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**THE REPUBLIC OF UGANDA**

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

**MISCELLANEOUS APPLICATION No. 1336 OF 2017**

*(Arising From Hccs No. 432 Of 2014)*

**THREE WAYS SHIPPING SERVICES LIMITED :::::::::::::::::::: APPLICANT**

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**VERSUS**

**MTN UGANDA LIMITED :::::::::::::::::::: RESPONDENT**

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

**RULING**

The applicant commenced this application for leave to appeal the decision of this court in  
15 Miscellaneous Application No. 103 of 2015 to the Court of Appeal and for costs of the  
application to be provided for.

The applicant is dissatisfied with the decision of this court in High Court Miscellaneous  
Application No. 103 of 2015 delivered on 18th October 2017.

The applicant avers that there are substantial points of law that require serious judicial  
20 consideration by the Court of Appeal and that it is in the interest of justice that leave be  
granted to the applicant.

The affidavit in support of the application is that of Oscar Baitwa, who deposed that on the  
29th October 2012, the respondent filed HCCS No. 503 of 2012 against the applicant for  
failing and or refusing to pay the sums of money amounting to USD 3,827,820.71. That in  
25 their defense, the applicant stated that the suit was a nullity as the action was based on an  
illegality and the court could not entertain the same. He deposed further that the court  
delivered its ruling on 23rd May 2014 wherein this court found that the respondent's action  
arose from an illegality and the same could not be entertained by the court.

He deposed further that the respondent filed HCCS No. 423 of 2014 against the applicant and  
30 2 others for recovery of the sum of USD 3,761,99.4 as money had and received for no  
consideration. That the applicant filled a defense in the matter wherein the applicant gave  
notice of the filing of an application to strike out the suit for being *res judicata* and an abuse  
of court process.

That this court delivered a ruling where it held that the suit was not *res judicata* and was not an abuse of court process. That the applicant is dissatisfied with the ruling and intends to appeal to the Court of Appeal.

He believes that the intended appeal has good chances of success and that the application has  
5 been made without unreasonable delay.

Counsel for the applicant contends that there are grounds of appeal that merit serious judicial consideration. That is;

- a) *The filling of a second suit based on the same facts with a previously dismissed suit on a preliminary objection is not barred by res judicata,*
- 10 b) *Whether in the pendency of an appeal against a dismissed suit on a preliminary objection, the filling of a second suit based on the same facts is not an abuse of court process.*

Counsel further contended that whereas the court noted that the two suits were based on the same facts, the court did not strike out or dismiss the second suit for abuse of court process.  
15 Counsel, therefore, concluded that the above matter merits consideration by the Court of Appeal.

On the other hand, counsel for the respondent opposed the application. Counsel contended that there are no arguable points of law that have been raised in the application disputing the finding of this court in HCCS No. 103 of 2015 that the suit was not *res judicata*.

20 According to counsel, the ruling of court distinguished the basis of the claim in HCCS No. 503 of 2012 which was based on the breach of the memorandum of understanding and HCCS No. 423 of 2014 which is for recovery of USD 3,761,993 based on a claim for money had and received for no consideration, on account of 134 invoices raised by the applicant, and paid without any services rendered.

## 25 **Ruling**

I have carefully considered the application together with the respondent's replies to the application, the submissions of the respective Counsel and the authorities cited.

The grounds for the application for leave to appeal on a preliminary point were set out in the case of *Sango Bay Vs Dresdner Bank [1971] EA 17* where Spry V-P held that;

5 “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.”

Further, in the case of ***Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors*** (Miscellaneous Application No. 292 of 2014) court held that;

10 “In order to determine whether there are grounds which merit judicial consideration on appeal, the applicant has to demonstrate the grounds of objection showing where the court erred on the question or the issues raised by way of an objection. It would, therefore, be necessary to set out what the controversy before the court was and how it determined that controversy. For leave to appeal to be granted, the applicant must demonstrate that there are arguable points of law or grounds of appeal which require serious judicial consideration on appeal arising from the decision of the court on the

15 controversy. It is necessary to set out the controversies upon which the court ruled and the grounds of the application which dispute or contest the correctness of the decision of the court on each controversy. Such grounds should be capable of forming the grounds of appeal deserving of serious consideration by the appellate court”.

20 The crux of Counsel for the applicant’s submission is that there are substantial points of law that require consideration by the court of appeal as to whether;

- a) *The filling of a second suit based on the same facts with a previously dismissed suit on a preliminary objection is not barred by res judicata,*
  - b) *Whether in the pendency of an appeal against a dismissed suit on a preliminary objection, the filling of a second suit based on the same facts is not*
- 25 *an abuse of court process.*

Counsel for the respondent averred that the applicant has failed to set out the controversies upon which the court ruled.

30 This court held that H.C.C.S No. 503 was not *res judicata* because the suit connotes the fact that the merits of the case were not heard save the analysis of the memorandum of understanding that court declared illegal and struck out the suit. It was my considered opinion that although the facts in H.C.C.S No. 503 of 2012 do not differ from H.C.C.S No. 503 of

2012, the case was struck out by reason of the illegality of the memorandum of understanding between the parties as determined by a court on a preliminary point but court did not delve into the merits of the case.

This court relied on the case of ***Isaac Bob Busulwa Vs Ibrahim Kakinda [1979] HCB 179*** where court held on a preliminary point of law on *res judicata* that the dismissal of a suit based on a preliminary point not based on the merits of the case does not bar a subsequent suit on the same facts and issues between the same parties.

It is trite law that for *res judicata* to apply, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit (see the case of ***Lt David Kabarebe Vs Major Prossy Nalweyiso C.A Civil Appeal No. 34 of 2003***). For the doctrine to apply, there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be *res judicata* (see ***Bukondo Yereimiya Vs E. Rwananenyere [1978] HCB 96***).

There are several other judgments of the High Court to the same effect, for instance, In ***Frederick Sekyaya Sebugulu Vs Daniel Katunda [1979] HCB 46*** the plaintiff's Counsel sought an adjournment because the plaintiff was sick in Nairobi. The application for adjournment was refused and the Hon Judge dismissed the suit. Thereafter the plaintiff moved under **order 9 rules 24 and 26** of the **Civil Procedure Rules** to set aside the order of dismissal of the suit and it was held that the dismissal could not be treated as *res judicata* because it was an order in the same case and not an order in a former suit, a necessary condition for application of the principle of *res judicata*.

Similarly, In ***Kerchand Vs Jan Mohamed (1919 – 21) EAPLR 64***, it was held that where a suit is dismissed on a preliminary point of law and the plaintiff did not have an opportunity to be heard on merits, a new suit on the same matter cannot be *res judicata*.

Further, in ***Isaac Bob Busulwa Vs Ibrahim Kakinda [1979] HCB 179***, it was held that the dismissal of a suit on a preliminary point, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues between the same parties.

Counsel for respondent has not raised any arguable points or legal grounds disputing or overturning the stated principle above. In my view in an application of this nature it is not sufficient to merely state that the applicant is dissatisfied with the decision on a point of law

without laying the background for the dissatisfaction as the applicant did in his case. As stated in the *Ayebazibwe Raymond* case (supra).

5           *“It is necessary to set out the controversies upon which the court ruled and the grounds of the application which dispute or contest the correctness of the decision of the court on each controversy. Such grounds should be capable of forming grounds of the appeal deserving of serious consideration by the appellant court”.*

I see none in this application

I am therefore of the considered view that counsel has not raised any arguable points of law meriting leave to appeal the decision of this court.

10   Counsel for the respondent averred that the respondent will suffer prejudice if the court granted leave to appeal. The respondent seeks to recover USD 3, 761,993.46 a large sum of money whose recovery has been and continues to be frustrated by the applicant's incessant applications.

15   I am inclined to agree with Counsel for the respondent, this case involves enormous sums of money and justice would be furthered if the suit is heard on its merits. In the premise, I dismiss this application with costs.

**B. Kainamura**

20   **Judge**

**5.09.2018**