THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 42 OF 2019

(ARISING FROM ELECTRICITY DISPUTES TRIBUNAL COMPLINT NO. EDT/13/2015)

OBUA FRANCIS.....APPLICANT

VS

UMEME LIMITED .....RESPONDENT

BEFORE HON. MR. JUSTICE RICHARD WABWIRE WEJULI

RULING

This application seeking orders that time be extended for the applicant's appeal against the judgment of the electricity tribunal in EDT 13 of 2015 and for costs of the application be provided for.

The brief background to the application is that in 2012 the applicant filed a complaint to dispute at the Electricity Dispute Resolution Tribunal against the respondent (EDT 13 of 2015) seeking for special damages for the value of spoilt milling equipment destroyed as a result of fire and loss arising.

The Complaint was dismissed on 25th August 17 and hence this Application filed on 24th January 2019 seeking for extension of time. The applicant is represented by Counsel Oryokot Emmanuel the respondents by Counsel Alex kaboyo.

When the Application came up for hearing on 13 March 2019 counsel for the applicant sought for leave to file a Rejoinder, on account that they had only been served with a Reply on the eve of the day of hearing. Respondent's counsel objected to the prayer for extension on account that the application was res judicata and an abuse of process.

He submitted that the applicant filed a similar application MA 373/ 2018 in the High Court seeking the same orders as in the instant application. MA 373/2018 was dismissed on the 29th August 2018. He also argued that the applicant was guilty of dilatory conduct as application 42 of 2019 was filed about five months after MA 373 of 2018 was dismissed.

That in both applications the applicant use the same lawyer that they therefore must be aware of the facts and timelines. He prayed that the application be struck out with costs for the foregoing reasons.

Applicants counsel contended that the application was not res judicata as this application 373 of 2018 was dismissed on a preliminary objection without being hard, yet the doctrine of res judicata requires that a case must have been hard and finally determined by the court on the issues.

He argued that the applicant was not an abuse of process as it had merits the applicant in his affidavit in support stated the reasons why he was unable to come to court earlier the court hearing an opportunity to be heard. The reasons as stated at paragraph 15 of the AIS being that the Applicant was not aware of the requirement to appeal within 30 days from the 29/8/2017.

The doctrine of res judicata is provided for under S.7 of the CPA which states that;

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court".

The ingredients of this doctrine were set down in the case of **Hon. Piro Santos Eruaga V General Moses Ali and another Election Petition No. 1 of 2007** where court stated that the ingredients of the doctrine of res judicata are:

i. That there has to be a former suit or issue decided by a competent court. ii. The matter in dispute in the former suit between the parties must also be directly and substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

iii. The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

I have carefully considered this doctrine and related it to the facts of this case. It is not disputed that MA 373 of 2018 and the current application MA 42 of 2019 are both between **Obua Francis and Umeme Limited**, and that MA 373/2018 was disposed of and therefore is regarded as a former suit.

The second corollary issue is whether the matter in dispute in the former suit/application MA 373 of 2018 between the parties is directly and substantially in dispute between the parties in the current suit.

Whereas in MA 373/2018 the Applicant sought for an order for leave to appeal the judgment of the Electricity Disputes Tribunal, in MA 42 of 2019 he seeks for an order for extension of time to file his appeal against the judgement of the Electricity Disputes Tribunal in EDT 13/2015 which is the same judgement in MA 373/2018.

In the case of **Boutique Shazim Ltd vs. Norattam Bhatia and Hemantini CA No. 36 of 2007** the court stated that:

"To give effect to a plea of res judicata, the matter directly and substantially in issue in the suit must have been heard and finally decided in the former suit. It simply means nothing more than that a person shall not be heard to say the same thing twice, in the successive litigations".

Save for the fact that the Applicant now has to seek for extension of time the matters in issues in the two Applications are substantially the same. The Applicant seeks to appeal against the same judgment and for costs.

However, to successfully invoke the doctrine of res judicata, there is rider, to the matter directly and substantially in issue in the subsequent suit having been heard and finally decided by the court in the first suit.

The decision must have followed a judicious hearing which then determined the matter on its merits otherwise the subsequent suit would not be affected by res judicata.

In order that a mater is considered as having been heard and finally decided the decision in the previous suit must have been based on the merits. A suit dismissed

for technical mistake or procedural impropriety is not considered as one determined on merits and therefore in such circumstances res judicata would not be successfully invoked as bar.

MA 373/2018 was dismissed for having been brought under a non-existent provision of the law and for reasons that in the first instance, the Applicant ought to have filed the Application for leave to appeal, in the Tribunal and not the High Court.

I have carefully reviewed the record of proceedings in MA 373/2018 and the relevant provisions of the **Electricity Tribunal Proceedings Rules SI 53/2012**. Rule 35(2) of the **Electricity Tribunal Proceedings Rules** which is to the effect that the law applicable to appeals and review from the High court shall with necessary modification apply to appeals from the Tribunal to the High Court.

Under Order 44 r (3) CPR, applications for leave to appeal are in the first instance made to the court making the order sought to be appealed from.

In the instant case therefore the application to extend time and in doing so also grant leave to appeal should in the first instance have been made to the Tribunal and not to the High Court. It is for this reason that MA 373/2018 was dismissed.

Counsel for the Applicant, who also happens to have been his lawyer in MA 373/2018 acknowledged this anomaly at the hearing of MA 373/2018 and should have taken heed. The application is therefore premature.

I will now address the second ground of objection which is that the applicant was guilty of dilatory conduct by filing MA 42 of 2019 five months after MA 373 of 2018 was dismissed. To this, the applicant cited paragraph 5 of his Affidavit in Support

wherein he averred that he was not aware of the requirement to lodge his appeal within 30 days of the decision in EDT 13/2015.

By filing the same application in the same court, both the Applicant and his lawyer are in abuse of court processes.

The Application cannot for the foregoing reasons be entertained by this court and is therefore struck out with caution to Counsel for the Applicant to refrain from such misconduct.

Be that as it may, the record indicates that EDT 13/2015 was decided on the 29/8/2017. The first attempt to appeal against it was filed 15th May 2018 and dismissed on the 29th August 2018. The Applicant then filed MA 42 of 2019 on the 24th January 2019.

From the record of proceedings, MA 373 of 2018 was filed and prosecuted on behalf of the Applicant by Ibaale, Nakato & Co Advocates who are his counsel in the instant application as well.

Whereas the applicant could therefore be excused for not having had a lawyer in EDT 13/2015, the fact that he subsequently had lawyers in MA 373 of 2018 but still did not file the instant Application within allowed time, after 29th August 2018 when MA 373/2018 was dismissed, casts immense doubt on any argument that he did not know the process.

Both the Applicant and his lawyers are guilty of dilatory conduct. MA 42 of 2019 was filed more than four months after dismissal of MA 373 of 2018.

In the event this application is dismissed for reasons that it offends the rules of procedure as indicated above but even that notwithstanding, even if this court had the mandate to entertain the application at this stage, which it does not for reasons that the Application is prematurely before it, the Applicant should have been more vigilant in pursuing his rights. He sat on his rights and inordinately delayed to pursue the intended appeal.

The application is consequently dismissed.

I make no order as to costs.

Ruling delivered this 22nd day of March, 2019.

Richard Wejuli Wabwire

JUDGE