

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
MISCELLANEOUS APPLICATION NO.553 OF 2022
(ARISING FROM MISC. APPLICATION NO. 64 OF 2021 AND MISC.
APPLICATION NO.716 OF 2019)
(ARISING FROM EMA NO.2606 of 2018)
(ARISING OUT OF DIVORCE CAUSE NO.18 OF 2015)

JACQUELINE RUGASIRA ::
APPLICANT

VERSUS

ANDREW RUGASIRA ::
RESPONDENT

Before: Lady Justice Ketrah Kitariisibwa Katunguka

Ruling.

Introduction:

1. Jacqueline Rugasira (herein called ‘the applicant’) brought this application against Andrew Rugasira (herein called ‘the respondent’); seeking leave to appeal to the Court of Appeal against the whole of the decision and orders of this court in Miscellaneous Application No.64 of 2021 and Miscellaneous Application No.716 of 2019; for costs of the application to be provided for; the application is brought under section 98 of the Civil Procedure Act, Order 44 rule 2,3 & 4 of the Civil Procedure Rules S.I 71-1).
2. The grounds of the application are contained in the notice of motion and the affidavits in support deposed by the applicant and Kagwa Norah; briefly that :
 - I. The learned trial Judge erred in law and fact when she consolidated Miscellaneous Application No.64 of 2021, which had been heard, and awaiting judgment with Miscellaneous Application No.716 of 2019, that was never fixed for hearing neither served upon the applicant nor heard;



- II. The learned trial judge erred in law and fact when she granted prayers and made orders in Miscellaneous Application No.716 of 2019 without the same being fixed for hearing neither served upon the applicant nor heard;
 - III. The learned trial Judge erred in law and fact when she held that the warrant of arrest and attachment was issued without a notice to show cause;
 - IV. The learned trial judge erred in law and fact when she held that the warrant of attachment and sale was issued on 18/12/2018 and that the notice to show cause was issued on 5/03/2020;
 - V. The learned trial Judge erred in law and fact when she held that the process of issuing warrant of attachment and sale of immovable property was invalid;
 - VI. The learned trial judge erred in law and fact when she held that the property comprised in leasehold register volume 3553 folio 23 plot 43 Peninsular Road Luzira, Kampala was not affected by the consent decree hence not subject to attachment and sale;
 - VII. The learned trial judge erred in law and fact when she held that the property comprised in leasehold register volume 3553 folio 23 plot 43 Peninsular Road Luzira, Kampala was not affected by the consent decree and inclusion of the same in the warrant of attachment and sale rendered the warrant null and void.
 - VIII. The learned trial Judge erred in law and fact when she held that there was no justification for the duplicate certificate of title of the land comprised in leasehold register volume 3553 folio 23 plot 43 Peninsular Road Luzira, Kampala to be delivered to court;
3. The respondent filed an affidavit in reply to the effect that the application is moot as an appeal has already been commenced; the applicant in MA No.64 of 2021 sought to execute a warrant of attachment and sale that had expired; the warrant of attachment and sale of the property and the subsequent order of sale were issued irregularly and he was never served with a Notice to Show Cause; the order issued

on 21/8/2019 was irregular as it was made without the duplicate or special certificate of title; the applicant and her lawyers were always aware of MA No.716 of 2019 for stay of execution and setting aside the execution; the application for execution contained figures not in the consent decree; the applicant has no arguable grounds of appeal and the appeal has no likelihood of success; the applicant has not advanced any reason to warrant grant of the application for leave to appeal.

Background:

4. A decree absolute issued in Divorce Cause No.18 of 2015 by consent of the parties; subsequently, the applicant filed EMA No.2606 of 2018; and a Warrant of Attachment and Sale was issued against property comprised in leasehold register volume 3553 folio 23 plot 43 Peninsular road Luzira in payment of a judgment debt of 922,000,000/=.
5. Consequently, the respondent filed Miscellaneous Application No.716 of 2019 seeking orders that the warrant of attachment and sale order of immovable property issued on 4/8/2019 be set aside contending that the warrant of attachment and sale order was issued irregularly as he was not served with a Notice to Show Cause; MA No.716 of 2019 had not been fixed for hearing, the applicant also filed Miscellaneous Application No.64 of 2021 seeking orders that the respondent delivers in court the duplicate certificate of title of the said attached property; MA No.64 of 2021 was heard inter parte.
6. On the 16th day of June 2022, this court delivered a ruling consolidating Miscellaneous Application No.64 of 2021 and Miscellaneous Application No.716 of 2019; this court found that the warrant of attachment and sale did not conform to the decree absolute as consented between the parties.
7. This court made the following orders: - Miscellaneous Application No.64 is hereby dismissed with costs; the warrant of attachment and sale of immovable property issued by this court on 4th July 2019 is hereby set aside; the execution vide EMA No.2606 of 2018 is hereby set aside; since the respondent in MA No.716 of 2019 was never served, the applicant therein shall bear his costs.



The applicant herein being dissatisfied with court's decision, has filed this application to be granted leave to appeal to Court of Appeal against this court's decision as delivered on 16/6/2022.

Representation:

8. The applicant is represented by counsel Chemisto Shuaib Kubai of M/s Oasis Advocates; while the respondent is represented by counsel Agaba Asaph of M/s CMS & Co. Advocates. Both counsel filed written submissions, which I have considered.
9. Counsel for the respondent raised preliminary objections to the effect that; the applicant's affidavit does not disclose the source of information in contravention of Order 19 rule 3 of the Civil Procedure Rules S.I 71-1; secondly, the affidavit of Norah Kagga is deposed without the applicant's written authority; and lastly, the applicant has already filed a Notice of Appeal.
10. It is trite law that points of law can be raised at any stage of the proceedings then court may determine at what point to consider them depending on their effect on the trial; (see *Mathias Lwanga Kaganda v. UEB CS No.124 of 2003*); I shall determine the preliminary objection first and the outcome shall guide the next course of action;
 - 1) *The applicant's affidavit does not disclose the source of information in contravention of the provisions of Order 19 rule 3 of the Civil Procedure Rules S.I 71-1.*
11. Counsel for the respondent submits that the information contained in paragraphs 4,5,7,11,12 and 13 are matters of law not within the knowledge of the applicant who is not a lawyer; that the affidavit does not disclose that the deponent obtained information in the affidavit from other sources; that it is evident that the applicant obtained some information or advice from her lawyers; all the information contained in the affidavit is from other people and sources which or whom she did not disclose.
12. For the applicant, counsel submits that everyone is expected to know the law, and knowing the law is not a preserve of lawyers; that the applicant ought not be

blamed for knowing her rights or her case; since she has been closely following up her case there was no need for her to disclose any sources of information as this is information within her knowledge; therefore her affidavit in support does not contravene the provisions of Order 9 rule 3 of the Civil Procedure Rules;

13. **Order 19 rule 3(1)** of the Civil Procedure Rules provides that: -

“Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.”

14. In *Standard Goods Corporation Ltd. v Harakchand Nathu & Co [1950] EACA 99* it was held that: " It is a well settled that where an affidavit is made on information, it should not be acted upon unless the source of information is specified. " (see: *Premchand Raichand Ltd and another v Quarry Service of East Africa Ltd and others [1969] 1EA 514*);

15. I have carefully examined the affidavit in support of the application it does disclose the source of information as the applicant; specifically, under paragraph 16; states and I quote “*That whatever herein above from paragraph 1-16 both inclusive is true and correct to the best of my knowledge.*”

16. I agree with counsel for the applicant that she cannot be faulted for knowing the law and her case, as ignorance of the law is no defence; laws are not hidden from the public since statutes, government journals, newspapers, printed publications, online, and other sources are there for whoever wishes to see and know; but also the information in the affidavit did not require appreciating the law since it is the process of service, dates and acknowledgment that is being deposed on.

17. I find that the applicant’s affidavit does not contravene Order 19 rule 3(1) of the Civil Procedure Rules. The first preliminary objection is not sustained.

2) The affidavit of Norah Kaggwa is deposed without a written authority from the applicant.

18. Counsel for the respondent submits that the affidavit in support of the application deposed by Norah Kaggwa is incurably defective for being sworn without the written authority of the applicant. Counsel relies on the authorities of



Binaisa Nakalema and 3 Others Versus Mucunguzi Myers MA No.460 of 2013; and Vicent Kafeero & 11 Others V. AG; Miscellaneous Application No.048 of 2012; that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other.

19. In response, counsel for the applicant contends that the cases cited by counsel for the respondent are misunderstood and misapplied to the facts of this case before court; for the scenarios mentioned in the case cited by the respondent refer to where there are several applicants or respondents in a matter and one swears an affidavit on behalf of others; that in this particular case, Kagwa Norah swore an affidavit in the capacity of an advocate with full facts of the matter and therefore there is no requirement of a recognized agent or advocate to furnish proof of authority; counsel relies on the case of; ***Electro-Maxx Uganda Limited Versus Oryx Oil Uganda Limited Miscellaneous Application No. 251 of 2020 (Arising out of Civil Suit No.216 of 2020;***

20. **Order 3 rule 1 of the Civil Procedure Rules** provides; “*Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person*’.

21. In the case of ***Electro-Maxx Uganda Limited Versus Oryx Oil Uganda Limited Miscellaneous Application No. 251 of 2020;*** also cited by counsel for the applicant; court had this to say;

“It is clear to me that deponing to an affidavit is one of the acts authorized by law that can be done either by the party themselves or by a recognized agent or by an advocate. Just like a party appearing for themselves, there is no requirement for a recognized agent or an advocate to furnish proof of authority to plead on behalf of their principal. The advocate only has to prove the fact of instructions by the named client.”



22. In this case, the facts show that Kagwa Norah deposed an affidavit in support of the application and an affidavit in rejoinder in the capacity of an advocate practicing with Oasis Advocates; stating that she has full facts of the matter to swear the affidavit; as far as this case is concerned, it is not in contention that the applicant is represented by Oasis Advocates; in the circumstances; Kagwa Norah deposed the affidavits as an advocate practicing under a law firm representing the applicant; there is no necessity of adducing written authority from the applicant as this is not a representative suit where Kagwa Norah is suing or being sued together with the applicant; if that were the case, written authority would have been required as per Order 1 rule 12 of the Civil Procedure Rules;

I find no merit in this objection as well.

3. The applicant has already filed a Notice of Appeal.

23. Counsel for the respondent submits that the application is moot and improperly before court as the notice of appeal and the letter requesting for proceedings have already been filed in this court; counsel cited ***Kasumba Idda Baisa & Equity Bank (U) Limited Versus Aneez S.B Jaffer and Others MA No.209 of 2017***; and prays that the application be dismissed with costs.

24. According to counsel for the applicant, the case law cited by counsel for the respondent is misconceived as the said case was an application for leave to appear and defend and not an application for leave to appeal from a ruling; counsel argues that application for record of proceedings and notice of appeal have no bearing since there is no right of appeal yet.

25. **Rule 76 (1) of The Judicature (Court of Appeal Rules) Directions** states that; Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court. The record shows that the applicant has already filed a notice of appeal dated 21/6/2022; lodged in this court on 22/6/2022;

26. An application for leave to appeal must be supported with proof that the applicant seriously intends to appeal; and such proof is by filing a notice of appeal which the applicants duly filed on 22/6/2022; **Rule 76(4) The Judicature (Court of Appeal Rules) Directions** provides that; when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not



be necessary to obtain the leave or certificate before lodging the notice of appeal. (see: **Standard Chartered Bank (U) Ltd VS Phillip Mwesigye CA NO. 0138/2013**).

I find no merit in this preliminary objection.

Merits of the application:

27. Since neither counsel framed any issues I shall under Order 15 Rule 1(5) of the Civil Procedure Rules; frame one issue for this court's consideration as;

Whether there are sufficient grounds to grant leave to appeal against the decision and orders of this court delivered in consolidated M.A No. 64 of 2021 and M.A No. 716 of 2019?

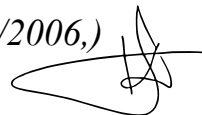
28. **Order 44 rule 2 of the Civil Procedure Rules** provides as follows; -

"An appeal under these rules shall not lie from any order except with leave of the court making the order or of the court to which an appeal would lie if leave were given." And under **Order 44 Rule 3 of the Civil Procedure Rules**; it is a requirement that applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.

29. *In the case of Sango Bay Estate vs Dresdner Bank & Attorney General [1971] EA 17Spry V.P* 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...."*

30. 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 instant case."*

31. The grounds for granting leave to appeal hinge on whether there are arguable points of law with a likelihood of success; that the application has been brought without undue delay; and the applicant has not been guilty of dilatory conduct (see: *Degeya Trading Stores (U) Ltd VS Uganda Revenue Authority CACA No. 16/1996*; and the *Commissioner General of URA VS Meera Investments Ltd HCMA No. 359/2006* cited with approval in *Alley Route Ltd VS Uganda 4 Development Bank Ltd HCMA No. 634/2006*.)



32. Counsel for the applicant cites the case of *Sango Bay Estate Versus Dresdner Bank & Attorney General (supra)*; and submits that the applicant's constitutional right to be heard was denied as she was never heard in MA No.716 of 2019; that during recovery of a debt, a judgment creditor can attach and sale any properties of the judgment creditor; that a Notice to Show Cause was issued by court on 6/11/2019 for hearing on 19/11/2019;
33. For the respondent counsel referred to Order 11 rule 1(a) of the Civil Procedure Rules; that the trial Judge properly consolidated the applications after considering the submissions and documents and found it necessary to avoid multiplicity of suits; that the warrant of attachment and sale was issued without notice to show cause to the respondent; and did not adhere to the consent decree absolute; that there is no substantive question of law to be determined by the Court of Appeal.

Decision:

34. The applicant's contention as presented in ground i & ii of the Notice of Motion is that it was an error in law and fact to consolidate Miscellaneous Application No.64 of 2021 which had been heard and awaiting judgment with Miscellaneous Application No.716 of 2019 that was never fixed for hearing neither served upon the applicant nor heard and prayers therein granted; I shall not delve into the other grounds (iii – viii) as it would appear as a review of this court's ruling which is not the case. In **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” .

The respondent in his reply avers that the applicant was always aware of Miscellaneous Application No.716 of 2019; the arguable legal issue is whether court validly consolidated MA 716/2019 and MA 64/2021; this court can not comment on it without appearing to review its own judgment; In **Herbert Sekandi t/a Land Order Developers v Crane Bank Ltd HCMA No 44 of 2007** cited in **Kengazi v Metl (U) Ltd (Miscellaneous Application 471 of 2015) [2015] UGCommC 172 (12 November 2015)**; 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 appellant court and that the



intended appellant has a bonafide and arguable case on appeal; to consolidate or not to consolidate is in my view a question of law; I therefore find merit in this application;

Leave to appeal is hereby granted;

Costs shall stay in the cause.



Ketrah Kitariisibwa Katunguka

Judge

8/02/2023

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