THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 811 OF 2018
(ARISING FROM MISCELLANEOUS APPLICATION NO. 209 OF 2018)
(ARISING FROM CIVIL SUIT NO. 335 OF 2017)

1. KINTU PAUL NICHOLAS
2. ATUMUHAIRE ELIOTT :: APPLICANTS

VERSUS

1. TATA UGANDA LIMITED
2. SHALENDRA KUNDRA :: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicants brought this Application by Notice of Motion under Order 44 rules 1(1), (2), (3) and (4) and Order 52 rules 1, 2 and 3 of the CPR seeking orders that;

a) The Applicants be granted unconditional leave to appeal against the learned trial Judge's refusal to strike out the Respondents' invalid defence despite admission of counsel and unjustified apportioning of blame to court clerks.

b) The costs of the application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deposed by **Kintu Paul Nicholas**, the 1st Applicant. Briefly, the grounds are that the Applicants are dissatisfied with the learned trial Judge's refusal to strike out the Respondents' invalid WSD which was filed out of time. The deponent stated that the Respondents' lawyers failed to file the WSD within the statutory fifteen days after service and filed it on 28th September 2017 yet the time had expired on 26th September 2017. He stated that when the application came up before the learned trial Judge on 6th December 2017, the Respondents' Counsel admitted filing the defence out of time and gave evidence from the bar purporting to blame her clerk; which the

Court allowed and further ordered for transfer of the file to Industrial Court. He concluded that the failure by the trial Judge to properly exercise her discretion by allowing an invalid defence on record without lawful justification is an arguable point on appeal and the intended appeal has high chances of success.

[3] The Respondent did not file an affidavit in reply despite evidence of service of court process. At the hearing, the Applicants were represented by **M/s Aler & Co. Advocates**. Neither the Respondents nor any representative appeared in Court. The Court directed Counsel for the Applicant to make written submissions which were duly filed and have been taken into consideration in the determination of the matter before the Court.

Issue for Determination by the Court

[4] One issue is up for determination by the Court, namely; **Whether the application discloses any grounds for grant of leave to appeal?**

Submissions

[5] Counsel for the Applicants cited the case of *Spear Motors Ltd v Attorney General & 2 Others, HCCS No. 692 of 2007* to the effect that leave to appeal will be allowed where there is a prima facie case that there are grounds of appeal that merit judicial consideration; or that the intended appeal has reasonable chance of success; or if the decission sought to be appealed conclusively determines the rights of the parties. Counsel submitted that the Applicants intend to appeal against the ruling of the trial Judge which allowed the Respondents to file their defence outside the mandatory 15 days, which raises a substantial question of law, to wit; whether it was procedurally right for the trial Judge to allow the Respondents to file their WSD out of time without any application for extension of time. Counsel submitted that the matter of whether the trial Judge properly exercised her discretion is a matter worthy of consideration by the appellate court.

[6] Counsel argued that the Respondents ought to have applied for extension of time and proved grounds such as mistake of former counsel and that the Respondents' counsel having admitted to filing the defence out of time, the court was obliged to enter a default judgment in favor of the Applicants. Counsel further argued that there was no legal justification for the Court to reward the Respondent with the privilege of entertaining the offending WSD. Counsel prayed that the Court finds that the intending appellants have proved all the required grounds for grant of leave to appeal against the ruling of the trial Judge.

Determination by the Court

[7] The legal requirement to seek leave before a party can prefer an appeal against an order of the High Court to the Court of Appeal is derived from the provision under Order 44 rule 1(2) of the CPR. Whereas rule 1(1) thereof lists down orders against which a party is allowed to appeal as of right, Sub-rule 2 provides that an appeal 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 order sought to be appealed from herein is not one of the orders listed under sub-rule 1, thus the need for the Applicants to seek leave. The rationale for the requirement to seek leave of the court before a party can appeal in certain cases is premised on the need to check unnecessary and/or frivolous appeals. See: *Lane v Esdaile (1891) AC 210 at 212* and *Exparte Stevenson (1892) 1 Q.B 609*. It is also based on the general rule that, in as much as possible, appeals should arise from final decrees and orders of courts and not interlocutory orders. See: *Incafex (U) Ltd v Kabatereine (1999) KALR 645*.

[8] The test for grant of an application for leave to appeal to the Court of Appeal was succinctly put by SPRY V.P in the leading case of *Sango Bay Estate Ltd & Others v Dresdner Bank A.G [1971] EALR 17 at 20* thus;

"As I understand it, 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 but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out".

[9] The law, therefore, is that while 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, in cases where the order sought to be appealed from was made in the exercise of a judicial discretion, a rather stronger case will have to be made out by the applicant. As such, an applicant seeking leave to appeal must show that the intended appeal has a reasonable chance of success or that he or she has arguable grounds of appeal or some compelling reason as to why the appeal should be heard. See: *Degeya Trading Stores (U) Ltd v Uganda Revenue Authority, CACA No. 16 of 1996* and *Musa Sbeity & Another v Akello Joan, HCMA No. 249 of 2018*.

[10] On the case before me, the Applicant intends to appeal against the decision of the trial Judge refusing to strike out a defence allegedly filed out of time by two days and without leave of the Court. Counsel for the Applicants argues that the WSD was invalid for having been filed out of time and faults the learned trial Judge for not striking it out. Under Order 8 rule 1(2) of the CPR, where a defendant has been served with summons under the Rules, he or she shall, unless some other or further order is made by the Court, file his or her defence within fifteen days after service of the summons.

[11] According to the court record, the Respondents were served with summons to file a defence on 11th September 2017 and filed their WSD on 28th September 2017. The 15 days, having started running on the 12th day of September 2017,

expired on 26th September 2017. The defence was filed two days later on 28th September 2017. The Court, however, exercised discretion to ignore the late filing by two days and validated the WSD that was on record. It is that exercise of discretion that the Applicants are presently seeking to challenge by way of appeal to the Court of Appeal. It is clear to me that the Court is given wide powers to extend time set by the rules. Under Order 51 rule 6 of the CPR, it is provided as follows;

> *"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order".*

[12] The above provision does not prescribe that the Court cannot extend time on its own motion or in its own discretion. The provision actually states that the court may extend time even where the application for such extension is not made until after the expiration of the time appointed or allowed. It is not specifically prescribed by the rule that any application for extension of time must be by way of a formal application; meaning that the court may be moved during a proceeding challenging the late filing and the court may allow to enlarge the time as the justice of the case may require. It is clear in the instant case that the Court exercised discretion endowed to it under the law and no prima facie case has been disclosed that the discretion was not exercised judiciously.

[13] Furthermore, being alive to the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the

process of the court under Section 98 of the Civil Procedure Act; the power to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it under Section 33 of the Judicature Act; and the constitutional dictate under Article 126(2)(e) of the Constitution to administer substantive justice without undue regard to technicalities; I do not see how the trial Judge would have decided otherwise in the circumstances. As such, I find no ground disclosed by the Applicants showing either that the intended appeal has a reasonable chance of success or that the Applicants have any arguable points on appeal that merit serious judicial consideration or some compelling reason as to why an appeal should be preferred.

[14] In the circumstances, the Applicants have failed to satisfy the Court that any ground exists warranting being granted leave to appeal against the decision of the trial Judge to the Court of Appeal. I find no merit in this application and the same is accordingly dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered by email this 22nd day of February, 2024.

Boniface Wamala
JUDGE