

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT JINJA**  
**MISC. APPLICATION No. 153 OF 2017**  
**(ARISING FROM MISC APPLICATION No 9 OF 2014)**  
**(ARISING FROM BUGIRI CIVIL SUIT No. 105 OF 2007)**

1. NANDHUBU PAUL
2. MUVANHUMA DIFASI
3. MWONDHA MARTIN
4. KYAZIKE TAPENENSI
5. NAMUTAMBA BEATRICE
6. BABIRYE MONICA
7. NAMAGANDA ESTHER
8. KAGHALA NAKATO



----- APPLICANTS

*Vs*

1. MUKWAYA MOSES
2. NKOTO SAMSOM
3. BAGEYA ISIFU

----- RESPONDENTS

**BEFORE: HON. JUSTICE MICHAEL ELUBU**

**RULING**

The applicants bring this application by Notice of Motion under Sections 76 and 98 of the **Civil Procedure Act** and Order 44 Rules 1, 2, 3 and 4 of the **Civil Procedure Rules** seeking orders that:

- a. Leave be granted to the applicants to appeal against the ruling and orders of the Trial Magistrate in Misc Application No. 9/2014 arising from Civil Suit No 105/2007 which was delivered on the

20<sup>th</sup> of December 2016 by HW Komakech Kenneth Magistrate  
Grade I Bugiri.

**b. Costs of the application be provided for.**

The background is that the applicants were plaintiffs in Civil Suit No 105 of 2007 filed in Bugiri Court. A consent judgment is then said to have been agreed by the parties and entered on the Court record. The respondents filed an application No. 2/14 challenging the consent Judgment. That application was dismissed. It was then that Miscellaneous Application No 9/14, seeking a review of the consent judgment, was filed. The application was also dismissed prompting the applicants to seek leave to file an appeal against the dismissal. The leave was denied. It is against that order of dismissal from which this instant applications stems.

When the matter came up for hearing, counsel for the applicants, Mr Mujurizi Jamiru, submitted that this application met the test for a grant of leave to appeal. He relied on the case of **Sobetra vs Leads Insurance H.C.M.A. [Commercial Court Div] 377 of 2013** where it was held that *An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct.*

It was the submission of Counsel that the Trial Magistrate in determining the application did not address preliminary points of law raised by both sides. These preliminary objections went to the root of the application. It was argued that the trial magistrate directed that the CS No 105/2007 be heard on its merits but did not first set aside the consent judgment which was properly on record. This, it is contended was irregular and illegal. His contention in addition was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not instructed Counsel to represent them in setting aside



the consent judgment which meant that these two parties were dragged into the suit and risked suffering the payment of costs in a matter that they had no interest. Lastly, that no claim of fraud was made or proved by the respondents to warrant the setting aside of the consent judgment.

The respondents opposed the application. Regarding the argument that Counsel was not instructed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, it is argued by Mr Ngobi Baliddawa, their Counsel, that in Paragraphs 4, 5 and 6 the applicants acknowledge the 1<sup>st</sup> and 2<sup>nd</sup> respondents as part of the respondents or parties in this matter. For that reason the submission that they were not party was redundant. Beside it is contended that the applicants for all the years this suit has been pending, have never made an application to strike off the 1<sup>st</sup> and 2<sup>nd</sup> respondents as parties. Thirdly there is no evidence on record, principally through affidavit, stating that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not instruct Counsel for the respondents to challenge consent judgment.

It is also submission of Counsel that the trial magistrate was alive to all the issues raised by the applicants including the preliminary objections and other grounds but he chose to exercise his discretion to avoid farther delay in an already old case and directed that CS No 105 of 2007 be heard on its merits.

I have carefully listened to the arguments on both sides, and given due consideration to the pleadings and evidence. The point for resolution is whether the applicants are entitled to the remedy sought.

Section 220 (1) (c) of **the Magistrates Courts Act** provides for leave to appeal and stipulates,

Leave to appeal for the purposes of subsection (1)(c) shall not be granted except where the intending appellant satisfies the chief magistrate or the High Court that the decision against which an appeal is intended involves

**a substantial question of law or is a decision appearing to have caused a substantial miscarriage of justice** (emphasis added).

I am in total agreement with the holding cited in the case of **Sobetra** (supra). For avoidance of doubt the grounds cited there for a grant to an applicant of leave to appeal are,

- a. *that his intended appeal has reasonable chance of success or*
- b. *that he has arguable grounds of appeal*
- c. *and has not been guilty of dilatory conduct”.*

The grounds intended by the applicant included one that Counsel was not properly instructed. I have looked at the record here and can find no evidence to show that Counsel has no instructions from the 1<sup>st</sup> and 2<sup>nd</sup> respondents. This is the principal ground on which the application turns.

The other ground is that the Court made no finding on the preliminary points of law raised by the parties nor did they prove fraud to warrant setting aside the consent judgment. I see no miscarriage caused by failure to make specific findings on the preliminary points as they did not affect the substantive justice of this matter.

This court will also seek guidance from the East African Court of Appeal, as it then was, where in the case of **Sango Bay Estates Ltd & Others vs Dresdner Bank AG** (supra) Spry V.P at page 40 stated the principle upon which leave to appeal can be granted as follows:

*“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, but where as in the present case, the order from*



*which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out”.*

This court should not interfere with the exercise of the discretion of a lower court unless it is satisfied that the Trial Magistrate in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Trial Magistrate has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice (see **Mbogo vs Shah [1968] EA 89**).

In this instant case the trial magistrate chose to exercise his discretion to dismiss this appeal because it was an old matter with a protracted history where several applications have been filed, some dismissed for want of prosecution, which in turn has caused delay. He also clearly showed that he was alive to all submissions made including the preliminary points of law already alluded to.

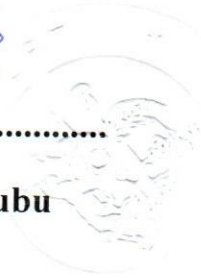
This court cannot fault the trial magistrate in the manner he exercised his discretion and sees no misdirection in the principle on which he made his findings. He considered all the complaints raised in the pleadings, evidence and submissions before finding that the mater proceed on its merits. I agree with him.

Additionally, it is true that no order to set aside the consent judgment was expressly made before the court ordered for CS 105/2007 to commence and be determined on its merits.

In that regard, and pursuant to this Courts Powers under Section 33 of the **Judicature Act** Cap 13 and Section 98 of **the CPA** I set aside the Consent Judgment and order that the said Bugiri CS No. 105 of 2007 proceed to be determined on its merits.

The application dismissed with costs.

ME



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**Michael Elubu**

**Judge**

**20.9.17**