THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ
HON. MR. JUSTICE C.M. KATO, J.A.
HON. MR. JUSTICE G.M. OKELLO, J.A.

CIVIL APPLICATION 53/97

REAMATON LTD:: APPLICANT

- VERSUS -

UGANDA CORPORATION CREAMERIES LTD:::::::::::::::::::: 1ST RESPONDENT

HENRY KAWALYA:: 2ND RESPONDENT

RULING OF THE COURT:

This is an application for striking out the respondent's notice of appeal lodged in the High Court on 30/7/97. The application was filed under Rules 42(2), 43(1) and 81 of the Court of Appeal Rules, 1996. The application is supported by the affidavit of Mr. Blaze Babigumira, counsel for the applicant, dated 24/11/97. On 18/5/98 Mr. Ebert Byenkya, one of the lawyers for the respondents, also swore and filed an affidavit in reply to that sworn by Mr. Babigumira.

The brief facts leading to this application are as follows. The applicant, Reamatom Ltd. filed a suit in the High Court against the two respondents. Judgment was entered in the applicant's favor on 29/7/97. On 30/7/97 the counsel for the respondents filed a notice of appeal against the said judgment. By their letter of 29/7/97 the respondents applied for a copy of the record of the proceedings. After the expiration of the statutory period of 60 days within which the respondents should have lodged their appeal the applicant filed this application for striking out the notice of appeal on the ground that the intended appeal had not been filed.

When the application came up for hearing Mr. Babigumira the learned counsel for the applicant strongly argued that failure by the respondents to serve his client with a letter requesting for the

record of the proceedings under Rule 82(3) of Court of Appeal Rules, 1996 was fatal to the intended appeal. He contended that the respondents cannot rely on the provisions of Rule 82(2) which can only be invoked after the appellant has complied with the requirement of Rule 82(3) which requires the appellant to serve the respondent with a copy of the letter requesting for the record of the proceedings in the lower court. Mr. Babigumira relied on the case of: Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank (Supreme Court Civil Appeal No.2/97), where the Supreme Court he1d that an appellant cannot rely on the said rule unless a copy of the letter requesting for the record of the proceedings was served on the respondent.

On the other hand Mr. Kihika who appeared for the respondents opposed the application on the ground that the applicant had in fact been served with a copy of the letter. He relied on the affidavit of John Simon Obongo dated 2/3/98. He further argued that Rule 82(3) being a remedial provision should be interpreted liberally. In the alternative he requested the court to extend time in favor of his client under Rule 52(3) (d) of the Court of Appeal Rules, 1996.

Rule 81 under which the application was lodged reads 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."

In the instant case the applicant based his application on the last part of the rule, namely that the respondents did not take an essential step in the proceedings within the prescribed time. The learned counsel for the applicant argued that he was never served with any letter requesting for the record of the proceedings from the High Court to facilitate the intended appeal. He further submitted that the last date for filing the appeal was 30/9/97 but to-date no appeal had been filed.

We agree with Mr. Babigumira's contention that no appeal was filed within the prescribed time and that his client was never served with the letter requesting for the proceedings of the court below. Mr. Kihika's argument that an affidavit of service was enough cannot be sustained in view of the clear provisions of Rule 82(3) which requires the appellant to retain proof of service; in

this case there was no evidence that the respondents had retained such proof. The required proof would have been by a copy of the letter bearing an endorsement and stamp of the applicant's firm of advocates or a statement in the affidavit of service showing that the applicant's counsel had declined to accept service or to stamp the copy of the letter.

Strangely, a copy of the purported letter was not even filed in this court to support Mr. Kihika's argument that the applicant's counsel had been served with a copy of the letter. Mr. Kihika's request that the provisions of Rule 82(3) should be interpreted liberally so that an affidavit sworn by Mr. Obongo may be regarded as good evidence of service cannot be maintained in the present case because that affidavit does not explain why only notice of the appeal was stamped but not the letter. The reason as to why the letter was not stamped may be that it was never served upon the applicant's counsel at all. In these circumstances the respondents cannot rely on the provisions of Rule 82(2) of the Rules of this court.

We now turn to the alternative submission by Mr. Kihika which was that the court should extend time within which he may lodge the appeal under Rule 52(2)(d). Mr. Kihika conceded that he had no authority to support his proposition that court can extend time when dealing with an application to strike out a notice of appeal.

To appreciate the correct position of the law on this point we find it necessary to reproduce the provisions of Rule 52(2) of Court of Appeal Rules. It reads:
"52. (1) Every application, other than an application included in sub rule (2) shall be heard by a single Judge of the Court, except that any such application may be adjourned by the Judge for determination by the Court.
(2) This rule shall not apply-
(a) to an application for leave to appeal, or for a certificate that a question or questions of great public or general importance arise;
or
(b) to an application for a stay of execution, injunction or stay of proceedings; or
(c) to an application to strike out a notice of appeal or an appeal; or

(d) to an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of hearing, including an application for leave or to extend time if the proceedings are found to be deficient in the matters in the course of the hearing."

The above provision makes it crystal clear that Rule 52(2) (d) is not applicable to applications for striking out notices of appeal as indicated in Rule 52(2) (d) itself. Clearly under Rule 52(2) (c) above an application for extension of time lies before a single judge only. We find no merit in the alternative submission of Mr. Kihika.

In the result we allow the application and strike out the notice of appeal. The respondents shall pay the applicant the costs of this application.

Dated at Kampala this 1st day of July 1998

S.T.MANYINDO

DEPUTY CHIEF JUSTICE

C.M. KATO

JUSTICE OF APPEAL

G.M. OKELLO

JUSTICE OF APPEAL