THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO 93 OF 2019

(ARISING FROM CIVIL APPLICATION NO 226 OF 2018)

(ARISING FROM CIVIL APPEAL NO 155 OF 2017)

(CORAM: CHEBORION, MUSOTA, MADRAMA JJA)

1. **GEORGE KASEDDE MUKASA**
2. **MICHAEL GALABUZI MUKASA** } **Administrators of the Estate of the late Mackay Albert Kalula Mukasa** } **APPLICANTS**
3. **JAMES GALABUZI MUKASA**
4. **ZACHARY KIWANUKA**
5. **BETTY NABETA**
6. **DAVIS NDYOMUGABE**

VERSUS

1. **HOLIDAY HOTEL LTD**
2. **TILE WORLD LTD**
3. **ROBERT SSEWAVA SSENYONJO**

RULING OF CHRISTOPHER MADRAMA IZAMA, JA

The applicants filed this application for leave to appeal to the Supreme Court of Uganda against the ruling and the orders of this court in Civil Application No 226 of 2010 issued on 21st March, 2019. Secondly, the applicant seeks for proceedings in Civil Appeal No 155 of 2017 to be stayed until the disposal of the intended appeal. Thirdly, the applicant prays for costs of the application to be provided for.

The grounds of the application are set out in the notice of motion and are that:

1. The applicants intend to appeal the ruling and orders of this court in Civil Application No 226 of 2018 delivered on 21st March, 2018 and filed a notice of appeal in this court together with a letter requesting for the record of proceedings.
2. The applicants cannot appeal the ruling and orders of court without the leave of this court.
3. The appeal to the Supreme Court has chance of success in so far as admission of evidence as sought by the applicants was made at the early stages of the appeal and it is not prejudicial to the respondents.
4. Further, the additional evidence bears a lot of relevance, credibility and is crucial in determining the issues in the appeal and/or cross appeal.
5. The court in determining the application did not exhaustively consider the foregoing along with the fact that the piece of additional evidence can be adduced or taken by the court through other parties that witnessed the document and/or drew the document.
6. The proceedings in the Court of Appeal should be stayed in the meantime until the intended appeal is determined by the Supreme Court since if the intended appeal succeeds it will have a bearing on the evidence before the Court of Appeal.
7. It is fair, equitable and in the interest of justice that the applicants are given leave to appeal to the Supreme Court.

The application is further supported by the affidavit of Davis Ndyomugabe, an advocate of the High Court of Uganda and the 6th applicant. The facts contained in the affidavit are that:

The deposition is made on behalf of all the applicants. The applicants filed in this court an application seeking permission to adduce additional

evidence in Civil Application No 226 of 2010 and this application was heard and dismissed on 21st March, 2019. The deponent attended court on the day when the application was heard and also the ruling of the court. Upon delivery of the ruling, their advocates informed court that the applicant's intended to appeal to the Supreme Court and they informally requested court for leave to appeal and for record of proceedings of the court to be provided. Thereafter, the court advised the applicants to make a formal application for leave to appeal in the event that it is found that there is need for leave to appeal. The applicant's advocates filed a notice of appeal and the letter requesting for the record of proceedings with copies attached to the affidavit. With the advice of his advocates he deposed that the ruling and orders of the court could not be appealed without leave of the Court of Appeal.

Further that the appeal to the Supreme Court has a very good chance of success in so far as:

(i) The court did not consider the fact that there were other witnesses to the agreement of 20th of July, 2012 and advocates who drew the agreement who can adduce and/ or have evidence taken from them other than that of the third respondent and the officials of the second respondent.

(ii) The application for additional evidence to be adduced or taken was made in ample time before the hearing of the appeal.

(iii) The respondents are not prejudiced by the admission of additional evidence and before the court their counsel said so.

(iv) The court did not succinctly weigh the importance of the piece of evidence proving fraud especially between the second and third respondents

(v) Court did not consider the fact that the additional evidence is relevant and crucial in determining the collusion and connivance of

the third respondent and the officials of the second respondent in dealing with the suit land.

(vi) The additional evidence of fraud during the pendency of the suit was relevant just as evidence of fraud before the suits so long as the suit had not been disposed of.

(vii) The evidence debunks the holding by the trial court that the second respondent is a bona fide purchaser for value without notice of fraud.

The deponent further deposed that upon the court granting leave to appeal the above ruling and orders, this court should not proceed further with the hearing of the appeal given that in the event of success in the Supreme Court, the appeal in this court will likely be affected by the additional evidence on record. In the premises he deposed that it is fair and just that the proceedings in this appeal be stayed in the meantime until the determination of the intended appeal.

The application is further supported by the affidavit of James Galabuzi Mukasa, the third applicant and the co – administrator of the estate of the late Mackay Albert Kalula Mukasa which states that he is duly authorised by the rest of the applicants to swear the further affidavit in support. He read the affidavit of Davis Ndyomugabe, and deposed that the facts contained in it are correct. He attended court on 21st March, 2019 when the application for leave to adduce evidence was heard and determined by the court. The advocate communicated to court their intention to appeal the ruling and orders of the court to the Supreme Court. He states that the additional evidence is very important and relevant in showing that the second respondent is not a bona fide purchaser for value without notice of the fraud by the first and second respondents. He reiterates the prayer to have proceedings in the Court of Appeal stayed temporarily pending disposal of the intended appeal by the Supreme Court.

The affidavit in opposition is deposed to by Betty Byamugisha the Managing Director of the 2nd Respondent who deposed that:

She got advice from Dr. John - Jean Barya advocate for the second respondent and discussed the affidavits of Davis Ndyomugabe and James Galabuzi and states that; On the basis of advice of Dr. John – Jean Barya, the intended appeal to Supreme Court from an order of this court refusing the application to adduce additional evidence in this court is not sustainable. The order of this court refusing the application to adduce additional evidence arose from Miscellaneous Application No 226 of 2010 and the order is interlocutory arising out of Civil Appeal No 155 of 2017. There is no right of appeal to the Supreme Court from an interlocutory order, not arising from the final determination of the appeal itself. She deposed that Civil Appeal No 155 of 2017 is still pending in this court. Further that this court lacks jurisdiction to hear an application and granted leave to the applicant to appeal where the applicant has no right of appeal at all. In the premises, she maintains that the application is frivolous and a waste of time and amounts to an abuse of the process of this court.

In the alternative and without prejudice Betty Byamugisha deposed that the applicants do not have any arguable case worth considering by the Supreme Court. Secondly, the intended appeal has no reasonable chance of success because the evidence sought to be adduced on appeal does not meet the legal criteria for adducing of additional evidence. She was present in court on 21st March, 2019 when Miscellaneous Application No 226 of 2010 was heard and dismissed and the learned justices fully considered the merits of the application in dismissing it. She contends that the learned justices in particular found that the additional evidence sought to be adduced in court was irrelevant to the issues in the High Court and Court of Appeal and the advocate for the respondents in the application submitted that adducing evidence was prejudicial to the respondents and would also

not have influenced the decision in the case. The applicants have not furnished the court with the basis of their allegations in paragraphs 9 of the affidavit of David Ndyomugabe and therefore the court has no material to pronounce itself on the allegations.

At the hearing of the application, the applicants were represented jointly by learned counsel Mr Mulema Mukasa and learned counsel Mr Paul Mukubira while the respondent was represented by learned counsel Prof John Barya appearing jointly with learned counsel Mr Nestor Byamugisha.

Upon the applicant's counsel proceeding with the application, the respondent's counsel objected to the application on the ground that no appeal lies to the Supreme Court from an interlocutory order of the Court of Appeal. This is a preliminary point of law that we need to address as there would be no need to hear an application for leave to appeal where there is no right of appeal. Prof Barya submitted that the arguments advanced in support of the application would be irrelevant because this court has no power to grant leave to appeal from an interlocutory order. Therefore the application itself is incompetent. Particularly, he submitted that the Supreme Court has a precedent on whether an appeal lies from an interlocutory order to the Supreme Court. This is in **Beatrice Kobusingye v Fiona and George Nyakaana SCCA No 5 of 2004 arising from Civil Appeal Cause No 29 of 2001**. In that cause justice Tsekooko JSC, held that the appeal had no jurisdictional foundation because there is no right of appeal to the Supreme Court from interlocutory orders of the Court of Appeal which orders are incidental to the appeal and not resulting from the final determination of the appeal itself. In that case the Supreme Court held that the Court of Appeal had not yet determined the appeal. It followed that the Court of Appeal erred in granting the certificate for the appellant to lodge an appeal to the Supreme Court. They held that the appeal was incompetent and struck it out.

Prof Barya submitted that this is what the applicants are doing in the application before this court. He submitted that any aggrieved party ought to raise an issue about the refusal to adduce evidence in the main appeal to the Supreme Court after the appeal has been finally determined.

In reply Mr Mulema Mukasa submitted that leave can be granted under rule 2 (2) of the Judicature (Court of Appeal) Rules which gives the court inherent powers to make such orders as are necessary in the interest of justice.

Consideration of the preliminary point of law

I have carefully considered the applicants application which according to the title was brought under rule 2 (2), 43 (1), (2) of the Judicature (Court of Appeal) Rules Directions and all enabling laws.

At the hearing of the application Mr Mulema Mukasa further cited section 6 (1) of the Judicature Act, Cap 13 laws of Uganda 2000 for the proposition that an order of the Court of Appeal in an interlocutory matter cannot be appealed as a matter of right to the Supreme Court. He submitted that one needed leave to appeal to the Supreme Court and the applicants application relies on the inherent powers of the Court of Appeal under rule 2 (2) of the rules of court which gives the Court of Appeal powers to make such orders as would suit the ends of justice. He conceded that the applicants realised that they had no right of appeal as of right hence the need to invoke rule 2 (2) of the rules of this court.

On the other hand Prof Barya submitted that there was no right of appeal from an interlocutory order and relied on the judgment of the Supreme Court in **Beatrice Kobusingye v Fiona and George Nyakaana SCCA No 5 of 2004.**

I have considered the Rule 2 (2) of the rules of this court which provides that:

> (2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extent to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.

The rule saves the inherent jurisdiction of the Court of Appeal and may be applied where the occasion warrants it.

The genesis of this application is a dismissal order made in an application to adduce additional evidence under the powers of the court in rule 30 (1) (b) of the rules of this court which gives this court discretion for sufficient reason to take additional evidence or direct that additional evidence be taken by the trial court or by a Commissioner. The rule gives the Court of Appeal discretionary powers. The jurisdiction of the Supreme Court is provided for by sections 4 and 6 of the Judicature Act Cap 13 laws of Uganda which provides that:

> 4. Jurisdiction of the Supreme Court.
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> An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as are prescribed by the Constitution, this Act or any other law.
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> 6. Appeals to the Supreme Court in civil matters.
>
> (1) An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order, including an interlocutory order, given by the High Court in the

exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal.

(2) Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court Of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard.

Section 4 of the Judicature Act is clear that an appeal to the Supreme Court from the Court of Appeal shall lie from such decisions of the Court of Appeal as are prescribed by the Constitution, the Judicature Act or any other law. In the circumstances of this appeal, the applicable statutory provision is section 6 of the Judicature Act which provides that an appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses the judgment or order including an interlocutory order, given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal.

In the circumstances of this case, there is no decision of the Court of Appeal in which the Court of Appeal confirmed, varied or reversed a judgment of the High Court in the exercise of its original jurisdiction. What the court did was to dismiss an application to adduce additional evidence that had been filed originally in the Court of Appeal and which did not emanate from a decision of the High Court. In any case, the Court of Appeal was dealing with an appeal from the High Court and has not reversed, confirmed or varied any decision of the High Court.

I have further considered the provisions for leave to appeal a decision of the Court of Appeal. First of all, the applicants cited rule 42 of the rules of this court which provides that whenever an application may be made either in the court or in the High Court, it shall first be made in the High Court. Rule 42 (2) does not make the applicants application any easier. It provides that:

> (2) Notwithstanding sub rule (1) of this rule, in any civil or criminal matter, the court may, upon application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under rule 6 (2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.

It is quite clear that the rules referred to deal with orders of the High Court and are not applicable to interlocutory orders of the Court of Appeal made in a pending appeal. I have accordingly further considered the Judicature (Supreme Court Rules) Directions for any provision that deals with applications for leave to appeal to the Supreme Court. This is catered for by rule 39 of the Supreme Court Rules which provides that:

> 39. Applications for certificate of importance for leave to appeal in civil matters.
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> (1) In civil matters –
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> (a) where an appeal lies if the Court of Appeal certifies that the question or questions of great public or general importance arise, application to the Court of Appeal shall be made informally at the time when the decision of the Court of Appeal 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 Court of Appeal within 14

days after the decision, the costs of which shall lie in the discretion of the Court of Appeal; and

(b) if the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of the sub rule, an application may be lodged by notice of motion in this court within 14 days after refusing to grant the certificate by the Court of Appeal for leave to appeal to the court on the ground that the intended appeal raises one or more matters of great public or general importance which will be proper for the court to review in order to see that justice is done.

(2) Where formally an appeal lay from the High Court or the court with leave of either the High Court or the court, the same rules shall apply to appeals from the Court of Appeal to the court –

(a) where an appeal lies with the leave of the Court of Appeal, application for the leave shall be made in formally at the time when the decision against which it is desired to appeal is given; or failing that application or if the court so orders, by notice of motion within 14 days after the decision; and

(b) if the Court of Appeal refuses to grant leave, or where an appeal otherwise lies with the leave of the court, application for the leave shall be lodged by notice of motion within 14 days after the decision of the Court of Appeal refusing leave or, as the case may be, within 14 days after the decision against which it is desired to appeal.

Rule 39 (1) of the Supreme Court Rules is inapplicable because it deals with the appeal on the basis of the certificate of the Court of Appeal that the question or questions of great public or general importance arise. Secondly, rule 39 (2) of the Supreme Court Rules applies to situations where formally an appeal lay from the High Court to the Court of Appeal with leave either

of the High Court or the Court of Appeal. It provides that the same rules would apply to appeals with leave to the Supreme Court.

Appeals from orders are dealt with by Order 44 of the Civil Procedure Rules. None of the orders listed under order 44 rule 1 of the Civil Procedure Rules relate to applications to adduce evidence. However, an appeal lies as of right under order 44 rule 1 (t) granting an order for review under order 46 of the Civil Procedure Rules. Any person considering himself or herself aggrieved by a decree or order or discovers new and important matter of evidence which could not have been discovered after the exercise of due diligence may apply for review of the judgment or decree.

The essence of the applicant's application for adducing evidence was to call additional witnesses to an agreement dated 20th of July 2012. These include advocates who drew the agreement who can adduce or have evidence taken from them other than the third respondent and officials of the second respondent. Particularly in paragraph 9 of the affidavit in support of the application, the applicant deposed that the evidence debunks the holding by the trial court that the second respondent is a bona fide purchaser for value without notice of fraud.

In hearings before the High Court, applications to adduce additional evidence may be made to the presiding judge before judgment. Ordinarily, the witnesses are supposed to be listed in the pleadings and in the very least during the scheduling conference. Where the matter proceeded without witnesses, the question would be whether those witnesses could not be procured at the time of the hearing. However, where there is a new and important piece of evidence, the applicant can apply for review of the judgment or decree of the High Court and has an automatic right of appeal.

In my opinion this is not one of those cases where the Court of Appeal reversed, varied or confirmed a decision of the High Court. The appeal is yet to be heard. I would not in the circumstances conclude that an application for leave cannot be granted on procedural grounds only. The question in this matter is whether the Supreme Court has any jurisdiction to hear the intended appeal. For that purpose I have considered the decision of Tsekooko JSC in **Beatrice Kobusingye v Fiona and George Nyakaana SCCA No 5 of 2004** where he considered whether an appeal lies from an interlocutory order. The learned justice of the Supreme Court applied the provisions of section 6 (2) of the Judicature Act and held that no appeal lies from an interlocutory orders of the Court of Appeal to the Supreme Court.

This decision is binding on this court unless overturned. However, section 6 (2) of the Judicature Act deals with an appeal that emanates from the judgment or order of a chief magistrate or magistrate grade 1 in the exercise of his or her original jurisdiction. In the premises, the decision is distinguishable from the facts of this case. In this application, there is no appeal from a decision of the High Court let alone a decision of a chief magistrate or a magistrate grade 1 and therefore it is the provision of section 6 (1) of the Judicature Act which applies. Section 6 (1) of the Judicature Act provides that an appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order including an interlocutory order given by the High Court. It does not deal with any interlocutory orders issued by the Court of Appeal. Further in accordance with section 4 of the Judicature Act, an appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as prescribed by the Constitution, the Judicature Act or any other law. The jurisdiction of the Supreme Court is prescribed by the Constitution under article 132 (2) of the Constitution which provides that:

(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.

The prescription of the jurisdiction of the Supreme Court under section 6 (1) of the Judicature Act does not cater for an appeal from the original interlocutory orders of the Court of Appeal. There is therefore no statutory provision conferring a right of appeal from an original interlocutory order of the Court of Appeal to the Supreme Court. The applicant's situation is best handled through an application for review upon the discovery of new and important piece of evidence (if any) or through a final appeal.

Appellate jurisdiction is a creature of statute as held in **Attorney General v Shah (No. 4) [1971] EA, 50** by the then East African Court of Appeal. In that appeal the High Court of Uganda had made an order of mandamus against officers of government and the Attorney General was aggrieved and appealed against the order. The respondent objected to the hearing of the appeal on the ground that the Court of Appeal had no jurisdiction to hear it. At page 50 Spry Ag. P held that:

> It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.

Further, Spry Ag. P held appellate jurisdiction was regulated by the 1967 Constitution of the Republic of Uganda (repealed) which provided under article 89 thereof that appellate jurisdiction was prescribed by law enacted by Parliament. He further held that jurisdiction was governed by the Judicature Act, 1967 (repealed) Law Ag. V. -P concurred with Spry Ag. P and held that the provisions of section 82 and 68 of the Civil Procedure Act did not confer any right of appeal. Mustafa, JA also concurred.

In the premises, I find no provision that confers a right of appeal to the Supreme Court from an original decision of the Court of Appeal in an interlocutory application pending appeal. It follows that an application for leave to appeal such a decision would be futile. Granting leave does not confer jurisdiction. Let the applicants wait for conclusion of the appeal and if they are still aggrieved, may appeal the entire decision to the Supreme Court. In the alternative, if there is any new piece of evidence which could not have been discovered after the exercise of due diligence, it is open to the applicant to apply to the High Court to review its own decision if there is any merit to do so. I would find that the applicant's application is incompetent and I would accordingly strike it out with costs.

Dated at Kampala the 3rd day of ~~January~~ Feb, 2020

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: BARISHAKI, MUSOTA, MADRAMA, JJA)

CIVIL APPLICATION NO.93 OF 2019

(Arising from Civil Application No.226 of 2018)

(Arising from Civil Appeal No.155 of 2017)

1. GEORGE KASEDDE MUKASA
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APPLICANTS

VERSUS

1. HOLIDAY HOTEL LTD
2. TILE WORLD LTD
3. ROBERT SSEWAVA SSENYONJO

RESPONDENTS

RULING OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the Ruling of my brother Christopher Madrama Izama, JA and I agree with the reasoning and conclusion that the applicants' application is incompetent and should be struck out with costs.

Since Musota, JA also agrees, this application is dismissed with costs to the Respondents.

It is so ordered.

Dated at Kampala this 3rd day of July 2020

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPLICATION NO. 93 OF 2019

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VERSUS

1. HOLIDAY HOTEL LTD
2. TILE WORLD LTD
3. ROBERT SSEWAVA SSENYONJO :::::::::::::: RESPONDENTS

(Arising from Civil Application No. 226 of 2018; also arising from Civil Appeal No. 155 of 2017)

CORAM:

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

RULING OF JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the Ruling of my learned brother Hon. Mr. Justice Christopher Madrama, JA and I agree with it.

There is no right of appeal to the Supreme Court from interlocutory orders of the Court of Appeal which orders are incidental to the

appeal and not resulting from the final determination of the appeal itself.

It follows that an application for leave to appeal an interlocutory order would be futile. Consequently, the applicant's application is incompetent and is struck out with costs.

Dated at Kampala this 3rd day of Feb 2020

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Stephen Musota
JUSTICE OF APPEAL