

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 0110 OF 2022

**(ARISING FROM MISC. APPLICATION NO. 044 OF 2020 AND HCT – 01
– LD – CV – CS No. 012 of 2020)**

KITHENDE APPOLINARIS KALYEBOGHA ::::::::::::::: APPLICANT

VERSUS

1. MRS. ELEONORA WISMER

**2. KIRUNDA MOSES T/A SPEAR LINK AUTCTIONEERS &
BAILIFFS**

**3. LOUIS KAHUMA THE REGISTERED TRUSTEES OF THE
DIOCESE OF KASESE**

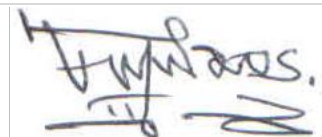
4. REV. FR. KIIZA DAVID::::::::::::::::::: RESPONDENTS

BEFORE HON. JUSTICE VINCENT WAGONA

RULING

The Applicant commenced this application under Order 44 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act seeking orders that:

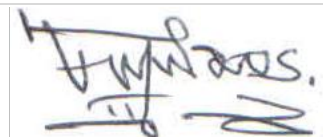
- 1. The applicant be granted leave to appeal the order dismissing HCT – 01 – LD – CV – CS No. 012 of 2020 with costs.*



2. That the costs of an incidental to this application be provided to the Applicant.

The grounds in support of the application are contained in the affidavit of the Applicant where he contended thus:

- 5 1. That he was the plaintiff in HCT – 01 – LD – CV – CS No. 012 of 2020 while the Respondents were defendants in the said suit which involved a multi-million property in Kasese.
2. That on the 14th of September 2022, court delivered its ruling and ordered that Civil Suit No. HCT – 01 – LD – CV – CS No. 012 of 2020 be dismissed
10 with costs.
3. That he was aggrieved by the order dismissing the said suit and he has since taken steps to appeal against the same by filing a notice of appeal and a letter requesting for a typed and certified record of proceedings and the ruling.
4. That the dismissal was based on an application which was in itself
15 incompetent and was wrongly decided by the trial judge.
5. That the Applicant has serious points of law which merit serious judicial scrutiny by the appellate court to wit:
 - (i) *Whether HCT – 01 – LD – CV – CS No. 012 of 2020 falls within the parameters of section 34 of the Civil Procedure Act Cap. 712.*
 - 20 (ii) *Whether the plaint in HCT – 01 – LD – CV – CS No. 012 of 2020 does not disclose a reasonable cause of action.*
 - (iii) *Whether Misc. Application No. 044 of 2020 was competently filed.*
 - (iv) *Whether the learned trial judge was justified to overrule the preliminary points of law which were raised.*

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(v) *Whether the learned trial Judge was justified to allow Misc. Application No. 044 of 2020 and HCT – 01 – LD – CV – CS No. 012 of 2020 with costs to the defendant and other issues which shall be raised after securing the record of proceedings.*

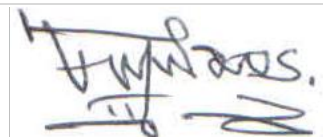
- 5 6. That the Applicant was aware that he could not appeal against the orders of this court in HCT – 01 – LD – CV – CS No. 012 of 2020 save with leave of court. That it is just and fair that leave to appeal the order dismissing the suit be granted to the Applicant.

The Application was opposed by the Respondent through the affidavit deponed by
10 Mr. Bwiruka Richard an attorney under Messrs Kaahwa, Kafuuzi, Bwiruka & Co. Advocates who contended thus:

1. That the contents of the motion were misleading. That HCT – 01 – LD – CV – CS No. 012 of 2020 was dismissed by an order of this court in Misc. Application No. 44 of 2022 on 4th November 2022.
- 15 2. That he was aware that the Applicant filed a notice of Appeal and a letter asking for the record of proceedings. That the appeal against the order dismissing HCT – 01 – LD – CV – CS No. 012 of 2020 lies as of right and no leave is required.
- 20 3. That it just and equitable that this application is denied and consequently dismissed with costs.

Representation:

Mr. Mishele Geoffrey of M/s Bagyenda & Co. Advocates appeared for the Applicant while **Mr. Joseph Kaahwa of M/s Kaahwa, Kafuuzi, Bwiruka & Co.**



Advocates appeared for the Respondents. Both parties filed written submissions that I have considered.

Issues:

The main issues at the heart of this application in my view are:

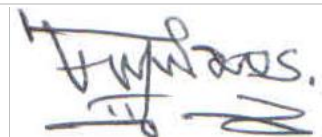
- 5 **1. Whether this Application is proper before this Court.**
- 2. Whether the Applicant’s application meets the grounds for grant of leave to appeal.**
- 3. Remedies available to the parties.**

Submissions of the Applicant:

10 Learned Counsel for the Applicant submitted that under Order 44 rule 1 (2), 3 and 4 of the Civil Procedure Rules is to the effect that in matters where a party has no automatic right of appeal, leave must be sought; hat the orders which the Applicant wanted to appeal against requires leave of court. That according to Spry VP in *Sango Bay Estates Limited & others Vs. Dresdner Bank (1971) E.A 17*, leave to
15 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.

Learned Counsel submitted that the Applicant in the affidavit in support of the Application raised pertinent issues of law which require serious judicial
20 consideration that is;

- (i) *Whether HCT – 01 – LD – CV – CS No. 012 of 2020 falls within the parameters of section 34 of the Civil Procedure Act Cap. 712.*

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(ii) *Whether the plaint in HCT – 01 – LD – CV – CS No. 012 of 2020 does not disclose a reasonable cause of action.*

(iii) *Whether Misc. Application No. 044 of 2020 was competently filed.*

(iv) *Whether the learned trial judge was justified to overrule the preliminary points of law which were raised.*

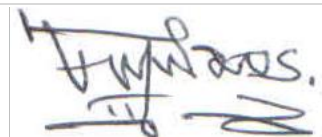
(v) *Whether the learned trial Judge was justified to allow Misc. Application No. 044 of 2020 and HCT – 01 – LD – CV – CS No. 012 of 2020 with costs to the defendant and other issues which shall be raised after securing the record of proceedings.*

10 Counsel submitted that the above questions require serious scrutiny which requires a decision of an appellate body. Counsel thus prayed that court should grant the Applicant leave to appeal to the Court of Appeal.

Submissions of Respondents:

15 Learned Counsel submitted that the application for leave to appeal is unnecessary, frivolous, a waste of courts time because an appeal of this nature lies as of right under Order 6 rule 30(2) of the Civil Procedure Rules. That HCT – 01 – LD – CV – CS No. 012 of 2020 was dismissed for non-disclosure of a cause of action under Order 6 rule 28 and 29 of the Civil Procedure Rules. That Rule 30(2) of order 6 provides that all appeals made in pursuance of this rule shall be appealable as of
20 right. That it implies that leave is not required.

That the Applicant filed a Notice of Appeal and a letter asking for a typed record of proceedings implying he appealed. That he cannot seek leave to appeal. That the current application has no merit and as such the same should be dismissed with costs.

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CONSIDERATION BY COURT:

Whether the application at hand is proper before this Court

Counsel for the Respondent raised a point of law that this application is improper
5 before this court. He argued that under Order 6 rule 30 (2) of the Civil Procedure
Rules, the Applicant has an automatic right of appeal against the order dismissing
HCT – 01 – LD – CV – CS No. 025 OF 2020. There was no response from the
Applicant’s Counsel on this issue.

Section 76 of the Civil Procedure Act provides for orders which are appealable as
10 of right and states thus:

*(1) “An appeal shall lie from the following orders, and except as otherwise
expressly provided in this Act or by any law for the time being in force from
no other orders—*

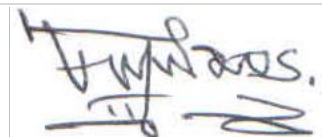
*(a) an order superseding an arbitration where the award has not been
15 completed within the period allowed by the court;*

*(b) an order on an award stated in the form of a special case;(c)
an order modifying or correcting an award;*

*(c) an order staying or refusing to stay a suit where there is an agreement to
refer to arbitration;*

*(e) an order filing or refusing to file an award in an arbitration without the
20 intervention of the court;*

(f) an order under section 65;

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(g) *an order under this Act imposing a fine or directing the arrest or detention in prison of any person, except where the arrest or detention is in execution of a decree;*

(h) *any order made under rules from which an appeal is expressly allowed by rules.*

(2) *No appeal shall lie from any order passed in appeal under this section”*

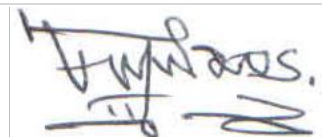
The above section does not provide for orders where a suit is dismissed for non-disclosure of a cause of action or where a suit is barred by limitation but it makes reference to other laws which expressly provide for such.

Order 6 rule 30 (1) and (2) of the Civil Procedure Rules provides thus:

(1) *The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.*

(2) *All orders made in pursuance of this rule shall be **appealable as of right.** (Emphasis added).*

Thus all orders made under rule 30 (1) are appealable as of right. However, Order 44 rule 1 does not list orders made under rule 30(1) as those which are appealable as of right under section 76 of Civil Procedure Act. Order 44 rule 2 provides thus:

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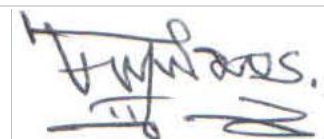
“An appeal under these Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.”

5 Rule 2 of Order 44 seems to suggest that save for orders listed under rule 1, any other appeal from orders made under the rules has to be with leave of court.

Section 76 of the Civil Procedure Rules is to the effect that where a law expressly provides for a right to appeal then leave is not required. Since Order 6 rule 30 (2)
10 provides for an express right to appeal, then leave is not required. The said order could not be included under Order 44 rule 1 since it in itself created a right of appeal.

The rationale why orders made under Order 6 rule 30 (1) are appealable as of right
15 is because they determine the case and have a consequential effect on the right of the parties. They are decrees of sort since they determine the suit and an aggrieved party must have an automatic right to appeal. It is thus my view that for all orders made under Order 6 rule 30 (1), an aggrieved party has a right to appeal as of right.

20 In the present Application, HCT – 01 – LD – CV – CS No. 025 OF 2020 was dismissed under Order 7 rule 11 of the Civil Procedure rules, the plaint having been rejected for non-disclosure of a cause of action against the Respondents. The question is - does order 6 rule 30 (1) apply to orders made under Order 7? In my view the consequential effect of orders made under Order 7 rule 11 have a bearing
25 on Order 6 rule 30 (1). The Civil Procedure Rules should be read as a whole to

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give effect to the intention of the legislator and the mischief that was intended to be cured.

Order 7 rule 11 provides thus:

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Rejection of plaint.

The plaint shall be rejected in the following cases;

(a) where it does not disclose a cause of action;

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(b) where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the relief claimed is properly valued but an insufficient fee has been paid, and the plaintiff, on being required by the court to pay the requisite fee within a time to be fixed by the court, fails to do so;

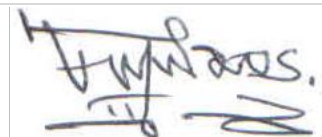
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(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where the suit is shown by the plaint to be frivolous or vexatious.

Order 6 is about pleadings as well as order 7 which is specifically focused on a
20 plaint which is a pleading. These orders in my view should be read together.

Under Order 6 rule 30 (1) it is provided that once any pleading is struck out on the
ground that it discloses no reasonable cause of action or answer and, in any such
case, or in case of the suit or defence being shown by the pleadings to be frivolous
25 or vexatious, court may order the suit to be stayed or dismissed or judgment to be

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entered accordingly, as may be just and an aggrieved a party has an automatic right of appeal under Order 6 rule 30 (2).

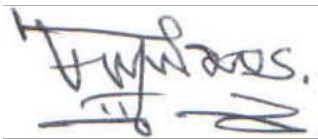
5 Therefore, where a plaint is rejected under Order 7 rule 11, a plaintiff has an automatic right of appeal by virtue of order 6 rule 30 (2) since the effect of the rejection constitutes striking out a pleading as provided for under rule 30 (1) of Order 6.

10 It is thus my view that the Applicant in this regard did not require leave to appeal against the order rejecting the plaint in Civil Suit No. 12 of 2020 that led to the consequential dismissal of the said suit.

This Application therefore is incompetent and frivolous and the same fails. This Application is therefore hereby dismissed with costs awarded to the Respondents.

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It is so ordered.



Vincent Wagona

High Court Judge

20 **FORT-PORTAL**

27.02.2023

