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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 1452 OF 2021
(ARISING FROM CIVIL SUIT No. 76 OF 2018)

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ARIONG JOSEPH ODEA APPLICANT

VERSUS

1. CHARLES ANGINA

2. DIAMOND TRUST BANK (U) LIMITED RESPONDENTS

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BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction

20 This application was brought by Notice of Motion under Order VI Rule 19 of the Civil Procedure Rules SI 71-1, and sections 96, 79(1)(a), and 98 of the Civil Procedure Act, Cap 71, where the Applicant seeks for orders that:

1. The Applicant be granted enlargement of time within which to appeal against the awards of Hon. Justice David Wangutusi in Civil Suit No. 76 of 2018.
- 25 2. Costs be in the cause.

Facts

This Application is supported by the affidavit of Ariong Joseph Odea the Applicant deposed in paragraphs 1-16, in which the grounds are stated as follows:

- 30 i. That a Decree in Civil Suit No. 76 of 2018 was passed on the 5th day of March, 2021 by His Lordship Justice David Wangutusi, and the 1st and 2nd Defendants were ordered to pay the Plaintiff general damages of UGX

- 5 300,000,000 in proportions of 2/3 to be paid by the 1st Defendant, and 1/3 to be paid by the 2nd Defendant. That the 1st and 2nd Defendants were ordered to pay the Plaintiff UGX 100,000,000 as exemplary damages. That the Applicant is not opposed to the findings of the Court but the excessiveness of the award of damages given to the Plaintiff.
- 10 ii. That having been dissatisfied with the excessiveness of the award, he instructed and partially facilitated Niwagaba Francis Advocates to proceed, and lodge an appeal which they were supposed to commence, and in the spirit of settlement, he also instructed his other Lawyers E. Wamimbi Advocates & Solicitors to negotiate for an amicable settlement
- 15 with the 1st Respondent.
- iii. That the option of an amicable settlement failed, and when he contacted Niwagaba Francis Advocates for an update of the appeal, Counsel Niwagaba was not forthcoming. That he realised that the appeal had not been lodged hence this application.
- 20 iv. That he has been advised by his Lawyers E. Wamimbi Advocates & Solicitors, whose advice he verily believes to be true that the conduct or mistake of a lawyer should not be visited on a client, and that he has since withdrawn instructions from Niwagaba Francis Advocates, and instructed E. Wamimbi Advocates & Solicitors to proceed with the appeal hence this
- 25 application for enlargement of time within which to file an appeal.
- v. That this application has been brought without unnecessary delay, and shall not cause any injustice to the Respondents.
- vi. That it is in the interest of justice that this application is granted.

30 The 1st Respondent Charles Angina deposed an affidavit in reply in paragraphs 1-14, but briefly that:

- i. He has been advised by his Lawyers M/S Simon Tendo Kabenge Advocates whose advice he believes to be true that the instant application is incompetent and should be struck out with costs.
- 35 ii. This application has been filed ten (10) months since judgment of the Court was passed, and the Applicant is guilty of dilatory conduct.
- iii. There is no sufficient cause upon which this Court can grant the Applicant enlargement of time within which to appeal, and that it is in the interest of justice that this application is dismissed with costs.

5 The Applicant deposed an affidavit in rejoinder in paragraphs 1- 8, in which he reiterated the averments in the affidavit in support of the application, and stated further that he is aware that an appeal or intent to appeal is not a bar to negotiations for an out of Court settlement.

Representation

10 The Applicant was represented by Counsel Emmanuel Wamimbi of M/S E. Wamimbi Advocates & Solicitors while Counsel Simon Tendo Kabenge represented the 1st Respondent.

The 2nd Respondent was represented by Counsel Mukiibi Semakula, who informed Court during the hearing of this application that they do not intend to oppose this
15 application.

Counsel for the 1st Respondent informed Court that they intend to raise preliminary points of law, and this Court gave a schedule to Counsel for the 1st Respondent, and Counsel for the Applicant to file written submissions hence this ruling.

Issues for determination

- 20 1. Whether this application is incompetent?
2. What remedies are available?

Counsel for the 1st Respondent raised preliminary points of law as follows:

- 25 (1) That the instant application is incompetent, the same having been issued on the 3rd day of December, 2021, and expired on the 24th day of December, 2021, and was automatically dismissed without notice.
(2) That the instant application is a nullity, the Applicant cannot amend an already expired Notice of Motion.
(3) That the instant application is incurably defective, the same having been brought under the wrong law, and that this Court does not have jurisdiction
30 to grant the orders sought.
(4) That the intended amendment introduces a new cause of action, as the prayer sought in the former application was for leave to appeal, and this has changed to extension of time within which to file a notice of appeal.

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5 Decision on the preliminary points of law

This Court will first consider the 4th preliminary point of law raised by Counsel for the 1st Respondent, and the submissions on record to find as below:

10 (4) That the intended amendment introduces a new cause of action, as the prayer sought in the former application was for leave to appeal, and this has changed to extension of time within which to file a notice of appeal.

Order 6 Rule 19 of the Civil Procedure Rules, SI 71-1 provides that:

19. Amendment of pleadings

15 "The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The principles that have been recognized in the exercise of discretion in allowing amendments are that: -

- 20 1. The amendment should not work injustice to the other side. An injury that can be compensated by costs is not treated as an injustice.
2. Multiplicity of proceedings should be avoided as far as possible, and all amendments which avoid such multiplicity should be avoided.
3. An application which is made malafide should not be granted.
- 25 4. No amendment should be allowed where it is expressly or impliedly prohibited by any law (For example limitation actions).

(See *Gasco Transport Services (Bus) Ltd V Martin Adala Obene SC Civil Appeal No.4 of 1994[1990 – 1994] EA 88 at pg.96*), cited by Counsel for the 1st Respondent.

30 In the instant application, the Applicant had filed a Notice of Motion with the Court Registry on 2nd November, 2021, seeking for orders that the Applicant be granted leave to appeal, and that costs be in the cause. On 17th January, 2022, the Applicant filed an amended Notice of Motion, seeking for orders of enlargement of time within which to appeal.

35 In the given circumstances, this Court finds that the cause of action in the amended Notice of Motion changed to an application for enlargement of time within which to appeal from the previous cause of action of leave to appeal.

- 5 I agree with the submission of Counsel for the 1st Respondent that this application has not been made in good faith.

This Court will not delve into the other preliminary points of law raised above, by Counsel for the 1st Respondent.

Issue No. 2: What remedies are available?

- 10 This Court will invoke its inherent powers under section 98 of the Civil Procedure Act, Cap 71 to make such orders as may be necessary for the ends of justice.

Accordingly, this application is struck out for introducing a new cause of action.

Costs of this application shall be borne by the Applicant.

It is so ordered.

- 15 Dated, signed and delivered electronically this 11th day of January, 2023.


SUSAN ABINYO
JUDGE
11/01/2023

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