THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO.103 OF 2011

(Arising out of Civil Appeal No.45 of 2011)

Asiimwe Francis :::Appellant

VS

Tumwongyeirwe Aflod ::RESPONDENT

CORAM: HON. JUSTICE S.B.K. KAVUMA, JA

HON. JUSTICE A.S. NSHIMYE, JA

HON. JUSTICE REMMY KASULE, JA.

RULING OF THE COURT

The applicant seeks orders of this court to grant him leave to appeal to this court and also that this court validates the appeal documents he has already filed in this court under **Civil Appeal No.45 of 2011.** He deponed to an affidavit in support of the application. He premises the application on **Order 44 rules 2, 3, &4** of the **Civil Procedure Rules and Rules 40 and 53** of the **Judicature (Court of Appeal Rules) Directions.**

Legal representation:

At the hearing the applicant was represented by learned counsel Bemanyisa Adonia while Counsel Asiimwe Ahimbisibwe Anthony was for the respondent.

Background:

The applicant and the respondent were both shareholder/directors in a company: ***BITOOMA COMPLEX [1999] LIMITED*** with equal share holding. On 30.01.06 by a mutual written agreement the applicant bought out the respondent from the said company at an agreed upon sum of money to be paid in installments, the last one being payable on 31.12.2007.

The applicant failed to pay the amount as agreed and the respondent filed against him **Civil Suit No.515/2008** in the **Chief Magistrate's Court, Mengo**, for the money owing. On 05.02.08 judgement was entered in favour of the respondent against the applicant who did not appeal, or cause review or in any way challenge the said court judgement. It is only after some considerable time in 2009 that the applicant moved court through **Mengo Chief Magistrate's Court Miscellaneous Applications No.437 and 439/2009** to set aside the bill of costs so that it is taxed inter-parties and took out objector proceedings against the property attached in execution of the decree. Otherwise the applicant acknowledged and accepted to pay the decretal sum by putting forth a payment proposal which, again, he never fulfilled.

In December 2009 the respondent attached and sold in execution of the decree in **Civil Suit No.515 of 2008,** the applicant's shares in **BITOOMA COMPLEX [1999] LTD.** The purchase of the shares was registered with the Registrar of companies.

On 26.08.2010 the new shareholders took over the company's assets which comprised of a school, among others. On 01.09.2010, the applicant moved the High Court for a revision of the Chief Magistrate's Court judgement of 05.02.08 in **Civil Suit No.515 of 2008.** The revision was dismissed by Mwangutsya,J. on 04.03.2011. The applicant then lodged **Civil Appeal No.45 of 2011** to this court against the decision of the High Court dismissing the revision. The appeal was lodged without leave of the High Court as the law prescribes. Hence this application.

The issues:

The issues for resolution are:-

1. **Whether the application is validly before this court; and if so,**

2. **The remedies available to the parties.**

Submissions of Counsel:

1st issue:

For the applicant, it is submitted that though leave of the High Court was necessary to be first obtained before lodgment of the appeal in this Court, it was not mandatory to first seek this leave in the High Court. Now that the appeal is already before this court, leave can be granted by this court to the applicant. Although Order 44 Rule (3) of the Civil Procedure Rules provides that:

"Applications for leave to appeal shall in the first instance be made to the court making the Order sought to be appealed from.", the word **"shall"** herein is only directory, according to the applicant's counsel. A party should not be sent away from justice just because there is no compliance with that rule. The applicant's counsel referred court to the cases of **Kizza Besigye Vs Museveni Yoweri & Another [2001-2005] HCB Vol.3** and **Supreme Court Civil Application No.23 of 2011: NSSF VS ALCON INTERNATIONAL LTD** and urged us to allow the application.

For the respondent, it was submitted that in the absence of leave from the High Court, there was no appeal in this court and that it was mandatory of the applicant to first pursue his application for leave to appeal in the High Court before pursuing the same in this court. On the basis of the authorities of **JANMOHAMED ALIBHAI v. RAMJI AMARSHI RAICHURA: EACA CIVIL APPEAL NO.81 OF 1952, DR. AHMED MUHAMED KISUULE V. GREENLAND BANK (IN LIQUIDATION) SCCA NO.10 OF 2010, and BEATRICE KOBUSINGYE V. FIONA NYAKANA & ANOTHER, SCCA NO.18 OF 2001,** the respondent's counsel urged us to dismiss the application.

As to the **2nd issue:** Both counsel submitted that the remedies available to the parties would depend on the resolution of the 1st issue.

Resolution of the issues:

1st issue:

Order 44 rules 1 (2), (3) and (4) of the Civil Procedure Rules set out which Orders are appealable as of right to this court. An Order made in revision under **section 83 of the Civil Procedure Act** is not one of them. It follows therefore that one intending to appeal against the said Order must first seek leave of the court entertaining the revision before an appeal is lodged to this court. If the trial court denies leave, then the intending appellant can apply to the appellate court for such leave.

The issue for resolution is whether, given the wording in **Order 44 (1) (3) of the Civil Procedure Rules**, can the appellant apply for leave to appeal in the appellate court without first applying for the same in the trial court? The old view in East Africa is expressed in the decision of the then **Court of Appeal** for **Eastern Africa** in **JANMOHAMED ALIBHAI V RAMJI AMARSHI RAICHURA** (supra) where their Lordships adopted the strict approach thus:

"If we acceded to it (that is, to the application) the effect would be to give a second chance to many appellants who had failed to comply with the Rules. It is well settled law that a right to appeal can only be founded on statute and that any party who seeks to avail himself of the right must strictly comply with the conditions prescribed by the statute."

Overtime however, courts have tended to adopt a more liberal approach. While, prima facie, the use of the word **"shall"** in a statutory provision is mandatory in character, courts have held that in some circumstances all that is meant by the word is in a directory sense. Where a statutory requirement results in a sanction for non-compliance, the mandatory nature of the word **"shall"** can be drawn. But this is not the only determinant, because quite often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non-compliance. It is also not always right, to restrict the directory interpretation of the word **"shall"** to only where it is shown that interpreting it as a mandatory command would lead to absurdity or to inconsistency with some other law, or would cause injustice. There is no precedent or authority for such: See **Supreme Court Election Petition Appeal No.26 of 2007 Sitenda Sebalu V Sam.K. Njuba & Another.**

The position of the law now is that there is no rule of the thumb or a universal rule of interpretation for determining if in a given statutory provision the word **"shall"** is used in a mandatory or a directory sense: See **Edward Byaruhanga Katumba Vs Daniel Kiwalabye Musoke: Civil Appeal No.2/98 (SC)** and **Besweri Lubuye Kibuuka Vs Electoral Commission & Another, Constitutional Petition No.8/98.**

Courts have overtime developed guidelines to ascertain whether the legislature intended a particular provision of legislation to be mandatory or merely directory. See: **The Secretary of State for trade and Industry Vs Langridge [1991] 3 Aller 591** where the Court of Appeal (England) appears to have approved as the proper test of the learned author of **"SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION" 4TH EDITION 1980** that:-

"The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act."

In 2005, **the House of Lords, (Lord Steyn)** added their weight to the above approach in **REGINA VS SONEJI AND ANOTHER: [2005] UKHL 49 (HK publications on Internet);** asserting that:

"……the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly taken to have intended total invalidity."

The above was also the view of the Australian High Court as expressed in **PROJECT BLUE SKY INC. VS. AUSTRALIAN BROADCASTING AUTHORITY [1998] 194 CLR 355.**

The **Uganda Supreme Court** adopted and applied the above approach in the **SITENDA SEBALU VS SAM.K. NJUBA & ANOTHER ELECTION PETITION APPEAL NO.26 OF 2007.**

We accordingly apply the same principles to this application. In our considered view it is necessary that the trial court that handled the revision is the first one to express itself as to whether or not there are any matters, whether of law or fact, that deserve to be addressed by the appellate court in the intended appeal. While a party, should in the normal course of things, not be prevented from pursuing an appeal, it is also necessary to put in place mechanisms that prevent intended abuse of court process.

In this particular application, the applicant did not challenge the judgement entered in the **Chief Magistrate's Court of Mengo Civil Suit No.515 of 2008 on 05.02.08** until after more than three years later on 01.09.2010 when he resorted to a Revision in the High Court. This was dilatory conduct on the part of the applicant. Because of inaction on the part of the applicant, the decree holder enjoyed the fruits of the decree, without being stopped, and it will cause injustice to him now for court to undo what has been done in satisfaction of the decree in the said suit.

We also hasten to add that it is not open to a party to avoid a particular court like the applicant did in this case, because, according to him [paragraph 5 of his supporting affidavit]:

" 5. That from the nature of the judge's ruling I was strangely convinced that he was unlikely to grant me leave to appeal than this honourable court."

The law required the applicant to first have made his application to the trial judge and he should have done so inspite of his self confessed strange conviction that the learned trial judge was not likely to grant him the leave he needed. Thereafter, if the same had been refused, then he should have come to this court.

We accordingly hold that this application is not validly before us.

As to the **2nd issue**: the remedy is that this application ought to be dismissed by reason of its being incompetent.

In conclusion, we dismiss this application with costs to the respondent.

We so order.

Dated at Kampala this…**14th** ….day of……**June**……..**2012**.

S.B.K. Kavuma
JUSTICE OF APPEAL

A.S. Nshimye
JUSTICE OF APPEAL

Remmy Kasule
JUSTICE OF APPEAL