

Nabunya v Wasswa and 2 Others
(Miscellaneous Application 2885 of 2023)
[2023] UGHCLD 401 (10 November 2023)
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Background;

2. The applicant who is the respondent in civil appeal No.23 of 2020 arising from Magistrare court at Luzira civil suit No.59 of 2017. The respondents/appellants in civil appeal No.23 of 2020 lodged a memorandum of appeal in this court on the 3rd of march 2020 and this honorable court fixed the appeal for hearing and a copy of the hearing notice was duly served onto the applicant and an affidavit of service is on record. As per the record the appellant has so far appeared in court twice regarding the proceedings in civil appeal No.23 of 2020 where the parties proposed to court to have the appeal settled outside court. The applicant avers that he was not served with the memorandum of appeal hence this application.

Applicant's evidence;

- 3. The application is supported by an affidavit deponed by *Mr. Wamimbi S. Wakwomu* the representative of the applicant which sets out the grounds of the application including the following;
- i) That he is the representative of the applicant and he is very well conversant with the facts of the case.
- ii) That the appellants have never been served with the memorandum of appeal by the applicant.
- iii) That the memorandum of appeal expired and the appellants never sought any extension of time to serve the appeal before the memorandum of appeal expired.
- iv) That it is in the interests of justice and all fairness that this application be allowed with orders sought.

Respondent's evidence;

- 4. The application is responded to by an affidavit in reply sworn by *Mr. Stephen Wasswa* on behalf of all the other respondents in which he states the following among others;
- i) That on the 3rd of march 2020, the respondents herein filed a memorandum of appeal vide civil appeal No.23 of 2020 in this honorable court.
- ii) That this honorable court fixed civil appeal No.23 of 2020 for hearing and the hearing notice was duly served upon the applicant/respondent.
- iii) That the applicant/appellant has so far appeared twice in court regarding the proceeding of civil appeal No.23 of 2020.
- iv) That the respondents also filed applications for stay and interim stay of execution pending civil appeal No.23 of 2020 which were served onto the applicant as well.

- v) That the applicant waived her rights to raise this preliminary objection of non-service when she appeared in court and she is only bringing the aspect of non-service after a failed out of court settlement.
- vi) That the respondents were not under any legal duty to serve the memorandum of appeal as the law does not provide for service of memorandum of appeals in appeals arising from magistrate court to the high courts.
- vii) That once an appeal has been filed in court for an appeal emanating from the magistrate's court to the high court, it becomes the duty of court to serve a notice upon the opposite party.

***Representation*;**

5. The applicant was represented by **Mr. Steven Serwadda** of M/s Kajeke, Maguru & Co. Advocates whereas the respondent was represented by **Mr. Katumba Chrisestom** of M/s Lukwago & Co. Advocates. Both parties filed their affidavits and the applicant filed her submissions which I have considered in the determination of this application.

***Issues for determination*;**

6. The main issue for determination is whether the civil appeal No.23 of 2020 should be struck out or dismissed for non-service.

***Resolution and determination of the issue*;**

- 7. The law on appeals to the high court and the form which the said appeals take is Order 43 Rule 1 of the Civil Procedure rules which states that every appeal to the high court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to court.
- 8. The civil procedure rules under Order 43 Rule 10 state that when a memorandum of appeal is lodged, the high court shall send a notice of the appeal to the court from which the decree the appeal is preferred and the court receiving the decree shall send all the material papers in the suit as may be specifically called for by the high court.
- 9. Further the civil procedure rules under Order 43 Rule 11 provide for the service of the notice of the day for hearing the appeal which is to be served on the respondent or his advocate in the manner provided for by the service of summons which notice shall contain the date when the appeal is to be heard.
- 10. All the above provisions speak to the fact that an appeal to the high court is valid upon the lodging of the memorandum appeal that is signed by the appellant or his advocate and presented to court where the same is received by court after which the appeal is fixed for hearing by court, where the appellant is required by law to serve the notice of hearing of the appeal to the respondent to have the appeal heard interparty.

- 11. In the instant application, the applicant avers under paragraph 2 of his affidavit in support of the application, that the respondents/appellants under civil appeal No.23 of 2020 never served him with the memorandum of appeal and that the respondents have never sought for an extension of time to serve the appeal upon the applicant.
- 12. The respondents in the affidavit in reply under paragraph 4(e) state that the memorandum of appeal was filed and court fixed the appeal for hearing where the hearing notices of the appeal were served onto the applicant/respondent vide civil appeal No.23 of 2020 and an affidavit of service is adduced in court to prove the same.
- 13. Further the respondents in their affidavit in reply under paragraph 4(f) state that the applicant has so far appeared in court twice regarding the proceedings of civil appeal No.23 of 2020 where by the last time the applicant appeared in court parties requested court for some time to have the matter settled outside court which time court granted.
- 14. I concur with the respondent averments under paragraph 4(f) of the affidavit in reply, that yes, it is true the applicant has so far appeared before this honorable court twice regarding the proceeding of civil appeal no.23 of 2020, where the first time he appeared was the 6th of July 2023 and the second time was the 13th of September 2023.
- 15. I am of the view that this honorable court proceeding to dismiss civil appeal no.23 on grounds on non-service of the memorandum of appeal yet the said appeal is already proceeding interparty would be shutting the doors of justice to the parties.
- *16.* It is a settled principle of law that this honorable court is vested with inherent powers to ensure that the ends of justice are met, I will invoke the said inherent powers due to the prevailing circumstances of this application. (**See; Section 98 of the Civil Procedure Act Cap.71** and ***Namiro Vs Uganda Marines Products Limited & Another. Misc. Cause No.78 of 2015 before Justice Bashaija Andrew.**)*
- *17.* Further in the administration of justice, the 1995 Constitution of Uganda enjoins judicial officers with judicial powers to ensure that justice is administered without undue regard to technicalities and courts should always be ready to invoke the same provision to ensure that substantive justice is administered. (*See; Article 126(2) e of the 1995 Constitution of Uganda as amended and **Mulindwa Vs Kisubika, Civil Appeal No.12 of 2014 by the Supreme Court of Uganda.**)*
- *18.* Be that as it may, for purposes of proceeding with the appeal and the fact that the appeal is still at the preliminary stages. The respondents should have the memorandum of appeal vide civil appeal No.23 of 2020 served onto the applicant within 21 days from the date of issuing this ruling.

- *19.* In the final result, I decline to grant the orders sought in this application because granting the said orders would not serve the ends of justice. The appeal, Civil Appeal No.23 of 2020 seems to raise important issues that require resolution by this court, the interests of justice would be better served if all the parties are heard on appeal.
- *20.* It is to the finding of this honorable court, that the application lacks merit and it is hereby dismissed with the following orders;
- i) That the respondents serve the applicant with the Memorandum of Appeal vide civil appeal No.23 of 2020 within 21 days from the date of issuing this ruling.
- ii) The costs of this application shall abide the results of the appeal.

I SO ORDER

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NALUZZE AISHA BATALA

JUDGE

10th /11/2023

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