

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 0082 OF 2022
(ARISING FROM HCT – 01 – LD – CV – CS No. 25 OF 2020)

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KITHENDE APPOLLINARIS KALYEBOGHA ::::::::::::::::::::::::::: APPLICANT

VERSUS

1. **JACK BIRUNGI**
- 10 2. **THE REGISTERED TRUSTEES OF
THE DIOCESE OF KASESE**
3. **THE BOARD OF GOVERNORS
HOPE MODEL ST. MARIA GORET SECONDARY SCHOOL**
- 15 4. **THE MANAGEMENT COMMITTEE
GLOBAL VINE NURSERY AND
PRIMARY SCHOOL ::::::::::::::::::::::::::: RESPONDENTS**

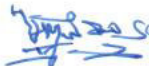
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BEFORE HON. JUSTICE VINCENT WAGONA
RULING

Introduction:

The applicant brought this application under Order 44 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act for orders that:

- 25 (a) The applicant be granted leave to appeal the order rejecting the plaint and dismissing HCT 01 – LD – CV – CS No. 25 of 2020 with costs.
- (b) Costs of taking out the application be granted to the applicant.



The History:

The applicant was the plaintiff in Civil Suit No. 25 of 2020 which was dismissed with costs after court rejecting the plaint on ground that the suit was barred by law. That he has since taken an effort to have the appeal prosecuted by lodging a notice of appeal and asking for a typed record of proceedings. That he believes that the suit was wrongly decided and seeks to appeal to the Court of Appeal for determination of the following questions:

1. Whether HCT 01 – LD – CV – CS No. 025 of 2020 is barred by Section 34 of the Civil Procedure Act.
2. Whether the plaint in Civil Suit No. 25 of 2020 does not disclose a cause of action.
3. Whether the learned trial judge was justified to reject the said plaint and dismiss Civil Suit No. 25 of 2022 with costs to the defendants.
4. Whether the learned trial judge was justified to ignore his preliminary points of law and ward costs to the defendants who had not validly filed a written statement of defense.

The applicant wishes that these points of law be determined by the Court of Appeal and thus prayed that the application be granted.

In response, the respondents opposed the application through an affidavit in reply deponed by Bwiruka Richard. The Respondents contended that court adequately analyzed the pleadings and the submissions of both counsel and reached a proper decision to dismiss Civil Suit No. 25 of 2020 since the same was barred by section 34 of the Civil Procedure Act. That the applicant's intended appeal has no chances of success since the trial court made a just, fair and proper decision. That the application was frivolous, vexatious and incompetent since it did not disclose



substantial points of law. The Respondents asked court to dismiss the application with costs.

Representation:

- 5 M/s Bagyenda & Co. Advocates represented the applicant while M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates represented the Respondents.

Issues:

- 10 1. Whether the applicant's application discloses grounds for grant of leave to appeal to the Court of Appeal.
2. Remedies available to the parties.

Resolution:

- 15 Order 44 rule 1 of the Civil Procedure Rules lists a number of orders from where an appeal emanates as of right. Rule 2 of order 44 provides that where no such order is listed under rule 1, then an aggrieved party should first seek leave before lodging an appeal in the appellate Court.
- 20 An order rejecting a plaint for non-disclosure of a cause of action or for a plaint being barred by limitation or law is not among the orders where a party has a right to appeal as of right. An aggrieved party must seek leave first in the trial court before lodging an appeal in the appellate court. In this case therefore, the applicant need to first secure leave before appealing against the decision of this court in HCT
- 25 - 01 - LD - CV - CS No. 25 of 2020 to the Court of Appeal.



The rules do not state the grounds upon which the court can set foot in either allowing or rejecting an application for leave to appeal. However, Courts have over time laid down the test that a party must satisfy before grant of leave. In **GM Combined Uganda Ltd Vs. AK Detergents Uganda Limited, SCCA No. 23 of 1994**, the Supreme Court cited with approval the decision of **Sango Bay Vs. Dredner Bank (1971) E.A 17** where Spry V.P observed 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....”* The Court further noted that: *“At this stage of litigation we are satisfied that the grant of leave to appeal is necessary to protect the applicant’s right of appeal and for attaining the ends of justice in the instant case.”*[Emphasis added].

The Hon. Justice Mubiru in **Kilama Tonny & Anor Vs. Mr. Grace Perpetua Otim, Civil Appeal No. 31 of 2019** stated that: *“The test to be applied before leave to appeal is granted is whether the question of law or equity before the Court is of sufficient difficulty or importance to warrant or require the decision of or consideration by the High Court”.*

In **Akisoferi Ogola Vs Aliko Emmanuel Otheino & Anor (1998) VI KALR I** it was held that an applicant for leave to appeal to the Court of Appeal must show that the application bears substantial questions of law to be decided by the appellate court and that he has a bonafide and arguable case on appeal. What amounts to a substantial question of law was defined in **Matayo Okum Vs Francisco Amundhe & Other (1979) HCB 229** where it was held that a substantial question of law is involved where the point raised is one of general principle 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. **The Hon. Justice Mubiru** further noted in **Kilama Tonny & Anor Vs. Mr. Grace Perpetua Otim** (supra) added thus: "Leave to appeal should not be refused simply because the trial Magistrate or the appellate Judge is of opinion that the decision was correct. If the question is one of principle and a novel one, ordinarily leave to appeal should be granted. Substantial justice should not altogether be lost sight of in considering finality of decision, in cases where the Legislature has thrown the duty of deciding whether the litigation should be continued further, on the trial court or alternatively the appellate Judge who considers an application for leave to appeal. It would be obviously absurd to allow an appeal against a decision under a provision designed to limit the right of appeal. However, if the question raised be one in respect of which there is no authoritative decision that would be a guide to the parties, then the circumstances favour granting of leave."

In this case the applicant contended that there are fundamental questions of law that should be considered by the court appeal including:

1. Whether HCT 01 – LD – CV – CS No. 025 of 2020 is barred by section 34 of the Civil Procedure Act.
2. Whether the plaint in Civil Suit No. 25 of 2020 does not disclose a cause of action
3. Whether the learned trial judge was justified to reject the said plaint and dismiss Civil Suit No. 25 of 2022 with costs to the defendants.
4. Whether the learned trial judge was justified to ignore his preliminary points of law and ward costs to the defendants who had not validly filed a written statement of defense.



Based on the analysis of the history of the entire case, in the context of this case, it is expected that the Court of Appeal may clarify on the extent of application of Section 34 of the Civil Procedure Act in terms of 3rd party claims and the effect of irregular execution proceedings on interests of 3rd parties. I am therefore satisfied that prima facie it appears that there are grounds of appeal which merit serious judicial consideration. Further, there is need to protect the Applicant's right of appeal and for attaining the ends of justice. I am therefore satisfied that in the circumstances of this case, the Applicant has presented grounds that warrant grant of leave to appeal to the Court of Appeal. The application succeeds. The application is allowed with no order as to costs.

I so order.



15 Vincent Wagona

High Court Judge / Fort-portal

11.11.2022