THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-MA-0186-2022
(Arising from BUS-00-CV-CS-245-2018)

1. TUMUSIIME JOAB T/A BAKERY LTD
2. JBO SWEET BREAD CO LTD ::::::::::::::::APPLICANTS

VERSUS

SAN SARA AGRO LIMITED :::::::::::::::::::: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

RULING

Introduction.

[1] This is an application for leave to appeal out of time and stay of execution of judgment brought under **Section 96 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 44 rule 3, Order 52 rules 1 to 3 of the Civil Procedure Rules.**

[2] The grounds upon which it is based are that;

1. The Applicants should not be punished for the negligence and mistakes of their former lawyers.
2. The Applicants have been vigilant and diligently following the prosecution of their case.
3. The intended appeal has a high likelihood of success and the Applicants will suffer irreparable injury if this application is not granted.

4. It is just, equitable, fair and in the interest of justice that this application be allowed.

Background.

[3]The background of this matter has its genesis from the Chief Magistrate's Court of Bushenyi wherein the Respondent herein sued the Applicants in **BUS-00-CV-CS-245-2018** for recovery of UGX. 11,000,000/= arising out of supply of cooking oil by the Respondent to the Applicants. After a full trial, the learned trial Magistrate entered judgment on **27th/02/2020** in favor of the Respondent. The Applicants feeling dissatisfied with the judgment and orders of the trial court, filed a notice of appeal on **4th/03/2020** and subsequently a memorandum of appeal on **22nd/07/2020**.

In its judgment delivered on **20th May 2022**, this court, based on a preliminary point of law raised by the counsel for the Respondent struck from the record both the notice of appeal and memorandum of appeal and subsequently the appeal was dismissed for having been filed out of time.

The Applicants filed the instant application on **6th July 2022** seeking for the orders for leave to appeal **BUS-00-CV-CS-245-2018** out of time and stay of execution of that judgment.

According to the court record, on **30th November 2022**, the instant application was called up for hearing but the Applicants and their advocates were not in court while counsel for the Respondent was in court. On a prayer by counsel for the

Respondent, the instant application was dismissed by this court under **Order 9 rule 22**.

The Applicants applied vide **HCT-05-CV-ML-0024-2022** to have the instant application reinstated. On **3rd May 2023** this court heard and allowed the application for reinstatement.

[4]The application was supported by an affidavit sworn by Mr. Tumusiime Joab the first Applicant and director in the second Applicant. It was opposed by an affidavit sworn by Mr. Turyahabwe Vincent counsel for the Respondent company. I have considered the content of both affidavits in coming to this ruling.

Representation.

[5]The Applicants were represented by M/s Twinamatsiko and Agaba Advocates while the Respondent was jointly represented by M/s Ngaruye, Ruhindi, Spencer and Co. Advocate and M/s Asingwire & Kakuru Advocates. Submissions were filed by all advocates and I have taken them into consideration.

Preliminary points of law.

[6]Counsel for the Applicant raised one preliminary objection in relation to the Respondent's affidavit in reply.

According to counsel, the affidavit in reply was incompetent for reason of having been sworn counsel in a contentious matter and who lacked authorization from the Respondent a company. To support this submission counsel relied on the decision of this court in **Mugoya Construction vs Central Electricals International Ltd MA no.**

609 of 2011 where an affidavit of counsel for the Respondent was struck out for offending **Order 3 rule 1** of the Civil Procedure Rules and being hearsay within **order 19 rule 3** of the aforementioned Rules. Counsel submitted further that the above also contravened **Rule 9** of the Advocates (Professional Conduct) Regulations SI 267-2 which prohibits advocates representing parties from appearing in such matters in which they had reason to believe that they would be required as witnesses to give evidence whether verbally or by affidavit. According to counsel, the instant application was a contentious matter that had the potential of opening counsel who deposed the Respondent's reply to the possibility of cross-examination

In their reply, counsel for the Respondent submitted that the case of Mugoya Construction vs Central Electricals International Ltd (supra) was distinguishable from the facts of the instant application. That in that case, the lawyer was swearing an affidavit in an application for amendment of a Written statement of defence a very contentious matter. That in the instant application, the affidavit in reply was made in opposition of an application for leave out of time whose facts were not contentious at all and hence competent. That the deponent counsel was representing the Respondent and thus acquainted with all material facts in regard to the case at hand. That he was deposing to facts within his knowledge as an advocate and hence did not offend **Order 19(1)** of the Civil Procedure Rules.

[7] An affidavit is a form of evidence usually containing a written statement of facts where the person making it promises that the facts therein are true by taking an oath or solemn affirmation. This oath is usually done in front of a commissioner for oaths, a Magistrate or notary public whatever the case may be. (**See Section 6 of the Oaths Act**).

According to **Order 19 rule 3(1)** of the Civil Procedure Rules, the content in affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated. (**See also generally per Mubiru J in Bankone Limitted vs Simbamanyo Estates Limited Misc. Appn. no. 645 of 2020 (Commercial Court) and Halbury's Laws of England Volume 21 at 417**).

Knowledge is usually acquired by a deponent through human senses like seeing, hearing, smelling, testing or touching followed by understanding and perceiving what one has sensed. (**See Greenwatch vs Attorney General and another [2003] EA 83 per Mukasa AG J**).

There is no legal prohibition against an advocate who of his or her own knowledge can prove some facts to state them in an affidavit on behalf of his or her client. (**See Pattni vs Ali and others [2005] 1 EA 339**). Advocates should however not swear affidavits on behalf of clients when their clients are readily available to do so. (**See Pattni vs Ali and others (supra)**).

It is now the law that an advocate should not act as a counsel and witness in the same case. (**See Ismail vs Kamukamu and Others [1986-1989] EA 165 (SCU)**). This is a rule of practice as well as a rule of professional conduct as provided for in **Regulation 9 of the Advocates (Professional Conduct) Regulations SI 267-2** which provides that:

> *"No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, to give evidence whether verbally or by affidavit, and if, while appearing in any matter it becomes apparent that he will be required as a witness to give evidence whether verbally or by affidavit, he shall not continue to appear. Except that this regulation shall not prevent an advocate from giving evidence whether or verily or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears."*

The general result of the above Regulation is in my view that before a court can accept an affidavit deposed by an advocate where an objection to it has been raised as it was in in the instant application, it ought to first ascertain whether the matter is in itself formal or non-contentious on the matters of fact stated in the affidavit. (**See also Uganda Development Bank vs Kasirye, Byaruhanga & Co. Advocates, SCCA No. 35/1994**).

[8] In line with the above legal principles, I have examined the impugned affidavit sworn by **Mr. Turyahabwe Vincent** and I am satisfied that the facts disclosed therein are derived from personal knowledge acquired by him in the time he has been in personal conduct of this matter as counsel. At any rate, much of the information is already before me in the court record.

The preliminary objection is therefore not sustained.

[9] Counsel for the Respondent also raised preliminary objections of their own relating to the instant application.

The first objection related to lack of prosecution of the instant application by the Applicants. To this counsel stated that the submissions of counsel for the Appellant related to setting aside a dismissal on **MA. No. 186 of 2022** and not leave to appeal out of time which was the gist of the instant application. That because of this variance, counsel was of the view that the Applicants should be found to have argued an application that was not before court and therefore abandoned the instant application therefore it should be dismissed.

There was no reply from the Applicants on this objection.

[10] It is an agreed position of the law that cases are decided on their merits as subjected to the evidence of the parties. The place of submission in the matter being secondary.

In **Daniel Toroitich Arap Moi and another v. Mwangi Stephen Murithi and another [2014] eKLR** the Court of Appeal of Kenya persuasively held that:

"Submissions cannot take the place of evidence...Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

I have examined the submissions on the court record. The record contains two sets of submissions, one set filed on **22nd May 2023** and **6th March 2023**. Both sets of submissions; it is true as submitted by counsel for the Respondent related to a different matter altogether. As I have noted hereinabove submissions do not constitute evidence of the parties. The merits of the instant application can ably be ascertained from the parties' respective affidavits.

In the premises the objection is not sustained.

[11] The second objection from counsel for the Respondent related to the fact that the instant application was pre-maturely before this court. In the view of counsel, since it was brought under **Order 44 rule 3** of the Civil Procedure Rules, it ought to have been filed in the first instance before the court that passed the decree.

[12] I am in agreement with the submission of counsel for the Respondent that according to **Order 44 Rule 1(3)** of the Civil Procedure Rules that applications for leave to appeal shall in the first instance be made to the court making the order sought to be

appealed from. However, the said **subrule** relates to appeals from orders where a party lacks an automatic right to appeal. To this end, where a party lacks an automatic right of appeal, then recourse is given to **Order 44 rule 3** where such a party will seek leave to appeal the said order.

The proper provision of the law under which the instant application ought to have been brought should have been **Section79(1)(b)** of the Civil Procedure Act which provides that:

> *"79. Limitation for appeals*
>
> *(1)Except as otherwise specifically provided for in any other law, every appeal shall be entered-*
>
> *(a)…*
>
> *(b)Within seven days of the date of the order of a registrar, as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed."*

The above notwithstanding, it is the view of this court the above error was one which did not go to the root of the instant application and can be ignored. **Article 126 (2) (e)** of the Constitution provides that substantive justice shall be realized without undue regard to technicalities. In **Comfoam Uganda Limited vs Megha Industries (U) Ltd HCMA 1084 of 2014**, this court observed that:

> *"The citing of the wrong law is not fatal to an application as the essence of all disputes is that disputes must be heard*

and determined on merits other than dismissal on technicalities"

I find no reason to depart from the above position of this court. Accordingly, this objection is overruled.

[13] In the third preliminary objection, counsel for the Respondent contends that the instant application was brought against a wrong party. That the application is against a party by the names of "San Sara Agro Co. Ltd" yet the proper name of the Respondent as per the court record ought to have been "Sun Sara Agro. Co. Ltd". That such an application is barred by law. Counsel relied on the authority of **Trustees of Rubaga Miracle Centre vs Mulangira Ssimbwa Misc. Application No. 576 of 2017** for this submission.

[14] From the onset, I have to point out, as a fact, that the Respondent named on the instant application is "San Sara Agro. Co. Ltd". According to the record of court, it is indeed true as counsel for the Respondent submitted that the proper party ought to have been "Sun Sara Agro. Co. Ltd".

It is also true as submitted by counsel for the Respondent that the law is now settled that a suit or application in the names of a wrong party cannot be cured by amendment.

However, it has been the position of this court in earlier decisions that where there exists a misnomer or mistake in naming a person, place or thing in a legal instrument which can be corrected by amendment, then this court has the power to order such an

amendment. The amendment is aimed at replacing the name appearing on the court document with what the party believes to be the right litigant. (**See** Attorney General vs Sanyu Television (1998) CS No. 614 of 1998, Kyaninga Royal Cottages Limited vs Kyaninga Lodge Limited HCMA 551 OF 2018 and Trust Ventures Ltd v Powerfoam (U) Ltd (Civil Suit No. 669 of 2017)). In Trust Ventures Ltd v Powerfoam (U) Ltd, it was held further that the correction of the name is only possible where the legal document speaks the truth and the misnomer was done out of good faith.

In the instant application, no reply was made by counsel for the Applicant to explain how the misnomer came about. This court however has discretionary power to move itself *suo moto* to allow parties to proceedings to alter or amend their pleadings for the purpose of determining the real questions in controversy between the parties. It ought to be pointed out that such amendments should be in accordance with the law and should not prejudice the rights of the other party.

The discretion of the court may be guided by the court asking itself whether the omission by the party at fault was one that was curable by amendment; What actually did the said party come to court for? Will an amendment once ordered by the court *suo moto* prejudice the other party to the suit or will it resolve the real questions in controversy between them and avoid multiplicity of suits.

I have examined the application wholesomely and it is my considered view that Applicant simply changed one letter in the name of the Respondent a mistake that did not affect the application before me. Such a mistake could in my view have been cured by amendment had it been raised earlier without causing any prejudice on the Respondent in order for this court to effectually and completely adjudicate upon and settle all questions involved in the instant application.

The preliminary objection is therefore not sustained.

[15] In the fourth objection, counsel for the Respondent submitted that the Applicant's affidavit in support ought to be struck off the record for containing deliberate falsehoods.

Counsel attacked **paragraphs 3, 4, 5, 6 and 8** of the said affidavit. The gravamen of counsel's submission on the said paragraphs as I understand it relates to the former lawyer and current lawyer. According to counsel, the deponent contradicted himself as to who was the current lawyer and previous lawyer in the facts. Counsel submitted that these contradictions amounted to deliberate falsehoods.

[16] The treatment that court has to give to affidavits with offensive paragraphs has now been settled by superior courts. The approach is now a relaxed one. The law is now that such irregularities cannot be allowed to vitiate an affidavit in light of **Article 126(2)(e)** of the Constitution which requires substantive justice to be administered without undue regard to technicalities. (**See** **Saggar vs Roadmaster Cycles (U) Ltd [2002] EA 25 per**

Mpagi-Bahingeine JA (as she was then)). It therefore follows that where a court finds paragraphs in an affidavit that it believes are falsehoods, the right thing for the court to do is to sever those paragraphs and rely on the remaining paragraphs in the affidavit. This is however subject to the fact that such parts as severed, should be irrelevant to the matter at hand. (**See** Col. Besigye Kizza vs Museveni Yoweri & EC, Election Petition No. 1 of 2001 and Baryaija vs Kikwisire and another CACA no. 324 of 2017).

I have examined the impugned paragraphs in the affidavit in relation to the submissions of counsel. It is my view that the only mention of a different advocate is in **paragraph 3** of the said affidavit after which the deponent maintains the name Twinamatsko Enock as his advocate. Such a contradiction does not in my mind make the whole affidavit of the Applicant suspect for this court to strike out the said paragraph. Even if this court were to strike out the said paragraph, the application could stil stand.

This objection is overruled.

The merits of the application.

[17] It is now a settled position of law in our jurisdiction that 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. vs Jadva Karsan (1953) 20 EACA 17, Baku Raphael vs Attorney General S. C Civil Appeal No. 1 of 2005 and Attorney General vs Shah (No. 4) [1971] EA 50)

Where there is no such right or the time within which a party can exercise such a right has expire, then an appeal shall be filed with leave of the court. While considering applications for leave to appeal as is the case here, to a higher court, the court should balance the need to keep the administration of justice tidy putting into consideration the already overloaded system of justice by preventing frivolous and vexatious appeals and the need to protect the Applicant's right of appeal and for attaining the ends of justice.

The court in **Sango Bay Estate vs Dresdner Bank & Attorney General [1971] EA 17** summed up this position of the law as follows:

> *"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…. At this stage of litigation, we are satisfied that the grant of leave to appeal is necessary to protect the applicant's right of appeal and for attaining the ends of justice in instant case."*

Order 15 rule 3 of the Civil Procedure Rules empowers this court with jurisdiction to frame issues from allegations made on oath by the parties, or by persons present on their behalf or their

advocates, allegations made in the pleadings or in answers to interrogatories delivered in the suit and any other documents delivered in the suit. (**See also** Oriental Insurance Brokers Ltd vs Transocean (U) Ltd (Supreme Court Civil Appeal No. 55 of 1995)). I shall therefore proceed in that regard and raised one issue for consideration by this court:

1. **Whether there are sufficient grounds to grant leave to appeal.**

Issue 1: Whether there are sufficient grounds to grant leave to appeal.

[18] As I have already observed herein above, the law governing applications of this nature is **Section79(1)(b)** of the Civil Procedure Act which provides that:

> *"79. Limitation for appeals*
>
> *(1)Except as otherwise specifically provided for in any other law, every appeal shall be entered-*
>
> *(a)…*
>
> *(b)Within seven days of the date of the order of a registrar, as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed."*

From the above provision, what an applicant in such an application has to show court is whether there exists "good cause" for the court to admit his or her appeal after the period stipulated in the law has expired. (**See also** Kiboro vs Posts & Telecommunications Corporation [1974] 1 EA 155).

According to counsel for the Respondent, it was submitted that there was no sufficient cause for this court to admit the Applicants' appeal since they first waited for this court to first pronounce itself on the fact that the earlier appeal was filed out of time, dismissed that appeal and then they applied to have a fresh appeal filed out of time. According to counsel, this is an abuse of court process.

[19] The law is now settled that an application for extension of time to appeal can be entertained by a court at any time. This could be during the pendency of an incompetent appeal or even after dismissing the incompetent appeal and a party has made good the defect as to why their appeal was dismissed in the first place. (**See** Kabogere Coffee Factory Ltd and another vs Kigongo [1990-1994] 1 EA 130 (SCU)).

[20] The onus to show that '*sufficient cause*' exists for Court to extend time under **Section79(1)(b)** lies squarely upon the Applicant.

As to what entails '*sufficient cause*' depends entirely upon the discretion of the court as weighed against the facts of each case before it. As such, it would be futile to lay down precisely as to what considerations must constitute 'sufficient cause' in such circumstances. However, in exercising it discretion, the court must do so judiciously.

The expression '*sufficient cause*' in my view implies the presence of legal and adequate reasons as drawn from the meaning of the word 'sufficient'. The English word 'sufficient' means adequate;

of such quality, number, force, or value as is necessary for a given purpose intended. (**See Blacks Law Dictionary, 9th Edition at page 1571**).

'*Sufficient cause*' therefore embraces no more than that which provides a plenitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. (**See for example Balwant Singh vs Jagdish Singh and Ors (Indian Supreme Court Civil Appeal No. 1166 of 2006**).
The '*sufficient cause*' should be such as it would persuade the court in exercise of its judicial discretion to treat the facts laid out before it by the Applicant as adequate to set aside a decree.
In applications of this nature, it has been held that sufficient cause must relate to the inability or failure to take the particular step. (**See Mugo and others vs Wanjuiru and another [1970] 1 EA 481**).
In **Shanti vs Hindocha and others [1973] EA 207**, it was held that:

> *"The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reason (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part. But there are other reasons and these are all matters of degree."*

[21] In the instant application, the 1st Applicant deposed that the judgment of the lower court was delivered on **27th February 2020** in his presence and in presence of his former lawyer whom, being dissatisfied, he instructed to appeal the judgment. That the said advocate prepared a Notice of Appeal which was filed in this court upon advice that said document could commence the appeal process. That the said advocate proceeded to apply for a certified copy of the record to prepare a memorandum of appeal. Subsequently a memorandum was filed by the said advocate. That unfortunately a preliminary point of law was raised and upheld by this court to the effect that a Notice of Appeal could not commence an appeal and that the memorandum of appeal had been filed out of time. That they were still interested in exercising their right of appeal and shouldn't be punished for the mistakes and negligence of their former lawyers.

On their part, it was deposed on behalf of the Respondent that the Applicants did not have reasonable grounds to support the instant application and were simply forum shopping.

[22] It is now a general principle of application by our courts that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation,

namely the hearing and determination of disputes, should be fostered rather than hindered. (**See** Banco Arabe Espanol vs Bank of Uganda [1999] 2 EA 22 (SCU)).

Where there has been no damage done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard; and accordingly, a procedural error, or even a blunder on a point of law, on the part of an advocate, such as a failure to take prescribed procedural steps or to take them in due time, should be taken with a humane approach and not without sympathy for the parties. (**See** Githere vs Kimungu [1976-1985] 1 EA 101).

In the Kenyan decision of Phillip Keipto Chemwolo and another vs Augustine Kubende [1986] KLR 495 quoted with authority by this court in Ojara vs Okwera (Miscellaneous Civil Application No. 23 of 2017) per Mubiru J) it was held that:

> *"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."*

I have examined the grounds relied upon by the Applicants in the instant application, clearly it was not because of an error on their part that their appeal was commenced by a wrong document but a mistake of counsel. I find it in the interest of justice that this

court should exercise its discretion and allow the Applicants leave to pursue their appeal in this court.

The application is therefore allowed. The costs of this application will abide the results of the appeal.

I so order.

Dated, delivered and signed at Mbarara this 31st August 2023.

Joyce Kavuma
Judge