

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISC. APPLICATION No. 421 of 2017

(Arising From Civil Suit No.285 of 2017)

10 **KENLOYD LOGISTICS (U) LTD ::::::::::::::::::::::::::::::::::: APPLICANT**

VERSUS

HARSHI ENERGY (U) LTD ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

15 **RULING**

This ruling arises from an application brought under Order 44 rule 1,2 and 3 and rules 5, 6 (2) (b), 42, 43 and 44 of the Judicature (Court of Appeal Rules) Directions, S.1, 13 – 1-. The applicant is seeking for orders that leave to appeal against the decision in Civil Suit No. 285 of 2014, the time within which to file an appeal against the decision in Civil Suit No. 285 of 2014
20 be extended, an order for stay to execution be granted, all orders consequential thereof be vacated, court grant any orders it may deem fit and costs of the application. The application is supported by the Affidavit of Esther K. Tayebwa.

The gist of the grounds of this application as contained in the affidavit are that the respondent sued the applicant in the High Court of Uganda Commercial Division vide Civil Suit No. 285 of
25 2014 claiming payment of USD 100,000 by summary procedure under Order 36. That the applicant paid the whole USD 100,000 and the respondent acknowledged receipt of the same in court when the applicant was served with summons. The plaintiff went ahead to claim for interest of 10% on the USD 100,000 that had been refunded yet it was not stated in the contract between the parties.

That the applicant then applied for leave to appear and defend the suit against the respondents claim for interest and costs but this was denied and judgment entered that the applicant pays interest of 10% on USD 100,000 for the period of 30th October 2013 to 18th August 2014.

That the applicant being dissatisfied with the judgment has learnt that it has no automatic right of appeal and that the time within which to appeal has since expired hence the application. That the intended appeal against the judgment raises questions of law and fact with a likelihood of success.

That the delay is attributed entirely to the mistake of Counsel of the applicants for following the wrong procedure to challenge the order (review instead of an appeal) and it is therefore imperative that time be extended within which to file the appeal.

The affidavit in reply was sworn by Anyuru Simon Kanyonga in his capacity as the respondents Advocates (Kateera and Kagumire Advocates). He admitted contents in paragraph 3 and 5 of the affidavit in support. He further added that the respondent filed bills of costs in respect of Miscellaneous Application No. 853 of 2014 and HCCS 285 of 2015 which were taxed by the consent of the parties and the applicant neglected to make the payments despite the various demands made by the respondent.

That the respondent applied for execution vide HCT – EMA No. 566 of 247 on 8th May 2017 upon the refusal of the applicants to make payment. The applicants belatedly applied for leave to appeal the decision in HCCS 285 of 2014 which is an abuse of court process aimed at denying the respondent from enjoying the fruits of litigation.

He also stated that the intended appeal has no merit and is not likely to succeed as the applicants did not state the grounds of its intended appeal or demonstrate the likelihood of success. That the respondent will be prejudiced by the grant of this order as it is suffering loss and continues to suffer loss due to the applicant's refusal to pay the decretal sum and taxed costs of the suit.

At the hearing of this application, Learned Counsel of the applicant submitted that the application to extend the time within which to appeal be granted and the applicants be granted leave to appeal the decision in Civil Suit No. 285 of 2014. According to Counsel, the applicant intended to challenge the decision and it instructed its lawyers who followed the wrong

procedure being a ground to extend the appeal. He further submitted that the mistake or inadvertence of Counsel should not be visited on the client and cited the holding in ***Mutaba Barisa Kweterana Vs Bazirakye Yereimiya and Another Civil Application No. 158/2014*** at page 6.

5 “this court has laid down in a long line of cases, that mistakes or inadvertence by Counsel should not be visited on the litigants themselves who came to seek substantive justice”.

Counsel for the applicant also submitted that the applicant had to prove that;

1. He or she has an arguable case worth considering by an appellate court
- 10 2. The appeal has reasonable chance of success and they cited ***Tusker Mattresses (u) Ltd Vs Royal Care Pharmaceuticals Civil Application No. 393 of 2010*** where it was held that;

“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”.

15 Counsel also outlined grounds that would be raised on appeal which merit serious considerations and they include;

1. The applicant was sued by the respondent in the High Court of Uganda (Commercial Division) vide Civil Suit No. 285 of 2014 seeking orders for the payment of a sum USD 100,000 by summary procedure under Order 36.
- 20 2. The applicant cleared the whole claim of USD 100,000 and the respondent acknowledged the receipt of the same in court upon the applicant being served with summons.
3. The respondent went on to pray for 10% on the USD 100,000 that had been refunded.
4. The Honorable Judge denied the applicants application for leave to appear and defend
- 25 against the respondent’s claim for interests and cost but the Honorable Judge further ordered that the applicant pays interest of 10% of USD 100,000 for the period of 30th October 2013 to 18th August 2014; and

5. That the applicant being dissatisfied with the judgment has learnt it has no automatic right of appeal and the lifetime within which to appeal has since expired hence this application.

Counsel for the respondent submitted that the application be dismissed with costs to the respondent and that the application is not brought in good faith and the omnibus application is an abuse of court process aimed at denying the respondent the enjoyment of the fruits of its litigation as the applicants did not lead any evidence to prove the grounds for an application for stay of execution under Order 43 rule 4 (3) CPR that includes satisfying the court that;

- a) Substantial loss may result to the party applying for stay of execution unless the order is made.
- b) The application has been made without unreasonable delay; and
- c) Security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

He further submitted that the court should consider the following factors in exercising its discretion whether or not to grant leave to the applicant to appeal and extend time within which to file an appeal which factors are not in dispute and they include;

1. The applicant must show either that his intended appeal has reasonable chances of success; or
2. That it has arguable grounds of appeal which deserve serious consideration and has not been guilty of dilatory conduct as per ***Dr. Sheik Ahmed Kisuule Vs Greenland Bank (in Liquidation) SCCA No. 11 of 2011*** and ***G.M Combined (U) Ltd A. K Detergents (U) Ltd C.A 23 of 1994.***

Counsel for the respondents further submitted that the applicant failed to show that its appeal has any reasonable chances of success as they relied on paragraphs 7 and 9 of the applicant's affidavit in support of the application which does not expound on how the appeal has a high likelihood of success as is required under the principles of the law.

The applicant also failed to show court how they will suffer irreparable harm in order for the application to stand.

Counsel for the respondent also submitted that the applicant stated that the intended appeal against the decision of the Judge raises questions of law and fact but did not indicate what those points of law or facts which warrant the opinion of the appellate court as it was similarly held in ***Kasim Jamada Waligious Vs Sunflag Textiles & Knit Wear Mills Ltd HCT-OO-CC-Ma***
5 ***154/2010*** that it is not enough to merely allege that the decision involves important questions of law without indicating the so called points of law.

Counsel for the respondent also submitted that the applicant's affidavit in support of the application under paragraph 8 states "*that the delay is attributable entirely to the mistake of Counsel of the applicants lawyer for following the wrong procedure to challenge the order.....*"

10 yet the applicant never vigilantly followed up on any of its rights to apply for leave to appeal out of time until when they were served with notice to show cause why execution should not issue against it.

DECISION OF COURT

15 I have considered the pleadings and submissions by both Counsel. The principles to guide court in an application of this nature were expounded in ***Dr. Sheik Ahmed Kisuule Vs Greenland Bank (in Liquidation) SCCA No. 11 of 2011*** and ***G.M Combined (U) Ltd A. K Detergents (U) Ltd C.A 23 of 1994*** where the courts held that;-

- 20 a) That the applicant must show either that his intended appeal has reasonable chances of success or
- b) That it has arguable grounds of appeal which deserve various considerations and has not been guilty of dilatory conduct.

The applicant's affidavit in support does not in my view expound on how the appeal has likelihood of success as they only stated that the intended appeal against the decision of the
25 Judge raises question of law and facts and has a high likelihood of success. (see ***Degeya Trading Stores (U) Ltd Vs URA Civil Appl No. 16 of 1996***).

The applicant's conduct of remembering that they had an option to appeal after being served with a notice to show cause why execution should not issue after a period of three years from 2014 to May 2017) shows that their conduct was dilatory.

An appeal should be filed within 30 days from the date of delivery of the judgment (see **Section**
5 **79 CPA and Sekyah Kyakwambala (CA No. 7 of 2010) (2012) UGHC 254**).

The applicant filed Misc. Appl No. 855 of 2014 wherein he sought for the review of the courts order in Misc. Appl No. 379 of 2014. Court in its decision of 22nd April 2016 held that the application for review was improperly before. Court opined that the applicant therein and herein should have appealed.

- 10 The applicant satback for over a year and it is only when the respondent filed EMA No. 566 of 2017 on 8th May 2017 for the applicant to show cause why execution should not issue (see para 7 of affidavit in reply) that the applicant woke up and filed this application. This in my view is a clear manifestation that the applicant is guilty of dilatory conduct and court should not grant this application.
- 15 In the result this application is dismissed with costs.

B. Kainamura

Judge

20 **7.08.2018**

