**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(CIVIL DIVISION)**

**MISCELLANEOUS APPLICATION NO. 581 OF 2021**

**(ARISING FROM MISCELLANEOUS APPLICATION NO. 454 OF 2021)**

**(ALL ARISING FROM MISCELLANEOUS CAUSE NO. 239 OF 2021)**

**1.UGANDA FREE ZONES AUTHORITY**

**2.FREDERICK KIWANUKA :::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANTS**

**VERSUS**

**CLARE S. KAWEESA :::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA**

**RULING**

**Introduction**

[1] This Application was brought by Notice of Motion under Section 98 of the Civil Procedure Act and Order 44 Rules 2, 3 and 4 of the Civil Procedure Rules seeking orders that:

a) Leave be granted to the Applicants to appeal against the Ruling and Orders made on the 6th August 2021 in Miscellaneous Application No. 454 of 2021: Clare S. Kaweesa Vs Uganda Free Zones Authority and Fredrick Kiwanuka.
b) Costs of the Application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and are also contained in the affidavit in support of the application deponed to by **Hez Kimoomi Alinda**, the Executive Director of the 1st Applicant. Briefly, the grounds are that the Respondent filed an application by Notice of Motion against the Applicants vide Miscellaneous Application No. 454 of 2021 seeking an order of extension of time for the Respondent herein to file an application for

judicial review out of time. During the said application, the Applicants raised preliminary objections and prayed that the application be dismissed with costs. The court overruled the Applicants' preliminary objections and proceeded to entertain the application and granted the orders sought by the Respondent. The Applicants are dissatisfied with the ruling and orders of this Honourable Court and wish to appeal against the same. The ruling and orders against which the appeal is intended involve substantial questions of law that merit judicial consideration on appeal. The intended appeal is meritorious and has a high probability of success. The application for leave to appeal has been made without delay. It is in the interest of justice to allow the application and grant leave to appeal against the said the ruling.

[3] The Respondent opposed the application vide an affidavit in reply deponed to by **Clare S. Kaweesa**, the Respondent, in which she stated that the contents of the application and the affidavit in support are an abuse of court process, untenable in law and should be struck out. She stated that the application has no merit whatsoever to warrant grant of the orders sought. The Respondent stated that the Applicants did not comply with the mandatory timelines and procedure for filing the intended appeal, the time has since lapsed and thus, the intended appeal is incompetent. She further stated that the Application for judicial review which was instituted on the 26th April 2021 was not time-barred and should not have been struck out. She concluded that there is no merit whatsoever in the application nor in the intended appeal and it is in the interest of justice that the application is struck out with costs.

**Representation, Hearing and Submissions**

[4] At the hearing, the Applicants were represented by Ms. Bridget Kusiima Byarugaba from M/s Shonubi Musoke and Co. Advocates while the Respondent was represented by Ms. Lydia Tamale from M/s Tamale and Co. Advocates. It was agreed that the hearing proceeds by way of written submissions, which were filed by both Counsel and adopted by the Court. I

have considered the submissions of Counsel in the course of determining the issue before the Court.

**Issue for determination by the Court**

[5] Only one issue is up for determination by the Court, namely; **Whether the Applicants have disclosed sufficient ground(s) to warrant grant of leave to appeal to the Court of Appeal.**

**Resolution by the Court**

[6] 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."***

[7] 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.

[8] 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 why the appeal should be heard.

[9] 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*** is instructive, and 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."***

[10] 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 be emphasized that on aspects that involved exercise of the court's discretion, a rather stronger case has to be established by the Applicant.

[11] On the case before me, the arguable points presented by the Applicants' Counsel are that the trial Court wrongly overruled the preliminary points of law

that were raised by Counsel for the then Respondent in M.A 454 of 2021 to the effect that the application was res judicata and that the powers to enlarge time under Rule 5 (1) of the Judicature (Judicial Review) Rules are expected to be exercised at the time of filing of the application. Counsel for the Applicants argued that they correctly relied on the decision of the Constitutional Court in ***Tukamuhebwa George & Others V Attorney General & Another, Constitutional Petition No. 59 of 2011***, which decision is binding on this Court. Counsel further submitted that they disagreed with the finding of the trial Court on when the application for extension of time ought to be filed as the same goes against the purpose of statutes of limitation one of which is to protect defendants from plaintiffs who fail to diligently pursue their claims. In response, it was argued by Counsel for the Respondent that the power given to the court under rule 5 (1) of the Judicial Review Rules is discretionary on the court and the trial Court correctly exercised its discretion.

[12] Starting with the argument regarding the Court's finding on the issue of res judicata, looking at the impugned decision of the Court, and the argument raised by the Applicant's Counsel, the same revolves around construction of the law on the doctrine of res judicata. The Court pointed out that the position of the law is now well settled, cited and interpreted various decisions including those from the highest courts in this land. In disagreement with the decision of the Court, Counsel appears to place undue reliance on one decision of the Court of Appeal/Constitutional Court against the weight of the already existing body of law. Counsel overly relies on the finding in the said decision in ***Tukamuhebwa George & Others V Attorney General & Another (supra)*** to the effect that it is possible for a case dismissed on a preliminary point to be res judicata. Counsel appears to construe this decision as setting a general principle of the law that any case dismissed on a preliminary point of law is res judicata. It is in this context that Counsel also placed undue reliance on the decision in ***Sam Akankwatsa V United Bank of Africa (U) Ltd, HC M.A No. 40 of 2019*** which, with the greatest respect, also appears to have construed

the said decision of the Constitutional Court in a similar manner. In my view, however, such does not change the settled position of the law.

[13] In the impugned decision, I set out the elements of the doctrine of res judicata as disclosed under Section 7 of the CPA and the decided cases that were cited. Counsel for the Applicant appears to completely ignore the element that the matter ought to have been "heard and finally determined by the court". I did indicate how the courts have interpreted this element and cited the case of ***Onzia Elizabeth v Shaban Fadul, HC Civil Appeal No. 0019 of 2013*** which I found to be of great persuasive value. In that case, the court held that the said phrase means and was intended to mean "heard and determined on merits". Before the court, there was no such decision. I therefore find the insistence on the plea of res judicata by the Applicant's Counsel a total misunderstanding of the law in light of the circumstances of the present case.

[14] It is noteworthy that Counsel for the Applicants rightly pointed out the fundamental exception to the rule of *stare decisis* to the effect that the courts below are bound to follow the decisions of higher courts unless they can be distinguished. This is well set out in the statement of the law by the Court in ***Continental Tobacco (U) Ltd v Global Hardware Company Ltd, HC C.A No. 17 of 2013*** which relied on the case of ***Jones v. Secretary of State for Social Services [1972] 1 AC 944***. Counsel correctly relied on this position of the law but went on to insist that the court in the impugned ruling was wrong in having distinguished the circumstances in the ***Tukamuhebwa George (supra)*** case from the present case since the Court was bound by the said decision. I find this argument devoid of merit in light of the established body of the law on both the subjects of *res judicata* and *stare decisis*. I am unable to find the argument by the Applicants' Counsel appealing in the least.

[15] Counsel for the Applicants also appears to have put the purpose of the statutes of limitation above the constitutional dictate for a fair hearing. The

argument of Counsel appears to be that once a party is caught up by limitation, they should not be heard even where the law itself gives a window to such a party to access the court. The law of limitation, as I understand it, is strict where it permits no exception. Where it provides a remedy to the affected party, such a party cannot be denied recourse to such a remedy by the technical reasoning that he/she ought to have exploited that remedy before filing the time barred action. The only known check point is bringing the application without inordinate delay. This was not one of the grounds on which the Applicants challenged the Respondent's application for extension of time. It ought also to be understood that the time limitation as set in rule 5 (1) of the Judicial Review Rules is specific and is given in permissive terms. The general law on the subject of limitation, therefore, has to be construed subject to this specific provision.

[16] As I indicated in the ruling in issue, rule 5 (1) of the Judicial Review Rules does not limit the court's discretion as to when and on what grounds the courts should exercise that discretion. The rule says the application shall be brought promptly and in any event within three months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made. I do not find anything in that provision limiting or intended to limit at what point an applicant must invoke that discretion and when the court is to exercise the discretion and when not. In my view, there would have been an argument worth consideration on appeal if the court had exercised jurisdiction illegally or injudiciously. There is no argument to that effect.

[17] In the circumstances, I do not find any arguable point raised by Counsel for the Applicant that would merit judicial consideration on appeal. It is clear that the Respondent herein has not been heard on her grievance. She desires to be heard and her grievance to be considered on merit. I do not see why the courts should waste more time on determining whether she should be heard

instead of adjudicating the real dispute. For those reasons, this application would fail. The other argument raised by the Applicants' Counsel in paragraph 4.0 of their submissions regarding existence of reasonable chances of success of the appeal if filed is based on questions of fact which would have to be verified at a proper hearing. The other matters raised in both Counsel's submissions are really peripheral, they would not impact on the result of this application and I have, therefore, not found it necessary to dwell on them.

[18] In the result, this application fails. It is dismissed with costs to the Respondent. The hearing of the judicial review application shall proceed unless the Applicants choose to make another application to the Court of Appeal which option is available to them under the law.

It is so ordered.

***Dated, signed and delivered by email this 25th day of February, 2022.***

**Boniface Wamala**
**JUDGE**