THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISC.APPLICATION NO. 40 OF 2020

(Arising from Misc. Application No.52 of 2019)

(Arising from C.S No. 56 of 2018)

1. KIZZA AGNES BIGOGO

2. DEO BYAGIRA :: APPLICANTS

VERSUS

1. MUGISA JOY
2. COMMISSIONER LAND REGISTRATION :::::::::::::::::: RESPONDENTS

RULING

Before: Hon. Justice Byaruhanga Jesse Rugyema

[1] This application was brought under **S.98 CPA, Order 44 rr. 2, 3, 4** and **O.52 rr.1 & 3 CPR** for orders that leave be granted to the Applicants to appeal against the Ruling/order in **Misc. Application No.52 of 2019** and that costs be provided for.

[2] The grounds in support of the application are outlined in the affidavit of a one **Patrick Mugalula** of **Ms. Katende Ssempebwa & Co. Advocates**; counsel for the Applicants which in brief are as follows:

1. That on 1/10/2018, the Applicants filed **C.S No.56 2018** against the Respondents for cancellation of certificate of title issued fraudulently to the 1st Respondent for property comprised in FRV MAS 11 Folio 24 Block (Road) Toro Road Plot 35 at Mosque Cell.
2. That the Respondent irregularly filed a Written Statement of Defence (WSD) on the 5/10/18 which the Respondent back dated

successfully and it was endorsed on the same day but served upon the Applicant/plaintiff on the 1/3/2019 without seeking leave of court.

3. On the 21/5/2019, the Respondent filed **Misc. Application No.52 of 2019** to strike out the suit for being Res judicata.
4. On the 23/3/2020, this court made a ruling striking out the plaint for being res judicata with costs to the Respondent.
5. The Applicants are aggrieved and dissatisfied with the ruling of the judge from which the trial judge struck out the plaint.
6. That the Applicants will suffer substantial loss if leave to appeal is not granted as there are triable issues with a likelihood of success to wit:

a) The learned judge erred in law and fact when he concluded that the Respondents' W.S.D was filed within time without perusing the record of court proceedings for the date of 11th Oct.2018 in **Misc. Application No.97 of 2018.**
b) The learned judge erred in law and fact when he ignored the issue of service of the WSD upon the Applicant which was done out of time and several months from the date of endorsement.
c) The learned Judge erred in law and fact when he reached a conclusion that **C.S No.56 of 2018** was time barred.
d) The learned Judge erred in law and fact when he failed to appreciate the cause of action against the Respondent.
e) The learned Judge erred in law and fact when he concluded that ownership of the suit property was a subject of litigation in the **H.C Administration cause No.596 of 1989** and that the suit property was mentioned in the certificate of passing account of the 25/11/1993 that passed on the suit property was given to the Respondent/Defendant.

f) The learned Judge erred in law and fact when she concluded that the suit was res judicata.

g) That this application has been brought without undue delay and it is in the interests of justice that the Application for leave to appeal be granted.

[3] In her affidavit in reply, the Respondent deponed out details regarding the background and brief history of this application thus;

a) That she is the widow and administrator of the estate of the late **Henry Mugisa.**

b) That she is the registered proprietor and owner of land comprised in FRV MAS 11 Folio 24 Block (Road) 15 plot 35 Old Toro Road at Mosque Cell, Hoima Municipality, Hoima District, the suit land/property.

c) That the suit property was acquired by the late **Henry Mugisa** in the 1970s by way of purchase and constructed thereon a semi-finished two storey building to its current state.

d) That the ownership of the suit property was subject to the High Court **Administration Cause No.596 of 1989** which listed it among properties belonging to the estate of the late **Henry Mugisa.** The Administration Cause was settled by consent, appointing her and the Administrator General as co-administrators.

e) That as co-administrators, they filed final accounts and inventory of the distribution of the estate, giving the suit property to her but the 1st Applicant and her husband objected and the matter was cause listed before **Justice C.K Byamugisha** who issued a certificate of passing of final accounts of the estate of the late **Henry Mugisa** giving inter alia, the disputed property to her.

f) That in exercise of her absolute right as owner, she applied for registration of the suit land as her property under free hold tenure.

g) That the Applicants filed **C.S No.56 of 2018** against her for cancellation of the certificate of title of the suit land/property and she filed a W.S.D and Misc. Application No.52 of 2019 to strike out the suit for being *res judicata.*

h) That the **C.S No.56 of 2018** was indeed struck out with costs and therefore, believe that the present application is redundant, frivolous and vexatious against her.

Counsel legal representation

[5] The Applicants were represented by **Mr. Ssebowa Solomon** of **M/s Katende Ssempebwa & Co. Advocates, Kampala** while the Respondents were represented by **Mr. Kasangaki Simon** of **M/s Kasangaki & Co. Advocates, Masindi.** Both counsel filed their respective written submissions as permitted by this court.

[6] In his submissions, counsel for the Applicants contended that the Applicants seek leave of court to appeal against the orders of court dated 23rd March, 2020 issued against them vide **Misc. Application No.52 of 2019** in which court struck out **C.S No.56 of 2018** with costs for being *res judicata,* among other reasons.

[7] The Applicants being dissatisfied by the Ruling /order, seek leave of this court to appeal against the Ruling/order of this court as it is the contention of the Applicants that the suit was not *res judicata*.

[8] Counsel proposed the following issues for determination of this application.

1. Whether the Applicant has arguable grounds of appeal worth considering by the Appellate court.

2. If so, whether court can grant leave to the Applicant to appeal against its Ruling/order in **Misc. Application No.52 of 2019**.

[9] As regards the 1st issue, counsel for the Applicants argued that as per **para.18 of the affidavit** in support of the application, there are arguable grounds of Appeal which should be considered at appeal and that at this stage, this court is not supposed to consider the merits of the intended appeal or the chances of success of the appeal; **Dr. Sheik Ahmed Mohammed Kisule Vs M/s Green Land Bank Ltd in liquidation, H.C.M.A No.2 of 2012 [2012] UG CommC 27**.

[10] Counsel concluded that if the 1st issue is found in the affirmative, this court should in the interest of justice grant leave to appeal against the ruling in **Misc. Application No.52 of 2019.**

[11] On the other hand, counsel for the Respondents raised a preliminary objection to the effect that the instant application was served out of time contravening **O.5 rr. 1(b) ,2 and 3 CPR** and that the same should be struck out with costs against the Applicants. He relied on the authority of **The Church of Almighty God Malaki Ltd Vs Administrator General & Anor H.C.M.A No. 92 of 2009.**

[12] As regards the merits of the Application, counsel contended that the affidavit in support of the application sworn by counsel of the law firm for the Applicants did not state that the Applicants were aggrieved by the order of dismissal of **Misc. Application No. 52 of 2019** and were therefore desirous of appealing the same.

[13] As regards the grounds on which the Applicants base their application for leave to appeal, counsel submitted that they were not arguable points of law or grounds of appeal which require serious judicial consideration on appeal arising from the decision of the court in the controversy.

Preliminary Objection

[14] Counsel for the Respondent raised a preliminary objection to the effect that the instant application was served out of time and the same should be struck out with costs against the Applicants. It being a preliminary objection, I am mandated to dispose it off first.

[15] **O.5 r.1 (1), (2), (3) CPR** provides thus;

1) When a suit has been duly instituted a summons may be issued to the defendant-

2) Service of summons...shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for extension.

3) Where summons have been issued under this rule and-

(a) service has not been effected within twenty-one days from the date of issue; and

(b) there is no application for an extension of time...

The suit shall be dismissed without notice."

Section 2(x) CPA defines a suit to mean all civil proceedings commenced in any manner prescribed and therefore include an application.

[16] The above provisions of the law mandates court to dismiss a suit or any application served beyond the prescribed 21 days; **See Kanyabwere Vs Tumwebaze (2005) E.A 86** and **The Church of Almighty God Vs Administrator General (Supra**).

In the instant case, the application was filed on **6th /4/2020** and was endorsed by the Registrar of this court on **20th May 2020.** According to

counsel for the Respondent, the application was served upon the Respondent on the **11/12/2021**. This was definitely beyond the prescribed 21 days as provided by **O.5 r.2 CPR.**

[17] Counsel for the Applicants submitted in rejoinder conceding the late service but attributed it to the fact that the Registrar upon endorsing on the application, forwarded it to the trial judge for further management which included giving a date for hearing. It could not be served upon the Respondent before securing a hearing date. That 2ndly, the trial Judge then, **Justice Gadenya Paul Wolimbwa** was involved in a road accident which affected the smooth running of the court and therefore, the court did not schedule the hearing of the application.

[18] That the above is exemplified by a letter dated **7/12/2021** written to the Registrar complaining for the delay to schedule the hearing of the application for leave to appeal. The letter is **annexture "B"** to the Applicant's affidavit in rejoinder to the application.

[19] It is however, my view that whereas the above contentions of the Applicant may amount to sufficient cause or reasons for the Applicants' failure to serve the applications within the prescribed time, no application was filed for extension of time showing the said sufficient reasons for extension. The reasons have to be tested in an application for extension of time to serve the application. The reasons in this case are merely being presented during submissions in the determination of the present application for leave to appeal and their veracity is in no way tested. The law requires an application for an extension of time and this was more so, in this case, where there is absence of evidence when the trial Judge fixed the application for hearing.

[20] In this application, I find that there is no evidence that the application was served within time as claimed by the Applicant in **para.17 of the affidavit in rejoinder.** Such an application served outside the prescribed time without seeking extension is liable for dismissal; **Michael Mulaggussi Vs Peter Katabaho H.C.M.A No. 6/2016.**

[20] In the premises, I would uphold the preliminary objection and dismiss the application for service outside the prescribed time without seeking extension.

Affidavit in support of the Application sworn by counsel from the law firm of Advocates for the Applicant.

[21] In this application, the Applicants did not swear any affidavit in support of the application. It is counsel from the law firm of the advocates for the Applicants that swore the affidavit in support of the Application while purporting to be familiar with the facts of the case.

[22] Whereas the contents of the affidavit could be factual as per the entire record of the suit or the applications therein, **para 16 of the affidavit in support** is not factual. It is as follows;

> *"16 That the Applicants are aggrieved and dissatisfied with the ruling of the Judge delivered on the 23rd day of March 2020 in absence of the parties or their advocates from which the trial Judge struck out the plaint with costs."*

And that therefore they intend to appeal.

[23] The deponent a one **Patrick Mugalula** from the law firm of advocates of counsel for the applicants, does not in the first instance, disclose that he was authorized by the Applicants to depone on their behalf or to do so within the meaning of **O.3 r.1 CPR**. In **para. 1 of the affidavit in support,** the deponent stated that he is

"an advocate of the High Court of Uganda working with Messrs Katende Ssempebwa & Co. Advocates counsel for the applicant herein, familiar with the facts of this case..."

clearly **Patrick Mugalula,** the deponent is not the firm and therefore, is not an authorized agent or duly appointed advocate of the Applicants and does not therefore have authority to swear an affidavit on behalf of the Applicants since affidavits are confined to such facts as the deponent is able of his or her own knowledge to prove **(O.19 r.3(1) CPR).**

[24] 2ndly, the deponent has not disclosed the source of information that the Applicants are aggrieved and dissatisfied with the ruling of the trial Judge delivered on the 23rd day of March 2020 in their absence. The deponent merely stated in para.22 of his affidavit thus;

"22 That whatever is stated herein above is true and correct to the best of my knowledge and belief."

[25] The foregoing is what was castigated by courts in **Banco Arabe Espanol Vs B.O.U S.C.C.A No.8/1998** and **M/s Simon Tendo Kabenge Advocates Vs M/s Mineral Access Systems (U) Ltd H.C.M.A No.565/2011.** In these authorities, such affidavits were found defective and were accordingly rejected.

[26] In conclusion, I find that the application is supported by a defective affidavit which I accordingly reject and as a result, the Notice of Motion is without any evidence in support. In the premises, the applicant's application for leave to appeal lack grounds of appeal that necessitate serious judicial consideration and in any case, there is no evidence that the Applicants were aggrieved and dissatisfied with the ruling in **Misc. Application No.52 of 2019** and intended to appeal. What was stated by the deponent in **para.16 of the affidavit** in support of the application

that the Applicants are aggrieved and dissatisfied with the ruling of the Judge delivered on the 23rd March 2020 is mere hearsay and therefore inadmissible. Leave to appeal cannot be granted to anyone who is not aggrieved by the decision of court.

[27] In the premises, the application fails and it is accordingly dismissed. No order as to costs since the parties are a mother in law and a daughter in law fighting for property of the deceased. This court must not be seen playing a role in further escalation of the conflict of the parties by way of awarding costs.

Dated at Masindi this 8th day of July, 2022.

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Byaruhanga Jesse Rugyema

JUDGE.