

5

**THE REPUBLIC OF UGANDA**

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

**MISCELLANEOUS APPLICATION NO. 1043 OF 2023**

**[ARISING FROM MISCELLANEOUS APPLICATION NO. 436 OF 2022]**

**[ARISING FROM EXECUTION MISCELLANEOUS APPLICATION NO. 500 OF 2021]**

10

**[ARISING FROM CIVIL SUIT NO. 102 OF 2008]**

**GELLADINE BUSINGYE BEGUMISA ] APPLICANT**

**VERSUS**

15

**1. EAST AFRICAN DEVELOPMENT BANK ]**

**2. BARCLAYS BANK LIMITED ]**

**3. FRANCIS KAMULEGEYA [AS JOINT RECIEVER ]**

**AND MANAGER OF BEGUMISA ENTERPRISES ]**

20

**LTD] ] RESPONDENTS**

**4. MARTIN JOHN WHITEHEAD [AS JOINT RECIEVER ]**

**AND MANAGER OF BEGUMISA ENTERPRISES ]**

**LTD] ]**

25

**Before: Hon Justice Ocaya Thomas O.R**

**RULING**

**Background:**

30

The Applicant brought this application for leave to appeal to the Court of Appeal against my decision in HCMA 436 of 2022 [“The Main Suit”] and costs of this application. The Applicant’s application was brought under the provisions of Section

5 98 of the Civil Procedure Act ["CPA"] and Order 44 Rule 1(2) -(4) of the Civil Procedure Rules ["CPR"]

In the main suit, the Applicant filed objector proceedings preventing the attachment of LRV 2427 Folio 7 plot 6 Namuwongo, LRV 2427Folio B Plot 7 Namuwongo, LRV 10 2427 Folio 9 Plot Namuwongo LRV 2111 Folio 2 Plot 7 Beach Lane at Ggaba ["the suit properties"]. The Applicant contended that the above properties are matrimonial property which were mortgaged to the judgment creditors by her husband Mr. Begumisa George, without her consent, as security for the debt of the judgment debtor.

15 The Applicant contended that the above properties constitute her matrimonial home which she has resided in for seventeen (17) years. She further contended that she lives on the properties together with her children.

20 According to the Applicant, when she got to know that her husband had mortgaged the properties to the judgment creditors she immediately filed Civil Suit No. 163 of 2008 against him and the 1<sup>st</sup> and 2<sup>nd</sup> Judgment Creditors ["the banks"]. The Applicant contended that in September 2011, her husband informed her that he had resolved his financial woes with the banks and the parties had agreed that some of the 25 properties of the judgment creditor would be sold to repay the loan to the 1<sup>st</sup> and 2<sup>nd</sup> Judgment Creditors and the suit properties would be released to the Applicant.

The Applicant contended that, in light of the above, and in light of requests to withdraw her suit together with promises to have the suit properties released to her, 30 the Applicant withdrew her suit but also lodged a caveat to protect her interest.

The Applicant stated that she was later surprised to discover that the property had not been released, and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent instead continued to attempt



5 to sell it and evict her. The Applicant averred that there was collusion between the Applicant and Respondent to this effect.

In that application, the Respondents opposed the application and contended that the same application was an abuse of court process. The Judgment debtors contended  
10 that the application had been brought through collusion with the Applicant's husband.

This court dismissed that application for being filed out of time with costs to the Respondents. The Applicant now makes this application for leave to appeal to the  
15 Court of Appeal.

### **Representation**

The Applicant was represented by M/s Mugarura Kwarisiima & Co. Advocates. MMAKS Advocates represented the 1<sup>st</sup> Respondents. There was no response from the  
20 2<sup>nd</sup> to 4<sup>th</sup> Respondents.

### **Evidence and Submissions**

The Applicant led evidence by way of an affidavit in support of the notice of motion and an affidavit in rejoinder all deponed by her. The 1<sup>st</sup> Respondent led evidence by  
25 way of an affidavit in reply deponed by Carol Luwaga, a Senior Legal Officer of the 1<sup>st</sup> Respondent.

The Applicant and Respondents made submissions in support of each their respective cases which I have considered before arriving at my decision below.

### **Decision**

It is common ground between the parties that the decision in the main suit is one which requires leave of court to appeal and I do not think it is necessary for me to  
belabor that point any further.



5 **Order 44 Rules 2 and 3** provide thus:

“(2) An appeal under these 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.

10 (3) Applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.”

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**  
15 **General v. Shah (No. 4) [1971] EA 50, Luwa Luwa Investments Limited v URA HCCA 43/2022, Roche Transport v URA HCCA 20/2021,**

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.  
20 **Order 44 Rule 1** 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  
25 which an appeal would lie if leave were given.

Apart from determining whether or not, 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  
30 significant, relief will not 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



5 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.

10 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  
15 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.

20 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 and C. A. Civil Application No 16 of 1996.**

25 An 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  
30 it is sought to appeal was made in exercise of a judicial discretion, a rather strong case will have to be made out See **GM Combined v, AK Detergents (Supra)**

5 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**

10 In applications where the court has to assess the merit of the grounds of appeal, an Applicant ought to attach a draft memorandum of appeal. See **Hosea Ssonko & Ors v Dick Banoba HCMA 122/2018, Junaco (U) Ltd v DFCU Bank HCMA 27/2023**

Whereas the Applicant did not attach a draft memorandum of appeal, the following  
15 grounds of appeal can be deduced from their affidavits:

(a) The trial court erred in law when it held that the Applicant's application was designedly delayed.

(b) The trial court erred in law and fact when it ignored the fact that the Applicant's objector application was in response to an execution application by the Respondents [and therefore could not have been designedly delayed].  
20

(c) The trial court erred in law when it overruled the Applicant's objection in deciding that the Respondent's affidavit in reply was not filed out of time.

(d) The trial court erred in law and fact when it failed to consider that the fact that the suit property was occupied by the Applicant and not the judgment debtor.  
25

Counsel for the 1<sup>st</sup> Respondent contended that under the provisions of Order 22 Rule 60 of the CPR, the remedy in the event an objector application is declined is to file a suit. Counsel made reference to various legislation which he contended was comparable and to a number of decisions he cited as persuasive precedents **including**  
30 **Dr. Andrew Kyando v Juma Shabani & Ors Civil Appeal 7/2022 and Thomas Kimaro v Martin Karl Mkumbo & Anor (2002) TRL 369** both from the Tanzanian High Court.

**Order 22 Rule 60** provides thus:

5 “Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he or she claims to the property in dispute, but, subject to the result of the suit, if any, the order shall be conclusive.”

10 The import of the ruling is that, whereas the object proceedings seek to establish and determine the interest in the attached property, such determination is conclusive unless a separate suit is commenced to determine rights in the property, in what case the objector determination abides the result of the suit. See **Lucy Oker Lagol & Ors v Bonga Ronald Okech & Anor HCCA 119/2019**.

15 In my view, a separate suit may be commenced notwithstanding the result of the objector application, seeks the objector application seeks to establish an interest in the property, rather than a legal right enforceable in rem. It also follows that there is no provision barring an appeal with leave from an order dismissing an objector proceeding since an objector application seeks to establish an interest in the attached  
20 property and the separate suit seeks to establish rights in rem. I therefore find the contentions of Counsel for the 1<sup>st</sup> Respondent on this head without merit.

For the 1<sup>st</sup> Respondent, it further was contended that the ruling in the main suit was rendered on 30<sup>th</sup> June 2023. On 10<sup>th</sup> July 2023, the Applicant lodged a notice of appeal  
25 and served it on the 1<sup>st</sup> Respondent on 14<sup>th</sup> September 2023. This was outside the seven (7) day timeline for lodging and serving a notice of appeal, that there is no valid appeal and consequently, the court would be acting in vain.

30 The purpose of leave to appeal is in order to give permission for an appeal which is not provided for as of right, to be lawfully commenced. It follows that, without leave, no step in an appeal requiring leave can be lawfully commenced. The filing of the notice of appeal and the subsequent service of the same were actions in vain. See **GM Combined (U) Ltd v. A.K. Detergents (U) Ltd CA No. 23 of 1994, Asiimwe Francis**

5 **v. Tumugyeire Aflod CA. MA. 103/2011, Arapyona Salimo v Barawa General Agencies HCCA 27/2013,**

In my view, grounds (b) and (d) merit consideration on appeal. Ground (c) did not, in my view, satisfy the threshold required in this application as it did not show that the  
10 court misdirected itself on some matter and thereby arrived at a wrong decision or that it is manifest from the case as a whole that the lower court made a wrong decision. The Applicant did not show the error complained of in ground (a) warranting leave. Accordingly, the Applicant has only made out the grounds for seeking leave only on grounds (b) and (d) above.

15

#### Delay

It must be noted that grant of leave to appeal is a judicial discretion and not a right. See *Omanya John Samson v Elijo Odongwun & Anor HCMA 44/2021*

20 Where a party takes an inordinate delay in seeking for a discretionary relief, the court is entitled to refuse to grant that relief. see **David Muhenda v Humphrey Mirembe SCCA 5/2012, Fred Byamukama & Anor v Michael Katungye HCMA 773/2022, Femisa International Limited & Ors v Equity Bank Limited HCMA 357/2022]**

25 An inordinate delay is a delay that is unusually or disproportionately large or excessive. [**Abel Belemesa v Yesero Mugenyi HCMA 126/2019**].

This impugned decision was rendered on 30 June 2023 and this application was filed in July 2023. The Applicant has therefore, in filing this application, not been guilty of  
30 inordinate delay.

On the whole, it would appear that the Applicant has demonstrated, prima facie, there are grounds of appeal that merit serious consideration.





5 Accordingly, I would grant leave to appeal to the Applicant on grounds (b) and (d) above.

**Conclusion**

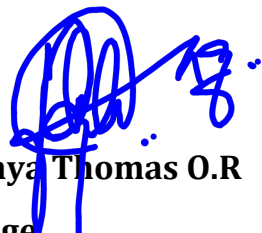
The applicant's application largely succeeds. I make the following orders:

- 10 1. The Applicant is hereby granted leave to appeal the ruling and orders in HCMA 436 of 2022 to the Court of Appeal only on the following grounds/issues:
- (a) The trial court erred in law and fact when it ignored the fact that the Applicant's objector application was in response to an execution application by the Respondents [and therefore could not have been
- 15 designedly delayed].
- (b) The trial court erred in law and fact when it failed to consider that the fact that the suit property was occupied by the Applicant and not the judgment debtor.
2. Leave to appeal on any other grounds/matters is rejected.
- 20 3. Costs of this application shall abide the outcome of the appeal.

I so order.

Delivered electronically this 27th day of November 2023 and

25 uploaded on ECCMIS.

  
Ocaya Thomas O.R  
Judge

30 **27<sup>th</sup> November, 2023**