THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 249 OF 2018

(ARISING FROM MISC. APPLICATION NO. 88 OF 2018)

(ARISING FROM MISC. APPLICATION NO. 769 OF 2014)

(ARISING OUT OF NAKAWA CIVIL SUIT NO. 173 OF 2015)

1. **MUSA SBEITY**
2. **CYBER AUTO SERVICES---------- APPLICANTS**

VERSUS

AKELLO JOAN---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for leave to appeal against the ruling of this Court in Miscellaneous application No. 769 of 2014 brought under Order 44 rules 2,3 &4 of the Civil Procedure Rules.

The applicants filed an application to extend the time within which to file an application for leave to Appeal against the ruling of court delivered on the 17th day of April 2015.

The court allowed the application on ground that the applicant could not file an appeal against the ex parte decision as he was not effectively served and only got to know about it when he was served with the taxation of costs notice.

It should be noted that the applicants should have filed an omnibus application for extension of time to appeal and the application for leave itself in order to save the courts time.

The applicants were represented by Ssemambo Rashid with Kato Absolom and the respondent was represented by Athieno Juliet holding brief for Nyaketcho Racheal. In the interest of time court directed the counsel for both parties to file written submissions.

The main ground for this application is that the respondent applied to set aside a consent settlement under Miscellaneous Application No. 769 of 2015 which was held in her favour, after the said application was heard ex parte. The Notice of motion in Miscellaneous Application No.

769 of 2015 was never served upon the applicants and they did not have the opportunity to defend the same.

The respondent has never filed any affidavit in reply to this application and in my view it would mean the application is not opposed on the facts as presented by the applicants. The respondent would only challenge the same on points of law and not the facts.

The facts upon which this application is premised are set out in the affidavit of 1st applicant Musa Sbeity as hereunder;

a) That the respondent filed HCCS No. 172 of 2013 against the applicants for a liquidated sum of US$72,050.
b) That on 22nd November 2013, a decree in a summary suit was entered ex parte in favour of the respondent.
c) That the claim by the respondent in HCCS No.172of 2013 arose out of a transaction involving a subject matter of US$6,500 yet she was awarded US$72,050 as sought in summary suit.
d) That the applicants filed several applications to appeal and or set aside the ex parte decree issued in summary suit.
e) That on the 21st October 2014, the applicants and the respondent entered into a consent settlement resolving all the applications and matters between them
f) That the respondent thereafter filed Misc. Application No. 769 of 2014 which was an application to set aside the Consent judgment in HCCS No. 173 of 2013.
g) That the applicants were never served with copies of the Notice of Motion prior to the hearing of the application and neither was the applicants advocates at the time to wit:- Okecha, Baranyanga & Co Advocates ever served with the same.
h) That on the 17th April 2015, Misc. Application No. 769 of 2014 was decided ex parte against the applicants. (The consent settlement was set aside)
i) That the respondent was duly paid the agreed amount of the Consent settlement of US$20,000 as full and final settlement of the dispute but she is claiming that this was an instalment.
j) That the respondent is in possession and utilising the motor vehicle which is the subject of the dispute.
k) That the applicants filed an application for extension of time within which to file an application seeking leave to appeal against the ruling of court, and the same was granted by this Honourable court.
l) That the applicant has sufficient grounds of appeal with a high likelihood of success, which merit serious judicial consideration.

Since the respondent never filed an affidavit in reply, these facts are deemed admitted as constituting the true position of the current application before this court.

The law governing the application for leave to appeal is set out in Order 44 rule 2 of the Civil Procedure Rules and it provides as follows;-

> ***"An appeal under these rules shall not lie from any order except with leave of the court making the order or of the court to which an appeal would lie if leave were given."***

This is an application to grant leave to appeal against the ruling of this court given under Miscellaneous Application 796 of 2015. That application was setting aside the consent judgement entered between the applicants and the respondents.

In the case of **Sango Bay Estate vs Dresdner Bank & Attorney General [1971] EA 17***Spry V.P* stated the principle upon which an application for leave to appeal may 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….**"
>
> The Court further noted 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**."

The issue for determination is;

Whether there are sufficient grounds to grant leave to appeal?

The main consideration for the grant of leave is whether prima facie there are grounds of appeal which merit serious judicial consideration. In the present application the applicant contends that the consent judgment was set aside in their absence and their counsel.

A consent Judgement is like a contract which derives its legal effect from the agreement of the parties. It may only be set aside on the same ground as those on which the contract would be set aside. See **Hirani v Kassam (1952) 19 EACA 131**.

The said Consent settlement was set aside ex parte implying that the applicants were not heard and therefore their contract was set aside without their involvement. This is a serious ground that needs judicial consideration on appeal.

The court should take into account the intending appellant's strong feelings of injustice when considering whether to grant permission, at least where those feelings are arguably objectively justified.

The applicants' justification lies in the fact that they were never served with the application that set aside the consent judgement and the court proceeded to set it aside ex parte.

Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard.

In the case of **Swain v Hillman [2001] 1 All ER 91** *Lord Woolf, MR* noted;

> ***"That a real prospect of success means that the prospect for the success must be realistic rather that fanciful. The court considering a prospect for permission is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is real prospect of success"***

See also **Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority Court of Appeal Civil Application No. 16 of 1996**

This court also notes that the respondent's counsel (Nyaketcho Racheal) is the person who actually deposed an affidavit in support of the application that set aside the consent Judgement. It appears she proceeded to argue the application since the Order arising out of the proceedings clearly shows she is the counsel for the applicant who appeared in court. The Advocates Act prohibits such conduct under **The Advocates (Professional Conduct) Regulations SI 267-2 Regulation 9** which provides;

> "***No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally of by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears***"

It is clear that this application for setting aside a consent judgement was a contentious matter and it was very wrong for counsel to get involved to the extent of deposing an affidavit and later appear to argue the same. This court condemns such behaviour of counsel and this practice must stop.

Considering the attainment of justice

This is the second consideration premised on equity and fairness. The applicants have stated that the respondent after executing the consent settlement with the respondent, they duly paid the said amount of US$ 20,000. The respondent does not deny receipt of the same except she is now contending that it was payment of an instalment.

The application to set aside was filed after the due performance of the applicants.

The actions of the respondent amount to approbating and reprobating. (Having her cake and eating it at the same time)

It is clear that this matter has never been heard on merit. This suit was brought under Summary suit and judgement was entered by the Deputy registrar. The applicants contend that the value of the subject matter was for US$6,500 and not US $72,050 as entered by court. In the instant case, the above raised matters that deserve attention and consideration by the appellate court.

I am satisfied that the grant of leave to appeal is necessary to protect the applicants' right of appeal and for attaining the ends of justice in the instant case.

In the result for the reasons stated herein above this application is allowed with no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
1st /06/2018