

UGANDA / JUDGMENT

Ebinu v Ejumu (Miscellaneous Application 166 of 2023) [2023] UGHCCD 235 (12 July 2023)

[2023] UGHCCD 235

COURT

HC: Civil Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

Miscellaneous Application 166 of 2023

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The Republic of Uganda In the High Court of Uganda Holden at Soroti Miscellaneous Application No. 166 of 2022 (Arising from Civil Appeal No. 38 of 2022) (Arising from Land Claim No. 8 of 2010)

Mary Ebinu Versus

Patrick Ejumu

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Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

1. Background:

This application is brought by way of a Notice in Motion under Sections 79 and 98 of the Civil Procedure Act, Cap 71 (CPA) for orders that;

- a) The Memorandum of Appeal filed by the respondent in Civil Appeal No. 38 of 2022 be struck out and/or dismissed for being filed out of time.

25 b) The respondent pays the costs of this application.

2. Grounds:

The grounds anchoring this instant application, as set out in the application and supporting affidavit, briefly are that: 30

- a) The applicant filed a Land Claim against the respondent in the Chief Magistrate's Court of Kaberamaido at Kaberamaido vide Land Claim No. 8 of 2010, and judgement was delivered in the applicant's favour on 23rd December 2021.
- b) The respondent never filed his appeal within the stipulated period of time, challenging the decision and orders of the trial court.
- c) The respondent lodged its Memorandum of Appeal in this court on 5th September 2022, which is outside the statutory time within which to lodge an appeal and without seeking leave of this court.
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- > d) The respondent has no good reasons for filing their Memorandum of Appeal out of time.
- e) The memorandum of appeal lodged by the respondent on 5th September 2022 ought to be struck out and/or dismissed with costs.

On the other hand, Emesu Morris, in the capacity of a Legal Assistant working with Emiru Advocates and Solicitors and conversant with the facts of the case but not the respondent, deposed an and filed an affidavit in reply objecting to the application. He states briefly that;

- a) The respondent, either personally or through his lawyers, has never filed a Notice of Appeal in this case but did apply for certified copies of the proceedings in order to enable him to file the appeal, which certified copies are yet to be availed. -Copies of the letters attached and marked "RD1."
- b) After waiting for a long time without getting the records, the applicant wrote to the Registrar High Court, Soroti, about the same. -Copy of the letter marked as "RD2."
- c) This application be determined on the point of law that the application is premature, misconceived, lacks legal merit and ought to be dismissed with costs on the ground that it is not legally tenable, sustainable or prosecutable.
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3. Representation:

According to the pleadings on the Court record, the applicant was represented by M/s Okwi and Company Advocates. On the other hand, the respondent was represented by M/s Emiru Advocates and Solicitors.

4. Submissions:

The applicant and the respondent filed their submissions which I am grateful for, and I have considered them in the resolution of the instant application. 35

5. Issues:

- a) Whether the memorandum of appeal filed by the respondent in Civil Appeal No. 38 of 2022 be struck out and/or dismissed for being filed out of time?
- b) What remedies are available to the applicant?

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6. Resolution:

In civil matters the duty and burden of proof lies on an applicant to prove his /her case on a balance of probabilities because he/she is the one who seeks to get a decision of the court in his/her favour. See: Sections 101 and 102 of the Evidence

Act. 10

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Before this application is resolved, I note that counsel for the applicant contends in his submissions that, according to him, the affidavit in reply to the application was improper before this court and thus should be struck out because it was not deposed by the respondent.

- As earlier noted, it is, indeed, Emesu Morris in the capacity of a Legal Assistant 15 working with Emiru Advocates and Solicitors and apparently conversant with the facts of the case but not the respondent who deposed and filed an affidavit in reply objecting to the application.
- Order 19 Rule 3 (1) of the CPR guides that affidavits shall be confined to such facts as the deponent can prove his or her own knowledge. The law scopes an affidavit 20 to matters upon which the deponent can prove his knowledge, but it does not state that the deponent ought only to be the party to the application.

By my reasoning above, I am fortified with the case of *Mbarara Municipal Council* versus Jetha Brothers Ltd Supreme Court Miscellaneous Application No. 10 of 2021, a similar case where an affidavit was sworn by a lawyer possessed with knowledge of the case; the court had this to say;

"...in my view, affidavits can be sworn by anyone to prove a set of facts, and an advocate is not an exception. An advocate is therefore not prohibited to swear an affidavit where necessary, especially on matters that are well within his/ her knowledge."

It is now my considered view that a person conversant with matters can swear affidavits and since Emesu Morris deposed that he was conversant with the facts of the instant case, even though he is not a party to the application, I find that his affidavit in reply is valid.

S *Issue 1 : Whether the instant application is a proper one for the grant of a temporary injunction?*

This application is brought under Section 79(1)(a) of the Civil Procedure Act, Cap 71 (CPA), which provides for limitation for appeals and states that "except as otherwise specifically provided in any other law, every appeal shall be entered within thirty days of the date of the decree or order of the court.

In addition, this application is also brought under **Section 98 of the Civil Procedure Act**, which enjoins this court with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the

15 court.

Counsel for the applicant, in his submissions, also cited Order 43 Rule 1 of the Civil Procedure Rules S. I No. 71-1 (CPR), which guides on the form of appeal to this court that every appeal shall be in the form of a memorandum signed by the appellant or his or her advocate and

presented to the court or to such officer as it shall appoint for that purpose. 20 Counsel of the applicant in the submissions averred that it is not in dispute that HW Pirimba Emmanuel of the Chief Magistrate's Court of Kaberamaido at Kaberamaido delivered Judgement in Land Claim No. 8 of 2010 on 23rd December 2021.

Counsel for the applicant submits that the respondent filed his memorandum of 25 appeal on the record of the court on 5th September 2022, which is nearly ten months beyond the stipulated time of thirty days within which to file an appeal. The respondent, through Emesu Morris states that the respondent, either personally or through his lawyers, has never filed Notice of Appeal in this case

but did apply for certified copies of proceeding in order to enable him file the 30 appeal, which certified copies are yet to be availed. Copies of the letters attached and marked "RD1".

To this, the applicant's lawyer contends that if the respondent insists that they have never filed an appeal from the date of the judgement/decreed which is 23rd

December 2021, then there is gross dilatory conduct of the respondent and his \$-35\$ lawyer because on the court record, the respondent lodged a "preliminary memorandum of appeal", a reason there is Civil Appeal No. 038 of 2022 before the court.

Emesu Morris states in his affidavit that the respondent applied for certified copies of the proceedings to enable him to file the appeal, which certified copies 40 are yet to be availed. Copies of the letters attached and marked "RD1", and after waiting for a long time without getting the records, the applicant wrote to the

Registrar High Court, Soroti, about the same. Copy of the letter marked as "RD2." Counsel for the respondent submits that upon the advice of the court after writing to the Assistant Registrar, a preliminary memorandum was filed pending the availability of the certified records so as to file a substantive Memorandum of Appeal.

Counsel for the respondent cited Section 79(2) of the CPA which states that: 10

In computing the period of limitation prescribed by this section, the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

Counsel for the respondent quoted the case of Kelia Obaya and Anor vs Ovuru 15 Stephano HCCA No. 2 of 2015, which according to him, Section 79(2) of the CPA was interpreted that;

> "...the computation of the thirty days prescribed within which to file an appeal should be reckoned from the date court notifies the litigant that the certified copy of the court record is ready for collection."

Counsel for the respondent went on to quote the judge in the above case as stating further that:

"... although the provision does not specify the time frame within which the record of proceedings has to be applied for, it is only logical that the application for the record of proceedings has to be made before the expiry of the thirty days from the date of the judgement."

The applicant's lawyer submits that merely requesting the certified copies of the proceeding by counsel for the respondent is not enough to commence the appeal process, and it is not provided in the law.

Furthermore, according to the applicant's lawyer, the respondent's claim that the 35 delay to file the appeal emanates from the trial court, the respondent himself or through his advocates should have sought leave of this Honourable Court to extend the time, but they chose not to.

Counsel for the applicant submits that the respondent's preliminary memorandum of appeal filed on 5th September 2022 was filed out of time within which to lodge an appeal, and the same was done with no leave of this court.

In the case of **Maria Onyango Ochola vs J. Hannington Wasswa [1996] H. C. B 43** it was held that; 10

> "A Notice of appeal does not commence an appeal in the High Court from the judgement of the Magistrate's Court. An appeal is commenced by a **memorandum of appeal* lodged in the High Court."***

According to counsel for the respondent, the judgement was delivered on 23rd December 2021, and a letter requesting for certified proceedings was filed on 7th January 2022 before the expiry of the thirty days under section 79(1) (a) of the CPA.

Counsel for the respondent contends that by the time this application was made, no certified copies of the proceeding were ever made available to the respondent.

According to counsel for the respondent, if the law provides for thirty days to file an appeal, and the thirty days' start running from the date certified copies of the record of the proceeding is availed to the intending appellant.

Upon perusal of the submissions and the pleadings in this instant application, the issue for this court to resolve is; 30

"whether the memorandum of appeal filed by the respondent in Civil Appeal No. 38" of 2022 be struck out and/or dismissed for being filed out of time?

According to **Section 79 (1) (a) of the Civil Procedure Act**, every appeal has to be 35 entered within thirty days of the date of the decree or order of the court.

The import of **Section 79 (2)**, however, is that in computing the period of limitation prescribed by this Section, the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

Furthermore, it should be noted that Order 43 Rule 1 of the CPR is to the effect that every appeal to this court shall be in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose.

In the present application, the judgement and the decree thereof vide Land Claim No. 8 of 2010 were delivered in the applicant's favour, and the decree was extracted on 23rd December 2021.

The thirty days, according to Section 79(1)(a) of the Civil Procedure Act, began to 15 run.

However, as per the record;

- a) On 7th January 2022, the Chief Magistrate's Court of Kaberamaido received 20 a letter during the pendency of the thirty days within which to file a memorandum of appeal, a letter by the defendant requesting a certified record of proceedings to inform the intended appeal was made to Magistrate Grade One of Kaberamaido Chief Magistrate's Court at 25 Kaberamaido.
- b) On 24th August 2022, the defendant-intended appellant, through his lawyers, filed a letter to the High Court Soroti asking the Assistant Registrar to intervene and call the file in respect of Land Claim No. 8 of 2010 to Soroti High Court.
- c) The preliminary memorandum of appeal was filed on 5th September 2022.

- d) On 4th October 2022, a letter from the Ag. Senior Magistrate Grade One of the Chief Magistrate's Court of Kaberamaido at Kaberamaido was received wherein he forwarded the original file vide Land Claim No. 8 of 2010 to the Assistant Registrar of Soroti High Court but noted that the record of proceeding was not yet typed as the court had no typist at that moment.

In all this, the record of proceedings had not yet been availed to the intending appellant despite the efforts in following up for reasons that he had no control over as the Magistrate Grade One at in a letter received on 4th October 2022, admitted that there was no record of proceedings as they had not been typed because the court lacked a typist. Therefore, the provisions of Section 79(2) of the Civil Procedure Act were applicable as that time within which the record had

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not been availed to the intending appellant is excluded by the application of that $\$$ provision.

According to the record, the intending appellant/respondent received the record of proceedings on 3rd March 2023 after service of the same to his lawyers, as evidenced by the affidavit of service deposed by Kamba Ayub and filed in court 10 on 20th March 2023, which indicated that on 2nd March 2023, the record of proceedings in Land Claim No. 8 of 2010 of the Chief Magistrate's Court of Kaberamaido at Kaberamaido was received and served upon the intended appellant's lawyers who acknowledged receipt by their stamp dated 3rd March 15 2023.

However, earlier to the receipt of the proceedings by the respondent's lawyers, on 2nd March 2023, a letter was filed by the intending appellant's counsel following up on the record of proceedings.

It is my considered view that the period between 23rd December 2021, when the judgement/orders were made, till 3rd March 2023, when the intending appellant acknowledged receipt of the record of proceedings as evidenced by the affidavit of service filed in court on 20th March 2023, that time has to be excluded from the 30 days under the meaning of Section 79 (1) (a) the Civil Procedure Act.

The intending appellant/respondent cannot be prejudiced by a delay in the court system of generating the record of proceedings within thirty days.

- Consequently, I am persuaded by the respondent's submission that section 79(2) 30 of the Civil Procedure Act excludes the time spent waiting for the record of the proceedings as in this instant application, as that is what the law is anyway.
- Moreover, in law it is the memorandum of appeal that commences an appeal in this court and not a notice of appeal as alleged by the applicant, so the 35 expectation for an appeal to commence is a memorandum of appeal and not any other document.

Therefore, the respondent's appeal vide Civil Appeal No. 38 of 2022, filed in court on 21st March 2023, was not filed out of time. 40

The period between 07th January 2022, when the letter requesting the record of \$ \mathsf{S} the proceedings, till 3rd March 2023, when the respondent/intending appellant acknowledged receipt of the record of proceedings, those days are excluded by the provisions of Section 79 (2) of the Civil Procedure Act from the thirty days required under Section 79 (1) (a) of the Civil Procedure Act.

In effect, therefore, this application is disallowed.

b. Issue No. 2: What remedies are available to the parties in the circumstances?

Since the application has been disallowed, the applicant is not entitled to any 15 remedy.

Costs shall be in the cause.

I so order 20

Adonyo, J

Judge 12th July 2023

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