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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CIVIL APPEAL NO. 0017 OF 2022
(Arising From Miscellaneous No. 0040 of 2021)
Arising From Civil Suit No. 0020 of 2020)

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1. BWENGYE JULIUS
2. ORIMWIKIRIZA ROBERT=====APPELLANTS

VERSUS

MASHEMERERWA JULIUS=====RESPONDENT

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BEFROE HON. JUSTICE SAMUEL EMOKOR

RULING

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This Appeal arises out of the ruling delivered by the Chief Magistrate at Kabale Chief Magistrates Court delivered in Miscellaneous Application No. 0040 of 2021 arising from Civil Suit No. 0020 of 2020 delivered on 07/06/2022.

The brief background to this appeal is that the Plaintiff filed Civil Suit No. 0020 of 2020 before Kabale Chief Magistrates Court under **Order 36 of Civil Procedure Rules** seeking recovery of UgX 20,000,000/= that he had lent to the 1st Defendant and the 2nd Defendant was the guarantor of the same.

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The 1st and 2nd Defendants upon being served with the said suit filed miscellaneous application No. 0040 of 2020 before the kabale Chief Magistrates Court seeking interalia orders that they (Applicants) be granted unconditional leave to appear and defend Civil Suit No. 0020 of 2020.

5 The Trial Chief Magistrate upon hearing the application on the 07/06/2022 delivered his ruling wherein he dismissed the application and entered Judgment for the Respondent/Plaintiff for the sum of UgX 16,000,000/= with costs.

The Applicants being dissatisfied filed the instant appeal.

The Appeal is premised on the following two grounds.

- 10 **1) The learned trial Chief Magistrate erred in law and fact when he held that the application for leave to appear and defend did not raise bonafide triable issues of law and fact hence arriving at a wrong decision thus occasioning a miscarriage of justice.**
- 15 **2) The learned trial Chief Magistrate erred in law and fact when he ignored the over whelming evidence of the Applicants/Appellants on record hence arriving at a wrong decision.**

Representation.

Messrs Bikangiso & Co. Advocates represented to the Appellants while Messrs Nasiima Patience & Co. Advocates appeared for the Respondent.

20 Both sides to this Appeal proceeded by way of written submissions.

Preliminary point of law.

Counsel for the Respondent in her written submissions raised a preliminary point of law to the effect that the instant appeal is prematurely before this Court since the appellants did not seek leave of Court to appeal against the ruling in
25 miscellaneous application No. 0040 of 2021 and that they do not have an automatic right of appeal.

5 Counsel relied on the provisions of **Section 76 (1)** of **Civil Procedure Act** from which an appeal lies listing the same from (d) to (h).

Counsel also relied on the provisions of **Order 44 Rule 1 (1)** of the **Civil Procedure Rules** that provides for appeals that lie as of right following orders under **Section 76** of the **Act** and listed the same from (a) to (u).

10 It is the contention of Counsel that the order which forms the subject of this appeal is not among the listed orders where an appeal would lie as of right and thus the Appellants needed to seek leave of Court as per the provisions of **Order 44(2)** of **Civil Procedure Rules**.

It is therefore the submission of Counsel that the instant appeal is a nullity and
15 incompetent and as a result ought to be dismissed.

Counsel for the Appellant in his written submissions in rejoinder contends that the preliminary point of law raised by the Respondent is misplaced, an abuse of Court process and only intended to mislead the Court.

It is the argument of Counsel that orders arising from applications that intends
20 to dispose of the entire main suit are appealable as of right and that the ruling in miscellaneous application No. 0040 of 2021 disposed of Civil Suit No. 0020 of 2020.

Counsel to buttress his argument relied on **Order 44 Rule (1) (k)** of the **Civil Procedure Rules** that provides that an appeal shall lie as of right from an order
25 giving or refusing to give leave.

5 It is therefore the argument of Counsel that the instant appeal is one arising from refusing to give leave to appear and defend Civil Suit No. 0020 of 2020 expressly falling **under Order 44 Rule (1) (k)** of the **Civil Procedure Rules**. Thus according to Counsel the Appellants did not need to seek leave to appeal against the ruling and orders that arose from miscellaneous application No. 0040 of 2021.

10 Counsel also relied on **Article 126(2) (e)** of the **Constitution as amended** that substantive justice shall be administered without undue regard to technicalities and prays that the preliminary point of law is overruled.

Determination.

The Supreme Court regarding appeals in **Baku Rapheal Obura & another** versus
15 **Attorney General, Supreme Court Constitutional Appeal No. 0001 of 2005, Chief Justice Odoki** (as he then was) held:

“It is trite law that there is no such thing as inherent Appellate jurisdiction.

Appellate jurisdiction must be specifically created by law, it cannot be inferred or implied”

20 In view of the above reasoning the argument of the Appellants Counsel that orders arising from applications that intend to dispose of the entire main suit are appealable as of right is flawed.

The Court in **Alinyo versus R [1974] EA 544** held that the right to appeal is a creature of statute, for one to appeal he or she must have a right to appeal granted
25 by law.

5 The law governing appeals to the High Court can be found under **Section 76(1)** of the **Civil Procedure Act** and **Order 44** of the **Civil Procedure Rules**. These are provisions in which a party can lodge an appeal as of right.

Section 76(1) of the **Civil Procedure Act** provides for statutory right of appeal in matters relating to arbitration, compensation from arrest, attachment or
10 injunction on insufficient grounds and orders imposing a fine or directing the arrest or detention of any person except where the arrest or detention is in execution of a decree.

The orders in Civil Miscellaneous Application No. 0040 of 2021 do not fall under **Section 76 (1)** of the **Civil Procedure Act**.

15 **Order 44** of the **Civil Procedure Rules** operationalizes the provisions of **Section (76 (1) (h))** of the **Civil Procedure Act** by detailing the orders from which there is a direct right of appeal not necessitating an application for leave to appeal.

Counsel for the Appellant argues that the instant appeal emanates from **Order 44 Rule (1) (k)**. I shall reproduce the same verbatim for ease of reference:

20 “(1) An appeal shall lie as of right from the following orders under Section 76 of the Act.

(k) an order under Rule 9 of Order XXIV giving or refusing to give leave”

The instant appeal is against the ruling in Civil Miscellaneous Application No. 0040 of 2020 arising from Civil Suit No. 0020 of 2020 that is filed under the
25 provisions of **Order 36** of **Civil Procedure Rules** as opposed to **Order 24 Rule 9** of the **Civil Procedure Rules** that provides as follows:

5 “(1) In other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of Court, be continued by or against the person to or upon whom the interest has come to be devolved.

(2) the attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured the attachment to the benefit of sub
10 rule (1) of this rule”

Clearly **Order 44 Rule 1(1) (k)** has nothing to do with the provisions of **Order 36 of Civil Procedure Rules**.

As guided by the **Hon. Chief Justice Odoki** (as he then was) in **Baku Rapheal Obura and another versus the Attorney General [Supra]** Appellate jurisdiction
15 must be specifically created by law and it cannot be inferred or implied.

It therefore follows that the best course of action for the Appellants was to proceed under **Order 44 Rule 1 (2) of Civil Procedure Rules** that provides:

“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
20 were given”

The Appellants should have sought leave as provided for above before filing the instant appeal.

The Appellants sought to shield themselves under **Article 126 (2) (e)** of the **Constitution** with Counsel submitting that substantive justice should be
25 administered without undue regard to technicalities.

5 As Counsel is well aware that provision was not intended to do away with the rules of procedure but it is a reflection of the saying that rules of procedure are hand maidens of justice. They are to be applied with due regard to the circumstances of each case.

10 **See Utex Industries Ltd versus Attorney General Supreme Court Civil Application No. 0052 of 1995.**

The instant appeal is incurably defective and consequently it is hereby struck out for being incompetent with costs to the Respondent.

Before me

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SAMUEL EMOKOR
JUDGE
28/02/2024

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