THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPLICATION NO. 26 OF 2021

(Arising out of Civil Appeal No. 17 of 2021)

[*Coram: R. Buteera, DCJ; C. Bamugemereire & C. Gashirabake, JJA*]

WANYAMA BWADENE SEPERIA ..... APPLICANT

VERSUS

KAMPALA CAPITAL CITY AUTHORIY ..... RESPONDENT

RULING OF COURT

Introduction

This is an application brought under Rules 82 and 83 of the Judicature (Court of Appeal Rules) Directions S.I. 13-10. It seeks for orders that:

a) The respondent's Notice of Appeal be struck out.
b) The respondent's appeal be struck out.
c) The costs of this application be awarded to the applicants.

It is supported by the affidavit of Wanyama Kodoli, the 2nd applicant, and the supplementary affidavit of Wanyama Bwadene Seperia, the 1st applicant.

Background

The background to this application is that the applicants filed an application for Judicial Review in Miscellaneous Cause No. 363 of 2018 in which they challenged the respondent's decision to halt their deployment due to budgetary constraints. On 11th August 2020, Her Lordship Hon. Lady Justice Henrietta Wolayo entered judgment in favor of the applicants.

The respondent being dissatisfied with that decision lodged a notice of appeal in the High Court on 4th September 2020. The respondent then made an offer of settlement to the 2nd applicant which the 2nd applicant accepted.

Grounds of application

The grounds upon which the application was premised were stated briefly in the application and laid out in detail in the affidavits in support of the application. The applicant averred, *among other things*, that:

1. On 1st February 2021, the 1st applicant filed Civil Application No. 26 of 2021 to strike out the notice of appeal for failure to lodge a memorandum and record of appeal within 60 days from the date of receiving the record of proceedings.
2. A few hours after the 1st applicant had filed application to strike out the notice of appeal, the respondent served on the applicants a record and memorandum of appeal.
3. The said record and memorandum were filed and served out of the prescribed timelines of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10.
4. An essential step in the appeal process was not taken and this warrants the striking out of the appeal.
5. The respondent did not seek court's permission to file and serve the record and memorandum of appeal out of time.
6. It is in the interests of justice that this application is allowed and the orders sought are granted.

Reply

In reply to the application, an affidavit in reply sworn to by Michael Mukwana, was filed. He averred, *among other things*, as follows:

1. That I am an advocate of the High Court and all subordinate courts and presently assigned the duties of Manager Litigation Services of the respondent.
2. That the present application is incompetent for it was served upon the respondent out of time since it was filed in this court on 1st February 2021, signed and sealed by court for service on 8th November 2021 but served on the respondent on 9th November 2022 and no application was made to and granted by this court to enlarge the time to serve the same out of time.
3. That the respondent filed a record of appeal in this court on 20th January 2020 vide Civil Appeal No. 17 of 2020 out of time due to COVID-19 restrictions.
4. That the respondent has since filed an application to validate the appeal.
5. That it would not serve the interests of justice for this Court to strike out the respondents notice of appeal in the circumstances of the present case.
6. That it is just and fair that the present application is dismissed with costs.

Issues

1. Whether the respondent omitted to take an essential step in the appellate process when it failed to lodge a memorandum and record of appeal.
2. Whether the applicant is entitled to the orders sought.

Representation

At the hearing of the application, the applicant was represented by Mr. Horace Nuwasasira, while the respondent was represented by Mr. Benson Kwikiriza.

Case for the applicant

Issue 1

Counsel for the applicant submitted that the appellate process in Uganda revolves, *inter alia*, around the essential steps doctrine as provided for under Rule 82 of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10. It recognizes that there are certain steps that must be taken in order to have a seamless and uncontroversial appellate process.

He submitted further that the Court of Appeal in **Ibrahim Abiriga Y.A. vs. Musema Mudathir Bruce; Election Petition Application No. 24 of 2016**, while resolving the central issue relating to the filing of a memorandum of appeal out of the prescribed timelines, relied on the Supreme Court's wisdom in **Utex Industries vs. Attorney General; SCCA No. 52 of 1995,** to define what an essential step is. He stated that Court defined an essential step as that fundamentally necessary action which should be taken by a party as demanded by the legal process such that if that action is not performed by that party without the permission of the court it would render any other prior legal process a nullity as against the party which has the duty to perform that fundamentally necessary action.

Counsel contended that the respondent did not lodge the record and memorandum of appeal in the registry of the Court of Appeal as is required under Rule 83 of the Judicature (Court of Appeal Rules). He cited Rule 83 (2) and (3) which provide that where the intending appellant by

way of a letter requested for a record of proceedings from the trial court, and served the said letter on the intended respondent, the 60 days do not begin to run until the said proceedings are transmitted to the intending appellant.

Counsel conceded that the applicant was served with a copy of the letter requesting for proceedings and a copy of the letter to which court attached a record of proceedings. He contended that what was in issue was that the respondent did not lodge a record and memorandum of appeal as is required by the Rules. He cited **Andrew Maviri vs. Jomayi Prpoperty Consultants; Civil Application No. 274 of 2014,** where while dealing with a case in which the appellants had omitted to lodge a memorandum if appeal after receiving a copy of the record of proceedings, this court observed that the provisions of Rule 83 are mandatory and cannot be circumvented. That the court held that it was incumbent upon the appellant to take the necessary steps to file the appeal immediately.

Counsel submitted that in this case, having been served with the record of proceedings on 8th September 2020, the applicant waited for the respondent to serve him a copy of the lodged record and memorandum of appeal, but all in vain. That when the wait became intolerable, the applicant on 5th January 2021, wrote to the court to ascertain if the record and memorandum of appeal were ever lodged. To this, the court responded on 6th January 2021 that the records and archives of court bore no such documents as pertaining to the said matter. He argued that it was demonstrated in the applicant's affidavit in support of the application. He added that by the time the applicant's lawyer wrote to the court, it was 48 days beyond the time line of 60 days prescribed by Rule 83 (1) and that as at the time of filing this application, the wait as still in motion.

He contended that the respondent did not institute an appeal as required by the Rules since there was no record of a memorandum of appeal being lodged in the court registry. That in the absence of any evidence to the contrary, it would be same conclusion as was arrived at in **Maviri** (supra), to wit that no appeal was instituted. He prayed that this court finds that no appeal was instituted by the respondent.

Issue 2

Counsel argued that the net import of Rule 82 of the Court Rules and decision in **Maviri** (supra) is that once an appellant omits to take an essential step in the prosecution of their appeal, the court upon application of the respondent to that appeal can strike out the appeal. He thus prayed that court strikes out the notice of appeal under Miscellaneous Application No. 363 of 2018. He submitted that the applicant has waited too long to enjoy the fruits of the judgment in Miscellaneous Application No. 363 of 2018 and it was an abuse of court process for there to be no end to litigation.

On costs, he cited Section 27 of the Civil Procedure Act which provides that costs follow the event. He referred to **Muwanga Kivumbi vs. Attorney General; Constitutional Appeal No. 06 of 2011**; the Supreme Court was dealing with whether costs can be denied in particular cases. The court held that the general rule is that except in public interest litigation cases, costs ordinarily will always follow the event. That it follows that in this particular matter, the court has the obligation to grant costs if it finds the application in favor of the applicant.

He thus prayed that the notice of appeal under Miscellaneous Application No. 363 of 2018 be struck out and the costs of this application be paid by the respondent.

Case for the respondent

Counsel for the respondent opposed the application on a point of law. He submitted that the application was incompetent for being served upon the respondent out of time. He stated that the application was filed on 1st February 2021, signed and sealed by the court on 8th November 2021. That, however, the said application was served upon the respondent after over a period of one year on 9th November 2022. To counsel, that rendered the application incompetent for violating Order 49 rule 2 of the Civil Procedure Rules, S.I. 13-10 (CPR) which provides that all notices, orders and documents required by the Act to be given or served on any person shall be served in the manner provided for the service of summons. He argued that the late filing in this case contravened O. 49 rule 2 of the CPR which provides for service of summons and such processes include a motion on notice.

He contended that Order 5 rule 1 (2) of the CPR requires that summons must be served within 21 days of issuance. He cited the Supreme Court case of **Kanyabwera vs. Tumwebwa [2005]2 EA 86**, where it was held that all the provisions under Order 5 rule 1 of the CPR are of strict application since a penalty accrues upon default. That the penalty for default, according to O.5 r. 1 (3) (a) of the CPR is dismissal of the suit or application.

He submitted that the applicant having defaulted on service of the application upon the respondent within time, the application was out of time and should be dismissed with costs to the respondent. He also prayed that the respondent's application to validate the appeal be allowed.

Rejoinder

Counsel for the applicant conceded that the application was filed on 01st February 2021 and indeed served upon the respondent on 9th November 2022. He disputed the respondent's contention that the application was sealed by court on 08th November 2021. He stated that the application was rather sealed by court on 08th November 2022.

He submitted that the instant application was in relation to Civil Appeal No. 17 of 2021 which was fixed for conferencing on 08th November 2022 and it was during that conferencing that counsel brought this application to the attention of the Deputy Registrar. That on that same date, the Deputy Registrar signed and sealed the application and directed that it is served and service was done on 09th November 2022.

He argued that it was not factually correct for the respondent to allege that the application was signed and sealed by the court on 08th November 2021. That the respondent's averments were a falsehood and deliberately intended to mislead this honorable court and more so when both counsel were in appearance on 08th November 2022 when the application was signed.

He submitted that it was true that the application was served as indicated and that it was signed on 08th November 2021 and fixed for hearing on 22nd November 2022. That, however, as can be borne out by evidence, the application did not come up for hearing or conferencing on 08th November 2022 but was actually introduced in conferencing on 08th November 2022 and came up for hearing on 22nd November 2022. He contended that the Registrar inadvertently forgot to change the year from 2021 to 22 because she could not have fixed the application for hearing to the previous year.

Counsel further argued that if indeed the application had come up on 22nd November 2021 and no party showed up, the application would have been dismissed or the court record would have proceedings of what happened on the day it was allegedly fixed. He contended that it was no coincidence that all the impugned dates were similar but for the years and that the respondent was merely attempting to take advantage of an honest mistake by the learned Registrar to cure their dilatory conduct.

He submitted that there was no way probable that the learned Deputy Registrar, H/W Lillian Bucyana, signed and sealed the instant application on 08th November 2021 yet the same Deputy Registrar was only deployed as Deputy Registrar of this court effective December 2021. He invited court to take judicial notice of the Judiciary News Press Release dated 12th December 2021 which showed that H/W Lillian Bucyana was deployed as Deputy Registrar of Court of Appeal effective December 2021. He argued that it was not conceivable how the same Deputy Registrar signed and sealed the instant application a month before she was appointed to the Court.

He submitted that the alleged application to validate the late filing was not before court, was unknown to the applicant and would be an after- thought by the respondent. He argued that the respondent had averred that they filed an application to validate the late filing of the Memorandum and Record of Appeal. He pointed out that this was almost a year after they filed the Memorandum of Appeal out of time and after the applicant filed the instant application to strike out the Notice of Appeal. He stated that the Memorandum of Appeal was filed on 20th January 2021 and the application to strike out the Notice of Appeal was filed on 01st February

2021. To counsel, the facts showed the respondent was clearly guilty of dilatory conduct and deserved no further chance to waste court's time.

Counsel reiterated that the facts depicted the respondent's dishonesty and their deliberate intent to mislead this court with falsehoods. He thus prayed that the preliminary objection be overruled and Application No. 26 be granted with costs to the applicant.

Court's consideration

This is an application to strike out the Notice of Appeal filed by the respondent. In reply to that application, the respondent raised a preliminary objection regarding the time when the Application was served. We shall handle the objection first. Counsel for the respondent contended that the instant application was filed on 01st February 2021, signed and sealed by the court on 8th November 2021 and yet served upon the respondent on 09th November 2022, almost a year later.

To resolve this contention, we shall look at the documents pertaining this application. A look at the applicant's Amended Notice of Motion, it is dated 02nd February 2021, received by the court registry on 09th February 2021 at 11:30am. It is indeed signed by the court registrar on 08th November 2021. However, a look at the affidavit in rejoinder sworn by the applicant, under Tab A, shows conferencing proceedings before H/W Lillian Bucyana. In the course of that conferencing, it is reflected that counsel for the applicant mentioned that Application No. 26 of 2021 had been filed. This was on 22nd November 2022. A look at Tab B attached to the affidavit in reply shows that H/W Bucyana was deployed to the Court of Appeal in December 2021. Naturally, there is no way she could have endorsed Court of Appeal documents in November 2021.

Whereas counsel for the respondent sought to argue that the application was endorsed by court on 08th November 2021, we find merit in counsel for the applicant's explanation that the application was truly filed in 2021 but this court endorsed it in 2022. This is borne out by the fact that in November 2021, the registrar that endorsed the application had not been deployed to this court. It is further borne out by the conferencing proceedings conducted on 08th November 2022. It is not strange that the Notice of Application bears 2021 and yet was endorsed in 2022 because the documents leave space for filling in the actual date as the Deputy Registrar in this case did.

On that note alone, we find merit in the applicant's contention that the respondent was seeking to use the similarity in the matching dates of 08th November to mislead this court. We find no merit in the respondent's claim that the application was served a year after it had been endorsed by this court and accordingly reject the point of law on the late service of the application. This is because as soon as the Application was endorsed on 08th November 2022, the applicant served the respondent the next day on 09th November 2022.

Turning to the application to strike out the appeal, we observe that counsel for the respondent did not oppose the application or respond to the averments in the applicant's affidavit in support of the application. The affidavit in reply only raised the point of law on late service. That point has been addressed above and duly rejected.

A look at the affidavit in reply and the attendant submissions, the respondent concedes to the late filing of the record of Appeal vide paragraph 4 of the affidavit in reply. We are guided by the wisdom in the case of **H.G. Gandesha & another vs. G.J. Lutaya, SCCA N0. 14 of 1989**,

where Court observed that the facts as deponed to in the affidavit of the applicant were not intrinsically incredible and therefore since they were not answered, they stood unchallenged.

In **SEREFACO Consultants Ltd vs. EURO Consult BV; C.A. Civil Application No. 16 of 2007**, the Court of Appeal considered an application where no affidavit in reply was filed and held that:

> **"In the application before me, there is the uncontroverted affidavit evidence of Mr. Chaapa Karuhanga, the chairman of the applicant company. It is settled law that if the applicant supports his application by affidavit or other evidence and the respondent does not reply by affidavit or otherwise, and the supporting evidence is credible in itself, the facts stand as unchallenged. See H.G. Gandesha and Kampala Estates Ltd and G.J. Lutaya, SC Civil Application No. 14 of 1989."** (Emphasis added)

Court went on to observe that:

> **"I find all the averments in Mr. Karuhanga's affidavit in support of this application strong uncontroverted affidavit evidence of the applicant Company. I find that evidence and the affidavit credible and not intrinsically unreliable or contradictory. There are no discrepancies in it. I am, therefore, satisfied and find that the averments in the affidavit of Mr. Karuhanga in support of the application remain on record unchallenged. I also accept them as correct and true."**

In the persuasive decision of **Chief V. C. Obumseli & Anor vs. Chinyelugo P. Uwakwe (2019) LPELR-46937 (SC),** the Supreme Court of Nigeria held that:

> **"it is trite law that depositions in an Affidavit, which are not challenged, are deemed admitted - Magnusson V. Koiki (supra). The Appellants only have themselves to blame, faced with an Affidavit, they failed to file a Counter-Affidavit to controvert the facts therein, therefore, the Court of Appeal was right to hold as it did against them."**

In the instant application, the applicant averred in the affidavit in support of the application that the respondent failed to lodge a memorandum and record of appeal within 60 days from the date of receiving the record from court. He averred further that prior to filing the record late, the respondent had not sought and obtained leave of this court to file out of time. That as such, the respondent had not taken an essential step in the appeal process which warranted the striking out of the appeal.

Whereas the respondent in this case, filed an affidavit in reply, there was no specific response to the averments made by the applicant in regard to the late filing. In the absence of evidence by the respondent controverting the applicant's averments thus far, we presume those averments in the affidavit in support of the application to be true in as far as the contention that Appeal No. 17 of 2021 was filed out of time. We find these averments devoid of any inconsistencies and therefore find them credible and reliable. We are fortified in our finding by the respondent's own admission to the fact and averring under paragraph 4 of the affidavit in reply that the respondent filed the record of appeal in this court out of time on 20th January 2020. That averment renders credibility to the applicant's case

that the respondent filed the appeal out of time and did not even seek extension of time within which to file.

Regarding the alleged application for validating the late filing of the appeal allegedly filed by the respondent, save for it being mentioned under paragraph 5 of the affidavit in reply and in the last paragraph of the respondent's submissions, nothing as much as the Application Number was adduced in evidence to prove that indeed there was such an application. We find no merit in that claim and reject it accordingly.

We accordingly allow this application with costs to the applicant. In effect, Civil Appeal No. 17 of 2021 is accordingly struck out for being filed out of time.

Dated at Kampala this ..... 14th ..... day of ..... February 2024

Richard Buteera
Deputy Chief Justice

Catherine Bamugemereire
Justice of Appeal

Christopher Gashirabake
Justice of Appeal