

UGANDA / JUDGMENT

Dr. S.B. Kinyatta and Another v Subramanian Gopalan and Another (Civil Application 108 of 2003) [2004] UGCA 27 (30 April 2004)

[2004] UGCA 27

COURT

Court of Appeal of Uganda

BEFORE

Okello, JA, Twinomujuni, JA, Kitumba, JA

CASE / FILE NUMBER

Civil Application 108 of 2003

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA / 5 CORAM: io CIVIL APPLICATION NO.108/2003 APPLICANTS 15 VERSUS RESPONDENTS 1. SUBRAMANIAN GOPALAN 2. GOPALAN & ASSOCIATES 1. DR. S. B. KINYATTA 2. RUGYEYO COFFEE FACTORY LTD HON. JUSTICE G. M. OKELLO, JA HON. JUSTICE A. TWINOMUJUNI, JA HON. JUSTICE C. N. B. KITUMBA, JA

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RULING OF THE COURT:

This application is brought under Rules 42(2), 43(1) and 81 of the Court of ²⁵ Appeal Rules by Notice of Motion. It seeks the orders of this court to the effect that:-

(a) The Notice of Appeal filed by the respondent on 2.2.2000 be struck out.

(b) The cost of this application be provided for.

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The background to the application as Motion and the affidavit sworn by Dr. S. B. Kinyatta in support thereof is No.444/1998. Judgment was delivered on 19.1.2000. On 2.2.2000 the can be gathered from the Notice of that the applicants were the successful party in High Court Civil Suit respondent lodged a Notice of Appeal. The Notice of Appeal was duly served on counsel for the applicant on 3.2.2000, together with a letter to the Registrar of the High Court calling for the record of proceedings of the suit. According to Mr. Henry Rwaganika, learned counsel who represented the applicant, though the Registrar wrote to the respondents on 13.9.2001 informing

them that the record was ready for collection, they have never filed a Memorandum and a Record of Appeal. It is the applicants' case that these documents should have been filed within sixty days from the date the record of proceedings was made available and that since that was not done the appeal is incompetent and ought to be struck out.

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In reply, Mr. Nsibambi learned counsel for the respondent relied on an affidavit sworn by Mr. Mohmed Mbabazi of Nyanzi, Kiboneka and Mbabazi Advocates, the firm which represents the respondent. Part of Mr. Mbabazi's affidavit makes the following averments:-

- "3. That the respondents did comply with all the essential steps in respect of the said appeal and the delay in filing the appeal is beyond their control and/or province.
- 20 4. numerous 25 "C"). That upon the delivery of the court ruling in Civil Appeal No.100 of 2000 dated 20th April counsel for the respondents M/s Nyanzi, Kiboneka and Mbabazi advocates on numerous occasions wrote to the Registrar (Civil) High Court of Uganda requesting for a typed record of proceedings but to no avail. (Copies of the said letters are hereto annexed as "A", "B" and

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- 5. That I have read the affidavit of Dr. S. B. Kinyatta dated 1st September 2003, and I have realized that the Registrar had written a letter dated September, 13th 2001 to the effect that typed proceedings in HCCS No.444 of 1998 are available for collection.
- 6. That the above said letter by the Registrar (Civil) has never been brought to the attention of our firm either by the Registrar or Counsel for the applicant who at all material times was served with our said numerous reminders to the Registrar.
- 7. That it is fair and just that in the circumstances that the respondents be given a chance to file and argue their appeal since the necessary documents have been prepared. (Copies of drafts of the Memorandum of Appeal and Written Submissions are hereto annexed as "D" and "E" respectively."

20 25 Contrary to Mr. Mbabazi's averment in paragraph 4 of his affidavit, a scrutiny of the annextures to the affidavit reveals that since 20th April 2001, the firm wrote only one letter to the Registrar dated 6th November 2001. That letter was never copied to counsel for the applicant as alleged. The letter is annex "B". Annex "A" was written before 20th April 2001 and not after as alleged. That one was the first letter dated 27th January 2000 which was admittedly received by counsel for the applicant. Annex "C" was neither addressed to the Registrar of the High Court nor was it requesting for a typed record of any proceedings. This clearly shows that paragraph four of Mr. Mbabazi's affidavit is totally false.

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In the second part of Mr. Mbabazi's affidavit, he swears that his firm has never received the Registrar's letter dated 13th September 2001. With the above deceitful background, we can not believe him. We are satisfied that

5 the Registrar of the High Court Mr. Lawrence Gidudu wrote to M/s Nyanzi, Kiboneka & Mbabazi Advocates on 13th September 2001 informing them that the court record in HCCS No.444/98 was ready for their collection.

10 15 It is now two and half years since and it is shocking to hear that up to this day, the respondent and his counsel have never bothered to check with the High Court to ascertain whether the record is ready or not. In **Utex Industries Ltd, vs. Attorney General Civil Application No.52/95** (SO(unreported)) the Supreme Court stated, as has been stated in other courts cases before, that it is the duty of an intending appellant to actively take steps necessary to prosecute an appeal. It is not the duty of a respondent or the court at all. Since September 2001, the respondents have done absolutely nothing towards the prosecution of Civil Appeal which they initiated on 2.2.2000, now more than four years ago.

20 **No.41 of 1996 (SC) (unreported)**. It is now settled law that failure to take an essential step in the process of prosecuting an appeal renders the appeal incompetent. Even failure to do so within the prescribed time has the same effect. See **Utex Industries Ltd vs. The Attorney General (supra)** and **Pearl Flowers Ltd Civil Application**

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Rule 82 of the Rules of this court requires an intending appellant to file a Record and a Memorandum of Appeal within 60 days from the date a Notice

of Appeal is lodged. This requirement is mandatory. Failure to comply with it renders the appeal incompetent. It is now four years since a Notice of Appeal in HCCS No.444/98 was lodged. There is no reasonable excuse being advanced for such a high degree of negligence on the part of the

5 respondent and his counsel. The appeal is incompetent and it is accordingly struck out with costs to the applicant. The applicants are also awarded the costs of this application.

r Dated at Kampala this day of 2004.

Hon. Justice G. M. Okello JUSTICE OF APPEAL.

on, Justice A. Twirumfujuni

JUSTICE OF APPEAL.

25 . Hon. Justice C. N. B. Kitumba JUSTICE OF APEAL.

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