

UGANDA / JUDGMENT

Rwabuhoro v zubairi Mukasa and 2 Others (Civil Application No. 165 of 2018) [2022] UGCA 72 (10 March 2022)

[2022] UGCA 72

COURT

Court of Appeal of Uganda

BEFORE

Musota, JA, Bamugemereire, JA, Musoke, JA

CASE / FILE NUMBER

Civil Application No. 165 of 2018

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CIVIL APPLICATION NO165 OF 2018

Hon. Lady Justice Elizabeth Musoke JA, Hon. Lady Justice Catherine Bamugemereire JA, Hon. Mr. Justice Stephen Musota JA

FRED. K. RWABUHORU ::::::::::::::: APPLICANT VERSUS

1. ZUBAIRU MUKASA

2. MARIAM NAMUBIRU ::::::::::::::: RESPONDENTS 12 3. AMINA MUKASA

(Arising out of the ruling of Anthony Oyuko J, in High Court Civil Appeal No.65 Of 2016 delivered at the High Court Circuit Fort Portal on the 10th day of April 2017)

RULING OF CATHERINE BAMUGEMEREIRE JA **Background**

The brief facts to this instant application are that the 20 respondent being dissatisfied with the Judgment on Appeal filed a notice of appeal in this Court and subsequently wrote a letter requesting for the record of proceedings and accordingly served onto the then Counsel for the applicants 24 as required by the law. The respondents having duly instructed their then lawyers and paid the requisite instruction fees were sadly informed by their counsel that

28 there was a missing record which caused an inordinate delay in filing the Memorandum of Appeal. Despite the missing record, the respondents were served with a hearing notice and an application to strike out their notice of appeal.

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Representation

The applicant was represented by Enock Wahinga of Ahabwe and Co Advocates while the Respondent was represented by Kaweesi Kakooza holding brief for Anthony Tebyasa and Co Advocates.

Applicant's Submissions

- a The applicant seeks that the notice of appeal be struck out, an order that the order for stay of execution be set aside and costs of the application. The applicant relied on Rule 82 of the rules of this court that permits a party to whom a notice
- 12 of appeal has been served to apply to court to strike it out on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time. Counsel prayed that the notice of appeal and order of
- 16 stay of execution filed by the respondent be struck out with costs to the applicant.

Respondents' Submissions

The respondent opposed the application to strike out the 20 notice of appeal and order of stay of execution. Counsel submitted that respondent filed an appeal to High Court that was dismissed and therefore instructed their lawyer Mssr Mukiibi- Kyeyune & Co Advocates to file an appeal to

24 this court. The respondents facilitated their lawyers who at a later stage informed them that a missing court record prevented them from being able to draft a Memorandum of Appeal containing grounds of the appeal. Counsel

contended that it was a negligent mistake or error on part of counsel and that it should not be visited onto the client. He relied on *Sepiria Kyamulesire v Justine Bikanchurika Bagambe SCCA No. 20 1995* which cited *Captain Phillip Ongom v Catherine Nyero Owota CACA No. 2001* with approval and in which Karokora JSC opined as follows:

> 'In my considered opinion considering the decided cases of this court and other courts at this point, it is now settled that errors of omission by counsel are no longer considered to be fatal to an application under Rule 4 of the rules of this court unless there is evidence that the applicant was guilty of dilatory conduct in the instructions of his lawyer...'

The respondent submitted that they used their very best endeavours to fully instruct Counsel but to their disappointment counsel was not able to deliver the resulting appeal. He prayed that the application to strike out the respondents notice of appeal be rejected and further prayed to

that this court extends time and allows the respondent to access the record of proceedings in order to file their Memorandum of Appeal on timelines set by court. 20

Considerations of the Appeal

The applicant relied on Rule 82 of the rules of this court that provides that: 24

> "A person on whom a notice of appeal has been served may at any time either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal as the case maybe, 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."

- 4 The Rule allows this court to strike out an appeal or notice of appeal and specifies the circumstances under which this court may consider when striking out an Appeal or a Notice of Appeal. Where no ^a lies or some essential step in
- the proceedings has not been taken or has not been taken within the prescribed time, this court may strike out such appeal. I
- In the instant application, Counsel for the applicant submitted that the respondent had never filed an appeal and even when the Deputy Registrar of the High Court of Uganda at Fort Portal communicated to the respondents by a letter dated 10/01/2018 notifying them that the matter from 12
- which the respondent intended to appeal had been prepared but the respondent choose to ignore the communication. The respondent however submitted that they did whatever they could within their limits, as far as the law requires, to 16
- instruct counsel, and that the respondent had duly paid a handsome fee to counsel for representation. He argued that Counsel for the respondent was negligent and made the applicant fail to get proper representation in the matter. 20

The respondent submitted that it was justifiable to argue that only one with the actual intention to appeal would go to such length to incur colossal sums of money as costs for

legal fees paid to counsel. Once fees are paid an advocate-28

client relationship is created and counsel owes his client a duty of competent representation. Regulation 12 of the Advocates (professional conduct) regulations requires advocates to advise clients in the client's best interests. It was submitted that in this case the lawyer for the respondent wilfully neglected the client's case, which amounts to exploitation of the client, by the advocate under

Regulation 11. 8

FRED K. RWABUHORO: ::APPELLANT

VERSUS**1. ZUBAIRU MUKASA****2. MARIAM NAMUBIRU****3. AMINA MUKASA****4. MRS. MUKASA RESPONDENTS**

(Appeal from the decision of the High Court of Uganda at Fort Portal before Oyuko, J dated 1st April, 2017 in Civil Appeal No. 65 of 2016)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA HON. MR. JUSTICE STEPHEN MUSOTA, JA

RULING OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the ruling of my learned sister Bamugemereire, JA. I agree with it and, for the reasons she has given, I too would dismiss the application with orders as she has proposed.

As Musota JA also agrees, the Court unanimously dismisses the application with costs to the respondents.

It is so ordered.

| Dated at Kampala this ,1.dt | day of | Ywd"d^ | 2022. |

|-----|-----|-----|-----| | Elizabeth Musoke | | | | |

Justice of Appeal

THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA****CIVIL APPLICATION NO. 165 OF 2018**

(Aising from High Court Ciuil Appeal No. 65 of 2016)

FRED. K. RWABUHORO APPELLANTS

VERSUS

1. ZUBAIRU MUIASA 2. MARIAM NAMUBIRU 3. AMINA MUKASA RESPONDENTS CORAIVI:
HON. JUSTICE ELIZABETH MUSOKE, JA HON. JUSTICE CATHERINE BAIVIUGEMEREIRE,
JA HON.. IUSTICE STEPHEN MUSOTA, JA

RULING OF HON. WSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Catherine Bamugemereire, JA.

I agree with her decision that this court will not be dispensing justice if a part5r's right of appeal were blocked on grounds of the lawyers' negligence. This application therefore lacks merit and ought to be dismissed.

Dated this)ok day of VLa*e)^ ²⁹²²

Hon. Stephen Musota JUSTICE OF APPEAL

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