

UGANDA / JUDGMENT

**Butebi Investment Enterprises Ltd v
Kibalama Mugwanya (Civil Application No.
354 of 2013) [2020] UGCA 3 (10 January 2020)**
[2020] UGCA 3

COURT

Court of Appeal of Uganda

BEFORE

Musota, JA, Muhanguzi, JA, Kasule, JA

CASE / FILE NUMBER

Civil Application No. 354 of 2013

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CIVIL APPLICATION NO. 354
OF 2013

(Arising From Civil Appeal No. 190 of 2013)

BUTEBI INVESTMENT ENTERPRISES LTD ::::::::::: APPLICANT

VERSUS

KIBALAMA MUGWANYA::::::::::::::::::::::::::

CORAM: HON. JUSTICE EZEKIEL MUHANGUZI, JA \$10\$

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\$25\\\$

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, Ag. JA

RULING OF COURT

This application was brought by way of Notice of Motion under Rules 15 4, 43, 83, 82 and 84 of the Judicature (Court of Appeal Rules) Directions SI 13-10) seeking for an Order that the Appeal filed by the Respondent be struck out on the grounds that some essential step in the proceedings has not been taken within the prescribed time and for an order that the costs of this application be provided for. \$20\$

The grounds upon which this application is premised are stated in the affidavit of Geoffrey Buwembo, the Applicant's Loans Officer, and are:

1. "That I am a male adult of Sound mind, a Loans Officer of the *Applicant herein and do depone hereto in that capacity.*

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- 2. That on the \$29\$ th day of October 2013, Counsel for the Applicant availed me a copy of the record of appeal filed by the Respondent in civil Appeal No. 190 of 2013 against the judgment of Lady Justice Elizabeth Musoke in Civil Revision No. 024 of 2013, Delivered on the 19th day of July 2013.
- 3. That the record of appeal filed by the Respondent contained a *Notice of Appeal and a Memorandum of Appeal.*
- 4. That upon perusal of the said Record of Appeal, I discovered that a Notice of Appeal had been filed in the Court of Uganda at Kampala on the \$22^{\text{nd}}\$ day of July 2013 and that the Respondent had also filed a request for proceedings in the High Court on the \$22nd day of July 2013 but the Respondent has to date never served a copy of the Notice of Appeal or the letter requesting for proceedings upon the Applicant in a manner required by law. A copy of the Notice of appeal contained in the Record of Appeal is hereto annexed as "\$A\$" while the letter requesting for proceedings also contained in a Record of Appeal is hereto annexed as "B".
- 5. That I am advised by Counsel for the Applicant, which advice I \$\frac{1}{2}\$ verily believe to be true, the memorandum of appeal and the record of appeal filed on the \$16^{\text{th}}\$ day of October 2013 was filed out of the time stipulated by law.
- 6. That I verily believe that the Respondent has failed to take an essential step in the proceedings in Civil Appeal No. 190 of 2013 and the said failure to take the essential step within the prescribed time has prejudiced the Applicant who is being unduly inconvenienced by the appeal filed contrary to law.

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- 7. That the failure by the Respondent to take the required essential step in the proceedings is an abuse of the process of Court and has prejudiced the Applicant.
- 8. That there has been inordinate delay by the Respondent in taking an essential step in the proceedings in Civil Appeal No. 190 of 2013 and this has occasioned a miscarriage of justice as the Applicant was taken by surprise when it was served with the *Record of Appeal.*
- 9. That it is fair, just, equitable and in the interest of justice that the Appeal filed by the Respondent vide Civil Appeal No. 190 of 2013 be struck out with costs.
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That what is stated herein is true and correct to the best of 10. my knowledge and belief, save for what is based on the advice, the source of which is herein disclosed, which I also verily believe to be true.

Background

The applicant sued the respondent in the Chief Magistrates Court of Mengo vide Civil Suit No. 2997 of 2010 under summary procedure to recover Ugs. \$40,000,000/\$ =. Summons to apply for leave to appear and defend the suit were issued but the respondent never applied for \$25\$ leave to appear and defend the suit and thus judgment was entered against him. The respondent being dissatisfied with the judgment and decree filed Miscellaneous Application No. 14 of 2011 seeking an order to set aside the judgment but the application was dismissed.

The respondent then filed Miscellaneous Application No. 024 of 2012 30 seeking for an order of revision of the said judgment but the application was dismissed. The respondent then filed Civil Appeal No.

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190 of 2013 in this court. The Notice of Appeal was filed on 22nd July 2013 which the applicant argues, was out of time.

Representation

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At the hearing of the application, Mr. Samuel Kariaghe appeared for the applicant while the respondent was unrepresented but filed S written submissions.

Applicant's submissions

Counsel for the applicant submitted that Civil Appeal No. 190 of 2013 is incompetent for failure by the respondent to take an essential step in the proceedings within the time prescribed by law. That the \$10 judgment being appealed from was delivered on 19th July 2013 and the respondent filed a notice of appeal on 22nd July 2013 and requested for a certified copy of the proceedings on the same date. The respondent did not serve the Notice of Appeal upon the applicant or the counsel under rule 78 of the rules of this court. \$15

The respondent went ahead to file the record of appeal and memorandum of appeal on 16th October 2013 and served upon counsel for the applicant on 29th October 2013.

Respondent's submissions

The respondent submitted that Miscellaneous Application No. 190 of \$20 2013 is incompetent for reasons that it was not served onto the respondent under rule 18 of the Rules of this court.

The respondent conceded that he filed all the necessary documents to commence an appeal in time but was short of service in time. That

- the respondent instructed his lawyers to file an appeal in time and \$25 was not aware that his lawyers did not serve the same onto the applicant within the prescribed time. He prayed that the negligence of his lawyer not be visited on the innocent litigant and relied on the Supreme Court decision in Banco Arabe Espanol Vs Bank of
- Uganda Supreme Court Civil Appeal No. 8 of 1998 for support. 30

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That despite the delay in service, all the appeal documents were later served on the applicant. The respondent prayed that this court invokes Article 126(2) (e) of the Constitution to dismiss this application.

Resolution of the application S

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The respondent raised a preliminary point of law on the competence of this application on grounds that it was not served on him. The respondent relied on rule 18(1) of the Rules of this court and argued that this application was filed in 2013 and the applicants did not effect service upon the respondent. The respondent did not file any response to the preliminary objection. The respondent however has not stated when he received service of this application or how he got to know it had been filed.

The case of Mukisa Biscuits Manufacturing Co. Ltd. versus West End Distributors Ltd (1969) EA 696 to the effect that;-

"A preliminary objection consists of an error on the face of the pleadings which rise by clear implication out of the pleadings and which, if argued as a preliminary objection may dispose of the suit".

From the foregoing, it is our considered view that the respondent's preliminary objection has not been proved to the satisfaction of court. \$20\$ The respondent has not stated the date when he was served vis a vis the date he should have been served. The preliminary objection is accordingly dismissed.

Rules 82 of the rules of this court provides:-

"Application to strike out notice of appeal or appeals." \$25\$

A person on whom a notice of appeal has been served may at any time either before or after the institution of 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"

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The above Rule allows Court to strike out an appeal or notice of appeal on grounds that there is no appeal that lies to Court or that an appellant has failed to take essential steps or has failed to take them within the time prescribed. These are the parameters that a Court has to take into account when striking out an appeal or a Notice of Appeal.

In this case, the respondent concedes to having served the Notice of Appeal out of time but argues that it was the negligence of his lawyer who filed the notice of appeal in time but failed to serve the applicant as prescribed under rule 78 of the Rules of this court. Rule 78 provides that:

"78. Service of notice of appeal on persons affected."

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly *affected by the appeal; but the court may, on application, which* may be made ex parte, direct that service need not be effected on any person who took no part in the proceedings in the High Court."

From the above rule, an intending appellant shall serve all concerned parties within 7 days after lodging the notice of appeal. The respondent failed to follow the procedure under rule 78 above but argued that it was the mistake of his counsel.

In *Banco Arabe Espanol v. Bank of Uganda* [1999] 2 EA 22, the Supreme Court held that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose

of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

In the instant application, the respondent instructed the advocates on time and indeed they filed the application expeditiously but failed to serve the applicant within the prescribed time. The principle in *National Enterprises Corporation v. Mukisa Foods, C. A. Civil Appeal No. 42 of 1997* where the Court of Appeal held that denying a subject a hearing should be the last resort of court shall be applied in this case.

It is our considered view that the error/mistake of counsel shall not be visited on the respondent and as such, this application is dismissed. We direct the registrar of this court to fix Civil Appeal No. 190 of 2013 for hearing in the next convenient session.

Dated this 10th day of 10th 2015

HON. JUSTICE EZEKIEL MUHANGUZI, JA

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HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, Ag.

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