**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL DIVISION**

**HCT-00-CC-CA-11 -2012**

***(Arising from Misc Application No. 75 of 2012)***
***(Arising from Civil Suit No. 846 of 2011)***

**1. MRS. MATOVU SARAH**
**2. KAKANDE ROBERT**
**3. MUKWAYA ROBERT :::::::::::::::::: APPELLANTS**

**VERSUS**

**ABACUS PHARMACY (AFRICA) LTD :::::::::::::::::: RESPONDENT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This ruling arises from a preliminary objection raised by Mr. Kenneth Kajeke, counsel for the respondent when this matter came up for mention to ensure compliance with times lines for filing written submissions and fix a date for judgment. Counsel for the respondent challenged the competence of this appeal on the ground that the appellant never sought leave to appeal.

The issue for determination now is whether this appeal is validly before this court.

According to Mr. Kajeke the order appealed against was to set aside exparte judgment and decree. In reliance on Order 44 rule 2 of the Civil Procedure Rules (CPR) he submitted that this appeal does not lie as of right.

He argued that the omission to seek leave renders the appeal incompetent. He cited the case of **Sango Bay Estates Ltd v Dresdner Bank A.G [1971] EA 17** where it was held that where leave is not sought the appeal is rendered incompetent and must be struck out.

In response, Mr. Sekidde Simon Peter filed written submissions in which he argued that the error of appealing without first seeking leave was made by the appellant's professional advisor to whom he had entrusted the conduct of the case. He urged this court to hear the appellant's case on its merits.

He relied on the case of **Ismail Serugo v Kampala City Council and Attorney General Constitution Appeal No. 1 of 1998 at page 190** where Mulenga, JSC held that a litigant must not be turned away from the seat of justice before his case is heard on merit, except in plain and obvious case.

He further relied on the case of **Yowasi Kabiguruka v Samuel Byarufu C.C.A No.18 of 2008**, where it was held that once a party instructs counsel , he assumes control over the case to conduct it through out, the party cannot share the conduct of the case with his counsel.

It was the submission of Mr. Sekidde that non-compliance with the rules of procedure is not fatal as no injustice would be done to the parties. He relied on the case of **Cloud 10 Limited v Standard Chartered Bank (Uganda) [1987] HCB 64** where it was held that errors of non-compliance with rules of procedure were not fatal as no injustice would be done to the parties.

He also cited the case of **Banco Arabe Espanol v Bank of Uganda SCCA No. 8 of 1997** to the effect that;

> *"The question of whether an "oversight", 'mistake", "negligence", or "error", as the case may be, on the part of counsel should be visited on a party the counsel represents and whether it constitutes "sufficient reason" or "sufficient cause" justifying sufficient remedies from courts has been discussed by courts in numerous authorities. Those authorities deal with different circumstances; and may relate to extension of time for doing a particular act, frequently in cases where time has run*

*out… But they have a common feature whether a party shall, or shall not, be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default of his professional advisor or advisor's clerk."*

Counsel for the appellants submitted that the above principle was developed in the interest of substantive justice and its rationale is that a litigant should not be permanently deprived of the right of putting forward his case by reason of the default of his professional advisor.

He submitted further that where the advocate mistakenly makes an error in carrying out the instruction, the innocent litigant is not made to suffer the consequences of that mistake. He prayed that this court invokes its inherent powers for the ends of justice to allow the appellants to file an application for leave to appeal.

Counsel for the respondent filed written submissions in rejoinder where he reiterated his earlier argument. He also argued that an appeal against orders made under Order 36 of the CPR does not lie as of right but leave has to first be sought before the court making the order or the court to which an appeal would lie if leave were given.

With reference to the authorities cited by counsel for the appellants, Mr. Kajeke submitted that an appeal is a creature of statute which provides for certain procedures to be followed. His view was that failure to follow the same procedure renders the appeal incompetent. He submitted that the authorities relied on by the appellants to the effect that litigants should not be punished for the mistakes of their professional advisors do not take away the express provisions of the law.

I have carefully perused the law and considered the submissions of both counsels. Order 44 rule 1 of the CPR which specifies orders from which appeals lie as of right does not include orders made under Order 36 of the CPR. The original suit and subsequent miscellaneous application to set aside the ex-parte summary judgment and consent order were brought under Order 36 of the CPR. Thus decisions made under Order 36 are not appealable as of right under Order 44 rule 1. Leave ought to be sought under Order 44 rule 2 to appeal against a decision made under Order 36.

It follows therefore that the appellants should have first sought leave of the court that made the order before lodging this appeal. In the event that leave was denied by that court the appellant should have then sought leave of this court.

Counsel for the appellant in his response conceded that the error of appealing without first seeking leave was made by the appellant's professional advisor. He urged this court to treat it as a mistake of counsel that should not be visited on the litigant. From his submission, it is certain that no application for leave to appeal was ever lodged either in the trial court or to this court. This was in contravention of section 76 of the Civil Procedure Act and Order 44 rule 2 of the CPR.

The position of the law is now settled. Where leave is required to file an appeal and such leave is not obtained the appeal filed is incompetent and cannot even be withdrawn. It must be struck out. See **Makhangu v Kibwana [1995-1998] EA 175.** This principle was applied by the Supreme Court of Uganda in the case of **Dr. Sheikh Ahmed Mohammed Kisuule v Greenland Bank (In Liquidation) S.C.C.A No. 11 of 2010** where a preliminary objection had been raised on the ground that the appellant had not sought leave of the High Court or Court of Appeal prior to filing the appeal. Kitumba, JSC observed that obtaining leave is not merely a procedural matter but an essential step. She held that no genuine steps had been taken to apply for leave and so there was no competent appeal before the court.

Similarly, I find that in the instant case the appellants did not take any genuine steps to apply for leave either in the Chief Magistrate's court or in this court as required by the law. This requirement was essential prior to the filing of this appeal. It therefore follows that without leave to appeal this appeal is invalidly before this court and it is incompetent. The defect is not curable.

I do not agree with counsel for the appellant's submission that non-compliance with the rules of procedure is not fatal as no injustice would be done to the parties. Rules of procedure should be complied with. The Supreme Court of Uganda has expounded this in the case of **Utex Industries Ltd. v. Attorney General SCCA No. 52 1995.** The application before the Supreme Court was for orders to enlarge time for failure to take the right step at the right time under certain

provisions of the Supreme Court rules of procedure. The applicant sought to rely on Article 126(2) (e) of the Constitution of the Republic of Uganda in support of its case. In rejecting the application the court said:

> ***"Regarding Article 126(2) (and the Mabosi case we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126(2)(e). Paragraph (e) contains causation against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids to justice meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case article 126(2)(e) or Mabosi case can assist the respondent who sat on its rights since 18/8/1999 without seeking leave to appeal out of time. It is perhaps pertinent here to quote paragraph (b) of the same clause (2) of Article126. It states; "justice shall not be delayed". Thus to avoid delays, rules of Court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily. "***

The Supreme Court reinforced this position in the case of **Kasirye, Byaruhanga and Co. Advocates v Uganda Development Bank SCCA No. 2 of 1997** where it said:-

> ***"We adopt the same reasoning here and say that a litigant who relies on the provisions of Article 126(2)(e) must satisfy the court that in the circumstances of a particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126 (2)(e) is not a magic wand in the hands of defaulting litigants".***

In that case the appellant had complied with all the other rules except serving the letter of request of proceedings on the respondent. Counsel for the appellant even conceded the lack of service of the written request but sought the aid of Article 126(2) (e) of the Constitution contending that no injustice had been occasioned to the respondent. The Supreme Court in upholding the preliminary objection had this to say after quoting Article 126(2)(e) and underlining the words “subject to the law”.

***"We have underlined the words subject to the law. This means that clause (2) is no license for ignoring existing law.***

In the instant case, I am not convinced by the argument that because the respondent would not suffer any injustice the rules of procedure should not be complied with. The inherent powers of this court would come in aid of the appellant only subject to the law. The contention that failure to obtain leave prior to appealing to this court was the mistake of the appellants' counsel which should not be visited on him, in my view, is an attempt to overstretch that well intended principle to the point of abusing it. With due respect to counsel, I do not think that that principle is applicable to this case where the requirement for leave to appeal is prescribed by law and in view of the settled position of the law that an appeal filed without leave is incompetent.

For those reasons, I find that this appeal is incompetent and must be struck out with costs to the respondent and I so order.

Dated this 4th day of December 2012

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Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Simon Peter Ssekidde for the appellants. The respondent and its counsel were absent.

**JUDGE**
04/12/12