

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[LAND DIVISION]  
MISCELLANEOUS APPLICATION NO.1400 OF 2023  
(ARISING FROM MISCELLANEOUS APPLICATION NO. 223 OF 2023)  
(ARISING FROM CIVIL SUIT NO. 0266 OF 2017)**

**1.EFULANSI NAMUTEBI  
2.ESEZA NOLA NAKIBUUKA  
3.YAYERI KAKULIRA NDAGIRE ::::::::::::::::::::::::::::::::::: APPLICANTS  
4.DEBORAH RACHEAL NAMUSOKE KIZITO  
(Administrators of the Estate of the late  
Erenesiti Keresipo Kizito)  
5.WILLY BALWANA SSERWANO**

**VERSUS**

**1. BOOST INVESTMENTS LIMITED  
2. THE KABAKA OF BUGANDA ::::::::::::::::::::::::::::::::::: RESPONDENTS  
3. UGANDA LAND COMMISSION  
4. THE ATTORNEY GENERAL**

**BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA**

**RULING.**

**Introduction:**

1. This was an application by notice of motion brought under Section 98 and 76 of the Civil Procedure Act, Section 33 of the Judicature Act Cap 13, and Order 44 rules 1(1), (2), (3) and (4) & 13 of the Civil Procedure Rules (CPR) for orders that: -

- i) Leave be granted to the Applicants to appeal against the Ruling and orders of HON. LADY JUSTICE OLIVE KAZAARWE MUKWAYA, Judge of this Honourable Court delivered by E-mail

on 30<sup>th</sup> June, 2023 vide Miscellaneous Application No. 223 of 2023 (Arising from Civil Suit No. 0266 of 2017): Boost Investments Limited & others versus Efulansi Namutebi & 4 others.

ii) Costs of this application be provided for.

**Background:**

2. The Applicants filed HCCS No. 0226 Of 2017 against the Respondents seeking orders inter alia, cancellation of the Certificates of title owned by the respondents comprised in LRV 3702 Folio 12 Plots 1048, 1049, 1550, 281, 282, 283, 284, 285, 286, 287, 288, 289 and 290 land at Kisenyi formerly known as FC 15453 which is part of the estate of the late Erenesiti Keresipo Kizito administered by the 1<sup>st</sup> – 4<sup>th</sup> Applicants. The Respondents raised a preliminary objection that the suit did not disclose a cause of action which was determined on 30<sup>th</sup> June 2023 and the Honourable Judge ruled that the suit indeed disclosed no cause of action, the plaint was rejected and struck out with costs to the Respondents.



3. The Applicants have since filed an appeal to the Court of Appeal however they made this Application seeking leave to appeal against the ruling and orders of HON LADY JUSTICE OLIVE KAZAARWE MUKWAYA.

**Applicants' Evidence;**

4. The grounds of the application are contained in the affidavit in support of the application deposed by **ESEZA NOLA NAKIBUUKA** the 2<sup>nd</sup> Applicant, and briefly are that:-

- i) That the Applicants were dissatisfied and aggrieved by the Ruling of the Court delivered on the 30<sup>th</sup> of June 2023 rejecting the plaint and striking out the same with costs to the Respondents on ground that it disclosed no cause of action, and intend to appeal against it.
- ii) That the Applicants have since filed their notice of appeal, applied for a typed and certified record of proceedings as an indication of the intention to appeal.
- iii) That the Applicants do not have an automatic right of appeal against the Ruling of this Honourable Court and that they can only appeal once leave is granted.



**1<sup>st</sup> Respondent's evidence;**

5. The application is opposed to by an affidavit in reply deposed by **JOHN BOSCO MUWONGE** the Managing director of the 1<sup>st</sup> respondent in which preliminary objections were raised as stated below;

i) That the affidavit in support of the application is incurably defective as it purports to be deposed on behalf of others without authority, the affidavits contains falsehoods and the Application is frivolous, vexatious, brought in bad faith and baseless in law and the 1<sup>st</sup> Respondent shall pray for the same to be dismissed with costs.

ii) In reply to the application, the 1<sup>st</sup> Respondent avers that this application is devoid of merit, untenable, filed in bad faith and a gross abuse of Court process and seeks redundant orders since an appeal from the same decision has already been filed on behalf of the same parties by Godfrey S. Lule Advocates and should be dismissed with costs to the 1<sup>st</sup> Respondent.

**2<sup>nd</sup> Respondent's evidence;**

6. The 2<sup>nd</sup> Respondent also opposed the application by filing an affidavit in reply deposed by **KIZITO BASHIR JUMA** and briefly states as follows;



- i) That the Application is devoid of legal merit, an abuse of Court process and a waste of this Honourable Court's precious time as the applicants have already filed an appeal in the Court of Appeal vide Civil Appeal No. 1180 of 2023.
- ii) That the order dismissing Civil Suit No. 266 of 2017 amounted to a final decree and no leave of Court was required as the applicants had an automatic right of appeal.

**3<sup>rd</sup> and 4<sup>th</sup> Respondent's evidence;**

7. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents also opposed the application by filing an affidavit in reply deposed by **KANANDA SAMUEL** and briefly states as follows;

- i) That the Civil procedure rules provide an automatic right of appeal on rejection of a plaint under Order 7 rule 11 and dismissal of the suit under Order 6 rule 30(1).
- ii) That this Application is an abuse of Court process as the Applicants have already filed Civil Appeal No. 1180 of 2023 challenging the decision in Misc. Application No. 223 of 2023.

**5<sup>th</sup> Respondent's evidence;**



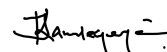
8. The 5<sup>th</sup> Respondent also opposed the application by filing an affidavit in reply deposed by **KAFUREEKA VICTOR JAGaine** and briefly states as follows;

- i) That this Application is improper, incompetent, misconceived, frivolous and an abuse of Court process and the same ought to be struck out and dismissed with costs.
- ii) That the Applicants have already filed Civil Appeal No. 1180 of 2023 challenging the decision in Misc. Application No. 223 of 2023.
- iii) That Misc. Application No. 223 of 2023 was granted in accordance with Order 7 rule 11 and Order 6 rule 30 (1) of the Civil Procedure rules and the applicants do not need leave to appeal since the law provides for an automatic right of appeal.

**Representation;**

9. The Applicants were represented by Wandera Moses of M/s Kimanje Nsibambi Advocates whereas the 1<sup>st</sup> Respondent was represented by Nyachoieo Mary of M/s Anguria & Co. Advocates and there was no representation from the other parties.

10. The Applicants, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed written submissions which I have considered during the determination of this Application.



**Issues for determination;**

- i) Whether the Applicants should be granted leave to appeal against the Ruling and Orders of this Honourable Court delivered on 30<sup>th</sup> June, 2023 vide Miscellaneous Application No. 223 of 2023 (Arising from Civil Suit No. 0266 of 2017): Boost Investments Limited & others versus Efulansi Namutebi & 4 others?**

**Resolution and determination of the issue;**

11. Before I delve into the merits of this application, I wish to address the preliminary objections as raised by Counsel for the Applicants and the 1<sup>st</sup> Respondent.
12. Counsel for the Applicants raised an objection that the Respondents' affidavits in reply had been filed out of time. Parties appeared before me on the 13<sup>th</sup> day of December, 2023 and this Honourable Court gave directions as to when parties should file their respective pleadings. So, the issue of not following timelines is over taken by events hence this preliminary objection is over ruled.



13. Counsel for the 1<sup>st</sup> Respondent raised a preliminary objection that the Applicants' affidavit in support is incurably defective as it purports to be deponed on behalf of others without authority. This Court finds this argument to be unfounded as the Applicants duly attached a consent to swear the affidavit which is annexed to the application and marked as Annexure "A". Therefore, this preliminary objection is hereby overruled.
14. I must state from the onset that in order to resolve this issue, it is critical to determine whether the Order issued in Misc. Application No. 223 of 2023 amounted to a decree appealable as of right or an order requiring leave of this Honourable court to appeal.
15. This Court takes cognizance of the fact that Misc. Application No. 223 of 2023 was brought under Order 7 rule 11 and Order 6 rule 30(1) of the Civil Procedure Rules.
16. Counsel for the Applicants argues that rulings and orders rejecting a plaint for non-disclosure of a cause of action under Order 7 rule 11 (a) of the Civil Procedure Rules is not one of the instances provided for under Section 76 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules and any order which is not mentioned in the said provisions of the law, has to be appealed against with leave of Court.





17. The glaring question before this Honourable Court is to determine whether the order as issued by Justice Olive Kazaarwe Mukwaya rejecting the plaint and striking the same out with costs amounted to a decree or an order requiring leave of this Court to appeal.

18. Section 2 (c) of the Civil Procedure Act defines a decree;

**To mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint (*Emphasis mine*) or writ and the determination of any questions within Section 34 or 92, but shall not include-**

- i) Any adjudication from which an appeal lies as an appeal from an order; or*
- ii) Any order of dismissal for default;*

19. On the other hand, Section 2 (o) of the Civil Procedure Act, Defines an order;

***An order is a formal expression of any decision of a civil Court which is not a decree, and shall include a decree nisi.***

20. The critical analysis of the said definitions which are set out in an Act of Parliament illustrates that a decree conclusively determines the

rights of parties with regard to any matter in controversy as opposed to an order. Suffice to say, if an order of Court is made with an effect of conclusively determining the rights of parties to an action it can be said to be a decree.

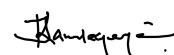
21. The Learned Judge found that the plaint in HCCS No. 0266 of 2017 disclosed no cause of action, rejected it and struck it out with costs which simply meant that the plaintiffs did not have any claim of right whatsoever in the subject matter and nothing had remained to be heard by the Trial Court.

22. I find the said order to have conclusively determined the dispute and therefore amounted to a decree within the meaning of Section 2 (c) of the Civil Procedure Act.

23. To the issue of whether the said decree is appealable as of right,

***In the case of South British Insce. Co. Ltd versus Mohamedali Taibji Ltd [1973] E.A .210, whose facts are in pari materia with the instant application, Justice Mustafa held;***

***If the decision conclusively determines the rights of parties, then it would be a decree, otherwise it would be an order. If for instance portions of a plaint are struck out***



***as being frivolous or vexatious, or if a suit is stayed, such a decision would be an order, whereas if a suit is dismissed with costs, that would be a decree. A decree is appealable, and an order made in terms of Order 6 rule 29 is made appealable as of right.***

24. It is undisputed that the learned Judge applied Order 7 rule 11 to reject the plaint and Order 6 rule 30(1) of the Civil Procedure Rules to dismiss it. **Order 6 rule 30(2) of the Civil Procedure Rules** provides that all orders made pursuant to this rule shall be appealable as of right
25. Owing to the fact that the plaint had been rejected and struck out with costs to the Respondents, I am fortified by the foregoing decision and the decision of the Highest Appellate Court in our jurisdiction in ***Hwang Sung limited versus M. and D. Timber Merchants and transporters limited Supreme Court Civil Appeal No. 02 of 2018*** holding that in such circumstances the aggrieved party has a right of appeal and does not need leave of Court to appeal.
26. Be that as it may, the Applicants seek leave of Court to file an appeal against the orders arising out of Misc Application No. 223 of 2023 yet

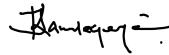


they have already filed Civil Appeal No. 1180 of 2023 in the Court of Appeal against the same decision which render this application a mere moot, superfluous and a clear abuse of Court process.

27. Under these circumstances this Honourable Court is functus Officio, and cannot grant such Orders since Court orders should not be issued in vain.

28. Therefore, for these reasons, I find this application to be superfluous, devoid of legal merit and an abuse of Court process and hence the same is hereby dismissed with Costs to the Respondents.

**I SO ORDER.**



**NALUZZE AISHA BATALA**

**JUDGE**

**12 /02/2024**