

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

CIVIL APPEAL NO. 28 OF 2013

(Arising from Chief Magistrates Court of Mengo Misc. Cause No. 04 of 2013)

JOSEPH KAWESAAPPELLANT

VERSUS

DIANA MUGISHA RESPONDENT

Hon. Lady Justice Monica K. Mugenyi

RULING

The appellant and respondent executed a deed by which the former was alleged to have lent money to the latter. The respondent deposited a land title in respect of Block 197 plot 195 Kyadondo, Mengo as purported security. The respondent subsequently attempted to re-pay the loan amount and redeem her title but the appellant claimed to have purchased the said land from her. The respondent, vide Misc. Cause No. 4 of 2013, successfully applied to the Chief Magistrates Court of Mengo for orders that the appellant deposits the original title under reference for safe custody; the registrar of titles be stopped from effecting transfer of the said property's proprietorship to any other person but herself, and that she be granted 2 weeks to redeem the said land title.

The appellant instituted the present appeal against the ruling and orders of the trial magistrate dated 31st July 2013. At the hearing of the appeal the parties agreed to file written submissions. Learned counsel for the respondent thereafter filed written submissions in which he raised a preliminary point of law that the present appeal is improperly before this court in the absence of leave to appeal the trial magistrate's ruling. Counsel cited the provisions of Order 44 rule 2 of the Civil Procedure Rules (CPR), as well as the cases of **Sango Bay Estates Limited vs Dresdner Bank A. G (1971) EA 17** and **Arthur Niwagaba & Others vs. The Owners, Condominium Plan Civil Appeal No. 53 of 2013** in support of his case.

Section 220(1)(a) of the Magistrates Court Act (MCA) makes general provision for appeals from chief magistrates' courts to the High Court, subject to any written law. Section 77 of the Civil Procedure Act (CPA) expressly prohibits appeals from any other orders save for such orders as are provided for under section 76 of the same Act or 'as otherwise expressly provided.' On the other hand, Order 44 rule 1 of the CPR does provide the orders from which an appeal may lie as

of right under section 76 of the CPA. Orders made under Order 52 of the CPR, as are in issue presently, are not listed among the orders from which an appeal would lie as of right. These orders may only be appealed with leave of court, and such leave should be sought, in the first instance, from the trial court before recourse can be made to the appellate court. *See Order 44 rules 2 and 3 of the CPR.*

In the matter before this court, no leave was sought from the trial court before recourse was made to this court sitting in its appellate jurisdiction. In the case of **Arthur Niwagaba & Others vs. The Owners, Condominium Plan** (supra), learned counsel for the appellant sought to seek requisite leave from the appellate court. However, my sister Lady Justice Elizabeth Ibanda Nahamya observed:

“The position of the law is now settled. Where leave is required to file an appeal and such leave is not obtained the appeal filed is incompetent and cannot be withdrawn. It must be struck out. (See Makhanu vs Kibwana (1995 – 1998) EA 175). This principle was applied in the case of Dr. Shiek Ahmed Mohammed Kisuule vs. Greenland Bank (In Liquidation) Supreme Court Civil Appeal No. 11 of 2010 where a preliminary objection had been raised on the ground that the appellant had not sought leave of the High Court or the Court of Appeal prior to filing the appeal. Kitumba JSC observed that obtaining leave is not merely a procedural matter but an essential step. She held that no genuine steps had been taken to apply for leave and so there was no competent appeal before the court.”

The learned judge then held:

“Similarly, I find that in the instant case the appellants did not take any genuine steps to apply for leave either in the Chief Magistrate’s court or in this court as required by law. This step was essential prior to the filing of this appeal. It therefore follows that without leave to appeal this appeal is invalidly before this court and is incompetent. The defect is not curable.”

As in that case, no genuine steps have been taken to secure leave first in the trial court, failure of which, in this court. It was argued for the appellant that since the trial magistrate entertained a matter beyond her jurisdiction, this court should not perpetuate the purported illegality. However, faced with an incurable defect in the appeal, this court cannot purport to consider the merits thereof. There must be a competent appeal in court before recourse can be made to the merits thereof. This is not the case presently. Learned counsel for the appellant did also contend in rejoinder that an oral application for leave to appeal was made before the trial court. With respect, this court finds nothing on record to support this assertion. An oral application, like any other proceedings, would have been captured in the record of the trial court. I do not find any such application. In the absence thereof this court is unable to agree with the learned counsel that any such application was made.

Procedural rules are hand maidens of justice. See **Iron and Steelwares Ltd vs. C. W. Martyr & Co. (1956) 23 EACA 175 at 177.** They are intended to facilitate the litigation process by serving as the rules of the game for all litigants. Within the context of the present preliminary point of law, it would seem to me that provision for application for leave to appeal is intended to expedite the adjudication process by allowing for judicial discretion in matters that may go to appeal. The absence of such provision would result in automatic appeals from all manner of orders with the resultant delay in conclusive resolution of disputes. The need for compliance with this rule cannot be over-emphasized; it should never be under-stated. I would, therefore, uphold the preliminary point of law raised; and do hereby strike out this appeal with costs to the respondent.

Monica K. Mugenyi
JUDGE

22nd April, 2014