

- b) That when the matter came up for hearing, Applicants' counsel raised a preliminary objection that the application was poorly before court because there was an amendment done to the pleadings without leave of court.
- c) That the trial judge ruled that the preliminary objection should be raised in the submissions and she would make a ruling on it while delivering the ruling.
- d) That in her ruling, the trial judge did not make any reference to the preliminary objection despite it being raised in the submissions;
- e) That the Applicants filed a notice of appeal against the decision for purposes of filing an appeal and applying for leave to appeal against the said orders;
- f) That the intended appeal raises serious issues that merit judicial consideration and determination by the Court of Appeal;

In his affidavit in reply, the Respondent opposed the application and averred that the same is an abuse of court process as it is aimed to cause inordinate delay in finalization of CA No. 16 of 2015. He further stated that the application has been brought nine months after the ruling was delivered which amounts to inordinate delay and the intended appeal has no chances of success and the application should be dismissed with costs.

Both Parties filed written submissions and they are on the court record.

Counsel for the Applicants submitted that setting aside execution is not one of the orders appealable as of right according to **Order 44 rule 1 of the Civil Procedure Rules** hence the application for leave to appeal. Counsel cited the case of **Sango Bay Estates Ltd Versus Dresdner Bank [1971] EA 71** as laid down by Spry V-P page 40, on the guiding principle for such applications to be where prima facie it appears that there are grounds of appeal which merit serious judicial consideration. Counsel further submitted that the intended appeal has grounds that merit judicial consideration and are serious points of law which are of general principle decided for the first time upon which further argument and a decision of the superior court would be to the public advantage.

It is also Counsel's submission that by failing to make a ruling on a matter that had been put before the court, injustice was meted out to the Applicants and for such injustice to be cured, the matter should be allowed to proceed to another court for a finding on the same. Counsel further submitted that the Applicants are dissatisfied with the orders of this court setting aside execution that was already concluded and that this application was within time. Counsel prayed for the application to be granted with costs.

In response, Counsel for the Respondents argued that the application does not raise novel or substantial grounds for appeal, it does not point to any serious question or questions of law with a likelihood of success on appeal, and it does not raise any questions that would require further argument and a decision of the higher court. It is also Counsel's arguments that the trial judge considered both parties submissions and proceeded to determine the ruling as she did, and further that the trial judge considered the evidence of both Parties to find that indeed there was no proper execution of the decree and found it prudent to stay execution until further orders were issued. Counsel prayed for the application to be dismissed for lack of merit.

Determination of the application:

I have carefully read and perused both Parties pleadings and arguments and will take them into consideration in determining this application.

This Applicant seeks leave to appeal against an interlocutory order of this court. ***Order 44 Rule 2 of the Civil Procedure Rules*** provides that an appeal under these rules shall not lie from any other order except with the leave of the court making this a precondition before an appeal from interlocutory orders can be lodged in the court of appeal.

Order 44 Rule 3 of the Civil Procedure Rules provides that applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.

The grounds for the application of leave to appeal in cases of such nature were set out in the case of *Sango Bay Vs Dresdner Bank [1971] EA 17 (cited in Ekisa George & Anor versus Bank of Baroda & others MA No. 29 of 2017)* where Spry V-P held that;

“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.”

I also make reference to the case of *Herbert Sekandi t/a Land Order Developers v Crane Bank Ltd HCMA No 44 of 2007* where the court noted that, *“an applicant for leave to appeal to the Court of Appeal must show that the application for leave to appeal bore substantial questions of law to be decided by the appellant court and that the intended appellant has a bonafide and arguable case on appeal with what amounting to a question of law is that the issue raised or involved one of general principle which is to be decided for the first time or where the question is one upon which further argument and a decision of the superior court would be to the public advantage.”*

From the foregoing decision, the applicant in an application for leave to appeal against an interlocutory order of this court or any other orders not appealable as of right, has to prove that the intended appeal raises substantial questions of law meriting consideration by the appellant court.

In the instant case, the questions/grounds intended to be raised on appeal require the Court of appeal to determine;

- (i) whether the judge erred in determining the application that was poorly before it;
- (ii) whether the trial judge erred when she set aside execution without proof of sufficient cause;
- (iii) whether the trial judge erred in law and fact when she relied on the principles of staying execution to set aside execution.

- (iv) Whether the trial judge erred in law and in fact when she granted the application for setting aside execution on the basis that the execution was complete.
- (v) Whether the trial judge erred in law when she stayed execution that was complete.
- (vi) Whether the trial Judge erred in law when she failed to consider the preliminary points of law that were raised by the Respondents.
- (vii) Whether the trial Judge erred in law when she set aside and stayed execution within an application for setting aside execution.

From the above grounds and from perusing the trial judge's ruling, the decision was reached in exercise of the trial judge's discretion and as such, the Applicants have to make a stronger case for the grant of this application.

The Applicants major contention relates to the orders of the trial judge of setting aside an execution that was allegedly complete. I have perused the judgment of the court in which the trial judge made a reference to the returned warrant of execution which informed court that there were no boundary marks put on ground. There is a copy of the said warrant on file issued on the 20th day of June 2017, which was issued for the sole purpose of curving out boundaries on the suit land. There are also two returns from the different bailiffs dated 07/07/2017 and 06/07/2017 with contradictory results as to whether boundary marks were or were not put on ground in accordance with the warrant.

It is clear that the main issue of contention between the Parties is execution in regard to creating proper boundary marks on the suit land in enforcement of the Court's decision in Civil Appeal No. 15 of 2016. I have observed that the above discrepancy as to the different returns was not addressed in this court's decision that is subject of the intended appeal. To address this discrepancy would amount to an appeal by this court of its own decision; therefore it would be sufficient for the same to be considered by an appellant court.

I have also observed that the impugned Ruling arose from an application for setting aside execution and yet the court made orders for stay of execution. This also raises a serious

question meriting judicial consideration which can only be cured on appeal by an appellant court not the court that issued the said orders.

As to whether the Applicants' are guilty of dilatory conduct, the Notice of Appeal was filed within the 14 days stipulated by the law on 20th January, 2020. Taking into consideration the time taken to prepare a certified copy of the Ruling of the Court which was certified on the 27th July 2020, with this application being filed on 23rd September 2020; Considering the peculiar circumstances of the past year and the Presidential Directives that were issued due to the Covid19 pandemic, the Applicants are not guilty of dilatory conduct.

In the result, this application raises questions that merit judicial consideration in order to have the judgment of this court in Civil Appeal No. 15 of 2016 finally enforced and execution properly conducted.

The application is hereby allowed with no order as to costs.

I so order.

Dated at Masaka this 12th day of August, 2021

Signed;



VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE