

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

Coram: Hon. Justice C.B. Kitumba, Ja
 Hon. Justice C.K Byamugisha, JA
 Hon. Justice A.S. Nshimye, JA

CIVIL APPLICATION NO 06/2009
(ARISING FROM CIVIL APPEAL NO. 92/2004)

SAYENI BROTHERS & CO. LTD :::::::::::::::::::::::::::APPLICANT
VERSUS
SIMBA MANYO ESTATES LTD :::::::::::::::::::::::::::RESPONDENT

RULING OF THE COURT

This is an application by the applicant seeking to strike out Civil Appeal No 92/2004. It was brought under Rules 1)3), 43, 45 and 82 of the Judicature (Court of Appeal) Rules.

The background of the application is that, on 12th August 2002 an arbitration award was made against the respondent's company. Being dissatisfied, it applied to the High Court under section 28, 34(1),2(a) (iv), (vi) and (vii), 3 of the Arbitration and Conciliation Act to have the award set aside. The application was heard and dismissed by Hon. Justice Stella Amoko Arach. The respondent appealed to this court against the said order to dismissal. It is the said appeal, that the applicant is now seeking to strike out.

Through its learned counsel, Mr. Herbert Kigundu Mugerwa, the applicant contends that the appeal is incompetent.

According to him, the respondent has no right to appeal because an appeal is a creation of statute. He referred us to section 76 of the Civil Procedure Act which set out categories of orders from which an appeal can lie. He contended that some of the orders mentioned in the above section emanate from arbitration proceedings. But he argued that, to set aside an order of award is not one of them.

Counsel submitted that it was clear that no appeal is available from any order, other than those enumerated in section 76(supra). He submitted that the essence of section 76 was to restrict orders that can be appealed against. Counsel sealed his argument by referring us to the case of **Attorney General V Shah (No. 4) [1971] EA 60** which is to the effect that even court has no inherent appellate jurisdiction. It cannot grant a right of appeal where none lies under statute. He therefore, concluded that there was no appeal.

He further cited to us the case of **B.D Billimoria & another VS T.D Billimoria [1962] EA198** in which section 77(1) of the Civil Procedure Ordinance which is similar to our Civil Procedure Act section 76(1) was considered and the case was on all fours similar to the one before us. The court of appeal held that there was no appeal against setting aside arbitration award. Counsel in particular referred us to the ruling of Justice

Goud in which he said that an appeal cannot lie even where there is leave in court. He prayed that Civil Appeal NO 92/2004 be struck out with costs here and below.

In reply, Mr. Bamwine Bernard, counsel for the respondent, opposed the application. He contended that the appeal sought to be struck out was brought under section 66 of the Civil Procedure Act. In his view that section is wide enough to cover any other order not provided for under sections 76 and 77 of the Civil Procedure Act. He explained that section 76 and 77 are limited to orders passed by the High Court under the Civil Procedure Act in exercise of its original or appellate jurisdiction.

He went on to argue that, the legislature must have contemplated that there might be some other instances where the High Court may make orders under any other law, that is why section 66 was made so wide to accommodate such instances.

He gave an example of the Arbitration Conciliation Act as one of the statutes that refer disputes to the High court but not through the Civil Procedure Act. He drew our attention to section 34 of the Arbitration and Conciliation act which provides for applications for setting aside arbitral awards which are filed in the High Court.

He argued further that the order that was made by the High Court in this case is not an order that was contemplated by section 76 and 77 of the Civil Procedure act but was contemplated by section 66 of the Civil

Procedure Act. He referred us to the authority of **Makula International Ltd VS Cardinal Nsubuga and another Civil Appeal No. 4 of 1981.**

In that case there was an appeal against a High Court decision dismissing an appeal against the decision of a taxing officer. The argument was that the appellant had no right to appeal under the provisions of the Advocates Act.

The Court of Appeal came to the conclusion that the court had jurisdiction to hear the appeal under section 68 of the then Civil Procedure Act, the equivalent of the present section 66 and 81(b) of the Civil Procedure Act.

Lastly, counsel explained that section 76 of the Civil Procedure Act is restricted to orders of the court where a matter is referred to arbitrator and not where parties on their own refer the matter to an arbitration under the Arbitration and Conciliation Act. He prayed that the application be dismissed with costs.

In answer, counsel for the applicant submitted that this court is bound by the authority of **Bullimaria (supra)** which is to the effect that appeal against arbitral award was not appealable even with leave of court.

He reiterated that once a matter is referred to the High Court to set aside an award, it becomes subject to section 76 of the Civil Procedure Act.

We have carefully considered the submissions of both counsel and read the record together with the authorities referred to us.

The matter before us is not new. It has arisen in other cases where a right of appeal from the decision of the High Court has been contested and we have pronounced ourselves. For example, there are cases like **Denis Bireije V Attorney General Civil Application No. 31/2005** and **Pius Niwagaba Vs Law Development Centre CACA No. 18/2006**.

In Denis Bireije's case, it was an application brought under rules 81 and 52(2) of rules of this court to strike out a notice of appeal. The main ground was that no appeal lies from the prerogative orders by way of judicial review made by the High Court in exercise of its special jurisdiction.

The background to the application was that, the applicant was a Director of Civil Litigation in the Ministry of Justice and Constitutional affairs. On instructions of the Minister of Justice and Constitutional Affairs, the Solicitor General, interdicted the applicant. Being aggrieved by the said interdiction, he petitioned the High Court for judicial review and sought for the prerogative orders of mandamus, certiorari and prohibition which were granted.

The Attorney General filed a notice of appeal against the learned judge's ruling.

In turn, the applicant filed the above mentioned application to strike out the notice of appeal. After listening to arguments of both counsel we had this to say.

“We have carefully looked at the above orders we are of the opinion that Mr. Matsiko is right in his submission that the orders which the learned judge issued amounted to a decree within the meaning of section 2 of the Civil Procedure Act. The orders exceeded what was expected from prerogative order of certiorari. It went further and conclusively determined the rights of the parties with regard to all matters that were in controversy. The decree therefore, is applicable to this court as of right, under section 66 of the Civil Procedure Act which provides:

“Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the court of appeal”.

In the second case of **Pius Niwagaba Vs Law Development Centre CA/2006.**

The main objection was that no appeal lies against decision/orders of the lower court. The brief facts were that the applicant Pius Niwagaba was a law graduate from Uganda Pentecostal University. His application to be

admitted to Law development Centre for a Post Graduate Diploma was declined on ground that the university from which he did his bachelor of Laws Degree had not been accredited by the Law Council under the Provisions of the Advocates Act as amended and the rules made there under.

He applied for Judicial review of the respondent's decision in the High Court and sought for orders of certiorari and mandamus. The learned judge allowed the application and granted the orders sought.

The Law Development Centre appealed to this court. Pius Niwagaba, then moved this court by application to strike out the appeal on ground that no appeal from orders of certiorari, mandamus and prohibition made by the High Court. Among other considerations, section 66 of the Civil Procedure Act, also referred to in the application before us, was considered.

It states "66 Appeals from decrees of High Court.

Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any other part of the decrees and from the orders of the High Court to the court of appeal".

This court reviewed and considered the case of **Makula International Vs His Eminence Cardinal Nsubuga & another (supra)** and stated that:

“It is clear, that where an order is made by the High Court on a matter brought to it by some Statutory provisions other than Civil Procedure Act or rules, it is appellable unless the appeal is specifically excluded by some special legislation”.

Their Lordships quoted from the judgment of Manyindo DCJ (as he then was) while dealing with the case of **Joseph Bayego Vs The Registrar of Titles CA No. 20 of 1994** (unreported)

“The court of Appeal of Uganda dealt with the matter in Makula International Ltd VS Cardinal Nsubuga and another Civil Appeal No. 4 of 1981 (unreported) the appeal arose from the matter under the advocate's Act’ with regard to taxation of costs. It was submitted by the respondent there, as in this case, that the Court of Appeal lacked jurisdiction in the matters as no appeal lay with leave of that court of the trial court.

The Court of Appeal held, quite rightly in my view that under section 68 of the Civil Procedure Act an appeal lies as of right from the order of the High Court not made under the Civil Procedure Act to the court of appeal. The court noted that section 82 of the same Act provides that the provisions of part VII of the Act relating to appeals from original decrees shall apply to orders of the High Court

made under section 68. And so in the instant case where the order was made on a matter brought to the High Court under the Registration of Titles and not under the Civil Procedure Act or rules, that order is appealable as of right. It has not been specifically excluded by law. There is therefore no merit in the objection raised by the respondent on grounds of jurisdiction.”

“We respectively agree with that holding and we follow it. We appreciate Mr. Nangwala’s submissions that section 10 of the Judicature Act and section 66 of the Civil Procedure Act have the same effect”.

The above three quoted decisions of this court are still good law and offer an answer to a similar application like the one before us.

We agree with Mr. Bamwine Bernard that the appeal sought to be struck out is sustainable under the provisions of section 66 of the Civil Procedure Act. Consequently, the application to have it struck out is misconceived.

It is accordingly dismissed with costs to the respondent.

Dated this 10THday of ...Sept... 2009.

C.N.B. KITUMBA
JUSTICE OF APPEAL

C.K BYAMUGISHA
JUSTICE OF APPEAL

A.S. NSHIMYE
JUSTICE OF APPEAL