

- (d) *The Applicant being aggrieved and dissatisfied with the ruling of the Judge delivered in the **Misc. Application No. 52 of 2019** filed an application for leave to appeal vide **Misc. App. No. 40/2020**.*
- (e) *The Applicant also filed **Misc. Applications Nos. 56 and 57 of 2020** for stay of execution of the ruling and orders in **Misc. App. No. 52 of 2010** (The applications have since been withdrawn).*
- (f) *That before the hearing of **Misc. Application No. 40/2020** for leave to appeal on **Misc. Appns. No. 56 and 57 of 2020** for stay of execution of the ruling in **Misc. Application No. 52 of 2020**, the Respondent successfully applied for consequential orders vide **Misc. Application No. 24/2020** pursuant to the ruling and orders in **Misc. Application No. 52 of 2019**.*
- (g) *That the decree issued by the Judge in **Misc. Application. No. 24 of 2020** granted vacant possession of the suit property and upon default an order of eviction against the Applicant.*
- (h) *That if execution of the decree is done, the pending application for leave to appeal and the intended appeal in the Court of Appeal will be a moot since the property will have already changed hands and the Applicant evicted and lastly, the Applicant will suffer substantial loss if leave to appeal is not granted.*
- (i) *That the Applicant's intended appeal has a high chance of success with several grounds/triable issues such as;*
- (a) *The learned Judge erred in law and fact when he concluded that the Respondent will not be prejudiced with his decision.*
- (b) *The learned Judge erred in law and fact when he concluded that the Applications for stay of execution and leave to appeal would be appropriately handled after the grant of consequential order.*

(c) The trial Judge erred in law and fact to deliver a ruling on the 21st December, 2021 whereas the Notice of Ruling was 23rd December, 2021.

(d) The trial Judge erred in law and fact to grant orders which were not part of the prayers in the Application for consequential orders.

(e) The trial Judge erred in law and fact to grant an order for consequential orders before hearing the Application for leave to appeal.

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

[3] In his affidavit in reply, the Respondent deponed out details regarding the background and brief history of this application and denied being aware of **Misc. Applications Nos. 56 and 57 of 2020**, that they have never been served upon her (indeed, the 2 applications were withdrawn on 20th April, 2022).

Background of the Application

[4] The brief history and background of this application as can be discerned from the contents of the Respondent's affidavit which contents were not specifically denied and challenged and pleadings in the main **C.S. No. 56 of 2018** is as follows:

*a) The Applicant and her son **Deo Byagira** filed the main suit **C.S. No. 56 of 2018** against the Respondent and another which was determined under **Misc. Application No. 52/2019** by way of striking out the suit for being *res judicata*.*

*b) The Respondent **Mugisa Joy** is the widow and Administrator of the Estate of the late **Henry Mugisa**, son to the Applicant,*

Kiiza Agnes Bigogo. She is the registered proprietor of the suit land/property comprised in **FRV MAS 11 Folio 24 Block (Road) 15 Plot 35 Old Toro Road at Mosque Cell, Hoima Municipality, Hoima District.**

- c) The ownership of the suit property was subject of **H.C Administration Cause No. 596/1987**, in which it was listed among properties belonging to the estate of the Respondent's late husband **Henry Mugisa** in which she and the Administrator General were appointed as co-administrators.
- d) On the filing of final accounts and inventory of the distribution of the estate, upon objections from the Applicant, 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 the Respondent, and in exercise of her absolute right as owner, she applied for registration of the suit land as her property under free hold tenure.
- e) The Applicant, **Kiiza Agnes Bigogo** filed and her son, **Deo Byagira** filed **C.S No.56 of 2018** against the Respondent **Mugisa Joy** and The Commissioner for Land Registration, the suit was however determined vide **Misc. Application No. 52 of 2019** wherein the suit was struck out as being Res judicata.
- f) Following the striking out of the suit, the Respondent filed **Misc. Application No.24 of 2020** for consequential orders inter alia; for vacant possession of the property which was granted by this court.
- g) The Respondent denied being aware of **Misc. Applications No.56 and 57 of 2020** against her and indeed, there is no

evidence that the 2 applications have ever been served upon her.

As already observed, the 2 applications have since been withdrawn by the Applicant.

Counsel legal representation

- [5] The Applicant in this application was represented by **Mr. Ssebowa Solomon** of **M/s Katende Ssempebwa & Co. Advocates, Kampala** while the Respondent was represented by **Mr. Kasangaki Simon** of **M/s Kasangaki & Co. Advocates, Masindi**. Both counsel filed written submissions as permitted by this court.

Preliminary Objection

- [6] Counsel for the Applicant in his submissions raised a preliminary objection which I have to firstly dispose of. The objection is to the effect that the Respondent's affidavit in reply violated **O.6 r.8 CPR** which provides that,

"It shall not be sufficient for a defendant in his or her Written Statement to deny generally the grounds alleged by the statement of claim,... but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages."

- [7] I have critically looked at the Respondent's affidavit in reply, she detailed out the history and background of the application thereby justifying her ownership of the suit property and that the intended appeal has no chance or likelihood of success by the grounds/triable issues raised therein. In my view, the affidavit in reply is not general as claimed by the counsel for the Applicant. I find that it met all the legal standards of filing affidavits in reply

since the rest of the facts the affidavit in support raised are generally uncontested facts in the matter which the affidavit in reply did not necessarily have to respond to. In the premises, I find the objection lacking merit and it is accordingly overruled.

Merits of the Application

- [8] I have carefully considered the facts stated in the affidavits in this application and the respective counsel submissions.
- [10] In **para.26 of the Applicant's affidavit** in support, she depones that the Respondent without giving notice to the Applicant appeared ex parte and the trial Judge gave directions of filing written submissions which were later served upon the Applicant's counsel.
- [11] It is my view that since the directions were served upon the Applicant's counsel as conceded, then, no prejudice or miscarriage of justice was occasioned to the Applicant since his counsel, indeed, as admitted in **para.27 of the Applicant's affidavit**, complied with the directions and filed his respective submissions which were considered in the determination of **Misc. Application No.24 of 2020** the ruling of which was accordingly delivered on the **21/12/21**.
- [12] The court record of **21/12/21** when the ruling was delivered does not reflect any counsel by the names of **Mr. Alex Odupa** appearing on behalf of the counsel for the Applicant. The inclusion of the name **Alex Odupa** in the decree must have been inadvertent arising from whoever drafted the decree. The same apply to the date the ruling was delivered. There was a mix of dates

considering the fact that the Ruling Notice in question was signed by the Registrar of this court on the 21st of December, 2021, the very day the ruling was delivered. Besides, I do not see how the above mishaps prejudiced the applicant as they neither affected the content of the ruling nor are they grounds of appeal and therefore, cannot form any ground for leave to appeal.

[13] In **Sango Bay Vs Dresdner Bank [1971] E.A 17** the principles to be followed in applications of this nature were laid out by Spry V.P (as he then was) inter alia as follows;

“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 considerations.”

In **Ayebazibwe Vs Barclays Bank Uganda Ltd & 3 Ors, H.C.Misc. Application No. 292 of 2014**, court held;

“in order to determine whether there are grounds which merit judicial consideration on appeal, the applicant has to determine the grounds of objection showing where the court erred on the question or the issues raised by way of 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.”

[14] Further, in the case of **Herbert Sekandi t/a Land Order Developers Vs Crane Bank Ltd H.C.M.A No.44/2007**, 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 Appellate court and that the intended appellant has a bona fide and arguable case on appeal. What amounted to a question of law is that the issue raised or involved is 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.

- [15] It follows from the above authorities that an applicant for leave to appeal is duty bound to show the court that the application in question bears substantial questions of law to be decided by the appellate court and has a bona fide and arguable case on appeal.
- [16] In the instant application, counsel for the Applicant submitted that the trial judge granted **vacant possession** of the suit property and an **eviction order** which were not part of the prayers in the application for consequential orders and which would make the intended appeal a moot since the applicant an elderly woman aged above 95 years would have been evicted.
- [17] In the first instance, the claim by counsel for the Applicant in his submissions in rejoinder that the Applicant is an elderly woman aged above 95 years and has been in possession of the suit property is not supported by any evidence. This is neither reflected in her affidavit in support of the application nor her pleadings in the main suit. Instead, in her W.S.D, the Respondent attached a photograph of the suit property as comprising of a dilapidated incomplete structure (**Annexure "C" to the W.S.D**) which she sought to repossess in her application for consequential orders vide **Misc. Application No.24 of 2020**.

Annex “C” would tend to show that the Applicant is in mere constructive possession but not in actual occupation or physical possession. The situation would have therefore been different if there was evidence that that the Applicant was in occupation or had the property as her matrimonial home and therefore, evicting her therefrom would prejudice her by causing her substantial loss and therefore lead to a miscarriage of justice.

[18] What therefore appears apparent is that the Applicant is in constructive possession hence the sought orders in **Misc. Application No. 29 /2020** to wit;

- a) Declaration that the Respondent is the rightful owner of the suit land/property.
- b) Declaration that the Applicant, her servants, employees, agents and/or any persons deriving title or authority from her are trespassers.
- c) Eviction orders.
- d) Permanent injunction restraining the Applicants, their agents, employees, servants and any other person deriving title or authority from the Applicant from occupying, dealing or otherwise interfering with the Respondent’s use of the land.

[19] It is therefore not correct as the Applicant and her counsel put it in **para.3.7 (d) of the Applicant’s affidavit in support** that the trial Judge granted orders which were not part of the prayers in the application for consequential orders. The sought orders were accordingly granted as reflected in the decree dated **21/12/21**.

[20] As regards the complaint about the hearing and determination of **Misc. Application No.24/2020** for consequential orders before

the hearing of the application for leave to appeal i.e, the present application and **Misc. Application No.40/2020**, it was the view of court that once the application for consequential orders is disposed of and the Applicant is granted leave, she would be in position to appeal against the whole and/or the entire decision and in an event that she is unsuccessful in either applications for leave to appeal or the Appeal itself, then there would be no need for the Respondent to file any application or suit to realize her main litigation thus avoidance of multiplicity of suits as was ruled in **Misc. Application No.24 of 2020**.

[21] In conclusion, I find that the Applicant has not shown that she will suffer any substantial loss if this application is not granted. She has not raised any arguable point of law which challenge the decision of court on the actual matters in controversy and which the court ruled upon, or matter of public importance for adjudication by the court of Appeal. The Application appear to me not having been filed or made bona fide but a ploy intended to delay/defeat justice so that the Respondent's realization of her fruits of litigation right away from **Administration cause No.596 of 1989** where the suit property was passed on to her through a certificate of passing of final accounts of the estate of her husband, the late **Henry Mugisa; Misc. Application No.52 of 2019** which determined the Applicant's **C.S No.56/2018** against the Respondent by way of having the plaint struck out and **Misc. Application No.24 /2020** that accrued her consequential orders for realization of the main litigation, are curtailed.

[22] In the premises, the application for leave is dismissed and it follows, also that, any pending application for stay of execution or otherwise which was pending the hearing and determination of

this application lapses accordingly. In the circumstances of this case, as of now, there is neither a suit for the Applicant nor an appeal standing. The Applicant may have to consider her luck in the Court of Appeal by filing the relevant necessary court papers.

[23] As regards costs, they follow the event. However, **S.27 (1) of the CPA** gives this court discretion to determine by whom it should be paid as the justice of the case requires. Much as the Respondent is the successful party in this application, the justice of this case require that costs do not follow the event. The Applicant is a mother in law of the Respondent. For purposes of ensuring and encouraging family unity, reconciliation and peace, I exercise my discretion not to award costs to the Respondent against her mother in law, the Applicant. Each party shall bear her own costs.

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

.....

Byaruhanga Jesse Ruggyema

JUDGE.