

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0568 OF 2022

5 **(Arising from Civil Suit No. 0594 of 2015)**

1.	SOUTHERN UNION INSURANCE BROKERS LTD	}	
2.	ALBERT NDUNA	}	
3.	MM BAGALAALIWO	}
	APPLICANTS		
10	4. COSTEN MUTUIKWA	}	

VERSUS

NIKO INSURANCE (U) LIMITED

RESPONDENT

15 **Before: Hon Justice Stephen Mubiru.**

RULING

a. Background.

The respondent sued the applicants jointly and severally for the recovery of a liquidated sum of
20 shs. 156,225,632/= being money had and received as insurance premiums, general damages for
breach of contract, interest and costs. The 1st applicant, an insurance brokerage company,
through its directors, the rest of the applicants, obtained that sum of money from the
respondent's various clients, but never accounted for it to the respondent. Shortly thereafter the
1st applicant closed business, hence the claim for fraud against its directors. In a judgment
25 delivered on 1st October, 2021 the applicants were found jointly and severally liable. And
directed to pay shs. 117,163,717/= as special damage, shs. 50,000,000/= as general damages
interest thereon at the rate of 20% from 13th December, 2012 and 6% per annum from the date of
judgment, respectively, until payment in full, and the costs o the suit.

30 Being dissatisfied with the decision, the applicants on 17th November, 2021 filed an application
for review and setting aside of that judgment on grounds that there was a mistake apparent on the
face of the record, and that a new and important mater of evidence had been discovered which
could not have been produced at the hearing of the suit even with reasonable diligence of the

applicants. They contended that the court had erred in lifting the 1st applicant's corporate veil in order to hold the rest of the applicants' personally liable. The Court had been misled by their counsel when it was informed that they had no evidence to rebut the prayer for lifting the veil, whereas not. The Court erroneously found the rest of the applicants to be shareholders in the 1st applicant yet they were only directors. That application was dismissed in an ex-tempore ruling delivered on 28th February, 2022 hence, this application.

b. The application.

10 This application is made under the provisions of section article 126 of *The Constitution of the Republic of Uganda, 1995*, sections 10 and 33 of *The Judicature Act*, sections 66, 76 and 98 of *The Civil Procedure Act*, Order 52 rules 1 and 2 of *The Civil Procedure Rules* and rules 41 (1), 42 (1) and 78 of *The Judicature (Court of Appeal Rules) Directions*. The applicant seeks leave to appeal an order dismissing their previous application for review of the judgment in the above
15 suit, upon a claimed discovery of a new and important matter of evidence. The applicants intend to argue on appeal that it was erroneous of the trial Judge to have allowed the lifting of the veil of the 1st applicant corporation by way of an application when it was not one of the prayers in the main suit. Having found that the applicant's failure to remit the premium was not fraudulent, the Court erred in lifting the veil. The trial Judge erred to have found that the application for lifting
20 the veil was not controverted, yet that was a mistake of counsel who failed to tender their evidence.

c. The affidavit in reply;

25 In the respondent's affidavit in reply, it is averred that the application is an abuse of process intended to prevent the respondent from reaping the fruits a judgment delivered in its favour. The Court rightly found that the 1st applicant's annual returns sought to be relied upon as new and important evidence discovered by the applicants did not qualify as such.

30. Submissions of counsel for the applicant.

M/s Fides Legal Advocates on behalf of the applicant submitted that the applicants intend to argue on appeal that it was erroneous of the trial Judge to have allowed the lifting of the veil of the 1st applicant corporation by way of an application when it was not one of the prayers in the main suit. Having found that the applicant's failure to remit the premium was not fraudulent, the
5 Court erred in lifting the veil. The trial Judge erred to have found that the application for lifting the veil was not controverted, yet that was a mistake of counsel who failed to tender their evidence. Substantial justice requires that leave be granted. Rules of procedure cannot prevent Court from rectifying its ow error. In the judgment, the court made the assumption that the 2nd to 5th applicants doubled as shareholders in the company whereas they were only directors. The
10 applicants have acted expeditiously without any dilatory conduct.

e. Submissions of counsel for the respondent.

M/s Tumusiime, Irumba and Co. Advocates on behalf of the respondent submitted that the
15 application is an abuse of court process, a deliberate intention to frustrate the justice system and to frustrate the respondent from recovering the fruits of litigation. The only new and important matter or evidence they wanted to rely on was the 1st applicant's Company annual return of 2011. The respondent filed an affidavit in reply to the said application attaching thereto the Joint Scheduling Memorandum, the Joint trial bundle clearly showing that the said 1st applicant's
20 Company annual return of 2011 formed part and partial of the documents relied on by all the parties during trial of the main suit. And the said evidence was never rebutted by the applicants inform of an affidavit in rejoinder. The Court rightly agreed with the respondent that since the Company Annual returns was formed part of the documents relied on by the parties, there's no way it could be treated as new evidence. The applicants had the option to file an appeal against
25 the main suit but chose to go for review and thus they're estopped from arguing an appeal in application for leave to review. The Court rightly came to the conclusion that what the applicants contended to be an error apparent on the face of the record was not self-evident irregularity in the process towards the decision, but rather a drawn-out process of reasoning, examination and scrutiny of the law and facts on the merits. It was evident that what the
30 applicants were attempting to achieve was the reversal of what they considered to be an erroneous decision, by forcing a rehearing and correction by the same court which made the

decision, yet an application for review, it must be remembered, cannot be allowed to be an appeal in disguise. Their intended appeal has arguable grounds of appeal and they are guilty of dilatory conduct.

f. The decision.

The right of appeal is a creature of statute and must be given expressly by statute (see *Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan* (1953) 20 EACA 17; *Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005* and *Attorney General v. Shah* (No. 4) [1971] EA 50). By virtue of section 76 (1) (h) of *The Civil Procedure Act*, a right of appeal exists from orders made under rules from which an appeal is expressly allowed by rules. Order 44 of *The Civil Procedure Rules* specifies orders from which appeals arise as a matter of right. An order dismissing an application for review is not listed among them. The order sought to be appealed is not one of the listed orders, hence this application. Rule 2 thereof states that an appeal under the Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.

Apart from determining whether or not *prima facie* there are grounds of appeal that merit serious consideration, the court to which an application of this nature is made should; (i) identify and assess the “seriousness and significance” of the points sought to be raised on appeal. If the points are neither serious nor significant, relief will usually be granted; (ii) the court must consider the points relate to a significant misdirection on law or fact; and (iii) the court must always have regard to all the circumstances of the case, including (a) the need for litigation to be conducted efficiently and at proportionate cost; and (b) the need to enforce compliance with rules, practice directions and orders. The relevant factors would vary from case to case but might include the promptness of an application for relief and other past or current delay.

If the question is one of principle and a novel one, ordinarily leave to appeal should be granted. Substantial justice should not altogether be lost sight of in considering finality of decisions, in cases where the Legislature and the Rules Committee have cast the duty of deciding whether the litigation should be continued further, on the trial court or alternatively the appellate Judge who

considers an application for leave to appeal. It would be obviously absurd to allow an appeal against a decision under a provision designed to limit the right of appeal. However, if the question raised be one in respect of which there is no authoritative decision that would be a guide to the parties, then the circumstances favour granting of leave.

5 Leave will normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial consideration (see *Sango Bay Estates Limited and others v. Dresdner Bank [1992] E. A. 17*; *G.M. Combined (U) Ltd v. A.K. Detergents (U) Ltd, S. C. Civil Appeal No. 23 of 1994*; *Degeya Trading Stores (U) Ltd. v. Uganda Revenue Authority, C. A. Civil Application No 16 of 1996*; and *Kayaga v. Waligo C. A. Misc. App. 80 of 2012*). An
10 applicant seeking leave to appeal must show either that his or her intended appeal has a reasonable chance of success or that he or she has arguable grounds of appeal and has not been guilty of dilatory conduct. Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard, but where the order from which it is sought to appeal was made in exercise of a
15 judicial discretion, a rather strong case will have to be made out (see *GM Combined v, AK Detergents SCCA No. 23 of 1994*). The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on appeal. A real prospect of success means that the prospect for the success must be realistic rather than fanciful (see *Swain v. Hillman [2001] 1 All ER 91*).

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In the instant case, the argument intended to be raised on appeal is that this court misdirected itself when it rejected an application for review. I have not found any grounds of appeal which merit serious judicial consideration by the Court of Appeal. The intended appeal has no reasonable chance of success since the arguments intended to be raised are not supported by the
25 record. Therefore, there are no arguable grounds of appeal. It is for that reason that this application is dismissed with costs to the respondent.

Delivered electronically this 11th day of January, 2023
Mubiru.....

30

.....**Stephen**

Stephen Mubiru
Judge,
11th January, 2023.