

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO.077 OF 2022
(Arising from Civil Suit No.251 of 2020)

THE OPEN FORUM INITIATIVE (TOFI):..... APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. UGANDA REVENUE AUTHORITY:.....RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Order 44 Rules 2, 3 and 4 of the Civil Procedure Rules seeking for orders that;

1. Leave be granted to the applicant to appeal the court's ruling in High Court Miscellaneous Application No.077 of 2020 arising out of misc. cause No.251of 2014
2. Costs of and incidental to the application be provided for.

The grounds of the application are briefly stated in the application and further expounded in the affidavit in support of the application but briefly state:

1. That the applicant being dissatisfied by the ruling/order of the honourable court vide Misc. Cause NO. 251 of 2020, be granted to appeal to the court of appeal on grounds that;
2. That the Hon. Justice erred in law and fact in finding no sufficient cause for enlargement of time to entertain the application for judicial review which concerned a matter of public importance from which an illegality subsists.
3. That the Hon. Justice erred in law and fact in not considering the merits of the application for judicial review which concerns a matter of public importance to wit that the Honourable minister of finance, planning and economic development acted ultra vires his lawful powers under section 164 of the income tax Act, cap. 340, occasioning an illegality in passing the Rental Rates (income tax) Regulation, 2020 without approval of parliament which is mandatory under section 5(6) of the income tax Act.
4. That the Hon. Justice erred in law and fact in finding that fact in finding that the 2nd respondent was a rightful party to the judicial review application.
5. That the Hon. Justice erred in law and fact by not considering the admission of illegality by the 1st defendant who did not file an objection and or appear in court to object or defend the unlawful

actions of the Honourable Minister of Finance, Planning and Economic Development.

The 1st respondent filed an affidavit in reply sworn by Richard Adrole opposing this application which stated that;

1. The court in miscellaneous cause no. 251 properly addressed itself to the law and the facts and came to the proper conclusion that the application for judicial review was time barred.
2. In paragraph 4 of the affidavit in support, I know that the court has no jurisdiction to address the merits of an application which is time barred and filed outside the mandatory period prescribed by law.
3. The limitation are not concerned with merits of a claim but rather whether or not the claim has been brought within the time set by the statute.
4. From the reading the misc. cause no. 251 of 2020 and the ruling of the court that the application for judicial review was clearly time barred and no sufficient cause was provided by the applicant to enlarge the time to file the application.
5. That I know that the impugned regulations were made available on various government websites and in print media on 23th march 2020 long before the imposition of the covid 19 nationwide lockdown which took effect on 23rd march 2020.

6. The application does not raise any serious grounds that warrant leave to appeal to the court of appeal as the court properly addressed all the issues raised by the applicant in this application.
7. The impugned regulations were lawfully made and passed by the minister in accordance with powers granted to the minister under section 164 of the income tax act cap 340 and that section 5(6) of the income tax act only relates to the coming into force of the statutory instrument.
8. That this application has no merit and is indeed a total waste of court's time.
9. That in the interest of justice, good conscience, equality, good governance and accountability that the orders sought herein should not issue.

The 2nd respondent also opposed this application and filed an affidavit in reply sworn by Lomuria Thomas Davis stating that;

1. That the intended appeal is premised on a cause of action that is barred in law and therefore with no chance of success.
2. That the applicant had a statutory deadline of 3 months within which to apply for judicial review of the 1st respondent's actions which she did not do.
3. That the cause of action arose on 13th march, 2020 however, the applicant filed the application for judicial review (miscellaneous

cause no.251 of 2020) on the 7th September, 2020, which was over 6 months from the date when the cause of action arose and over 2 months after the lapse of the statutory deadline.

4. That equity aids the vigilant and not the indolent and this Honourable court rightly held there is no sufficient cause for enlargement of time to entertain the application for judicial review.
5. That in the interest of justice that the application be dismissed with costs to the respondent.

At the hearing of this application, the parties were directed to file written submissions which I have had the occasion of reading and considered in the determination of this application.

The applicant was represented by *Festo Tindyebwa* while the 1st respondent was represented by *Jeffrey Atwine (PSA), Geoffrey Madette (SSA) & Lydia Mugisa (SA)* while the 2nd respondent was represented by *Ssali Alex Aliddeki*

In an application of this nature, the only issue for determination is whether there are sufficient grounds to grant leave to appeal.

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 it a precondition for a to seek for leave to appeal an order of such nature to the court which issued the order

before a party may seek to for orders before the court which an appeal would lie if leave were not given.

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 court in ***Herbert Sekandi t/a Land Order Developers v Crane Bank Ltd HCMA No 44 of 2007*** 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.

The case of ***Sango Bay Estate Ltd vs Dresdner Bank & Attorney General [1971] EA 17*** Spry V.P cited by both parties stated the principle upon which an application for leave to appeal may be granted as follows:

“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....”

This, therefore, means 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 appellant court and has a bonafide and arguable case on appeal.

Counsel argued that the court erred in finding that there was no sufficient cause or good reason to extend time to invoke its supervisory powers under judicial review to compel the Honorable minister of Finance and Economic Planning to present the impugned regulations before the parliament as is a mandatory requirement under the section 5(6) of the Income Tax Act, Cap 340 as amended. He argued that Misc. Cause No. 251 of 2020 was an action brought in public interest on a matter of public importance that could only be cured by the supervisory powers of the court of law which was a good and sufficient reason to extend time in accordance with the law Counsel cited ***Esso Standard Eastern Inc v Income Tax [1971] 1 EA 127(HCK)***, Duffus P, court granted extension of time because the case concerned of public importance.

Counsel submitted that this was a serious point of law for consideration which merited leave to appeal the decision of the court.

In opposition counsel for the 1st respondent submitted that an applicant must demonstrate that he was prevented by a particular reason from filing his cause in time. Counsel cited ***Joseph Initiative Ltd v Akugibwe Joselyn Misc. Application No. 51 of 2018*** where it was held that the party asking for extension of time has to show that he was prevented by sufficient cause from taking a particular step in time. Counsel submitted

that public importance of a matter could not amount to sufficient cause for extension of time.

Counsel for the 2nd respondent submitted that the law of limitation under Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009 as amended is to the effect that an application for judicial review shall be made 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. That during trial of Misc. Cause No. 251 of 2020, the applicant had not proved any sufficient cause and it was found that there was no sufficient cause warranting the enlargement of time to entertain the application for judicial review.

Both counsel for the respondents submitted that the applicant had initially argued that their failure to file the application within statutory timelines had been caused by the Covid 19 lockdown which allegation was dismissed by the court. That his lordship had determined that despite the Covid-19 restrictions and/directives that were in place, the court registries were kept open to ensure that matters of public interest were filed and heard and indeed other matters of a similar nature were filed and heard during the lockdown and had therefore found no merit in the applicant's reason.

They argued that this ground therefore had no merit and the applicant was only wasting court's time.

Counsel submitted that the purpose of the 2nd respondent being a party to the suit was to guard against the implementation of an illegal law. That it was in good faith and in the interest of the 2nd respondent that assesses and collects the rental rates as per Section 3 of the Uganda Revenue Authority Act.

In response, counsel for the respondents argued that this ground lacked merit whatsoever owing to the fact that the impugned regulations were made under the authority of parliament by the Minister of Finance, Planning and Economic Development whose actions could not be imputed on the 2nd respondent who is simply an implementing agency.

Counsel for the 2nd respondent submitted that its presence was not necessary for the court to determine Misc. Cause No. 251 of 2020 since the 2nd respondent's mandate is only to administer tax laws. That the applicant should have sued only the 1st respondent and in the unlikely event that the order quashing the Regulations had been granted, it would not have deprived the 2nd respondent of a basis to execute its mandate in that regard.

Analysis

This application for leave to appeal is brought under Order 44 rule 2 which provides that An Appeal under these rules shall not lie from any

other order except with leave of the court making the order or of the court to which the appeal would lie if leave were given.

The general rule is that, unless provided by any law, no leave to appeal is required except where the appeal is required except where the appeal is against an interlocutory order or decision of the court. This therefore means a right to appeal is not natural or inherent. It is well settled that an appeal is a creature of statute and there is no right of appeal unless is given clearly and in express terms by a statute.

The present application seems to be rooted in the fact that the decision of the court was not final or that it was interlocutory or preliminary. But it is my considered view that the decision of this court was final and therefore the right of appeal was automatically available without seeking leave of the court. An appeal lies against the preliminary decree as much as the final decree. There cannot be an appeal against what has not been decided against a party.

This application in my view would not be necessary since the ruling delivered in this matter was final and had a direct consequence of disposing off the entire application although this was done in an interlocutory manner.

However, for completeness I will determine the application on its merits. The applicant in this case intends to appeal on the following four grounds but only two arose from the decision of this court to wit;

1. *That the Hon. Justice erred in law and fact in finding no sufficient cause for enlargement of time to entertain the application for judicial review which concerned a matter of public importance from which an illegality subsists.*
2. *That the Hon. Justice erred in law and fact in finding that fact in finding that the 2nd respondent was a rightful party to the judicial review application.*

Under rule 5(1) of the judicature (judicial review) rules 2009 provides that;

An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arouse, unless the court considers that there is good reason for extending the period within which the application shall be made.

The applicant however, filed this application seeking for extension of time within which to such an application. This was filed on the 7th of September, 2020 six months after the stipulated statutory three months period and he alleges that the late filing was with good reason.

In *IP Mugumya vs Attorney General HCMC NO. 116 of 2015*, Hon Justice Steven Musota (as he then was) dismissing the application for being filed out of time contrary to Rule 5(1) of the judicature (Judicial review) Rules 2009 had this state; it is clear from the above that an application for

judicial review has to be filed within three months from the date when the grounds of the application first arouse.

The application for judicial review must be brought within 3 months and upon failure a party must seek leave to have the application heard by setting out the reasons why the same was never filed within the stipulated time. The applicant never made out the case for extension of time and therefore the court was right to refuse to hear the application on merit. The time set by law is a condition precedent and court must be satisfied before the merits are argued.

It is important and necessary that all the necessary parties are before the court while pursuing an application for judicial review. In the present case as rightly submitted by the respondent's counsel, the impugned regulations were made under the authority of Parliament by the Minister of Finance, Planning and Economic Development.

Therefore, the Attorney General was the proper party to represent the Minister and not the implementing agency. The public nature of the function if impregnated with the government character of tied or entwined with government or fortified by some other additional factor, may render the corporation an instrumentality or agency of government.

In an application for judicial review, necessary parties must and proper parties may, be impleaded. A necessary party is one against whom relief

is sought and without whom no order can be made effectively by the court.

Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard.

In the case of *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf, MR noted; “that a real prospect of success means that the prospect for the success must be realistic rather than fanciful. The court considering a prospect for permission is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is real prospect of success”

See also *Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority* Court of Appeal Civil Application No. 16 of 1996

In an application of this nature, the applicant must clearly show the grounds upon which they intend to appeal and must further illustrate the likelihood of success on appeal by laying out those grounds. It was not enough for the applicants to aver that they were aggrieved by the court’s decision rather they had to show that the intended appeal has a chance of success. The present application is far short of the required standard of proving a prima facie case and serious trial issues.

This application lacks merits and is dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

31st January 2023