

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 18 OF 2023
(ARISING FROM CIVIL SUIT NO. 009 OF 2011)

5 **DAJ COMMUNICATIONS LTD ::::::::::::::::::::::::::::::::::: APPLICANT**
VERSUS
DAVID KIHKA ::::::::::::::::::::::::::::::::::: RESPONDENT
BEFORE: HON. JUSTICE VINCENT WAGONA
RULING

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Introduction:

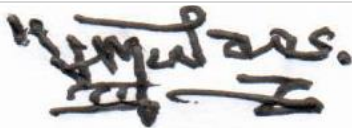
The applicant presented this application under section 82 and 98 of the Civil Procedure Act and Order 46 rule 1 and order 22 rule 26 of the Civil Procedure Rules for orders that:

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1. **The judgment and orders of court in civil suit no. 00009 of 2011 be reviewed and set aside.**
2. **An order doth issues restraining the Respondent/plaintiff, his agents or servants from executing the judgment and orders in civil suit no. 0009 of 2021 until this application is heard and disposed off.**
3. **That the costs of taking out the application be provided for.**

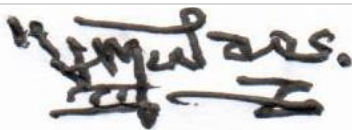
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Grounds and Evidence in Support of the Application:

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The application was supported by the affidavit of Mr. Mugarra Dennis, the applicant's Managing Director who averred as follows:

1. That the applicant was issued a post-paid arrangement by MTN Uganda Limited Sim Cards at a prices of shs 2,265/= between June to August 2010 which information could not be readily availed during trial. That as the Managing Director, the deponent issued orders to the Respondent and other agents to sell Sim Cards at a shs 3,000/= and by the Respondent's own admission, he sold the same at shs 800/= thus causing significant loss to the applicant of shs 68,200,000/=.
2. That at trial, the applicant intended to present Mr. John Balinda, the internal Auditor as a witness who was not available during trial, to adduce evidence on how the Respondent occasioned loss to the applicant in comparison with other agents. That although the audit report was admitted as DEX11, there was no witness to explain the contents thereof.
3. That the applicant's legal counsel Mr. Bwiruka failed or neglected to call Ms. Annet Irene Basemera, the applicant's Director Sales and Mr. Edwin Tuhaise the Sales Supervisor then and other agents who duly and rightfully sold the said sim cards at the actual prices which would show inconsistencies in the Respondent's evidence and to prove that he caused loss to the applicant.



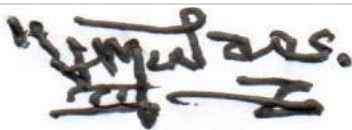
4. That the Respondent's actions caused loss to the applicant of shs 68,200,000/= which was alluded to by the trial judge but the missing evidence from other agents and their sales would have showed that the Respondent sold at a prices that disadvantaged the applicant thereby occasioning loss to her.

5. That there is threat of execution of the decree in Civil Suit No. 009 of 2011 before hearing this application. That as such the judgment and ruling of court in civil suit no. 009 of 2011 should be reviewed and the resultant execution stayed.

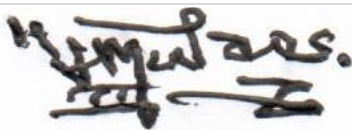
Reply for the Respondent:

The application was opposed by the Respondent who contended as follows;

1. That he was the successful party in Civil Suit No. 0009 of 2011 where after court carefully examining the evidence ordered the applicant to pay him a sum of shs 20,100,000/= as special damages, general damages of shs 1,000,000/=, interest on general damages at 17% and costs. That the applicant being aggrieved lodged an appeal to the Court of Appeal against the decision of this Court.

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2. That to his surprise, while the appeal process is still pending, the applicant opted to file this application. That since the applicant appealed, the remedy of review is no longer available to the applicant and therefore the current applicant is misconceived, bad in law and an abuse of court process and constitutes forum shopping and court should be pleased to dismiss the same.
3. That the applicant has not demonstrated that they had exercised all due diligence to retrieve and have the documents inform of tac invoices tendered in Court. That there is no indication that the applicant wrote to MTN and that MTN failed or refused to avail the said information to the applicant.
4. That the documents alluded to by the applicant were not listed in the list of documents or at scheduling and therefore the prayer to tender them is an afterthought.
5. That court rightly found that the applicant had sold all the sim cards at shs 800/= and not shs 3000/= each as the applicants wants court to believe. That John Balinda was available at all times during trial and there was no evidence on record to prove that the applicant sought to rely on such witness.



6. That there was equally no evidence on record to prove that the Applicant sought to rely on Ms Annet Iren Basemera and Mr. Edwin Tuhaise as witnesses. That these were not listed as witnesses in the written statement of defense or in the joint scheduling memorandum or evidence to prove such.

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7. That even if the evidence alluded by the applicant would be considered, it would not have any effect on the judgment of court since court estopped the applicant from denying that they instructed the Respondent to sell lines at shs 800/= . The Respondent denied causing any loss to the applicant and stated that he was given a DVD player where the applicant was declared the best agent in Western Region for MTN.

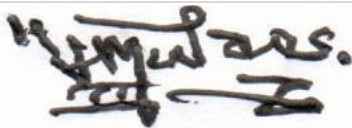
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8. That the evidence that the applicant intends to adduce is geared towards repairing their case and thus disguised as an appeal. That the evidence that the applicant alluded to was duly considered by court on merit. That he had not applied for execution thus the prayer for stay of execution is misconceived. That the applicant is guilty of dilatory conduct since the application was brought after a year and thus the same should be rejected.

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20 **Representation and hearing:**

Musinguzi Midra of M/s Zack Olowo Advocates & Solicitor appeared for the applicant while *Mr. Musinguzi Bernard of M/s Kayongo, Musinguzi & Co.*



Advocates appeared for the Respondent. Both counsel addressed me by way of written submissions which I have duly considered herein.

Issues:

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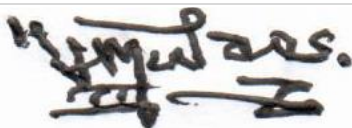
- 1. Whether this application is incompetent.**
- 2. Whether the current application satisfies the grounds for review.**
3. Remedies available to the parties.

10 **Resolution:**

Issue No. 1: Whether this application is incompetent.

Mr. Musinguzi Benard raised a point of law contending that the current
15 application was barred by law. That review only applies where there is no
appeal and he invited me to the provisions of Section 82 of the Civil Procedure
Act and Order 46 rule 1(a) and (b). Learned further cited the case of *Muhamad
Katamba & Anor v Hajji Kiramba Kasallita & others, HCMA No. 1165 of
2016* where court held that “..An appeal would only be lodged by an aggrieved
20 party, such party would have no right to file an application for review.”

Learned counsel argued that the applicant lodged an appeal against the decision
of this court in Civil Suit No. 009 of 2011 by lodging a notice of appeal. That

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the said appeal is still pending and has never been withdrawn. That as such the current application is barred by law and should be rejected. Counsel Midra Musinguzi for the applicant did not respond to this concern.

5 **DECISION:**

Section 82 of the Civil Procedure Act_Cap. 71 provides that:

Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this

10 *Act, **but from which no appeal has been preferred; or***

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.

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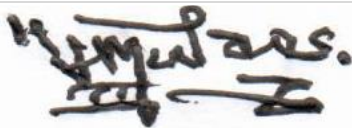
Order 46 rule 1 and 2 of the Civil Procedure Rules S.I 71 also provides that:

1. Application for review of judgment.

(1) Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from
20 ***which no appeal has been preferred; or***

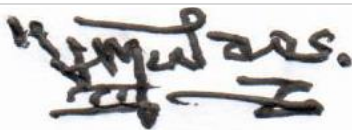
*(b) by a decree or order from **which no appeal is hereby allowed,** and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within*



his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate court the case on which he or she applies for the review.

Section 82 and Order 46 rule 1 limits the locus standi for purposes of review to a person aggrieved by a decision of Court. In Re Nakivubo Chemists (U) Ltd [1979] HCB 12 court guided that an aggrieved party for purpose of review is one who has suffered a legal grievance. Justice Karokora JSC (as he then was) in Muhammed Bukenya Allibai Vs. W.E Bukenya & Anor, SCCA No. 56 of 1996 defined an aggrieved party as a party who has been deprived of his property.



Further, locus to file an application for review only survives as long as there is no appeal filed by a party seeking a review. Section 82 and Order 46 posits a firm position that a right to apply for review only exists if there is no appeal filed by a party seeking such relief.

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I agree with the position cited by learned counsel Mr. Musinguzi Benard for the Respondent in *Muhamad Katamba & Anor v Hajji Kiramba Kasallita & others, HCMA No. 1165 of 2016* where the Hon. Namundi J observed that:

10 *An appeal would only be lodged by an aggrieved party. Such party would have no right to file an application for review.*

This position was further considered in *Kisya Investment Ltd vs Attorney General CA 31 of 1995* wherein their Lordships held that:

15 *“A party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing an appeal subsequently even if the review is pending.”*

20 In a persuasive dictum by the High Court of India in *Behari Lal and Anr. vs M.M. Gobardhan Lal and Ors. on 29 April, 1948, AIR 1948 All 353, Raghubar Dayal, J*, while commenting on order 47 of the Civil Procedure Code of India which is the equivalent of Order 46 of our Civil Procedure Rules observed thus:

In this view of the matter, it would follow very clearly that once an appeal is filed, there is no right in the applicant to seek review of the

judgment in appeal and there is no jurisdiction in the Court to deal with the review application which has become incompetent. After the filing of the appeal, it cannot be said that the applicant is aggrieved by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred.

The filing of the appeal implies that all matters connected with the dispute are transferred to and placed under the control of the appellate Court. Therefore, the appellate Court takes over control of the case and should entertain all matters incidental to or related to the same. (See Behari Lal and Anr. vs M.M. Gobardhan Lal and Ors. on 29 April, 1948, AIR 1948 All 353).

It is however worth noting that where an application for review is filed prior to lodging an appeal, the application for review survives. This was considered in Hoima District NGO Forum & 6 others v Murungi Catherine & 5 others, HCMA No. 13 of 2013, Byabakama J (as he then was) citing with approval SARKAR'S LAW OF CIVIL PROCEDURE [8th Edition] Volume 2 at Page 1592 where the author notes thus:

“Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a Court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review but once

the appeal is heard, the review cannot be proceeded with” (emphasis added).

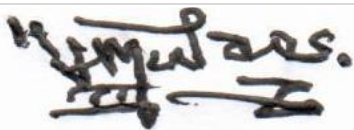
He further observed that:

The above passage simply reinforces the position articulated in O.46 r. (1) (a) [Supra] that, any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, may apply for a review of judgment to the court which passed the decree or made the order. It would appear, therefore, a review can be said to be competently filed if it precedes the appeal.

Therefore, where an application for review precedes the appeal, then it is competent. The subsequent filing of the appeal does not render the application for review defective.

It is worth noting, that even in the currency of appeal, a person aggrieved by a decision of court who is not a party to the appeal retains the locus to file an application for review. The fact that an appeal has been filed does not negative an aggrieved party’s right to seek review. This Position was considered in *Behari Lal and Anr. vs M.M. Gobardhan Lal and Ors (supra)* where court noted thus;

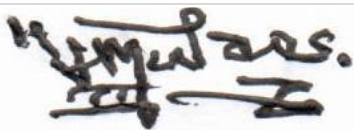
“It is true that under Order 47. Rule 1, Sub-rule (2) applications for review can be presented even after the filing of an appeal by persons other than the applicants for review. It is, however, also clear from its provisions that such applications for review presented after the filing



of an appeal would be restricted to only such matters which could not be decided in the appeal by the non-applicant.Any other party can apply for review only when the ground of such appeal is not common to him and the appellant. It would appear that in such cases the orders of the appellate Court will not be with respect to those matters which would be considered by the Court of review, and that, therefore, there is not expected to be any question of conflict of decisions or jurisdiction. In fact, the position would be that the subject-matter of the decree sought, to be reviewed would not be within the jurisdiction of the appellate Court to interfere and, therefore, in substance the position would be that the review application is with respect to such matter which is not under appeal.”

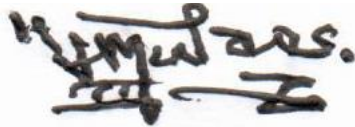
The import of restricting review to orders which have not been appealed against is to avoid situations where the trial court and the appellate court may issue contradicting decisions.

In this case, the applicant lodged an appeal against the decision of the Hon. Lady Justice Elizabeth Jane Alividza in Civil Suit No. 009 of 2011 delivered on 16th June 2022 by way of lodging a notice of appeal on 30th June 2022. The same notice was endorsed by the Deputy Registrar on 7th July 2022 and was served upon the Respondent’s counsel on 7th July 2022. The applicant also filed a letter seeking for a certified copy of the proceedings on 30th June 2022 and the same was served on 7th July 2022. Therefore, there is a pending appeal

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which has never been resolved by court or withdrawn by the applicant. Thus the current application is barred by Section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules. I thus have no jurisdiction to try the matter at hand. I therefore find this application incompetent. I therefore strike
5 it out with costs awarded to the Respondent.

I so order.



10 Vincent Wagana
High Court Judge
FORTPORTAL

DATE: 30/11/2023

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