

and equitable that the applicant be granted leave to appeal to the Court of Appeal against the ruling and orders of this Honourable court.

In opposition to the application an affidavit was sworn by Mr. Sam Phiri in his capacity as the Chief Executive Officer of the respondent company. He deposed inter alia; that the applicants have never sought leave to appeal against the said order and did not apply to stay those orders or proceedings pending the disposal of the appeal. He also averred that the purpose of this application is to make a mockery of justice as the applicants do not intend to pursue any appeal before the Court of Appeal. There was no affidavit in rejoinder sworn by the applicants to rebut whatever was stated in the affidavit in reply.

At the hearing of this application the respondent was represented by Mr. Yesse Mugenyi while the applicants were represented by Mr. Nanda Wamukoota Charles who appeared together with Mr. Allan Kikwe. In his submissions for the applicants, Mr. Wamukoota stated the four grounds on which the application is premised and submitted that the pre-condition was not fulfilled because the applicants do not have the money and the only remedy available is an appeal. He added that the appeal requires leave of Court and the applicants have arguable grounds of appeal with higher chance of success. It was contended for the applicants that they have already filed a notice of appeal, applied for certified record of proceedings and if leave is not granted the applicants will be condemned unheard.

Conversely, Mr. Mugenyi submitted for the respondent that leave to appeal should have been sought first before filing a notice of appeal. He referred to the case of ***Matovu Sarah & Others vs Abacus Pharmacy (Africa) Ltd High Court Civil Appeal No. 11 of 2012*** where this Court ruled that an appeal filed without leave is incurably defective.

Counsel for the respondent referred to the principles governing leave to appeal as stated in various authorities namely; ***Tusker Mattresses (U) Ltd vs Royal Care Pharmaceutical Ltd HCMA No. 258 of 2011; Dr. Sheikh Ahmed Mohammed Kisuule vs Greenland Bank Limited (In Liquidation) HCMA No. 2 of 2012 and Sango Bay Estate Ltd & Others vs Dresdner Bank AG [1971] EA 17.*** It was then submitted for the respondent that there are no arguable grounds of appeal at all since the applicants only state that they are aggrieved by the decision and that they will be condemned unheard.

Counsel for the respondent argued that the powers exercised by this court in determining the application whose ruling and order are being appealed against were discretionary powers as enjoined by Order 9 rule 12 of the Civil Procedure Rules under which the application was made.

The respondent's counsel while relying on the principle in *Sango Bay Estate Ltd & Others vs Dresdner Bank AG (supra)* and *Martin vs Andersons Ltd [2006] 1 EA 168* further submitted that the applicants have not explained their delay in bringing this application to Court and yet in an application of this nature the applicants should not be guilty of dilatory conduct. He argued that no application has been filed for leave to appeal out of time yet the appeal has to be lodged within 30 days from the date of the ruling and therefore leave to appeal has to be applied for within the 30 days.

Lastly, Mr. Mugenyi argued that when this court made the order and the applicants did not comply with it, judgment was entered and the order is being executed. The view taken by the respondent's counsel was that the applicants cannot appeal against an interlocutory order when there is judgment in the main suit which was entered upon their failure to comply with the Court order which has not yet been set aside.

In rejoinder, Mr. Wamukoota submitted that the applicants obtained from the Court of Appeal an Order of Interim stay on 6/5/2013 which was intended to stay all orders arising from HCCS No. 69 of 2011 including the one made on 9/2/2013 which the applicants are seeking leave to appeal against. It was argued for the applicants that the judgment does not affect this application because such judgment arose out of Orders of this Court and hence there is need for leave to appeal against that ruling. Counsel for the applicants also submitted that in an application for leave to appeal it is not necessary to talk about the merits of the appeal or the chances of success of the appeal as was held in *Charles Sempebwa & 134 Others vs Silver Springs Hotel 1996 Ltd CACA No. 103 of 2003*.

It was contended for the applicants that the notice of appeal was filed within 14 days as required by law and not 30 days and therefore the application is properly before court because the rules allow a party to obtain leave after lodging the notice of appeal. He added that the rules do not state the time period within which the application should be brought. In that regard, Mr. Wamukoota submitted that this is not an application where leave to enlarge time is required as submitted by counsel for the respondent.

Mr. Kikwe, submitted that in regard to the judgment entered in default of failure to comply with the order of this court, that order can still be appealed against as the applicants' non compliance with the Order does not take away their right to appeal, which is why they brought this application. It was also his contention that the applicants still have the right to appeal against the judgment/decreed.

I have considered the application and the affidavits as well as carefully listened to the submissions of both counsel and the cases relied upon. While the applicants contend

that the appeal raises arguable grounds the respondent argued otherwise. In the case of ***Sango Bay Estates Ltd & Others vs Dresdner Bank AG (supra)*** Spry V.P at page 40 stated the principle upon which leave to appeal can be granted as follows:

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration, but where as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out.”

The Supreme Court of Uganda in the case of ***G.M. Combined (U) Ltd vs A.K. Detergents (U) Ltd Civil Appeal No. 23 of 1994*** alluded to this principle which was subsequently followed the Court of Appeal in ***Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority, Civil Application No. 16 of 1996*** where their Lordships stated;

“An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct”.

The same principle has been followed in various cases, see among others: ***Alley Route Ltd vs UDB HCMA No 634 of 2006 (2)***, ***Tusker Mattresses (U) Ltd vs Royal Care Pharmaceutical Ltd(supra)***, ***Spear Motors Ltd vs Attorney General & 2 others High Court Civil Suit No, 692 of 2007***, ***Dr. Sheik Ahmed Mohammed Kisuule vs Ms. Greenland Bnak Ltd (In Liquidation) (supra)***.

Therefore for this application to succeed, the applicants are required to show that there are grounds of appeal which merit serious judicial consideration. The ruling and order sought to be appealed against were made by this Court in exercise of its discretion under order 9 rule 12 of the Civil Procedure Rules which provides that if judgment has been passed pursuant to the preceding rules under that Order, the court may set aside or vary the judgment upon such terms as may be just.

It is clear from the above rule that this Court is clothed with an unfettered discretion to give such terms as it considers just while setting aside an ex parte judgment. For this application to succeed, the applicants need to satisfy this Court that there are matters whether of law or facts that deserve to be addressed by the appellate Court in the intended appeal. These include showing how this Court misdirected itself in the exercise of its discretion and as a result arrived at a wrong decision or that this court

was clearly wrong in the exercise of the discretion and that as a result there has been a miscarriage of justice. I believe those are the arguable grounds of appeal in this case that would merit consideration by the appellate Court.

However, upon looking at the materials before this court, I am afraid the applicants have not raised any of those arguable grounds in this application. All I see is merely the allegation that the applicants are aggrieved by the order of this Court that the applicants deposit Shs. 100,000,000/= in Court as a condition precedent for filing their written statement of defence. According to the affidavit in support sworn by the 1st applicant, this order curtailed his rights to be heard and as such he was condemned unheard. The 1st applicant states further that they failed to pay the money and their solution lies in appeal. It is my view that these proposed grounds of appeal do not merit serious judicial consideration as anticipated in the above authorities. This is because first of all, this Court exercised its discretion by setting the terms it deemed just after taking into account the circumstances of the case and in my view it cannot be faulted for doing so unless it misdirected itself and arrived at a wrong decision. The applicants have not stated so.

Secondly, the applicants' failure to fulfill the condition cannot be an arguable ground of appeal that merit serious judicial consideration by the appellate Court. To my mind the intended appeal is just an abuse of the court process which this Court is enjoined to prevent. While a party should in the normal course not be prevented from pursuing an appeal, it is also necessary to put in place mechanisms that prevent abuse of Court process as was observed by the Court of Appeal of Uganda in ***Asimwe Francis vs Tumwongyeirwe Aflod Miscellaneous Application No. 103 of 2011.***

In any event, the applicants put the cart before the horse by rushing to the Court of Appeal and filing a notice of appeal without first seeking leave to appeal. While I am aware that this can be validated by an order for leave to appeal, I do not think it should be encouraged because the requirement for leave in this case is a requirement of a substantive law which must be complied with failure of which makes such an appeal incompetent.

On the whole, taking into account the circumstances of this case, I do not find any arguable grounds of the intended appeal that merit granting this application and it is accordingly dismissed with costs.

I so order.

Dated this 13th day of February 2014.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Owakukiroru Raymond who was holding brief for Mr. Yesse Mugenyi for the respondent. The applicants and their counsel were absent.

JUDGE
13/02/14