THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, CJ, TSEKOOKO, KITUMBA, TUMWESIGYE AND KISAAKYE JJ.S.C.)

CIVIL APPEAL NO.11 OF 2010

BETWEEN

DR. SHEIKH AHMED MOHAMMED KISUULE:::::::::: APPELLANT

AND

GREENLAND BANK (IN LIQUIDATION)::::::::::::::::RESPONDENT

[Appeal against the decision of the Court of Appeal (Mukasa-Kikonyogo DCI, MpagiBahigeine, Kavuma IIA) dated 11th February, 2009 in Civil Appeal No 13 *of2009J*

JUDGMENT OF KITUMBA JSC

This is a second appeal which arises from the decision of the Court of Appeal which confirmed the High Court decision in Miscellaneous Application No 616 of 2007 dismissing the appellant's application for review of its decision in HCCS 469 of 2001 dated 3/10/2001.

The following is a brief background to this appeal. The appellant together with one Karisa jointly obtained an overdraft facility from the respondent bank on 17th November 1995. The facility was of Uganda Shillings thirty million (30,000,000/ =). The appellant deposited two certificates of the title in respect to his land comprised in Block 27 plots 246 and 238 Makerere Kikoni. Subsequently, the borrowers incurred problems with their business and were unable to meet their financial obligations towards the respondent.

In 1998 Karisa dropped out of the business and the appellant solely undertook to pay back the loan by paying shillings one million five hundred thousand (1,500,000m/ =) per month. The appellant defaulted and the respondent sold off the two plots obtaining shs 7,265,000/= which it credited on the appellant's account. A total of shs 78,197,987/= was outstanding on the appellant's account as at 07/03/2001.

The respondent sued the appellant for recovery of the same plus interest and prayed for costs of the suit. In his pleadings and at the trial in the High Court, the appellant admitted that he obtained a loan from the respondent bank. He claimed, however, that there was re-negotiation of the terms of the loan in 1998 whereby the respondent bank agreed to freeze/waive interest on the loan. The Bank respondent vehemently denied that allegation.

20 The agreed issues during the trial in the High Court were:

(i) Whether the plaintiff waived or froze the interest.

(ii) Whether the securities were undervalued.

(iii) Whether the defendant is indebted to the plaintiff in the sum claimed.

25 (iv) Whether the plaintiff is entitled to the relief claimed.

The learned trial judge resolved the first and the second issues in the negative. He answered the third and the fourth issue in the affirmative. On 3rd January, 2003 she gave judgment in favour of the plaintiff/appellant and ordered him to pay shs. 78,190,985 with interest at the rate of 15% per annum and costs of the suit to the respondent.The appellant vide Miscellaneous Application No. 616/2007 applied to have the judgment in HCCS No 469 of 2001 reviewed on the ground that he had discovered a letter dated 14th July 1998 which was a new and important matter of evidence which he was unable to produce at the trial. This letter purported to have been written by the respondent acceding to the appellant's request to have the interest on the loan frozen. The learned judge dismissed the application for review with costs to the respondent.

The appellant was dissatisfied by the decision of the learned judge and filed his appeal to the Court of Appeal on the following grounds:

1) *"The learned trial judge erred in law and fact when she dismissed the application for review on the basis that it had no merit.*

2) *The learned trial judge erred in law and fact when she misdirected herself and misconstrued the issue for determination in regard to whether there was agreement of waiver and/or freezing interest.*

3) *The learned trial judge erred in law and fact when she failed to consider the letter dated 14th July* 1998 *while hearing the application for review on the premise that it was suspect.*

4) *The learned trial judge erred in law and fact when she failed to evaluate the evidence on record and chose to believe the respondent's case and not the appellant.*

5) *The learned trial judge erred in law and fact when she failed to answer issue two* (2) *in the affirmative after having found the appellant's property was under valued."*

During the trial in the Court of Appeal the five grounds were reduced to two issues which were agreed upon by both parties for determination namely:

(i) *Whether the learned trial judge erred in law and in fact when she dismissed the appellant's application for review on the basis that the letter dated 14th July* 1998 *was no discovery of new and important matters of evidence?*

(ii) If issue one is *answered in the affirmative, what* is *the effect of the judgment?*

The learned justices of the Court of Appeal answered the first issue in the negative. The appeal was dismissed with costs to the respondent.

The appellant was again dissatisfied with the decision and filed his appeal to this Court on following grounds:

1) Their lordships erred in law and fact when they failed to re-evaluate the evidence in respect of whether respondent waived/froze interest on the principal.

2) Their lordships erred in law and fact when they failed to re-evaluate the evidence in respect of whether the respondent undervalued the securities.

3) *Their lordships erred in law and fact when they failed to re-evaluate the evidence in respect of the actual sum of the appellant* is *indebted to the respondent.*

The appeal in this court was argued by Ms. Muganwa Nantenza and Co. Advocates for the appellant and Ms. Basaza Wasswa & Co Advocates for the respondent. According to the record of appeal the same counsel argued the case in the courts below.

Learned Counsel for both parties filed written submissions in this court.

In their submissions counsel for the respondent raised what appears to be a preliminarily objection regarding the competence of the instant appeal.

Counsel for the respondent contended that the appellant contravened the provisions of Order 44 rules (1) and (2) of the Civil Procedure Rules when he did not seek leave from either the High Court or the Court of Appeal against the order of the High Court, in High Court Miscellaneous

10 Application No 616 of 2007 which dismissed his application to review the judgment in HCCS No 469 of 2001.

According to counsel, obtaining leave to appeal from either the High Court or the Court of Appeal is mandatory before one can appeal against an

15 order dismissing an application for review of a judgment. Counsel contended that in the instant appeal the appellant's appeal against the order in the High Court dismissing his application No 616 of 2007 to review the judgment of the High Court was improperly before the Court of Appeal and is similarly improperly before this court. It ought to be struck

20 out under rule 78 of the rules of this court.

In addition to the written submissions which the respondent's counsel filed in this court on 27th April 2011 counsel wrote to this court on 11th May 2011 complaining that the record in Miscellaneous Application No 583 of 2008

25 which arose out of Miscellaneous Application No 616 of 2007 had been forged by counsel for the appellant. The forgery complained of is that Miscellaneous Application No 583 of 2008 was an application for stay of execution. It was not an application for leave to file an appeal and such leave was granted unopposed.

However, counsel for the appellant had filed a supplementary record in this court whereby it is purported that leave to appeal was applied for and

was granted unopposed. Respondent's counsel requested this court to compare the handwritten notes of the trial judge and the supplementary record that was filed by the appellant's counsel. By the letter from the Registrar of this court dated 17th June, 2011 handwritten notes of the trial judge in Miscellaneous Application No 583 of 2008 were put on the file of the instant appeal.

Counsel for the appellant replied to the preliminary objection to his submissions in rejoinder. Counsel contended that this appeal is properly before this court. He argued that leave to appeal was sought and obtained as indicated in the supplementary record of appeal. He argued further that the appellant was a party who had suffered legal grievance and therefore, had a right to appeal to this court according to Article 132(2)(3) of the Constitution sections 72, 73 and 74 of the Civil Procedure Act and the Judicature Act. In support of his submission he quoted the authority of

***Mohammed Vs Bukenya & Departed Asian property Custodian Board* SC CA 56/1996.**

Counsel argued further that the appeal is not only against the decision of the Court of Appeal confirming the High Court order dismissing the

application for review, but arises under R.29 of the Court of Appeal Rules the duty on the 1st appellate court to re-evaluate the evidence adduced before the trial court as stated in the memorandum of appeal. According to counsel, that is why the requirement for leave was not strictly adhered to.

Alternatively counsel argued that under Rules 78 and 98(b) of the Rules of

this court an appeal may not be opposed on grounds of procedural matters relating to failure to taking an essential step before the institution of the

appeal like seeking leave to appeal. The remedy for one who opposes the appeal for failure to take an essential step is to file an application striking out the appeal as is provided by the Rule 78 of the Rules of this court. The respondent's counsel could not raise such matters without leave of court.

I will first consider the alternative argument raised by appellant's counsel.

Rule 98(b) of the rules of this court provides:

"A respondent shall not, without the leave of the court, raise any objection to the con1petence of the appeal which might have been raised by application under Rule 78 of these Rules."

Rule 78 provides:

" A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike 20 out the notice or the appeal, as the case n1ay be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

In the instant appeal both counsel filed written submissions according to Rule 25 94 of the Rules of this court. Counsel for the respondent has raised his objection regarding the competence of the appeal. This court has perused the filed submissions and will, therefore, consider the objection.

I have carefully perused the record the law and submissions of counsel for

both counsel. During the hearing of the appeal in the Court of Appeal counsel for the respondent Ms. Basaza Wasswa raised the objection that the appeal was incompetent because counsel for the appellant had not sought leave either from the High Court or the Court of Appeal before the institutionof the appeal. The submission by counsel appears in the record of proceedings of all three Justices who heard the appeal.

In reply Mr. Ssemakula Muganwa for the Appellant submitted that they applied for leave to appeal orally though it was not captured on record. Then he continued to argue that the appeal is as of right under Order 44 Rule (1) (t) and did not have to seek for leave.

It is unfortunate that the learned Justices of Appeal did not all refer to this objection in their judgment.

A perusal of Order XLIV (1) lays down orders from which appeals may be made as of right. Rule 2 of the same order provides as follows:

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

Where application for review is rejected under Order XLVI Rule 3(1) that is not included among the orders where an appeal may be made as of right.

It is, therefore, obvious that Order XLIV Rule (1) refers to the order allowing review of the judgment and not otherwise. In case an application for the review of the judgment is refused the dissatisfied party has to seek for leave before filing an appeal.

Rule 3 provides that the application for leave must be made first to the court which made the order sought to be appealed. According to the record of appeal there is no evidence on record that an application for leave to appeal to the Court of Appeal was made in the High Court.

In this court counsel for the appellant has changed his position from the one he maintained during the hearing in the Court of Appeal. Counsel now contends that application for leave before filing the appeal was necessary and that the evidence that such leave was applied for and was granted is contained in the Supplementary Record of Appeal.

I have carefully perused the record of appeal and compared it with the supplementary record and the handwritten notes of Hon Lady Justice Stella Arach Amoko. According to the main record of Appeal, Miscellaneous

15 Application No 583 of 2008 is not included therein. What is contained therein is only the affidavit in reply by Benedict Ssekabira sworn on 19th November, 2008 replying to the affidavit of one Grace Nanteza of 31st October, 2008. In the affidavit by Benedict Ssekabira he opposes the application for stay of execution in HCCS 496/2002 and Miscellaneous Application No 616/2007.

20 In the supplementary record the actual Notice of Motion and the supporting affidavits are not included. What is contained are the court proceedings of 26 /02/09 before Hon Lady Justice MS. Arach Amoko. I have compared that with the handwritten notes of the learned judge.

25 The supplementary record reads:

"Semakula. This is an application for stay of execution of the decree in civil suit No *496 of 2001, order in Miscellaneous Application* No 616 *of 2007* ***and leave to appeal in the absence of the applicant****."*

30 The underlined words are not contained in the judge's handwritten notes. I agree with counsel for the respondent that counsel for the appellant has smuggled in this phrase so as to give an impression that leave to appeal was

applied for. It was granted unopposed. This is forgery of the court record and this court takes serious view of the same.

I am of the considered view that if the appellant's counsel had applied for leave to appeal he would have included in the supplementary record, the Notice of Motion, the supporting affidavit and the court order granting such leave. He did not do so and resorted to forging the court record so as to mislead this court. This court is not inclined to entertain an appeal where the record appears to be forged.

This court takes very serious view of such conduct by an advocate. The advocate who indulged into this unethical conduct should be reported to the Law Council for further investigations and necessary action to be taken.

Additionally, where leave is required to file an appeal such leave is not obtained the appeal filed is incompetent and cannot even be withdrawn as an appeal. See ***Makhangu Vs Kibwana*** [1995-1998]. 1 **EA** 175.

It is not a merely procedural matter but an essential step envisaged by Rule 78 of the rules of this court. I am unable to appreciate the argument by appellant's counsel that because the first appellate court failed in its duty to re-evaluate the evidence, therefore, the appeal was against the whole judgment and leave to appeal was not, therefore, necessary. If such argument were to be accepted it would make a mockery of the rules of procedure.

lam, mindful of the law that generally the court will grant leave to appeal in civil proceedings, where it appears on the face of it that

there are grounds of appeal which deserve serious consideration, see ***Sango Bay Estates Ltd Vs Dresdrer Bank A,Cr*** (1971) EA 17.

However, in the instant appeal no genuine steps were taken to apply for leave to appeal either in the High Court or in the Court of Appeal. Consequently there was no competent appeal before the Court of Appeal. Similarly there is no competent appeal before this court.

In the result I would strike out this appeal with costs to the respondent.

Dated at Kampala this 14th day of November 2011

C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT

6)

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

(CORAM: ODOKI, C.J, TSEKOOKO, KITUMBA, TUMWESIGYE AND KISAAKYE, JJ. S.C)

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[Appeal against the decision of *the Court* of *Appeal (Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine, and Kavuma J.J.A) dated 11th January 2009, in Civil Appeal No* 13 of *20091*

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned sister, Kitumba JSC, and I agree with it and the orders she has proposed.

_ As the other members of the Court also agree, this appeal is struck out with costs in this Court and the Courts below.

Dated at Kampala this . 14th day of November 2011

B J ODOKI

7) CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

CIVIL APPEAL NO.11 OF 2010

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JUDGMENT OF TSEKOOKO, JSC

I have read in draft the judgment of my learned sister, the Hon. Lady Justice Kitumba, JSC., which she has just delivered. I agree with it. I also agree that the appeal be struck offwith costs to the Respondent here and in the two courts below.

Delivered at Kampala this .....l4th .....day of November 2011

J W N Tsekooko
Justice of the Supreme Court

8)

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ODOKI, CJ., TSEKOOKO, KITUMBA, TUMWESIGYE, AND KISAAKYE JJ. SC]

CIVIL APPEAL NO.11 OF 2010

BETWEEN

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GREENLAND BANK (IN LIQUIDATION)::::::::::::::: RESPONDENT

[Appeal against the decision of the Court 0 Appeal (Mukasa-Kikonyogo DCJ, Mpagi Bahigeine and Kavuma, JJ .*A)* dated 11th February, 2009 in Civil Appeal No. 13 of 2009]

JUDGMENT OF TUMWESIGYE JSC

I have had the benefit of reading in draft the judgment of my learned sister, Hon. Lady Justice Kitumba, JSC.

I agree with the judgment and the orders proposed.

Dated at Kampala this l4th day of November 2011

JOTHAM TUMWESIGYE

JUSTICE OF THE SUPREME COURT*THE REPUBLIC OF UGANDA*

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ODOKI, CJ., TSEKOOKO, KITUMBA, TUMWESIGYE, AND KISAAKYE JJ. SC]

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JUDGMENT OF DR. E. KISAAKYE, JSC

I concur with her that this appeal has no merit and that it should be dismissed with costs in this court and the courts below.

Dated at Kampala this ..14th day of .November 2011.

DR. ESTHER M. KISAAKYE JUSTICE
OF THE SUPREME COURT