

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

MISCELLANEOUS APPLICATION NO. 80 OF 2012.
(Arising out of H.C.C.S. No. 399 of 2010)

CORAM HON. JUSTICE S. B. K. KAVUMA, JA
HON. JUSTICE A. S. NSHIMYE, JA
HON. JUSTICE REMMY KASULE, JA

LIVINGSTONE KAYAGA KIZITO:.....APPLICANT

VERSUS

CHARLES

WALIGO:.....RESPONDENT

RULING OF THE COURT.

This is an application brought by way of Notice of Motion under **Rule 40 (2) (b)** of the rules of this court seeking orders

(1) That the applicant be granted leave to appeal against the Ruling and Orders of Justice Joseph Murangira in H.C.C.S. No. 399 of 2010.

**(2) The costs of the application be provided for.
The application is based on the following groundsill**

That the applicant is aggrieved by the ruling and orders of the Hon. Justice Joseph Murangira dated 6th January, 2012 in H.C.C.S. No. 399 of 2010.

(2) That the learned trial judge overruled the applicant's preliminary objection against the respondent's suit.

(3) That the applicant has no automatic right of appeal against the ruling and orders of the High Court but must seek leave.

(4) That the applicant applied for leave to appeal in the High Court but the application was refused.

(5) That the applicant must seek leave of the Court of Appeal in order to appeal.

(6) That it is just and equitable that this application be granted so that he can exercise his right of appeal.

Background of the application;

The applicant in High Court Civil Suit No. 399 of 2010 during the scheduling conference raised preliminary points of law to the effect that;

- (a) There was no cause of action.**
- (b) The suit was time barred by Section 176 of the Registration of Titles Act, 230.**
- (c) The suit was res- judicata.**
- (d) The agreements upon which the suit was based were illegal.**

The learned trial judge dismissed the preliminary objection with costs.

The applicant was not satisfied with the ruling of the learned trial judge and applied for leave to appeal against

The application was brought in the same Court under **Order 44 Rules 2 and 4 of the Civil Procedure Rules.** It sought orders that;

- (a) The applicant be granted leave to appeal against the ruling of Justice Joseph Murangira in H.C.C.S. No. 399 of 2010.**

(b) The costs of the application be provided for.

It was supported by an affidavit of the applicant in which he deponed as follows

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(a) That the applicant is aggrieved by the ruling of the Hon. Justice Joseph Murangira dated 6th January 2010 in H.C.C.S. No. 399 of 2010.

(b) That the learned trial judge overruled the applicant's preliminary objections against the respondent's suit.

(c) That the applicant has no automatic right of appeal against the ruling and orders of the court but must seek leave.

(d) That it is just and equitable that this application be granted so that he can exercise his right of appeal.

us The learned trial judge on 12th April 2012 found that, the application had no merit and accordingly, dismissed it with costs.

Being dissatisfied with the said ruling, the applicant filed this fresh application before us seeking leave of this Court to appeal.

At the scheduling conference, it was agreed that there was only one issue for determination which was:

Whether the applicant is entitled to the grant of leave to appeal against the learned trial judge's ruling.

Representation.

Mr. Nuwagaba Wilfred appeared for the respondent while Mr. Tuhimbise Alex was for the applicant.

Submissions for the applicant.

Counsel for the applicant submitted that the application was for leave to appeal against the ruling and orders of Justice Murangira. An affidavit was deponed by the applicant in support of the application and the grounds were set out in the body of the Motion.

According to counsel, the applicant adduced evidence as per the affidavit and annexures thereto; including the

plaint marked as annexure **“A”**. In H.C.C.S No. 399 of 2010, the applicant filed a defence which was attached as annexure **“B”**. Counsel outlined the history of the matter and stated that when the matter was set down for scheduling, the applicant raised preliminary points of law which the Honourable judge overruled and since the applicant had no automatic right of appeal, he applied for leave of court to appeal against the said ruling which leave was refused. Annexure **“F”** is the ruling. Following the said dismissal, the applicant decided to seek leave to appeal to this court.

Counsel contended that in paragraph 7 of the applicant’s affidavit, there existed points of law. This Court should look at them and pronounce itself at an appellate level. He supported his argument by citing the case of ***Charles Ssempebwa & 134 others V. Silver Springs Hotel Limited 2007 HCB vol. 1 page 65.***

Counsel argued that Court below did not have to dismiss the suit without first hearing evidence.

He Submitted that it is equitable and in the interest of justice that leave to appeal be granted with costs.

Submissions for the respondent.

Counsel for the respondent strongly opposed the application and pointed out that the applicant did not file an affidavit in rejoinder, hence the facts in the affidavit in reply were not rebutted. He cited the case of **Charles Ssempebwa** (supra) and contended that the application failed the test stipulated therein. He invited the Court to look at the Plaintiff, the Written Statement of Defence, the submissions on the point of law and the reasons given by the learned trial Judge in determining those points of law, particularly paragraph 7 in support of the application which revealed two clear facts namely:-

(a) That the issue as framed in paragraph 7 of the affidavit in support of the application has no connection with the facts raised and has been raised in the abstract.

He wondered how a matter raised in the abstract could raise a serious matter of law.

(b) That the complaints raised in the preliminary objection were answered as in paragraph 5 of the affidavit in reply.

1. On the question of registration of the agreements, he referred to annexure **“LL4”** which showed that the agreements

bore embossing stamps under the Stamps Act.

2. On the question of *res judicata*, he referred us to annexure “**LL6**” particularly pages 3-4 thereof which replicated the consent judgment passed in *civil suit No. 562/2006* which was attached to the plaint as one of the annexures. That the ruling had nothing to do with the respondent who was not a party and the dispute in that matter had nothing to do with the suit from which this application arises, hence the principle does not apply.

The issue of joint tenancy was answered in the affidavit in reply paragraph 5 (iii). Annexure “**LL5**” is a certificate of Title of one of the former owners. Counsel asked Court to read paragraph 5 (iii) together with paragraph 6 of the Written Statement of Defence.

The applicant admitted that defendants 1-3 were his sisters who had entered a consent judgment in respect of their share.

In counsel’s view, the question of joint tenancy is a matter of mixed law and fact and can be determined after leading evidence.

He further argued that the applicants wanted court to believe that the respondent's claim was for recovery of land, yet it was a specific claim for specific performance under the Contract Act. Even if it were a claim for land, the respondent would have had time and the option to amend.

He finally prayed that we find that the application did not raise any serious question of law or fact to warrant intervention of this court and that the same be dismissed with costs. It will not cause injustice to the applicant since he will have a right to appeal if he does not succeed on merit in the court below.

Submissions in rejoinder.

Counsel sought to adopt his submissions in the lower Court. He pointed out that the parties agreed under **Order 6 Rule 28 of the Civil Procedure Rules** that the issues agreed upon did not require adducing evidence. In his view, there was need for the appellate Court to pronounce itself on the matter. Finally he reiterated his earlier prayer that the application be granted with costs.

Courts findings.

Whether the applicant is entitled to the grant of leave to appeal against the learned trial judge's ruling.

The right to appeal is a creature of Statute as enunciated in the case of ***Shah V. Attorney General (1971) EA 50.***

Where there is no right of appeal, a party must seek leave of court to do so.

Order 44 rules 1 (2), (3) and (4) of the Civil Procedure Rules set out which Orders are appealable as of right to this Court.

The applicant was right when he stated in his affidavit that, he had no automatic right of appeal and that he had to first seek leave of Court from the High Court which made the ruling. The application for leave in the High Court was denied hence, this second application for leave in this Court.

Rule 40 (1) (a) of the Judicature (Court of Appeal Rules) Directions SI 13/10 provides that;

(1) “In civil matters -

(a) where an appeal lies if the High Court certifies that a question or questions of great public or general importance arise, application to the High Court shall be made informally at the time when the decision of the High Court is given

against which the intended appeal is to be taken; failing which, a formal application by notice of motion may be lodged in the High Court within fourteen days after the decision, the costs of which shall lie in the discretion of the High Court;

and. ”

Rule 40 (1) (b) provides that;

“If the High Court refuses to grant a certificate under paragraph (a) of this sub rule, an application may be lodged by notice of motion in the Court within fourteen days after the refusal to grant the certificate by the High Court for leave to appeal to

the Court on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done".

To determine whether the applicant ought to be granted leave, there is a wealth of authorities that guide Court on the principles that govern granting leave.

It is the applicant's case that the merits of the case need not be argued.

In the case of ***Sango Bay Estates Ltd & Ors Vs Dresdner Bank A.G (1972) EA 17***, it was held that the applicant must prove the existence of prima facie grounds of appeal which merit serious consideration.

Also in the case of Degeya Trading Stores (U) Ltd. V. Uganda Revenue Authority, Court of Appeal Civil Application No. 16 of 1996, their Lordships of this court observed that,

"An applicant seeking leave to appeal must show

either that his intended appeal has reasonable chances of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct

The learned trial judge in dismissing the application for leave held that:-

"...in joint consideration of these issues with my ruling which is under dispute, the said were properly answered by this court. Issues (a) and (b) above do not arise from my said ruling. As regards the claim of filing several suits and unregistered documents, the court properly dealt with those issues.

In my considered view, the facts and law relating to each issue raised do not require further judicial consideration. I hasten to add that the said issues do not arise from my said ruling. There are no serious issues on points of law or fact arising from the said ruling that would merit the judicial consideration by the Court of Appeal..."

When we perused and analyzed the grounds raised by the applicant, we did not find any merited ground worth the grant of leave to appeal. We are satisfied that the learned trial judge was

correct in dismissing the application for leave.

We hence, dismiss this application with costs to the respondent and order that the case be recommenced from where it stopped in the High Court before the preliminary objections were raised, preferably before another Judge.

Dated at Kampala this 12th day of October 2012.

**HON. JUSTICE S.B.K. KAVUMA,
JUSTICE OF APPEAL.**

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**HON. JUSTICE A.S. NSHIMYE,
JUSTICE OF APPEAL.**

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**HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL.**