THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MA-0427-2009

(Arising out of Civil Appeal No. 0014 of 2008)

(Arising from Nabweru Magistrates Court Civil Suit No. 146 of 2007)

NELSON ONYANGO & 7 OTHERS::::::::::::APPLICANTS/RESPONDENTS

VERSUS

STEWARDS OF GOSPEL TALENTS LTD:::::::::RESPONDENT/APPELLANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application was brought under O.44 r.1 (2), (3) and (4) of the Civil Procedure Rules, Rules 5, 40 (2) (a) of the Judicature (Court of Appeal Rules) Directions, and Section 98 of the Civil Procedure Act. It is for orders that leave be granted to the applicants to appeal to Court of Appeal from the decision of the High Court dated 5th August, 2009 made in Civil Appeal No. 0014 of 2008 arising out of Nabweru Magistrate's Court Civil Suit No. 146 of 2007; that the costs of this application be provided for.

The application is supported by the affidavit of one Nelson Onyango which contains the grounds of the application. Briefly they are that the ruling and orders raise an arguable ground of appeal on matters of law which merit consideration by the Court of Appeal, inter alia, that the Learned Judge erred in law by interfering with the trial Magistrate's discretion in circumstances that do not merit interference with a trial court's discretion and further that the Learned Appellate Judge erred in law in considering grounds that were not pleaded both in the trial and the appellate court; that the court's ruling and/or order is not appealable as of right; that the intended appeal has a high probability of success; that the application for leave has been made without undue delay; and, that it is in the interest of justice that this application be granted.

The application was opposed by the respondents. The reasons for the objection are contained in the affidavit of Dr. E. S. Bizimenyera. It would appear that some of the grounds raised in the affidavit of Dr. Bizimenyera are irrelevant in as far as this application is concerned. For instance in paragraph 2 thereof Dr. Bizimenyera states:

> ***"2. That I have been advised by our lawyers, whose advice I verily believe to be true, that our appeal to this honourable court was as of right and did not require leave."***

There is no any complaint in the instant application that HCT-00-CV-CA-0014-2008 was not as of right or that it was filed without leave whereas leave was required. This is therefore a redundant averment in the said affidavit.

In paragraph 3 he states that the advice he has received from his lawyers is that this application for leave to appeal is misconceived since the order is appealable as of right. However, the fact of the matter is that the respondents are opposing the application and under O.44 (1) of the Civil Procedure Rules this application is not listed as one that is appealable as of right. What is appealable as of right is an order under O.9 r.23 "rejecting an application for an order to set aside the dismissal of a suit."
The impugned order herein is not any such order since the order of dismissal of the suit was actually set aside. Hence this application.

The background to this application is not complex at all. M/s Stewards of Gospel Talents Limited, the respondent herein, filed a suit against Nelson Onyango and others, the applicants herein, jointly and severally in the Chief Magistrate's Court in Nabweru at Nabweru vide Suit No. 146 of 2007. In the suit, the plaintiff sought a permanent injunction to restrain the defendants from trespassing on its church property. The church is known as Kazo Gospel Church. The plaintiffs were allegedly erecting a makeshift structure within its incomplete church building at the time of the alleged trespass.

The main suit was fixed for hearing and the plaintiffs called their first witness on 18/12/2007. Before the cross-examination of PW1 Galukande could be completed, an adjournment was granted allow the witness, PW1, to get some documents. The matter was therefore adjourned to 7th January 2008 which, probably unknown to the parties, fell in court vacation. Following non-appearance of the plaintiffs or their counsel, the learned trial Magistrate Grade I dismissed the suit for want of prosecution under O.9 r.22. The following day the plaintiffs filed an application for reinstatement (Miscellaneous Application No. 004/2008 of that court). The learned trial Magistrate heard it and disallowed it on 31/01/2008. Hence the appeal to this court vide HCT-00-CV-CA-0014-2008.

I heard the appeal, allowed it, set aside the dismissal order and ordered that the file be sent back to Nabweru court for the hearing to be continued as by law established. I gave reasons for so ordering. It is not necessary to repeat them here. Suffice it to say that according to the affidavit of Dr. Bizimenyera, paragraph 4 thereof, hearing has since resumed and it is due to come up for further action on 28/10/2009 at 2.00 p.m.

What is being sought herein is a second appeal. Section 72 of the Civil Procedure Act spells out the requirements for second appeals. The intending appellant must demonstrate that:

"(a) the decision is contrary to law or some usage having the force of law;

(b) the decision has failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure or any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case on the merits."

Other than alleging that the ruling and orders raise an arguable ground of appeal on matters of law which merit consideration by the Court of Appeal, the application is silent as to what that error is. It is in my view not enough to argue that a party is interested in pursuing a second appeal against the decision of this court on appeal as it is natural for any loser in a court case to feel disenchanted with the decision itself. There ought to be some indication in the application itself the basis for the belief that the appeal, if filed, has a reasonable prospect of success. The intending appellant can do so by showing that the decision sought to be appealed is contrary to law or to some usage having the force of law. The instant application is wanting in that regard, implying that all the applicant wants to do is to appeal against the decision of this court as a matter of course. That cannot be so in a second or third appeal.

As I said in the impugned ruling, discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable in the given set of circumstances. This court did just that in the impugned application. I am of the view that the instance application does not meet the legal requirements laid down in Section 72 of the Civil Procedure Act as regards second appeals. I am also of the view that no miscarriage of justice will be occasioned by the hearing and determination of the dispute between the parties on merit, where the applicants will have the opportunity to defend themselves instead of seeking to capitalize on technicalities which the law maker in its wisdom took care of in Article 126 (2) (e) of the Constitution.

I would accordingly reject this application and dismiss it with costs to the respondent and I do so.

Orders accordingly.

Yorokamu Bamwine
JUDGE
26/10/2009

Order:

This ruling shall in my absence be delivered by the learned Deputy Registrar of this Division.

Yorokamu Bamwine

JUDGE

26/10/2009