THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJSC.)

CIVIL APPLICATION NO. 21 OF 2008

BETWEEN

1. EDWARD RURANGARANGA & :::::::::: APPELLANTS
2. MBARARA MUNICIPAL COUNCIL

AND

HORIZON COACHES LTD: :::::::::: RESPONDENT

[An application under rules 42(1), 74(1) and 78 of the Rules of the Supreme Court].

RULING OF THE COURT:

This application was brought under rules 42(1), 74(1) and 78 of the Rules of this Court for an order to strike out the respondent's notice of appeal lodged on 14-08-2008. The application is supported by the affidavits of Edward Rurangaranga, the first applicant, David Kigenyi Naluwayiro, Town Clerk of the 2nd applicant and of Stephen Aata, a Clerk in the Chambers of Mr. Paul Byaruhanga, Advocate and counsel for the applicants. All the affidavits were sworn on 13th October, 2008.

The respondent opposed the application and relied on Charles Muhangi's affidavit in reply and its annextures.

The background to this application is briefly that the applicants had successfully sued the respondent and three others who included the Attorney General, Waiswa Moses and Mukwano Enterprises Ltd in High Court Civil Suit No. 234 of 2007 over a land dispute. (For clarity, we shall hereinafter refer to the three last named persons together as co-defendants.

The respondent alone appealed against the decision of the High Court. However, later it served copies of the notice of appeal on all its co-defendants after the time for such service was extended by the Court of Appeal. The Court of Appeal subsequently heard the appeal, dismissed it, and confirmed the decree of the High Court.

Dissatisfied with the decision of the Court of Appeal, the respondent lodged a notice of appeal to this court on 14-08-2008. It is this notice of appeal that this application seeks to strike out.

The sole ground on which the application is based is that:

"The essential step of serving a notice of appeal on all the other persons directly affected by the appeal has not been taken."

Counsel for both parties filed written submissions. In his submissions, Mr. Paul Byaruhanga, learned counsel for the applicants, contended that the Court of Appeal confirmed the decree of the High Court in Civil suit No. 234 of 2007 against the respondent, Waiswa Moses and Attorney General with an order for costs in favour of Mukwano Enterprises Ltd. The decree of the Court of Appeal therefore, Mr. Byaruhanga argued, directly affected the Attorney General, Waiswa Moses and Mukwano Enterprises Ltd. He submitted that the respondent should have either made all its co-defendants parties to the intended appeal or served copies of the notice of appeal on all of them as required by rule 74(1) of the Rules of this court but it did not. Learned counsel further submitted that the failure is fatal to the notice of appeal because that was failure to take an essential step in the prosecution of an appeal.

He asserted that the requirement under rule 74(1) of the Rules of this Court is not just good administration but mandatory. In his view, failure to serve persons who are directly affected by the intended appeal with the copy of the notice of appeal when the intended appeal is against the whole judgment of the Court of Appeal, rendered the appeal bad for want of parties. He relied on ***Ahmed Bin Ahmed Kassim Kasais - vs - Syed Abdullah Fadhal (1958) EA 60*** and prayed that the notice of appeal be struck out.

Mr. John Matovu of Matovu & Matovu Advocates, counsel for the respondent, contended that the application is misconceived and barred by law. He submitted that the appeal in the Court of Appeal was between the applicants and the respondent. The co-defendants were not directly affected by the intended appeal since the respondent was neither seeking to challenge

the costs awarded to M/s. Mukwano Enterprises Ltd nor seeking costs of the appeal against any of its co-defendants but the applicants only. He conceded that all the co-defendants were served with copies of the notice of appeal to the Court of Appeal by order of that Court. He asserted that despite that service, none of these persons showed interest to be involved in the appeal proceedings. which was a clear indication that the co-defendants were not directly affected by the appeal.

Learned counsel further submitted that the point that all persons who are directly affected by the appeal ought to be served with copies of the notice of appeal had been raised by counsel for the applicants in the Court of Appeal and was argued by counsel of both parties but that the Court of Appeal did not pronounce itself on it. He argued that if the applicants were aggrieved by the failure of the Court of Appeal to pronounce itself on the point, they, the applicants, should have filed a notice of cross appeal rather than raise the same point in this court when they are time barred to do so.

On the case of ***Ahmed Bin Ahmed Kassim Kusais*** (supra), Mr. Matovu submitted that that case is distinguishable from the instant case on their facts and therefore, that the principle laid down therein was not applicable to the instant case. He prayed that the application be dismissed with costs to the respondent.

It is clearly discernible from the above arguments of counsel for both parties that Mr. Matovu, learned counsel for the respondent, does not dispute the fact that the co-defendants were not served with copies of the notice of appeal lodged by the respondent on 14-08-2008. His contention is that the co-defendants were not persons directly affected by the appeal because they took no part in the proceedings in the Court of Appeal.

The record shows that the co-defendants took no part in the proceedings in the Court of Appeal. But because all these persons were served with copies of the notice of appeal to the Court of Appeal, they were made aware of the appeal proceedings though they took no part in them.

The affidavits in support of this application, particularly that of Edward Rurangaranga sworn on 13th October 2008, shows that the decree of the High Court original suit No 234 of 2007 directly affected the respondent and all its co-defendants. The same affidavit also shows that on appeal, the Court of Appeal confirmed the decree of the High Court. The appeal to this Court from that decision of the Court of Appeal therefore, directly affect all the co-defendants notwithstanding their having not taken part in the proceedings in the Court of Appeal.

Mr. Byaruhanga submitted in reply, rightly in our view, that taking no part in the proceedings in the Court of Appeal by the co-defendants was no justification for not serving them with copies of the notice of appeal without obtaining direction from this Court to that effect. We respectfully accept that view as the correct interpretation of rule 74(1) which enjoins an intended appellant to serve copies of notice of appeal on all persons directly

affected by the appeal; but the same rule also permits the court, on application which may be exparte, to direct that service need not be effected on a person who took no part in the proceedings in the High Court or Court of Appeal.

In the instant case, there is no evidence that the respondent sought and obtained direction from this court not to effect service of copies of the notice of appeal on the co-defendants on the ground that they took no part in the proceedings in the Court of Appeal. In the absence of such a direction, failure to serve copies of the notice of appeal on these co-defendants amounted to failure to take an essential step in the appeal process and a violation of rule 74(1) of the Rules of this Court. We should add for emphasis that the provisions of this rule are couched in mandatory terms and their requirement constitutes an essential step in an appeal process. The applicants were therefore justified in seeking to have the notice of appeal struck out.

Mr. Byaruhanga also challenged the notice of appeal on the ground that failure to serve the co-defendants with copies of the notice of appeal renders the intending appeal defective and therefore no appeal lies for want of parties. He relied on ***Ahmed Bin Ahmed Kassim Kusais*** (supra).

Mr. Matovu replied that ***Ahmed Bin Ahmed Kassim Kusais*** was distinguishable from the instant case on their facts and that therefore, the principle laid down in that case was not applicable to the instant case.

We have read the case in ***Ahmed Bin Ahmed Kassim Kusais*** (supra) and noted that in that case the respondent, R had sued the appellant, A and another defendant, B in the Supreme Court of Aden to recover a sum of money against one or the other of the defendants in the alternative. R succeeded against A but his claim against B was dismissed despite R's refusal to abandon it. A appealed against that decision of the Supreme Court of Aden to the defunct Court of Appeal for Eastern Africa and served copies of the notice of appeal on R and B. He however neither included B on the title of the appeal nor served him with a copy of the record of appeal.
The Court of Appeal for Eastern Africa dismissed A's appeal to protect B's interest from the potential damage that would ensue should A succeed in getting the judgment against himself set aside.

In our opinion, the facts of the two cases are different in material particulars. In ***Ahmed Bin Ahmed Kassim Kusais,*** notice of appeal was served on the appellants' co-defendant in the Supreme Court of Aden. In the instant case however, such a service was not effected on the respondent's co-defendants. Most importantly, in ***Kusais case,*** the claim was against A and B in the alternative whereas in the instant case, the claim against the respondent and its co-defendants was joint.

In the scenario in the instant case, if the respondent should succeed in his appeal to have the judgment against itself set aside, the decree in favour of the applicants can be executed against the respondent's co-defendants. In these circumstances, we accept that the principle laid down in ***Ahmed Bin Ahmed Kassim Kusais*** (supra) is not applicable to the instant case.

Mr. Matovu further pointed out that the question that copies of notice of appeal ought to be served on all persons directly affected by the appeal had been raised by counsel for the applicants before the Court of Appeal and that counsel for both parties argued the point in their respective written submissions but that the Court of Appeal did not pronounce itself on it. Learned counsel submitted that if the applicants were aggrieved by the failure of the Court of Appeal to pronounce itself on the issue, they should have filed a notice of cross appeal rather than raise the same matter in this court because they are time barred to do so.

We think, with respect to learned counsel, that this submission is misconceived. This application raises a different point. The point is based on failure to serve copies of notice of appeal to this court on persons directly affected by the appeal as required by rule 74(1) of the Rules of his court. The point is clearly similar but not the same point that had been raised by counsel for the applicants in the Court of Appeal. The point that had been raised in the Court of Appeal was in respect of failure to serve copies of notice of appeal to that court as required by rule 78(1) of the Court of Appeal Rules.

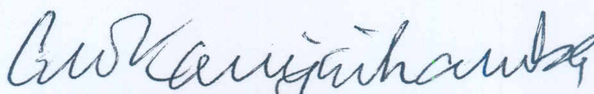
No notice of cross appeal is thus required to raise this point in this Court because the appellant is not seeking to appeal against the Court of Appeal's failure to pronounce itself on the similar point raised and argued before it.

In view of our finding on the main ground of this application, we allow the application and strike out the notice of appeal lodged by the respondent on 14-08-2008. We also order the respondent to pay the applicants' costs of this application.

Dated at Mengo this:..5th........ day of:....August.................. 2009.

B. J. ODOKI
CHIEF JUSTICE

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



G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

B. M. KATUREEBE
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