

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-MA-0072-2012
(ARISING FROM CIVIL APPEAL NO. 0051-2012)
(ARISING FROM MISC. APPLICATION NO. 048-2011)**

CHESANG JOAN.....APPLICANT

VERSUS

1. BARAWA GENERAL AGENCIES LTD

2. SANDE T/A BARAWA GENERAL

AGENCIES LTD.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

This ruling arises from an application brought under Order 43 r. (1) and (2) and (5), for orders of stay of execution in Civil Suit 28 of 2011 till determination of Civil Appeal 51/2012.

The grounds of the application are that applicant is likely to suffer substantial loss,

- The application has been made without delay.
- That applicant undertakes to provide security for due performance.

The application is supported by the affidavit of **N. Joani** which sheweth that:

Applicant was unsuccessful in civil Suit 43/2011. That on that date the trial Magistrate was out of station and the following ruling was made in her absence. She further averred that she was only advanced a loan of shs. 600/= with interest

for 1 month till July 2009. She shows that she has never signed for 5 million, and the figure was a forgery. She undertook to provide security and prayed for this court to stay execution pending determination of her appeal which had triable issues.

During the hearing **Counsel Namono** for the appellant relied on the above affidavit and invited court to consider the said evidence and grant the prayers as prayed.

In defence **Counsel Okeyo** opposed the application on grounds that; among others that applicant must satisfy court that;

1. There is an appeal which is competent with high chance of success.
2. That substantial loss would occur to applicant unless order of stay is made.
3. That the application has been made without delay.
4. That applicant has given security for the due performance.

Counsel relied on the case of ***Mohamed Kisule v. Greenland Bank SCCA. 10/2010***, to state that the ground that the appeal is incompetent has not been satisfied by applicant. He argued that in his affidavit appellant does not show that there is a pending appeal with a high chance of success. Orders made were made under Order 36 Civil Procedure Rules, yet appeals under order 36 need leave to be granted (as per O.44 r. 1 and 2). He argued that appeals under O.36 of the Civil Procedure Rules are not of right. He argued that appellant ought to have sought leave. The appellant has not satisfied court that there is a competent appeal. He referred to ***Robert Mugabe v. Irene Twinobusingye*** that an appeal without leave is incompetent (***CA.50/2009***). ***Matovu & Others vs. Abacus Pharmacy (Africa) Ltd***

MSC. 75/12; where **Justice Hellen Obura** held that an appeal without leave is incompetent.

He argued that apart from filing a memorandum of appeal, the application falls short of the above and should be dismissed with costs.

In rejoinder **Counsel Namono** insisted that matters counsel raised should be ignored since they were not deponed to in the affidavit in reply.

In resolving this matter, I will immediately tackle the question of law and procedure pointed out by the respondent's Counsel in submission regarding applications filed under order 36, and order 44 rules 1 and 2.

The gist of the argument is that the applicant did not seek the leave of court to appeal, which renders any subsequent applications based on that appeal incompetent.

O.44 r.2 provides that;

“An appeal under these rules shall not lie from any other order except with leave of court making the order of the court to which an appeal would lie if leave were given.”

From the details of this application CA 51 of 2012, arises from Kapchorwa Miscellaneous Application 48 of 2011 which arises from Civil Suit no. 0028 of 2011, which was under order 36 of the Civil Procedure Rules.

Going by the provisions of O.44 r.2 of the Civil Procedure Rules orders under order 36 Civil Procedure Rules are not appealable as of right. They need the leave of court before such an appeal is commenced. This position was enhanced by **K. Kwesiga**.

Robert Mugabe v. Irene Twinobusingye Civil Appeal 50 of 2009- Kabale holding that;

“The order dismissing an application for leave to defend under summary suits or order 36 of the Civil procedure Rules is not one of the orders set out in order 44 rule 1. “

Therefore the appellant ought to have sought leave to appeal as prescribed under Rule 3 and 4 of this order. This same position was upheld in the cited case of Matovu Sarah v. Abacus Pharmacy (supra), which was cited with approval the case of **SANGO BAY ESTATES LTD V. DRESDER BANK AG (1971) E.A. 17**, which held that where leave is not sought the appeal is rendered incompetent and must be struck out.

The above is the law that governs this present application. Even if the Respondents did not plead these matters in their affidavit in rejoinder, it is not a fatal omission. An illegality once pointed out to court can never be allowed to stand. (See **MAKULA INTERNATIONAL LTD V. CARDINAL NSUBUGA, CA,4/1981**).

The fact that no such leave was sought renders the purported appeal a nullity, yet for this application to succeed it must be shown that there is a pending appeal with a high chance of succeeding. Without such an appeal orders sought in this application would hinge in the abyss. It is a fact that on record there is no leave to

defend which was sought by applicants. This omission renders the appeal incompetent and any subsequent applications arising therefrom are equally rendered incompetent.

It would be an exercise in futility for court to agree with counsel for applicant's assertion, so that we ignore this omission at this stage only to be confronted with it at the trial of the substantive appeal.

I therefore find that this application is incompetent for being based on a nonexistent incompetent appeal, which in law is a nullity. For the above reasons this application fails and is dismissed for being incompetent.

The purported appeal is also struck off the record for being incompetent and a nullity. I so order. Costs to Respondents.

Henry I. Kawesa

JUDGE

20.08.2014