**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA**
**HOLDEN AT MBALE**

**HCT-04-CV-CA-0027-2013**
**(ARISING FROM KAPCHORWA CIVIL SUIT NO. 15 OF 2012)**

**ARAPYONA SALIMO AUGUTINE ::::::::::::::::::::::APPLICANT**

**VERSUS**

1. **BARAWA GENERAL AGENCIES**
2. **SANDE ISAAC**

**T/A BARAWA GENERAL AGENCIES:::::::::::::::::: RESPONDENTS**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

The applicant moved this court by Notice of Motion to grant orders that:

1. The applicant be granted leave to appeal against Kapchorwa Chief Magistrate's Court ruling in Misc. App. 17/2012.
2. Costs.

The grounds were that:

a) There are serious and arguable matters which merit consideration on appeal.
b) Application bears substantial questions of law, which deserve the consideration of the appellate court.
c) The applicant has a bonafide and arguable case on appeal.
d) The applicant is not guilty of dilatory conduct.
e) It is in the interest of justice that application is granted.

The application is supported by the affidavit of **Arapyona Salimo Augustine**.

The application is opposed by the Respondents; on grounds contained in the affidavit of **Sande Isaac**.

It was argued for applicants by Ms Jingo, Sempijja & Co. Advocates that application be granted on reasons contained in their written submission.

Respondent's counsel Kob Advocates in reply raised a preliminary objection on three points of law which I will first determine as herebelow:

**1. Time barred**

The Respondent's counsel was of the view that the application was time barred. He argued that Section 220(4) of the MCA, requires appeals of this nature to be made within a period of 14 days from date of first refusal by the Chief Magistrate. The matter in issue having been dismissed on 5th December, 2014, and applicant having filed this application on 13.2.2013, the same was out of time.

He relied on ***Kitariko vs. Twino Katama (1983) HCB 97***, to propose that rules of court must prima facie be obeyed. He argued that article 126 (2) (e) was not available to cure the said irregularity.

In response, the respondents argued that the arguments were misleading, because the application is under O.44 r. 2 and 3 of the Civil Procedure Rules, not section 220 (4) of the MCA. He argued that the order of the Chief Magistrate was not an appellate order envisaged under section 220 (4) MCA for which time was limited.

I have examined the application.
It is an application brought under O.44 r (1) (e), (3), and (4) of the Civil Procedure Rules.
The provisions of O.44 r. (2) are that:

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

The above provisions arises from the fact that the order appealed is not appealable as of right under O.44 r. 1 of the Civil Procedure Rules.

I therefore agree with the arguments by applicant's counsel that the application was not brought under section 220 (4) and is therefore not subject to time frames stated thereunder. The application is in time, because it originated from the Chief Magistrate's original jurisdiction, not her appellate jurisdiction.

**2. No order extracted**

Respondent's counsel referred to section 220 (1) (a) MCA to argue that appeals from Grade I and Chief Magistrate's Courts lie from decrees and orders to the High Court. He argued that no such order was extracted. He referred to ***Yona Yakuza v. Victoria Nakibembe (1988-90) HCB 138*** to argue that:

> "*Failure to extract a formal decree before filing the appeal was a defect which goes to the root of the jurisdiction of the court and could not be waived.……*"

Respondents argued that this argument concerns appeals and did not cover applications for leave to appeal. I do not agree with respondents that in view of the provisions of O.44 r. 2 of the Civil Procedure Rules no order was necessary. The wording of Rule 2 of O.44, refers to "Appeals laying from any other "order" or "order" of the court to which an appeal would lie." An order was necessary but not mandatory. According to the **Uganda Civil Justice Bench Book, at page 370** extraction of a decree is a good practice but not a mandatory requirement. This was the position in ***Henry Kasambwa v. Yakobo Rutarihamba HCCA No. 10 (1989),*** and ***Nawemba Suleiman v. Bwekwaso Magenda (1989) HCB 140***.

In view of the above position this objection is not sustained.

**3. Improper application and abuse of court process.**

This ground is not grounded on any justifiable argument. The procedure adopted by applicants is not an abuse of court process as it is provided for under O.44 r. 2 of the Civil Procedure Rules. This position is also the position in ***GM Combined (U) Ltd v. A.K. Detergents (U) Ltd CA No. 23 of 1994***, and ***Asiimwe Francis v. Tumugyeire Aflod CA. MA. 103/2011*** (unreported),

> "*that one intending to appeal against an order must first seek leave of the court which entertained the said order, before an appeal is lodged. If the trial court denies leave, then the intending appellant can apply to the appellate court for such leave*."

This ground is therefore moot.

Regarding the merit of the application, it is trite law as held in ***Sango Bay Estates Ltd v. Dresdner Bank [1971] EA 17***, that leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration.

These positions were also articulated in ***James Bunwa v. Byayeshbaho (1976) HCB 224***;

> "*The power to grant leave to appeal is restricted to matters involving a substantial question of law or where the decision to appeal against appears to have caused a substantial miscarriage of justice. Before leave is granted these two conditions must be fulfilled by the grounds on which leave to appeal is sought. This leave to appeal can be granted for consideration of a limited question only*."

I have looked at the pleadings, supporting affidavits and the submissions.
Regarding the question of triable issues, the affidavit of the applicant mentions in paragraph 8, 9, 10, 11, 12 and 13 that, he intends to appeal the decision, where there are triable issues, on a question of law, and that the denial to appeal caused him injustice.

I have perused the lower court's Ruling 'A' from which it was found that applicant's intended appeal has triable issues.

These same issues have been reiterated by applicant's counsel in submission relating to questions intended to be determined on appeal.

These are:

1. That a point of law as to whether striking out the affidavit of the 2nd Respondent would have an impact on applicant's application.
2. A point of law whether the learned trial Magistrate exercised her jurisdiction judiciously when she ordered the applicant to deposit 30 million shillings in court as security within 10 days before filing the defense.

3. The point of fact and law in respect to evaluation of evidence to support her order to furnish 30 millions within 10 days as condition to file his defense.

Counsel relied on the case of ***Kundalal Restaurant v. Devshi & Co. [1952] 19 EACA 77 (CA-K)*** to argue that they have a defence which is not a sham. Also relied on ***Mbogo v. Shah (1968) EA 98***, to make claim to a need for the court to interfere in the exercise of discretion by the Chief Magistrate on grounds that under paragraph 4, 7, 8, 9,10, 11 of applicant's affidavit it is shown that the learned trial Magistrate did not exercise her discretion judiciously.

He further argued that the appeal was brought under section 220 (1) (a) MCA not section 220 (1) (c) requiring proof of a question of law.

In their rejoinder respondents opposed all the above; and argued that the application does not merit the standard of proof set out in the Sango Bay case (supra). They argued that learned trial Magistrate acted within her discretion and judiciously. They referred to paragraph 5, 6, and 7 of the affidavit in reply and argued that there is no merit in the application; and it should be dismissed.

I have found that according to the Ruling of the learned trial Magistrate which gave raise to the application for leave to appeal annexed as 'A' to the application the trial court found that the applicant is entitled to defend the suit, since he raised triable issues and also raised a good defence to the same. The court also used its discretion and ordered a conditional grant of leave to defend.

The facts as shown in the above discourse are satisfactory of the standard required of an intending appellant as per the Sango Bay case.
This applicant has come to court with a grievance against the conditional grant of leave to defend. He has demonstrated that he has triable issues. He has shown that he is not before court on a frolic, but to seek justice; against what he considers an injudicious use of discretion. He has raised question of law and questions of mixed fact and law arising out of the said decision. I am satisfied that the standards necessary in these types of cases as discussed in ***SANGO BAY ESTATES LTD*** (supra) to the effect that:

> *" leave will be granted where "prima facie it appears that there are grounds of appeal which merit serious judicial consideration*."

And in the case of ***James Bunwa V. Byayeshbaho (1976) HCB 224*** that before leave is granted the decision appealed should be shown to have raised a substantial miscarriage of justice, are proved.

The learned trial Magistrate's order to grant conditional leave to defend in the view of the applicant is injudicious. It needs an appellate consideration for which I would grant leave in this matter.

For reasons I have stated, I do allow this application. Costs will abide the main cause. Applicant is granted leave to appeal as prayed. So it be.

**Henry I. Kawesa**
**JUDGE**
**11.11.2016**

Appeal be prosecuted within 30 days from now.

**Henry I. Kawesa**

**JUDGE**

**11.11.2016**