**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**
**LAND DIVISION**

**CIVIL APPEAL NO. 42 OF 2013**

***(ARISING FROM MISC. APPLICATION NO. 002 OF 2010)***

***(ARISING OUT OF MISC. APPLICATION NO. 34 OF 2008)***

***(ORIGINALLY ARISING OUT OF CIVIL SUIT NO. 018 OF 2008)***

**EMMANUEL TUMUSIIME:::::::::::::::::::::::::::::::::::::::::: APPELLANT**

***VERSUS***

1. **PERUSI NAMAGEMBE**
2. **NYINA BARONGO:::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

***BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW***

***JUDGMENT***

This is an appeal from the decision of His Worship Kobusheshe Francis, Chief Magistrate - Luwero Chief Magistrate's Court *(hereinafter the "trial court")*dismissing the Appellant's application in ***Misc Appl. No.002 of 2013.***

***EMMANUEL TUMUSIIME*** *(hereinafter referred to as the "the Appellant")* through his lawyers, Mr Harimwomugasho, filed ***Misc.Application No. 002 of 2013*** in the trial court seeking to set aside the *ex parte* orders against him in ***Misc Application No. 34 of 2011*** on grounds that he was never served with the court process in the application, and that the Appellant's former Counsel, Mr. Arthur Katongole's negligence ought not to be visited on him.

At the hearing of the application Mr. Matovu, Counsel for ***PERUSI NAMAGEMBE and NYINA BARONGO*** the Respondents at the trial (and herein

on appeal) raised a preliminary objection on a point of law that the application was *res judicata* and that the trial court could not entertain it.

The trial court agreed with Counsel for the Respondents, and found no merit in the application because it was *res judicata,* and that service on the Applicant's Counsel was proper service, and dismissed the application. The Appellant being dissatisfied with the decision of the trial court filed this appeal and preferred the following grounds.

1. ***The learned trial magistrate erred in law and fact when he completely failed to evaluate the Applicant's evidence to come to a correct conclusion.***
2. ***The learned trial magistrate erred in law and fact by holding that the matter was res judicata.***
3. ***The trial magistrate erred in law and fact in ruling that the Applicant's non appearance in court was an act of irresponsibility which disentitled him from pleading that Counsel's acts should not be visited on him.***
4. ***The trail magistrate erred in law and fact when he did not give the Applicant an opportunity to defend himself on the issues raised by the Respondents herein.***

***Resolution:***

***Ground 1.***

Counsel for the Respondents again raised preliminary objections on points of law that no appeal lies to this Court from the ruling of the trial court dismissing a matter on a preliminary point of law save with leave of court. That no such leave was sought hence this appeal is barred by law. Secondly, that the High Court has no jurisdiction to hear an appeal where no automatic right of appeal is created under the law.

Counsel for the Respondents also submitted that the ruling of the trial court dismissing ***Misc Application No. 002 of 2013*** was a decision made pursuant to a preliminary objection raised by Counsel for the Respondent to the effect that the issues raised by the Appellant were *res judicata* having been determined by the trial court in ***Misc Application No. 034 of 2011.*** That under ***Order 6 r. 29 CPR***, court has power to dismiss a suit upon a preliminary objection being raised, as was the case in ***Misc Application No.002 of 2013,*** and that such a dismissal does not give an automatic right of appeal.

Counsel further submitted that orders appealable as of right are spelt out under ***Section76 CPA*** and ***Order 44 CPR,*** and that the order made by the trial court being appealed against is not within any of the categories set out as appealable as of right. Furthermore, that if the appeal could lie at all, it required leave which in this case was never sought by the Appellant. To fortify this position Counsel cited the cases of ***A.G v. Shah (No.4) [1971] EA 50*** *and* ***Mityana Ginners Ltd. v. Public Health Officer Kampala [1958] EA 339.***

In reply, Counsel for the Appellant submitted that leave to appeal in lower courts may be made either orally or formally depending on the election of the Counsel with personal conduct of the case. Counsel submitted that the Appellant informed him that the Counsel who had personal conduct of the case in the lower court orally applied for leave to appeal, and that most of the trial court papers were removed from the court file. That the notice of appeal was filed in the same court and was duly signed by the trial magistrate, and that as such this Court should consider the oral application for leave to appeal and the notice of intention to appeal as sufficient to constitute leave to appeal.

Counsel sought to distinguish the cases cited by Counsel for the Respondents in that they concerned an appeal from High Court to the Court of Appeal, and that it

is not the case with the instant appeal. Counsel submitted that the preliminary objection is based on a mere technicality which should be ignored under ***Article 126 (2) (e) of the Constitution,*** be overruled with costs to the Appellant.

According to the record of the trial court, Counsel for the Respondents raised a preliminary objection in ***Misc Application No. 002 of 2013*** to the effect that the application could not be heard and determined by the trial court because it was *res judicata*. The trial court (at page 5 of its judgment) concurred with the objection raised and held that;

> ***"…I am convinced therefore that the ex parte proceedings where only one party is heard cannot be barred by the doctrine of res judicata. I however agree that where a court has at an earlier stage decided a matter in one way or other between the same parties as the case proceeds, the same court should not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings…"***

***Section 76 CPA (supra)*** *and* ***Order 44 CPR(supra)*** spell out orders from which appeals lie as of right. The provisions do not include appeals against orders in preliminary objections. Leave must first be sought under ***Order 44 r.1 (2) CPR*** to appeal against an order on a preliminary objection. The Appellant should have first sought leave of the court that made the order before filing this appeal, and in the event that it was denied, he would seek for leave of this Court. The Appellant did not comply with these mandatory requirements of the law. Therefore, the argument by Counsel for the Appellant that leave to appeal in the lower court may be either oral or written lacks any basis in law.

These findings are fortified by the decision in ***Dr. Sheik Ahmed Mohammed Kisuule v. Greenland Bank (in liquidation) S.C.C.A No. 11 of 2010.*** A preliminary objection had been raised on ground that the appellant had not sought

leave of the High Court or Court of Appeal prior to filing the appeal. It was held that obtaining leave is not merely a procedural matter but an essential step, and that since no genuine step had been taken to apply for leave there was no competent appeal before the court.

It is the established law that an appeal is a creature of statute, and a court can only exercise appellate jurisdiction where that jurisdiction is given by statute. A party who seeks to avail himself or herself of the right of appeal must strictly comply with the conditions prescribed by the ststute. See: ***Hamam Singh Bhogal t/a. Hamam Singh & Co. v Javda Karsan (1953) 20 EACA 17 at 18.***

The above holdings apply on all fours to the instant appeal. The Appellant did not take any steps to apply for leave either in the trial court or in this Court where the appeal would lie as required by the law. Without complying with this requirement the appeal is incompetent, and as such not curable under ***Article 126 (2) (e) of the Constitution*****.**

The application of ***Article 126 (2) (e)(supra)*** in that regard has been duly considered in the case of ***Matovu & 2 Others v. Abacus Pharmacy (Africa) Ltd. H.C.C.A. No. 11 of 2012*** relying on the case of ***Utex Industries Ltd vs. Attorney General, .S.C.C.A. No. 52 of 1995.*** it was held that in enacting ***Article 126(2) (e) (supra)*** the Constituent Assembly never intended to wipe out the rules of procedure of our courts, and that paragraph (e) only contains caution against undue regard to technicalities.

***Article 126(2)(e) (supra)*** is not a magic wand in the hands of erring parties. It would follow that the argument by Counsel for the Appellant that the grounds of appeal raise issues both in law and equity would be a legally untenable.

Further, the allegation that most court papers were removed from the court file is not supported by any evidence. It was just a mere unsubstantiated and unproven

claim. The appeal is therefore incompetent and must be struck out with costs to the Respondents. The resolution of this issue renders the consideration of the other grounds of appeal unnecessary.

***BASHAIJA K. ANDREW***
***JUDGE***
***06/03/2014.***