Virji et al, Supreme Court Civil Application No. 20 of 2008** that was relied on by counsel for the respondent.

Counsel for the respondent also relied on the case of **Delia Almaida vs. Or Carmo Rui Almaida, *SCCA No. 15 of 1990,*** where this court held that the delay in filing an appeal in time was due to the inadvertent failure of counsel for the applicant to copy to and serve the letter requesting for record of the proceedings on the opposite party and that that inadvertence of counsel constituted ***"sufficient reason"*** and the application for extension was granted.

The strict reading of rule 5 and the aforementioned authorities reveals that the rule presupposes an application for extension of time by the party that has failed to take an essential step within the prescribed time. The respondent did not file such application for a period of approximately 4 years after the expiration of the prescribed time.

In the case of **Delia Almaida vs. Carmo Rui Almaida**(supra), the respondent (intending appellant) did not copy his request for a

record of proceedings to the respondent within 30 days of the date of delivery of the judgment sought to be appealed against.

An application to strike out the notice of appeal was brought under rules 78 and 80 of the rules of the court on ground that an essential step had not been taken in time. Counsel for the applicant prayed to the court that the substance of the matter and not the form should be considered.

The court held that:

"Looking at both sides, it is apparent that the intending appellant ought to have applied to extend time as soon as the mistake of not copying the application or proceedings to the respondent became known..."

It further stated that:

"... This court would probably take into account the situation of a blameless applicant faced with delay by the court, according to the particular circumstances, but it cannot aid an applicant who is at fault."

It is a clear from the foregoing that a litigant who fails to take an essential step within the prescribed time should apply for extension of time within which to take the step as soon as they discover the mistake. Time is of the essence.

In the instant case, the respondent has neither moved court to allow her more time within which to institute her appeal nor has she done any act in pursuance of the institution of her appeal. She

did not heed to the threats by counsel for the applicants to have her Notice of Appeal struck off in a letter dated 27th May, 2017.

She has merely been dragged to court approximately 3 years after the said letter threatening to apply to strike out the notice of appeal, to defend this application to strike out her notice of appeal. In her response, the respondent cites mistake of counsel as the reason as to why she did not take essential steps towards the institution of her appeal. In her affidavit in reply, she states that she gave her former counsel firm instructions to pursue her appeal and that it was her lawyers that did not do enough to ensure the institution of the appeal.

Counsel for the applicants argued that the burden to prove "**sufficient cause**" lay on the party alleging that they were prevented by sufficient cause from doing an act and that the respondent had failed to discharge that burden since she merely stated that her lawyers failed to collect the copies of the proceedings even when they were informed that the same was ready by the Registrar of the Court of Appeal.

We agree with counsel for the applicants. There is no proof whatsoever on record, except her word, that the respondent gave her former counsel instructions to pursue the appeal. Vigilance would also require that the respondent requests from time to time for updates on the progress of the process of institution of the

appeal from her counsel, but still there is no evidence to that effect. It is unlikely that reasonable litigant who is desirous of pursuing her right of appeal would sit back for a period of 4 years after giving instructions to her counsel to pursue her appeal and wait for hearing dates without ever making any inquiries on the progress of her appeal.

There was absolute lack of vigilance and due diligence by the Respondent, which takes her out of the protection of rule 5 of the rules of this court that she sought to rely on. The case of **Godfrey Magezi & Anor vs. Sudhir Rupaleria** (supra) sought to be relied on by the respondent is distinguishable from the instant facts because in that case, the applicant sought leave to file an appeal against the decision of the Court of Appeal out of time and also to validate the filing of Civil Appeal No. 16 of 2001 that was filed out of time.

The applicant in that case had done all that was necessary and required of a diligent litigant such as paying the filing fees and security for costs and having the appeal instituted by his counsel. However, there was a mix up regarding the dates when particular events such as the date of filing of the memorandum of appeal, dates of the receipts for the payment of the requisite fees e.t.c, occurred.

The court found that although there was back-dating and mix up on the receipts and dates appearing in the filing of the appeal, payment of filing fees and security of costs, there was no evidence

by the respondent to prove that the mix up of those dates was done by the applicants as he was not personally handling the appeal. This was found to be inadvertence of counsel and errors of court officials which ought not to be visited on the litigant.

In the instant case, the respondent did not apply for extension of time even when she found out that the time within which to institute her appeal had expired and she lacked vigilance in her pursuit of the appeal.

Further, when the matter came up for hearing of the application on 1st July, 2020, the respondent had neither filed an affidavit in reply nor the Memorandum of Appeal, Record of Appeal or any other document to show interest in her appeal albeit the respondent's counsel having been duly served with court process.

Court issued a schedule for the respondent to file the necessary documents and set the matter for hearing on 16th July, 2020.

According to the respondent's affidavit in reply, by 2nd July, 2020, her new counsel M/s Tuhimbise & Co. Advocates were preparing the appeal and an application for extension of time within which to institute the appeal.

Again, the respondent was guilty of dilatory conduct on 16thJuly, 2020 on the day scheduled for hearing the application to strike out her notice of appeal. She had not only not taken the necessary steps to institute her appeal but had also failed to honour the dates and deadlines provided by the Court on 1st July, 2020. Instead a

belated affidavit in reply to the application and submissions in reply were filed outside the deadlines and not even served on the Applicants.

The respondent, who was present in Court, prayed to be allowed to file and serve the Applicants since she had been bedridden and did not have Counsel present.

Court allowed the respondent who was visibly unwell, to have her submissions put on record, notwithstanding that they had been filed outside the agreed timelines and had not been served on the Applicants.

All these different incidents clearly show the respondent's lack of interest in pursuing her appeal diligently. This case has been in court since 2003 making it 17 years of litigation. The past 5 years being those that could have been avoided had the respondent done enough to pursue her appeal.

Counsel for the applicants correctly argued that there should be an end to litigation.

The justice of this case demands that the notice of appeal that was lodged by the respondent on 25th June, 2015 is struck out in accordance with Rules 78 and/or 80(a) of the Judicature (Supreme Court Rules) Directions.

Accordingly, the application to strike out the Notice of Appeal lodged on 25th June, 2015 is allowed with costs to the applicant.

Dated at Kampala this.....5th.....day of .....October.....2020

Hon. Dr. Esther Kisaakye

JUSTICE OF THE SUPREME COURT.

Hon. Rubby Opio-Aweri

JUSTICE OF THE SUPREME COURT

Hon. Prof. Lillian Tibatemwa- Ekirikubinza

JUSTICE OF THE SUPREME COURT

Hon. Percy Night Tuhaise

JUSTICE OF THE SUPREME COURT

Hon. Mike J. Chibita

JUSTICE OF THE SUPREME COURT