

UGANDA / JUDGMENT

# Muyimbwa v Fr. Ssemujju (Civil Appeal 9 of 2023) [2024] UGHC 698 (20 June 2024)

[2024] UGHC 698

## COURT

High Court of Uganda

## BEFORE

Oyuko Anthony Ojok, J

## CASE / FILE NUMBER

Civil Appeal 9 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIO

CIVIL APPEAL NO. 009 OF 2023

MUYIMBWA FRANK.....

(Suing as an aggrieved party) \$5\$

VERSUS

FR. SSEMUIU DENIS.....

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK

Ruling on preliminary objections:

Brief background:

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The appellant instituted Miscellaneous Cause No. 022 of 2022 in the Chief Magistrate's Court of Mpigi at Mpigi, whereof, preliminary objections were raised in regard to the competence of the application by counsel for the respondent and service out of time. Counsel for the respondent contended that the law under which the application was instituted was criminal in nature while the application was a civil matter. And that since the provisions of the law are criminal, the matter ought to have been instigated by criminal prosecution rather than through criminal litigation. The preliminary objections were determined and the trial Magistrate in her decision

dismissed the application with costs to the respondent. The respondent being dissatisfied with the said decision lodged an appeal in this court.

**Representation:**

Ms. Angella Nankya appeared for the respondent, while the appellant was selfrepresented. Both parties made oral submissions in open court.

**Preliminary objection:**

At the hearing of the appeal, counsel for the respondent raised two preliminary objections to the effect that; the appeal is incompetent since it was filed out of time without seeking leave of court. That the appellant did not file a memorandum of appeal in time but instead only filed a notice of appeal on the 2<sup>nd</sup> February, 2023 and the Memorandum of appeal on the 28<sup>th</sup> July, 2023 which was five months after the ruling was delivered.

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Counsel submitted that the ruling was delivered on the 27<sup>th</sup> January, 2023. The Memorandum of appeal should therefore have been filed within 30 days according the **Section 79** of the Civil Procedure Act and not the Notice of Appeal. Counsel relied on the case of Geoffrey Nangumya t/a Namgumya & Co. Advocates v. Security Plus (U) Limited, Miscellaneous Application No. 0858 of 2021 to support her submission.

Secondly, that the appellant does not have an automatic right of appeal under **Order 44 Rules 1** and 2 of the Civil Procedure Rules. Thus, the appellant should have sought leave before the Magistrate and if denied then he would have appealed before this court which he did not do. As such the appeal is incompetent.

In reply, the appellant submitted that the Notice of appeal was filed on the 2<sup>nd</sup> February, 2023 to the High Court and the lower court which was within 30 days. That the ruling was delivered on the 27<sup>th</sup> January, 2023 and the certified typed record of proceedings was received by the appellant on the 18<sup>th</sup> of July and served on the respondent's counsel on the 28<sup>th</sup> July, 2023. That in the circumstances the appeal was filed within time as such the preliminary objection should be overruled and the appeal heard on its merits.

Counsel for the respondent in rejoinder submitted that the appellant ought to have sought leave to file out of time which was not done.

**Consideration of court: 20**

I have carefully considered the submissions of both parties in regard to the preliminary objections raised by the respondent.

Counsel for the respondent contended that the appeal was incompetent for being filed out of time and without seeking leave to appeal since it was not as of right as provided under **Order 44 Rules 1 and 2** of the Civil Procedure Rules.

**a. filing appeal out of time:**

I have carefully looked at the record of appeal; the appellant filed the Notice of appeal on the 2<sup>nd</sup> February, 2023. Requested for the certified copy of the typed proceedings on the 1<sup>st</sup> February, 2023. He followed up on the certified copy of the typed proceedings with two letters dated 13/6/2023 and 08/07/2023. The court record, shows that the ruling was delivered on the 27/1/2023 and the record of proceedings was certified on the 15/3/2023 and was received by the appellant on 18/7/2023 from court. Then the Memorandum of appeal was filed on 20/7/2023 and served on the respondent on 28/7/2023.

**Section 79** of the Civil Procedure Act provides that; 35

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"(1) Except as otherwise specifically provided in any other law, every appeal shall be entered—

- (a) Within thirty days of the date of the decree or order of the court; or
  - (b) within seven days of the date of the order of a registrar, as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.
- (2) 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<sup>2</sup>

In the case of Geoffrey Nangumya t/a Namgumya & Co. Advocates v. Security Plus (U) Limited, (Supra) as cited by counsel for the respondent it was stated that;

"Section 79 of The Civil Procedure Act provides that an appeal to the High Court shall lie within 30 days of the date of the decree or order of the court. A notice of appeal does not commence an appeal in the High Court from the judgment of the Magistrate's Court. An appeal is commenced by a memorandum of appeal lodged in the High Court. An appeal filed out of time without the leave of court is incompetent and will be struck out as incompetent (see: Maria Onyango Ochola and others v. J. Hannington Wasswa [1996] HCB 43; Loi Kageni Kiryapawo v. Gole Nicholas Davis, S. C. Miscellaneous Civil Application No.15 of 2007 and Hajj Mohammed Nyanzi v. Ali Ssegane [1992 – 1993] HCB 218).

However, in computing the period of limitation prescribed by the 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 is excluded (see section 79 (2) of The Civil Procedure Act).

Where an appellant is unable to frame his or her grounds of appeal for want of a certified copy of the Decree, Order or record of proceedings and has been prompt in making application thereof, and through delay on the part of Court from which appeal is sought to be made has not been able to obtain such certified copy, the applicant thereby furnishes sufficient cause for not filing the appeal in time, in which case an application for extension of time to appeal will be allowed. Furthermore, section 79 (1) of The Civil Procedure Act provides that an appellate court may for good cause admit an appeal though the period of limitation prescribed has elapsed. Good cause must relate and include the factors which caused inability to file the

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appeal within the prescribed period of 30 days (see: *Tight Security Ltd v. Chartis Uganda Insurance Co. Ltd* H. C. Misc. Application No. 8 of 2014)."

In the instant case the appellant filed the Memorandum of appeal on 20/7/2023\$ having received the certified record of proceedings on 18<sup>th</sup> July, 2023. In line with the provisions of **Section 79** of the Civil Procedure Act and the authority cited above, it is my considered view that the appellant filed his appeal within the prescribed time under the law. The appeal was therefore filed within the 30 days as provided for under **Section 79 (1) (a)** of the Civil Procedure Act.

This preliminary objection is hereby overruled.

### **b. seeking leave to appeal: 10**

Counsel for the respondent contended that the appellant ought to have first sought leave of court before lodging his appeal because he has no automatic right to appeal under **Order 44 Rules 1** and 2 of the Civil Procedure Rules.

The right to appeal is a creature of Statute as enunciated in the case of **Shah v. Attorney General** (1971) E. A 50. Where there is no right of appeal, a party must seek leave of court to do so. Order 44 rule 1 of the Civil Procedure Rules set out which Orders are appealable as of right to this Court.

In the instant case the appellant ought to have sought for leave of court before lodging his appeal as provided for under Orders 44 Rule 2, 3 and 4 since the orders sought to be appealed against do not fall within those listed under Order 44 Rule 1 of the Civil Procedure Rules. In the case of *Joseph Bamwebehire and Another v. Nareeba Dan and 7 Others*, Miscellaneous Application No. 107 of 2020, it was held that:

> "This rationale for the requirement to seek leave before a party can appeal" in certain cases is premised on the need to check unnecessary and/or frivolous appeals. See: *Lane v. Esdaile* (1891) A. C. 210 at 212 and *Ex parte Stevenson* (1892) 1 Q. B. 609. It is also based on the general rule that, in as much as possible, appeals should arise from final decrees and orders of courts and not interlocutory orders. See: *Incafex (U) Ltd Vs Kabatereine*. (1999) KALR 645."

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In the circumstances, I find that the appeal is in completely before this court for failure to seek leave of court before it could be filed.

This preliminary objection is hereby upheld.

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In a nutshell the appeal is dismissed for failure to seek leave of court as provided<br>for under **Order 44 Rules 1, 2, 3 and 4** of the civil Procedure Rules. I make no<br>order as to costs.

I so order.

Right of appeal is not automatic.  $S$

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OYUKO ANTHONY OJOK

JUDGE

20/6/2024 \$10\$

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