

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 946 OF 2016
ARISING FROM MISCELLANEOUS APPLICATION NO 754 OF 2016
ARISING FROM CIVIL SUIT NO 77 OF 2012

WANZALA ENTERPRISES LTD}.....APPLICANT

VERSUS

BARCLAYS BANK OF UGANDA LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This is an application for leave to appeal to the Court of Appeal against the ruling and order of this court delivered on 19th September 2016 and for costs of the application to be provided for.

The grounds of the application are set out in the Notice of Motion and are as follows: Firstly, the Applicant is dissatisfied with the ruling and orders of this court. Secondly, according to the Civil Procedure Rules, leave is required as the ruling and order is not appealable as of right. Thirdly, the ruling and order greatly affects the Applicants as it permits a biased arbitrator/referee to proceed and make an award and the Applicant should be allowed to appeal to the Court of Appeal. Fourthly, the intended appeal has merit and has a high probability of success because there are serious arguable grounds. Fifthly, the application was made without unreasonable delay and lastly it is in the interest of justice that the application should be granted.

The application is supported by the affidavit of Kasibbo Joshua, the Managing Director of the Applicant which reiterated the grounds contained in the notice of motion. On matters of fact he deposed that the Applicant had applied in Miscellaneous Application No 754 of 2016 for orders that the arbitrator/referee appointed to reconcile the party's accounts is incapable of acting for reason of conflict of interest or likelihood of bias and for an order that a new arbitrator/referee is appointed by the court. The court dismissed the application and ordered the auditors assigned to proceed and file a final award. It was by agreement of the parties that they appointed Messieurs Mungereza & Kiriisa Certified Public Accountants and one of the partners Mr Kariisa Joram is a director in the Respondent bank. In the ruling, an auditor not envisaged by the Applicant one Mr Kwizina Thomas was ordered to be the referee/arbitrator yet the appointment was by agreement

of the parties. The court erred in law and fact when it ruled that the reconciliation exercise was assigned to Mr Thomas Kwizina, yet the right to assign the arbitrator/referee was a preserve of the parties. By allowing Messrs Mungereza & Kariisa Certified Public Accountants to make the final award, despite the glaring conflict of interest, the Applicant would be prejudiced hence the appeal. He contended that the court erred in law and fact in ruling to conclude that the Applicant had waived its right to object to Mr Joram Kariisa as an arbitrator hence the need to appeal.

The Respondent opposed the application and the affidavit in opposition is that of Esther Masawi Birungi, Head of Business Support and Corporate Recoveries of the Respondent. She deposed that the intended appeal does not raise any serious matters of law and fact. She contended that the Applicant's application was dismissed for failure to apply the proper procedure. On the merits of the application, the Respondent could not have concealed the directorship of Mr Kariisa Joram in the Respondent bank, a fact which was already within the knowledge of the Applicant and its lawyers. It was false to allege that the court ruling ordered an auditor not envisaged by the agreement of the parties to be a referee. The trial judge did not purport to appoint a new auditor since this would be contrary to the terms of the consent order by which the parties appointed Mungereza & Kiriisa Certified Public Accountants as the Arbitrator/Referee. While it was the right to assign or appoint an arbitrator/referee of the parties, the parties indeed exercised this right by virtue of the consent filed on 10th October 2014. The right to assign a particular person to carry out the reconciliation was the preserve of the appointed arbitrator/referee. Thirdly, allowing Mungereza & Kariisa to make a final award would not prejudice the Applicant as the Applicant still has the opportunity to challenge the award on any prescribed grounds under the law.

In the Notice of Motion the Applicant does not have an arguable case worth consideration by the appellate court. Secondly the affidavit in support of the motion does not demonstrate any substantial grounds of appeal which merit judicial consideration. The application is prejudicial to the Respondent since there is a pending suit which is yet to be determined by the court and is likely to be delayed by the intended appeal. There are no reasonable chances of success in the intended appeal. The Applicant's application is frivolous and an abuse of court process and should be dismissed with costs. In case the court is inclined to grant the application, the application should be granted with an order for the Applicant to deposit security for costs of the appeal.

The court was addressed in the written submissions.

The Applicant relies on the ground that the appointment of the referee would lead to a conflict of interest because Mr Joram Kariisa is a director in the Respondent bank. Secondly, Mr Thomas Kwizina was not envisaged by the Applicant to be the arbitrator/referee. And for Messrs Mungereza & Kariisa Certified Public Accountants to make a final award despite the glaring conflict of interest would prejudice the Applicant. On that basis he submitted that the intended

appeal has merit and has a high probability of success and there are serious arguable grounds. Secondly the application was made without unreasonable delay and finally it is in the interest of justice that the application is granted.

In response to the affidavit in opposition to the application, he submitted that the Respondent would not be prejudiced since the parties agreed to a trial by a referee and the issue of arbitrator/referee is central to the trial of the case. The application cannot be frivolous and an abuse of the process of court as alleged. He relied on **Kasese Cobalt Authority versus National Forestry Authority High Court Miscellaneous Application No 1079 of 2013** where it was held that whatever the merits of the application for leave, it cannot be an abuse of process of court as it is a right conferred by the rules. Finally it was not necessary for the deposit of security for costs as prayed for. It cannot be a condition precedent for granting of leave to appeal.

In reply the Respondent's Counsel submitted that the basis of the court ruling was that the challenge to the arbitrator was not made within the prescribed time. He submitted that the court ruling clearly highlights that while the Applicant had a right to challenge the impartiality of the arbitrator, the objections ought to have been made within 15 days of discovery of justifiable circumstances for the challenge in terms of section 13 (2) of the Arbitration and Conciliation Act Cap 4 laws of Uganda. He submitted that it was not in dispute that the Applicant claims to have discovered the directorship of Mr Kariisa Joram around October 2015. Under those circumstances, the Applicant was expected to file his objection within 15 days of discovery of such information. This matter was comprehensively addressed in the ruling of the court and the Respondent does not intend to delve into it. However the Applicant brought the application 10 months later in 2016. Consequently the authority of **Kasese Cobalt Company Ltd versus National Forestry Authority** (supra) is distinguishable and not applicable. In that case the triable issue was whether service on the liaison officer was effective service. In the instant application, there is no such triable issue. In the premises it is the Respondent's submission that the Applicant failed to demonstrate that there is a prima facie ground of appeal which merits serious judicial consideration and therefore the application ought to be dismissed with costs.

Ruling

I have carefully considered the Applicant's application and the point raised by the Respondent's Counsel amounts to a preliminary objection to the application. The question of whether the ruling of the court holds that the Applicant had no right to challenge the arbitrator under the Arbitration and Conciliation Act is a matter on which leave to appeal can be given.

I agree with the Counsels that the grounds for granting leave are spelt out by the justices of the Court of Appeal in **Degeya Trading Stores (U) Ltd versus Uganda Revenue Authority Civil Appeal Number 16 of 1996**. The question is whether there are arguable points of law which merit judicial consideration by the appellate court.

Where there is a preliminary point of law, the arguable point of law should relate to the preliminary point of law upon which the application sought to be appealed from was dismissed. Where the point of law disposes of the entire application, the arguable point of law would be whether the court erred in law in ruling on the point of law as it did. For that reason I will first consider my ruling on the point of the limitation period within which an arbitrator can be challenged. This court considered the matter between pages 23 and 24 and came to the conclusion that a challenge to an arbitrator has to be made within 15 days after being aware of the conflict of interest. Particularly at page 24 I held that the application was made out of time and therefore I concluded that the application had no merit.

The Applicant's application for leave purports to challenge the ruling on other grounds in the ruling. The Applicant does not raise the question of whether the application challenging the arbitrators/referees is time barred. The question of whether the Applicant's application is time barred is fundamental to the jurisdiction of the court handling it. In the premises, because the Applicant has not raised any arguable grounds challenging the question of whether the applicant's objection to the referee was time barred, the application for leave to appeal will lead to no possible good because it does not challenge the ruling of the court on the preliminary point of law. In the premises therefore, I find nothing that merits judicial consideration at an appellate level and the Applicant's application is accordingly dismissed with costs.

Ruling delivered in open court on the 19th of December 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Alima Nabayunga holding brief for Nsubuga Kenneth Counsel the applicant

Diana Nabuuso holding brief for Faida Joy Counsel for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19th December 2016

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*