THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 62 OF 2023

(ARISING FROM CIVIL SUIT NO. 48 OF 2021)

JEREMY JOHN GRAHAM :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

DR. KAGORO KAIJAMURUBI :::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

RULING

This application seeks leave of court to appeal the decision of this court in Civil Suit No. 048 of 2021 to the Court of Appeal.

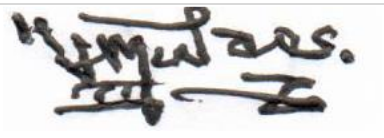
The application is supported by the affidavit of Nassiwa Hellen Leticia, an advocate under M/s Baluti & Co. Advocates, learned counsel for the applicant who averred as follows;

1. That the Respondent filed Civil Suit No. 048 of 2021 in the High Court of Uganda at Fort Portal against the applicant for breach of the Lease Agreement in respect of Land comprised in LRV 658, Folio 4, Block 33, Plot 5, land at Kabarinzi, Mwenge, Kyenjojo District and order for recovery of possession or re-entry, rent in arrears, interest, damages and costs.
2. That the applicant raised a point of law contending that the dispute was subject of a valid arbitral clause and as such court did not have the jurisdiction to entertain the same.

3. That the learned trial Judge agreed with the applicant and delivered a ruling with orders that:
   (i) The parties are referred for arbitration in accordance with clause 6 of the lease agreement dated 28th August 1964.
   (ii) The dispute shall be arbitrated by ICAMEC which is a body of professional arbitrators and concluded within 90 days from the date of delivery of this ruling.
   (iii) The costs of the suit shall abide the outcome of the arbitration.
4. That the applicant being dissatisfied with the ruling intends to appeal to the court of appeal on ground that:
   (1) The learned trial judge erred in law and fact when he acted beyond his jurisdiction in giving directions for arbitration between the parties.
   (2) The learned trial judge erred in law and fact when he declined to award costs of the suit to the applicant/defendant.
5. That the applicant has substantial grounds of appeal with a high likelihood of success and merits serious judicial consideration. That it is in the interests of justice that the application is granted.

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

1. That the applicant is his tenant on the suit property in the main suit and owes him rent for a prolonged period of 30 years. That his past efforts as the Landlord to apply the Arbitration clause in the tenancy/lease agreement were frustrated by the applicant who ignored the same and he continued to occupy the suit property in default of rent.
2. That he later filed Civil Suit No. 48 of 2022 seeking re-entry and payment of rent in arrears and the applicant in his Written Statement of Defense, counter



claim and joint scheduling memorandum admitted being his tenant and owing him rent. That the applicant later raised a preliminary point of law that the lease agreement had an arbitral clause and the matter was to proceed through arbitration.

3. That the efforts to invoke the arbitral clause were frustrated by the applicant. That in the ruling of court dated 8/6/2023, court sent the parties for arbitration as prayed for by the applicant. That the applicant who raised the point of law is estopped from challenging the same.
4. That the application is tainted by improper motive and is an abuse of court process and is being used to deny or refuse or delay to pay rent which the applicant admits owing for many years in breach of contract. That the intended appeal has no probable cause of action or probability of success since the ruling offers a win – win situation.
5. That the applicant's challenge as regards costs is misguided as costs are in the discretion of court and the applicant is guilty of misconduct by frustrating the previous efforts to have the matter arbitrated and the issue of costs was left pending the outcome of arbitration.
6. That the current application was brought in bad faith and the intended appeal has no merit and as such should be dismissed with costs.

In rejoinder, Nassiwa Hellen further clarified as follows;

1. That the affidavit in reply specifically paragraphs 11, 14 and 15 is argumentative and to that extent barred by law and should be struck out. That the applicant has never made any admission of indebtedness to the respondent and the dispute between parties is on ground rent.

2. That the applicant has always expressed willingness to co-operate with the Respondent and bring the matter to an amicable resolution. That the applicant's prayer in the point of law was for the plaint to be struck out and the suit dismissed with costs to the applicant. That the applicant's appeal has substantial grounds of appeal with a high likelihood of success and which merit serious judicial consideration.
3. That the application was not brought in bad faith as the applicant remain committed to the amicable resolution of the matter. That it is in the interests of justice that the application is granted.

Representation and Hearing:

Mr. Baluti Emmanuel of M/s Baluti & Co. Advocates appeared for the applicant while ***Mr. James Byamukama of M/s Byamukama, Kaboneke & Co. Advocates*** appeared for the Respondent. Both counsel filed written submissions which I have duly considered.

Issues:

1. **Whether the application discloses substantial grounds of appeal which merit serious judicial consideration.**
2. **Remedies available.**

Resolution:

Submissions for the Applicant:

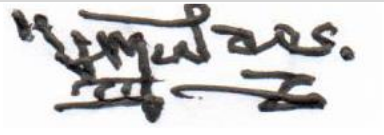
Order 44 rule 2 of the Civil Procedure Rules provides that save for orders where the law provides an automatic right of appeal, leave must be sought first before filing an appeal. In ***Sango Bay Estate v Dresdner Bank & A.G [1971] E.A 17*** court observed

that; "*As I understand it, leave to appeal from an order in civil proceedings will normally be granted where primafacie it appears that there are grounds of appeal which merit serious judicial consideration."*

In ***Ayebazibwe v Barclays Bank Uganda Ltd & 3 others, HCMA No. 292 of 2014*** court observed that; "*The applicant has to demonstrate the grounds of objection showing where the court erred on the question or issues raised by way of an objection. It would therefore be necessary to set out what the controversy before the court was and how it determined that controversy. For leave to appeal to be granted, the applicant must demonstrate that there are arguable points of law or grounds of appeal which require serious judicial consideration on appeal arising from the decision of the court on the controversy."*

It is contended by the applicant that Court in its ruling in Civil Suit No. 48 of 2021 went beyond its jurisdiction when it directed on how the arbitration was to be conducted. That Court also erred in denying the applicant costs. Section 5 and 9 of the Arbitration and Conciliation Act limits court's intervention in matters subject of arbitration to referring the matter for arbitration. The Act ousts the jurisdiction of Court save as provided for under the Act. It is contended by the Applicant that the learned trial judge thus exceed the jurisdiction permitted by the Act when he went ahead to issue orders directing the manner in which arbitration was to be conducted by ICAMEK and the period of 90 days within which the same was to be conducted and declined to award costs.

It is argued by learned counsel for the applicant that section 27(2) of the Civil Procedure Act is to the effect that costs follow the event unless court for good cause order otherwise. The learned trial judge having dismissed the suit ought to have awarded costs to the applicant which he did not. The intended appeal has high



chances of success since the applicant has established substantial grounds of appeal which merit serious judicial consideration.

Submissions for the Respondent:

It was submitted by learned counsel for the Respondent that before leave is granted, the applicant must have demonstrated that he has arguable grounds of appeal and the appeal has high chances of success (***Sango Bay Estates Ltd v Dresdner Bank (1972) E.A 17).*** The applicant must also prove that the grounds merit serious judicial consideration and that there are questions of law to be decided by the appellate court and that the applicant has a bonafide arguable case on appeal. (See***Sobetra v Leeds Insurance Co. HCMA No. 377 of 2013 & Herbert Sekandi t/a Land Order Developers v Crane Bank HCMA No. 44 of 2007***).

The applicant must also prove that the intended appeal has high prospects of success and it is necessary to protect the applicant's right of appeal and that the appeal involves principles of law to be considered by the appellate court. (See ***KengaziAngella v Mei (U) Ltd HCMA No. 471 of 2015 &Kilama Tony v Grace Otim HCCA No. 031 of 2019).***

The ruling of court was a result of a prayer by the applicant to have the matter referred for arbitration. The applicant is estopped from challenging his own prayer on whose basis court referred the matter for arbitration. It is also admitted in the pleadings that the applicant was the one who had defaulted on the lease agreement and frustrated arbitration; therefore he has no cause or primafacie case with reasonable chances of success of appeal.

The application is tainted with an improper motive of abuse of court process and denying or causing delay regarding the applicant's obligation to pay rent to his

landlord as per the agreement between the parties. As regards costs, the order was not final but pegged on conclusion of arbitration and as such there are not grounds which merit serious judicial consideration.

The applicant did not explain how court's move to refer the case for arbitration and appoint an arbitrator affects him to warrant an appeal. The applicant wants to engage court in an academic exercise that has no relevance to the matter before court.

Applicant's submissions in Rejoinder:

Learned counsel for the applicant contended in rejoinder that the applicant does not object to the case being referred for arbitration but rather objects to the orders given by court regarding the conduct of arbitration. In ***Obbo v Onyango & Ors, HCCA No. 130 of 2012*** court observed that; "*It is trite law that if a court has no jurisdiction its decision is a nullity. Jurisdiction cannot be conferred on court by consent of the parties. A court cannot give itself jurisdiction in a case otherwise outside its jurisdiction on the grounds that it would be for the convenience of the parties and witnesses."*

The learned trial judge erred when he made orders regarding appointment of an arbitrator and the period within which arbitration is to be conducted. The learned trial judge also erred when he declined to award costs. The application discloses arguable points of law and ought to be granted.

CONSIDERATION BY COURT:

Section 76 of the Civil Procedure Act Cap. 71 lists the orders from where an appeal shall lie as of right and Order 44 rule 1 of the CPR lists orders which are appealable as of right and under rule 2 appeals against other orders must be with leave of court.

An Appeals against the orders contested by the applicant in this case appear to require leave of court.

Regarding the basis for granting such leave, Spry V.P in **Sango Bay Estate vs Dresdner Bank & Attorney General [1971] EA 17**, stated that: ***"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…."*** He further observed that; *"**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**."*

In **Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors, HCMA No. 292 of 2014**, it was noted thus: ***"the applicant has to demonstrate the grounds of objection showing where the court erred on the question or the issues raised by way of an objection. It would therefore be necessary to set out what the controversy before the court was and how it determined that controversy. For leave to appeal to be granted, the applicant must demonstrate that there are arguable points of law or grounds of appeal which require serious judicial consideration on appeal arising from the decision of the court on the controversy. It is necessary to set out the controversies upon which the court ruled and the grounds of the application which dispute or contest the correctness of the decision of the court on each controversy. Such grounds should be capable of forming the grounds of appeal deserving of serious consideration by the appellate court…arguable points should arise from the ruling of the court and not on something which was not in controversy raised before and which the court did not and could not have determined."***

Leave to appeal is not granted as a matter of course. The applicant must demonstrate that the intended appeal raises arguable grounds of appeal which require serious

judicial consideration by the appellate court. The intended appeal must have prospects of success and the success must be realistic and not a fanciful one. (See: ***Swain v Hillman [2001] 1 ALL ER 91***). The court in considering an application for leave is not called upon to examine the merits of the intended grounds of appeal which is a preserve of the appellate court (See ***Swain v Hillman (supra).*** The court should not deny leave to appeal only on the basis of the court's opinion that the intended grounds of appeal have no merit or are not appealing to the appellate court as it is necessary to protect the applicant's right of appeal.

In the present application, the applicant contends that the decision by the trial court to issue directions appointing ICAMEK as an arbitrator and directing that arbitration be done within 90 days went beyond the jurisdiction granted to court under the Arbitration and Conciliation Act. Further that the failure to award costs of the suit to the applicant after upholding the point of law was also erroneous.

The applicant believes that the above concerns raise arguable points of law or grounds of appeal which require serious judicial consideration on appeal and have high chances of success and that the outcome may support his rights and interests in some way. In order to protect the applicant's right of appeal I grant the application. The costs will abide the outcome of the appeal. I so order.

Vincent Wagona

High Court Judge / Fort-portal

DATE: 27/03/2024