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Herbert Sekandi t/a Land Order Developers V Crane Bank Ltd-HCT-00-CC-MA-0044-2007[2007] 25 (23 March 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CC-MA-0044-2007
(Arising from HCT-00-CC-CS-0732 OF 2005)

Herbert Sekandi t/a Land Order Developers Applicant

Versus

Crane Bank Limited Respondent

23 March 2007

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Notice of Motion under Order 44 rule 1 (2), (3) and (4) of the Civil Procedure Rules for orders that:

(i) The applicant be given leave to appeal the decision of the Hon Judge in Misc. Application No. 0851 of 2005 delivered on the 8th September 2006.
(ii) The costs in this application to be provided for.

The application was based on six grounds, but at the hearing two were abandoned leaving the following:

1. The Hon. Judge entered judgment against the applicant on the basis of an admission under Order 13 of the Civil Procedure Rules which was not supported by the pleadings or evidence.
2. The Hon. Judge failed to consider the fact that the payment to the respondent of the sum claimed in the plaint outside the ambit of Court as was the case by the applicant amounted to a new contract between the parties which suspended the original cause of action.
3. The Hon Judge failed to consider the fact that the payment to the Respondent was in fact "a compromise" under Order 25 rule 6 of the Civil Procedure Rules which was arrived at in good faith.

4. The Hon. Judge failed to consider the law on a solicitors lien in cases where the parties compromise the suit themselves outside Court which is that, in absence of collusion or fraudulent conspiracy to deny Counsel his costs by the parties to the suit, such a compromise entered into before verdict or judgment is good and will not be set aside or affected at the instance of the solicitor and the solicitor in such a case can only

afterwards look to his client only for payment and cannot proceed in the action for the costs.

Order 25 rule 6 of the Civil Procedure Rules provides:-

> " Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court may on the application of a party, order the agreement, compromise or satisfaction to be recorded, and pass a decree in accordance with the agreement, compromise or satisfaction so far as it related to the suit."

In Miscellaneous Application No. 851 of 2005 the Applicant, Herbert Sekandi had , inter alia, applied for the plaint in C S. No. 732 of 2005 to be struck out. In that suit the Respondent, Crane Bank Ltd, was by summary procedure seeking to recover Ug. Shs5,359,819/= with interest at the agreed penal rate of 36% per annum. In his affidavit in support of Misc. application No. 851 of 2005 the applicant averred:

> "4. That the debt due to the respondent is now fully paid and I attach collectively as "X" all the deposit slips on my account with the respondent Bank.
> 5. That the respondent has not further claim against me or my above named company."

At the hearing Mr. John Kabagambe agreed that the Respondent's claim in the above suit had been satisfied. He however, rejected the applicant's proposal on costs and having so failed to agree on costs the application was heard on merit. Following which the order intended to be appealed against was made. At the hearing of the application Mr. Kibuuka Musoke had submitted that the suit debt was paid to the respondent who accepted it without any prejudice. Counsel did contend that the Respondent's claim was extinguished. That in law the Respondent had compromised the suit and the issue of costs remained only between the Respondent and his Counsel.

With respect to this application Mr. Kibuuka Musoke argued that the arrangement under which payment was made in the main suit was not an admission but a compromise under Order 25 rule 6 CPR and the Court should have entered an agreement or compromise. Further that the decree should have originated from the compromise and not from the original suit. He submitted that Court should not have made an order for costs against the Applicant/defendant. In reply Mr. Kabagambe for the Respondent argued that the Applicant had not moved Court to record any compromise and there was none on record. Counsel referred to ***Sango Bay Estates Ltd & Others Vs Dresdner Bank AG [1972] EA 17*** where the East African Court of Appeal held that leave would normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration.

In ***Akisoferi Ogola Vs Aliko Emmanuel Otheino & Anor (1998) VI KALR I*** it was held that the applicant for leave to appeal to the Court of Appeal must show that the application bears substantial questions of law to be decided by the appellant Court and that he has a bonafide and arguable case on appeal. What amounts to a substantial question of law was defined in ***Matayo Okum Vs Francisco Amundhe & Other (1979) HCB 229*** where it was held that a substantial question of law is involved where the point raised is one of general principle decided for the first time or where the question is one upon which further argument and a decision of the superior Court would be to the public advantage.

After the Respondent had filed Civil Suit No. 732 of 2005 where it was claiming to recover shs 5,359,891/= agreed interest and costs, the Applicant paid to the Respondent a sum of shs

6,000,000/= After that payment the applicant applied for the suit to be struck out on the ground that he had fully paid the debt due, among others. The Applicant's intended appeal raises an important point of law whether such payment and acceptance of payment amounted to a compromise within the provisions of Order 25 rule 6 of the Civil Procedure Rules.

Counsel for the Respondent argued that the applicant's intended ground of appeal was introducing a new matter since this court had not been moved to record a compromise, if there had been any. However, in ***Makula International Vs Cardinal Nsubuga & Anor (1982) HCB II*** it was held that whether an appellant can on appeal raise anew point of law not argued before the lower Court is a matter for the discretion of the appellant Court. The principal is that if the applicant has raised arguable grounds of appeal and there are serious matters which merit consideration on appeal, and is not guilty of dilatory conduct the court should exercise its discretion and grant the applicant leave to appeal. See ***The Commissioner General Uganda Revenue Authority Vs Meera Investment Ltd HC Misc. Application No. 0359 of 2006***.

Considering all the above I find the issues raised appropriate for guidance by the Appellant Court and I accordingly allow this applicant and grant leave to the applicant to appeal against the ruling in Miscellaneous Application No 0851 of 2005 delivered on the 8th September 2006. The Order as to costs in the intended appeal shall bind the costs of this application.
I so order.