THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO 107 OF 2020

(Arising from Miscellaneous Application No. 138 of 2019)

(From M.A No. 166 of 2017 and Civil Suit No. 102 of 2009)

1. **JOSEPH BAMWEBEHIRE**
2. **JACK NDYAHABWE :: APPLICANTS**

VERSUS

1. **NAREEBA DAN**
2. **TWIJUKYE RICHARD**
3. **BIRYAHO VINCENT**
4. **KOBUSINGYE TEOPISTA**
5. **BYAMUKAMA**
6. **BAHIREIRA ATHANASI**
7. **KAMUSIIME ROBERT**
8. **ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under Order 44 Rule 1 (2), (3) & (4) of the CPR for orders that leave be granted to the Applicants to appeal against the ruling and orders of this Court made on 14th February 2020 and for costs of the application to be provided.

The application was supported by an affidavit sworn by **Joseph Bamwebehire**, the 1st Applicant, which lays out in detail the grounds of the application. Briefly, the grounds are that;

a) The Applicants filed M.A No. 138 of 2019 seeking review and setting aside orders in M.A No. 166 of 2017 wherein the 1st to 7th Respondents were added as parties to Civil Suit No. 102 of 2009.
b) The court dismissed the application on 14th February 2020 and the Applicants, being dissatisfied with the decision of the court, instructed their lawyers to appeal the decision.
c) The 1st Applicant was informed by their lawyers that an appeal in a matter such as this is not as of right and they are required to seek leave of the court so as to appeal.
d) The intended appeal raises important matters of law and facts that deserve to be addressed by the Court of appeal, namely that;
    (i) The court erred in law and in fact when it held that the applicants have no interest in the matter.
    (ii) The court erred in law and in fact when it held that M.A No. 138 of 2019 was disguised as an appeal.
    (iii) The court erred in law and fact when it held that the 1st to 7th Respondents could be added as parties after judgment in Civil Suit No. 102 of 2009.
    (iv) The court erred in law and fact when it held that the resolution Annexture "B" was not illegal or champertous.
    (v) The court erred in law when it ordered that costs of the application be borne by Counsel for the Applicants personally.
e) The application has been brought without delay and it is just and equitable that the application for leave to appeal be granted.

The application was opposed through affidavits in reply deponed to by the 5th and 7th Respondents, and another on behalf of the 8th Respondent. The gist of the affidavits of **Byamukama (the 5th Respondent)** and **Kamusiime Robert (the 7th Respondent)** is as follows:

a) The Applicants were never beneficiaries in HCCS No. 102/2009 but legal representatives who discharged their role upon court issuing the decree.

b) After the decree was issued by the court, the 1st Applicant resorted to sharing the decretal sum with third parties, including his brother, without the knowledge and authority of the beneficiaries. The Applicants also attempted to change instructions from the lawyers who had handled the matter without the consent and knowledge of the 1st to 7th Respondents and of the other beneficiaries.

c) The deponents, among other Respondents, challenged the change of instructions vide M.A No. 045 of 2018 and the same was declared void by the court. The Applicants were later discharged from their representative role by a court order vide M.A No. 224 of 2015, which order was confirmed vide M.A No. 652 of 2017 and the same was never challenged by the Applicants and is therefore binding on them.

d) The Applicants do not have any interest in the matter as they are not beneficiaries but are frustrating the 1st to 7th Respondents and the other beneficiaries from obtaining the fruits of justice.

e) The 1st to 7th Respondents were added to HCCS No. 102 of 2009 vide M.A No. 166 of 2017 so as to protect their interests and expedite execution proceedings after the Applicants mishandled the same. This order was never appealed. During the hearing of M.A No. 166 of 2017, the Applicants vide M.A No 373 of 2017 sought to be added to the application (M.A 166 of 2017) which was rejected by the court upon realising that the Applicants had no interest in the matter and would not be prejudiced. The Applicants sought leave to appeal against the dismissal of M.A No. 373 of 2017 but the application was denied by both the High Court and the Court of Appeal.

f) The Applicants then resorted to filing M.A No. 138 of 2019 for review of the orders issued vide M.A 166 of 2017 which application was also dismissed for being incompetent and an abuse of the court process. The Applicants have therefore brought this application which is also incompetent and is another attempt at frustration of the Respondents and other beneficiaries from realising the fruits of their judgement.

For the 8th Respondent, an affidavit in reply was deponed to by **Sam Tusubira**, a State Attorney in the Attorney General's Chambers, who averred that the burden imposed on an Applicant in an application such as this one is that he/she must show that the grounds upon which they intend to appeal involve questions of great public or general principle of public advantage and that the appeal has a likelihood of success. The deponent stated that it is not merely enough for an applicant to aver that he is aggrieved with the decision of the court. He further stated that the Applicant has not satisfied Court that there are substantial questions of law meriting serious judicial consideration or that they have a bonafide and arguable case on appeal. The deponent concluded that the application has no merit and should be dismissed with costs.

Representation and Hearing

At the hearing, the Applicants were represented by Mr. Mamawi Bill from M/s Greystone Advocates; the 1st to 7th Respondents were represented by Mr. Mpumwire Abraham from M/s Bashasha & Co Advocates and the 8th Respondent by Mr. Madete Geoffrey from the Attorney General's Chambers. It was agreed that the matter proceeds by way of written submissions which were duly filed by Counsel. I have considered the submissions in the course of reaching a determination of the matter that is before the Court.

Issue for Determination by the Court

One issue is up for determination, namely, **whether the application discloses sufficient grounds for grant of leave to appeal**.

Court Determination

The legal requirement to seek leave before a party can prefer an appeal against an order of the High Court to the Court of Appeal is derived from the provision under Order 44 Rule 1 (2) of the CPR. Rule 1 (1) of Order 44 CPR lists down orders against which a party is allowed to appeal as of right. Sub-rule (2) thereof provides that 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 were given. Under sub-rule 3 thereof, applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from. The order sought to be appealed from herein is not one of the orders listed under sub-rule 1; thus the need for the Applicants to seek leave.

The rationale for the requirement to seek leave before a party can appeal in certain cases is premised on the need to check unnecessary and/or frivolous appeals. See: ***Lane v. Esdaile (1891) A.C. 210 at 212 and Ex parte Stevenson (1892) 1 Q.B. 609***. It is also based on the general rule that, in as much as possible, appeals should arise from final decrees and orders of courts and not interlocutory orders. See: ***Incafex (U) Ltd Vs Kabatereine (1999) KALR 645***.

The legal test for grant of an application for leave to appeal to the Court of Appeal was succinctly put by **SPRY V.P** in the leading case of ***Sango Bay Estate Ltd & Others vs. Dresdner Bank A.G [1971] EALR 17 at page 20*** thus;

> ***"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."***

The law, therefore, is that while 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, in cases where the order sought to be appealed from was made in the exercise of a judicial discretion, a rather stronger case will have to be made out by the applicant.

In ***Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority, Court of Appeal Civil Appeal No. 16 of 1996***, it was held that an applicant seeking leave to appeal must show that the intended appeal has a reasonable chance of success or that he has arguable grounds of appeal.

In ***Musa Sbeity & Another vs. Akello Joan HCMA 249 of 2018***, it was held that leave to appeal will be given where the court considers that the appeal would have a prospect of success; or where there is some compelling reason as to why the appeal should be heard.

It has further been held that in order to determine whether there are grounds which merit serious judicial consideration on appeal, the following test should be carried out by the Court, as set out in ***Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors, HCMA No. 292 of 2014***, to wit:

> ***"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."***

From the above legal position therefore, the court needs to examine the controversies that the trial court was faced with, how the court resolved them and whether the grounds raised by the Applicant in objection raise arguable points that require serious judicial consideration. It should also be noted that on aspects that involved exercise of the court's discretion, a rather stronger case has to be established by the Applicant. I will therefore deal briefly with each of the alleged arguable points raised by the Applicant to determine whether they or any of them justify the grant of leave to appeal to the Court of Appeal.

The Court erred in holding that the Applicants have no interest in the matter.

The record indicates that the Applicants represented the 1st to 7th Respondents together with other beneficiaries vide HCCS No. 102 of 2009. It has been shown, and not disputed by the Applicants, that the Applicants themselves were not beneficiaries under the claim in the said suit but were entrusted by the beneficiaries and appointed legal representatives in the matter pursuant to a representative order issued by court. The Applicants prosecuted the matter and judgment and decree were granted by the court.

It was alleged that during execution of the said decree, the Applicants mishandled the proceeds under the decree which led to a disagreement between the Applicants and the 1st to the 7th Respondents, among the other beneficiaries. The 1st to 7th Respondents applied to the court to be made parties to the case for purpose of furthering execution and realising the fruits of the judgment; which the court allowed. The Applicants' protestation of this move was rejected by the court.

It so happened that vide M.A 224 of 2015, the Applicants were, under a court order, discharged from acting as legal representatives to the beneficiaries under HCCS No. 102 of 2009. The above order was re-affirmed by the court under M.A No. 652 of 2017. These facts have not been rebutted by the Applicants and copies of the said orders are on record.

As such, the Applicants having ceased to represent the 1st to 7th Respondents plus the other beneficiaries under the head suit, and the 1st to 7th Respondents having been made parties to the suit by a court order, I do not see any arguable point of fact or law arising from the finding of the trial Judge in M.A No. 138 of 2019 to the effect that the Applicants have no interest in the matter before the court. The Applicants have not shown any such interest by affidavit or otherwise. They do not indicate that, contrary to the facts that have been placed before the court, they are beneficiaries under the said decree. Neither do they disclose any other legitimate interest of any kind.

In the circumstances, I do not find any arguable point raised by the Applicants on this contention. This contention, thus, raises no point of either law or fact that merit any judicial consideration by a court on appeal. It therefore does not pass the requisite test as to make the Applicants merit being granted leave to appeal the impugned decision of the court.

The Court erred in holding that MA No. 138 of 2019 was disguised as an appeal.

M.A No. 138 of 2019 was an application for review of orders issued vide M.A No. 166 of 2017 which had the effect of adding the 1st to 7th Respondents as parties to HCCS No. 102 of 2009. The trial Judge found that the application disclosed no grounds warranting the grant of an order for review. There was no mistake apparent on the face of the record, the applicants were not aggrieved parties and had no interest in the matter. The Applicants were simply challenging the decision of the court on its merits which did not fall under the ambit of an application for review. The court therefore concluded that the application was in effect an appeal that had been disguised as a review application.

From the above set of facts, I do not find any arguable point that requires judicial consideration by a court on appeal. The law on review is so clear.

Not every grievance by any person entitles such a person to an order of review of a court decision. Once an application does not fall within the provisions of Section 82 of the CPA and Order 46 of the CPR, it cannot be entertained, let alone be granted by the court. This ground does not, therefore, pass the standard required to make the court grant leave to a party to appeal.

The Court erred to add the 1st to 7th Respondents as parties to the suit after judgment.

It is clear to me that the question as to whether or not the 1st to 7th Respondents were wrongly added as parties to HCCS No. 102 of 2009 could only be raised as an appeal against the decision in M.A 166 of 2017. It could not be a matter for review since it did not disclose any of the known grounds for review. The trial Judge in M.A No. 166 of 2017 interpreted the law and gave reasons as to why the said Respondents were entitled to be made parties to the suit even at that stage. If a party was not satisfied with the said reasons, the recourse would have been to appeal that decision. Where a party preferred the avenue of review, the court to which the application for review was brought was not in error to reject this contention. That is the clear position of the law and I do not find any arguable point of law or fact that merit judicial consideration by a court on appeal. This ground too does not pass the required test.

The Court erred in holding that Annexure "B" was not illegal or champertous

The trial Judge highlighted the law on what would make the said document (Annexture "B") illegal or champertous. The law and the facts appear clear. The document was a resolution. It was neither an agreement nor was it of the class intended to be prohibited by the legal principle against champerty. I do not find any matter that requires further argument and a decision of a superior court on the matter. This contention too does not disclose any point of law meriting judicial consideration by a court on appeal.

The Court erred in law when it ordered the Applicants' Counsel to pay costs of M.A No. 138 of 2019 personally.

The law on costs under Section 27 of the CPA and upon decided authorities is clear. Costs follow the event unless the court, on good cause, orders otherwise. As such, costs are awarded at the discretion of the court. In the matter in issue, the court elaborately set out the background and made a specific finding on abuse of court process by the Applicants explicitly facilitated by their counsel. The court voiced the need to stop such practice and decided that it was necessary in that case to penalise the advocate behind the practice by personally paying costs of that application. This was a pure exercise of discretion which, in my view, was exercised judiciously.

As per the legal position set out herein above, where the decision sought to be appealed was passed in exercise of discretion by the court, a rather stronger case has to be proved. I do not find any ground capable of challenging the said exercise of discretion by the court. On the evidence before the Court, there is nothing to point to any credible challenge against the finding of the trial Judge on the issue of abuse of the court process by the Applicants and their Counsel. I therefore do not find any arguable point that merits serious judicial consideration by a court on appeal under this contention.

In all therefore, the Applicants have not raised any grounds that merit serious judicial consideration by the Court of Appeal or any arguable case with a likelihood or prospect of success. In my considered view, the matters presented by the Applicants have long been settled in a multiplicity of applications but the Applicants have surprisingly continued raising the same. It is a settled principle of the law that litigation must come to an end and a successful party ought to be given an opportunity to enjoy the fruits of litigation. The Respondents and other over 3000 beneficiaries have been denied the fruits of their judgment since 2013 when the order of payment was made. This process should not be hampered any further through frivolous and vexatious proceedings at the instance of the Applicants.

In the final result therefore, I have found no merit in this application and the same stands dismissed with costs against the Applicants.

It is so ordered.

Dated, signed and delivered by email this 21st day of June 2021.

Boniface Wamala
JUDGE