THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 12 OF 2021
(Arising from M.A No. 558 of 2020)
(Arising from Company Cause No. 03 of 2015)

DAMANICO PROPERTIES LTD :: APPLICANT

VERSUS

1. **IRENE DAMANI**
2. **PARAUS DAMANI**
3. **KRISMA DAMANI :: RESPONDENTS**

BEFORE: HON. MR JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under *Section 98 of the Civil Procedure Act (CPA), Section 33 of the Judicature Act, and Order 44 Rules 2, 3 and 4 of the Civil Procedure Rules (CPR)* seeking orders that:

1. The Applicant be granted leave to appeal against the decision (ruling and orders) of the Learned Trial Judge in Miscellaneous Application No. 558 of 2020 (arising from Company Cause No. 03 of 2015).
2. All the proceedings in and/or arising from Company Cause No. 03 of 2015 be stayed pending the hearing and determination of the intended appeal.
3. Costs of the Application be provided for.

The application was supported by an affidavit deponed to by **Hema Damani**, a Director of the Applicant, which sets out the grounds of the application. Briefly, the grounds are that:

a) The Applicant filed M.A No. 558 of 2020 (arising from Company Cause No. 03 of 2015) seeking dismissal of the said Company Cause against the

Applicant (who had been named 2nd Respondent in the amended petition) on preliminary points of law to the effect that;

(i) The amended petition (in the Company Cause) was incompetent, misconceived, marred by irregularities and was incurably defective.

(ii) The Respondents (Petitioners in the Company Cause) had no locus to file a petition against the Applicant vide Company Cause No. 03 of 2015.

(iii) The amended petition in Company Cause No. 03 of 2015 was barred by *Estoppel* and *Res Judicata*.

b) The Applicant averred that the determination of the above application would conclusively determine or dispose of Company Cause No. 03 of 2015.

c) On 29th December 2020, this Honourable Court dismissed the said application with costs.

d) The Applicant is aggrieved and dissatisfied with the decision of the Learned Trial Judge and intends to appeal against the same to the Court of Appeal.

e) The Applicant's intended appeal raises arguable points of law with a high chance of success to be determined by the Court of Appeal, to wit;

(i) The Learned Trial Judge erred in law and fact when he held that the question of whether the amended petition in Company Cause No. 03 of 2015 was properly brought against the Applicant (the 2nd Respondent in the amended petition) was res judicata.

(ii) The Learned Trial Judge erred in law and fact when he held that the Respondents who are not members of the Applicant Company could sustain a petition against the Applicant under sections 248 and 249 of the Companies Act No. 1 of 2012.

(iii) The Learned Trial Judge erred in law and fact when, having found that the Respondents do not have locus to file the amended petition against the Applicant, he went ahead to hold that the

Court has jurisdiction to hear the same petition against the Applicant pursuant to the general powers of Court under section 33 of the Judicature Act.

(iv) The Learned Trial Judge erred in law and fact when he failed to evaluate the evidence on record on *estoppel* and *res judicata* and come to the conclusion that the amended petition was barred under the said doctrines.

f) The Applicant cannot appeal against the said decision of the Learned Trial Judge as of right and requires leave of this Honourable Court so as to appeal.

g) It is in the interest of justice that the application be granted.

The Respondent opposed the application vide an affidavit in reply deponed to by **Irene Damani**, the 1st Respondent, in which she stated that:

a) The application is devoid of merit, is frivolous, vexatious, incompetent and an abuse of the court's due process.

b) The Ruling of the Learned Trial Judge in M.A No. 558 of 2020 dismissing the preliminary objections did not conclusively determine rights of the parties but required hearing of evidence to resolve the issues with finality.

c) The deponent is advised by her lawyers that it is not sufficient ground to merely assert that one is aggrieved with a decision of court as that is a normal consequence of litigation.

d) The application does not demonstrate any serious issues for judicial consideration by the Court of Appeal or any miscarriage of justice that may be suffered if amended Company Cause No. 03 of 2015 is heard and disposed of on merit.

e) The deponent is further advised by her lawyers that the intended grounds of appeal as shown in the instant application can best be argued

in the amended Company Cause No. 03 of 2015 which is still pending and thus cannot be resolved in a disguised application.

f) The application as a whole is a vain attempt at furtherance of the Applicant's abuse of process to frustrate the hearing of the Company Cause for winding up of Lakeside City Ltd and compensation for land irregularly acquired by the Applicant (2nd Respondent in the Company Cause).

The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

At the hearing, the Applicant was represented by Mr.Edward Mugogo while the Respondents were represented by Mr. Abdu Katuntu. It was agreed that hearing proceeds by way of written submissions which were duly filed. I have taken the submissions into consideration in the course of resolution of the issues before Court.

Issues for determination by the Court

Two issues are up for determination by the Court, namely:

1. Whether the Applicant has sufficient grounds for the grant of leave to appeal to the Court of Appeal.
2. What remedies are available to the parties?

Issue 1: Whether the Applicant has sufficient grounds for the grant of leave to appeal to the Court of Appeal.

Applicant's Submissions

It was submitted by Counsel for the Applicant that the law governing grant of an application for leave to appeal, where an applicant cannot appeal as of right,

is set out under Order 44 Rules 2 and 3 of the CPR and the considerations thereof have been subject of court decisions. Counsel referred the Court to the decisions in ***Musa Sbeity & Another vs. Akello Joan HCMA 249 of 2018*** which cited ***Sango Bay Estate Ltd & Others vs. Dresdner Bank A.G [1971] EA 17***. Counsel further referred the Court to the decision in ***Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors, HCMA No. 292 of 2014***.

Counsel submitted that the gist of the above cited authorities was that leave to appeal from an order in civil proceedings will be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration. In order to determine whether there are grounds that merit serious judicial consideration on appeal, the applicant should set out what the controversy before the court was; how the court determined that controversy; the applicant's grounds of objection to the court's determination of the controversy; and the arguable points that require serious judicial consideration on appeal.

Counsel for the Applicant therefore followed the above approach while making arguments as to why the application should succeed. I will refer to the arguments variously while resolving each particular controversy.

Respondents' Submissions

In response, Counsel for the Respondents submitted that in M.A No. 558 of 2020, the court found that there was a valid court order for the addition of the Applicant as a 2nd Respondent to the Company Cause and that order has never been challenged. The court further found that the facts before it established serious matters that merited investigation by the court. These included several allegations that appeared to impute fraud and oppressive conduct. The court therefore held that it ought to be slow in wielding the axe to strike down a pleading of this particular nature which on the face of it establishes a cause of

action albeit citing the wrong law. Counsel submitted that it was this investigation of fraud that the applicant seeks to run away from under the guise of appeal in the hope of buying more time to frustrate the progress of the Company Cause.

The Respondents' Counsel further submitted that no prejudice is to be suffered by the Applicant if the Company Cause is heard and determined on its merits. Counsel argued that the approach of the courts has been to discourage appeals from interlocutory orders and parties to be encouraged to appeal after final disposal of causes; and this is what this Court should do. Counsel referred the Court to a number of decisions, namely; ***Sanyu Lwanga Musoke vs Sam Galiwango, S.C.C.A [1997] V KALR 47; Charles Harry Twagira vs Uganda, SC Crim. Appeal No. 27 of 2003;*** and ***Yedida Padde vs Hamidadi Ali, HCCA No. 0045 of 2008***.

Counsel finally argued that the order disallowing the applicant's preliminary objections did not finally determine the parties' rights but rather allowed them an opportunity to present their respective cases to be heard and decided on merit. This application is therefore unnecessary, has not demonstrated any grounds for grant of leave to appeal and ought to be dismissed.

Applicant's Submissions in Rejoinder

Counsel for the Applicant submitted that the Respondents' submissions in reply were devoid of any merit in as far as challenging the application is concerned. The Respondents have not addressed the pertinent issue before the Court which is whether there are sufficient grounds for grant of leave to appeal. Counsel further submitted that the authorities cited by the Respondents' Counsel are distinguishable from the facts and circumstances of the present case and Counsel proceeded to illustrate the distinction.

Court Resolution

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 ***Musa Sbeity & Another vs. Akello Joan HCMA 249 of 2018*** (**Musa Ssekaana J.**), 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 why the appeal should be heard.

In order to determine whether there are grounds which merit serious judicial consideration on appeal, the decision in ***Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors, HCMA No. 292 of 2014*** lays down the test as follows:

> ***"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, 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 intend to summarize and deal with the pertinent controversies under the various headings as indicated below.

Propriety of the amended Company Cause as against the Applicant (2nd Respondent)

The matter raised by the Applicant before the Trial Judge was that the amended Company Cause was not properly brought against the Applicant (as 2nd Respondent) since the Company Cause was brought under sections 248 and 249 of the Companies Act 2012, which provisions dealt with internal management issues of a company where the parties are members of such a

company. It was argued for the Applicant that since the Petitioners in the Company Cause (the present Respondents) were not members of the Applicant Company, they could not bring a petition against the Applicant within the provisions of sections 248 and 249 of the Companies Act. The Applicant therefore contended that they were wrongly added to the amended Company Cause No. 03 of 2015.

The Learned Trial Judge found that the Applicant had been added to the Company Cause pursuant to a court order, which order had not been challenged by the Applicant. The Learned Judge held that the Applicant ought to have challenged the court order by way of an appeal and not by a fresh application as the Applicant sought to do. The court therefore agreed with the Respondents that the question regarding the propriety of adding the Applicant to the Company Cause was res judicata.

It is argued by the Applicant in the present application that the addition of the Applicant to the Company Cause by an order of the court did not make the amended petition regularly brought against the Applicant. Counsel argued that in an application to add or join a party as a defendant or respondent, the party sought to be added ordinarily has no say about whether they can be added or not since a person can sue whomsoever they choose. However, whether the suit can be sustained against such a party is a question that can only be determined after the said person has been joined to the cause. The party can only raise this issue at this stage.

Counsel for the Applicant further argued that in any case, the issue of whether the current respondents could sustain a petition under sections 248 and 249 of the Companies Act did not arise in the application to join the applicant to the Company Cause and could not come up before the petition was filed against the Applicant.

Counsel for the Respondents did not specifically address this contention by the Applicant. The issue raised by this contention is; where a party is sought to be added to a suit, and the application is allowed by the court, is such an added party barred from contesting the propriety of the suit against them after they are added as a party? The opinion of the Learned Trial Judge appears to be that the party ought to have raised such a contestation at the time of the application for them to be joined as a party and, if their protestation was rejected by the court, the party would then appeal. On the other hand, the argument by the applicant herein is that at that level, the issue of propriety of the suit against the intended defendant does not and cannot arise since the person is not yet a party and cannot challenge the suit. The Party only obtains locus to challenge the suit after they are effectively added to the suit. It is further argued that since a plaintiff is dominus litis (they can sue whoever they wish), a party intended to be added cannot choose whether to be added or not.

I find the above contestation an arguable point of law that requires serious judicial consideration by the court on appeal. The court needs to pronounce itself on a number of issues including whether mere grant of an application to add a party makes the suit properly brought against such a party; whether a person sought to be added as a party has locus to challenge the propriety of the suit against them during the application for adding the party; whether, once the application to add a party is granted, the added party is barred from challenging the propriety of the suit against them on account of the doctrine of res judicata.

The above contentions are disclosed from the decision of the trial Judge and are not settled. They, in my considered view, constitute arguable points of law that require serious judicial consideration by the court on appeal.

The question of *locus standi* and *cause of action*

The Learned Trial Judge found that the amended petition in Company Cause No. 03 of 2015 was premised on sections 248 and 249 of the Companies Act which are meant to protect the interest of minority shareholders in a company where such shareholders are members. While the court found as a fact that the Respondents (Petitioners in the Company Cause) were not members in the Applicant Company, and therefore could not sustain an action under the said provisions of the law, the court went on to hold that the pleadings in issue evidently showed that there was a serious question that had to be investigated. The court therefore concluded that the situation amounted to a case of citing the wrong law and took the view that although the respondents had sought protection under the wrong law, the court has wide discretionary powers to investigate all matters and, where deserving, to grant any orders that may be prayed for. The court therefore exercised its jurisdiction granted by the Constitution and Section 33 of the Judicature Act to grant the remedies appropriate in the circumstances.

The contention raised by the Applicant is that the Learned Trial Judge wrongly diverted from the issue of *locus standi* to the application of Section 33 of the Judicature Act. Counsel for the Applicant argued that for Section 33 of the Judicature Act to apply, the court has to be exercising its jurisdiction as granted by the law and the claim has to be one properly brought before the court. Counsel argued that in the case in issue, the court had no jurisdiction to entertain a petition brought under sections 248 and 249 of the Companies Act by parties who were not members of the company in issue. The claim by the Respondents was therefore not properly before the court and the court wrongly invoked the application of section 33 of the Judicature Act.

My finding is that it is arguable whether a party's lack of *locus standi* to sue in a particular matter can be cured by the application of the general provision as

to remedies under section 33 of the Judicature Act. It is also arguable whether a petition brought under sections 248 and 249 of the Companies Act for winding up of a company, can accommodate claims against wrongs done by another company that is not subject to the winding up process. I find these arguable points of law that merit serious judicial consideration of the court on appeal.

The question of *Estoppel* and *Res Judicata*

It was the finding of the learned Trial Judge that upon the facts that were before the court, it was premature for the court to reach a determination based on the pleas of *estoppel* and *res judicata* as laid by the Applicant. There were facts that needed to be placed before the court by way of a suit including serious allegations of fraud that could not be determined by the court through a strike out application.

The Applicant on their part insisted that there was enough material before the court to reach a finding that the matters raised in the Company Cause as amended were barred under the doctrines of *estoppel* and *res judicata* as against the Applicant.

In my view, the finding on this issue by the Trial Judge was an exercise of judicial discretion. The question as to whether the evidence before the court suffices to reach a particular determination is a matter of discretion of the trial Judge. As indicated herein above, the law is that where the decision sought to be appealed from was reached by the court in exercise of judicial discretion, a rather stronger case has to be made out.

In the instant case, I do not find a case strong enough as to call for an interference with this finding of the trial Judge. I, therefore, do not find any

arguable point from this contention by the Applicant worthy of serious judicial consideration on appeal.

Nevertheless, since the Applicant has established existence of arguable points worthy of serious judicial consideration on two earlier grounds, issue one is resolved in the affirmative.

Issue 2: What remedies are available to the parties?

Given my finding on the first above issue, the application by the Applicant succeeds and is accordingly allowed with orders that:

1. The Applicant is granted leave to appeal against the decision of the Learned Trial Judge in Miscellaneous Application No. 558 of 2020 (arising from Company Cause No. 03 of 2015).
2. All the proceedings in and/or arising from Company Cause No. 03 of 2015 are stayed pending the hearing and determination of the intended appeal.
3. The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

Boniface Wamala
JUDGE
26/03/2021