IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODER, J.S.C. & PLATT, J.S.C)

CIVIL APPLICATION NO. 23/94

BETWEEN

G.M.COMBINED (U) LIMITED:: APPLICANT

AND

A.K. DETERGENTS (U) LIMITED :::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the Order of the High Court at Kampala (J.W.N. Tsekooko. J), dated 11/7/1994).

HIGH OOURT CIVIL SUIT NO.348 OF 1994

RULING OF THE COURT:

High Court Suit NO. 2348 of 1994 was brought by .GM. combined (U) Ltd. against A.K. Detergents (U) Ltd. seeking to set aside the sale of the Plaintiff's property to the Defendant. The P1aintiff (whom we will call "G.M.C" for convenience) had borrowed money from the Uganda Development Bank and the Development Finance Company of Uganda, on the strength of debentures. It is said that 'G.M.C. defaulted in repaying these loans, so that under their debentures, the creditors had the power to sell, and did sell property of G.M.C. to A.K. Detergents (U) Ltd. (we shall refer to the Defendant as A.K.D"). G.M.C. considered that the sales to A.K.D. were invalid and sued to set aside certain sales of movable and immovable property.

A.K.D. retaliated by taking out a chamber summons under Order 23 Rule 1 of the Civil Procedure Rules and section 4 of the Companies Act, seeking an order that G.M.C. give security of costs which might be incurred by A.K.D in the suit.

The learned Judge, who heard the application, granted it and ordered security on term, that security should be provided in the sum of Shs. 50 million in 90 days, with all proceedings stayed in the meantime. This order was delivered on 11th July, 1994.

Mr. Kabenge and his client G.M.C. thought the order was wrong, and Mr. Kabenge rose to apply for leave to appeal. He stated that he did so under Order 4 rule 2 of the Civil Procedure Rules. Mr. Mubiru for A.K.D opposed this informal application for leave to appeal. He sated that the issues involved were "big" so that there should be a formal application. This submission appealed to the learned 4udge who set out his views as follows:-

> "There has grown up some practice for seeking leave informally. This of course loses sight of O.40 Rule 1(4) of the Civil Procedure Rules which appears to be mandatory. In view of the fact that the informal application has been opposed, and since O.40 Rule 1(4) of the Civil Procedure Rules, requires this type of Motion, the informal application is refused."

Unfortunately, the learned Judge had not allowed Mr. Kabenge to reply to the arguments of Mr. Mubiru. Mr. Kabenge ought to have been allowed to explain his application fully since he had merely applied for leave. Apparently Mr. Kabenge was overwrought and walked out. He then brought the present motion on 25th July, 1994, seeking leave to appeal from this Court. .

At the hearing of this present simple application, which one might have thought would take only a few minutes, Senior Counsel Mr. Mulenga proposed two preliminary points. The first was that the Uganda Development Bank, the Development Finance Corporation of Uganda and the Receivers should be joined. We need not dwell at length on this point, because in the end, by striking out all references to these Institutions and persona, the application was withdrawn.

The second point, and the one which has raised a great deal of learning, is that Mr. Kabenge ought to be made to follow the Judge's ruling, and apply formally for leave first in the High Court. His informal application being incompetent is no application at all. He must be made to abide by Order 40 rule 1(4) of the Civil Procedure Rules, which provides as follows:-

"(4) application for leave to appeal shall be by motion on notice."

Rule 39(a) of the Rule of the Supreme Curt gave the learned Judge the discretion to order a formal application to be made, even though it provides for an informal application. As Mr. Kabenge applied under Order 40 rule 2 of the civil Procedure Rules, it was said; he was bound by Order 40 rule 1(4), and could not rely upon Rule 39(a) of the rules of the Supreme Court. As Mr. Kabenge had insisted upon Order 40 that appeared to Mr. Mulenga to allow him to distinguish the decision in SANGO BAY VS. Dredner Bank (l97l) E.A. 17.
At least, at first sight, that decision seemed to be entirely against Mr. Mulenga and in favour of Mr. Kabenge, but Mr. Mulenga submitted that it must be distinguished.

The central point of the dispute is whether Order 40 rule 1(4) controls the procedure when applying for leave, or whether rule 39(a) of the Supreme Court Rules controls the application. Rule 39(a) is in conflict with Order 40 rule 1(4) and provides as follows:-

"39 (a) where an appeal lies with the leave of the superior court, application for such leave say be made informally, at the time when the decision against which it is desired to appeal is given or by motion of chamber summons according to the practice of the superior court, within fourteen days of such decision."

Mr. Kabenge was misunderstood, it seems when he is alleged to have said that he was applying under Order 40 rule. 2. That rule says:-

"2. The Rules of Order XXXIX shall apply so far as may be, to appeal from orders,"

That had nothing to do with the application Mr. Kabenge was making. He was, of course, explaining that the order made by the learned Judge Under order 23 Rule 1 of the Civil Procedure Rules was not an order from which as appeal lay as of right Under Order 40 Rule 1(1), but lay with leave of the Court Under Order 44 Rule 1 (2) of the

Civil Procedure Rules. It says

> "(2) an appeal under these rules shall not lie from any other order save with leave at the Court making the Order or of the Court to which an appeal would lie if leave were given."

That is then the fundamental rule**,** which caused Mr. Kabenge to apply for leave to appeal. Then Order 40 rule 1(3) requires the application to be made in the first instance to the High Court.

However, there is one significant fact still to be considered, and that is that Mr. Kabenge applied informally at the end of the ruling. That was not sanctioned by Order 40 rule 1 (4). Was Mr. Kabenge then entirely wrong to do so? No, he was not. He had the authority of Rule 39(a) of the Supreme Court Rules to do so. The situation which suddenly developed was that Mr. Mubiru asked for a forma1 application, and the Judge relied upon Order 40 rule 1(4), without giving Mr. Kabenge the chance to oppose Mr. Mubiru and point to Rule 39.

It has been emphasised that Mr. Kabenge only relied on Order 40. That seems unfair. All he did was to point to the authority, which required leave to appeal. He was not asked for authority on which he could rely to apply informally.

It is plain that Rule 39(a) and Order 40 rule l(4)are substantially in conflict, But this conflict was resolved as long ago as 1971 by the Court of Appeal for East Africa in SANGO BAY Ltd vs. Dresdner Bank (1971) E.A. 17 where at p.20 Spry V.P made the following observations:-.

> "The first ground on which this application is based is that the Judge erred in rejecting the informal application for leave to appeal made immediately after delivery of the main order. He based his decision on O.40 rule 1(4), but rule 23 of the East African Court of Appeal Rules, 1954, expressly allows informal

application. Formerly, this position was that the Court of Appeal Rules had effect as if contained in the Order in Council which empowered them and therefore prevailed, as regards procedural matters, over municipal legislation.
Now, as regards Uganda, their authority depends on section 43 of the Judicature Act, I967, and it seems to me that having been expressly preserved by an Act later in date than the Civil Procedure Act and Rules, they must continue to prevail. I think therefore that the Judge was wrong to treat the informal application as incompetent."

That opinion applies with the same force today as it did in 1971. It has never been doubted and we propose to follow it. It is quite clearly on all fours with the present case and there is no ground distinguishing it from the alleged nature of the application. The ruling of the learned Judge was substantially a serious misdirection, since Mr. Kabenge was entitled to side-step Order 40 Rule 1(4) and rely upon Rule 39(a) of the Supreme Court rules, to make an informal application.

It is said that nevertheless, the Judge had a discretion to order a formal application. With respect, that is not the real point. The party applying f or leave has in the first instance the choice, whether to apply informally at the time of delivery of Judgment or Order, or making a formal application later. What is involved in that choice? If the party has instructions to appeal, he may without incurring any coats, apply informally at once. Indeed, this Court has had occasion to encourage advocates, to be prepared in advance of delivery of Judgment or Ruling, with instructions whether or not to appeal. If instructions are received, no further waste of time and money will occur. If however, the position is not clear and the advocate needs further instructions, then he may apply later by a motion or notice. Initially therefore, the choice of procedure is open to the party who wishes to appeal. Nor is it open to the Respondent to insist on a formal application. His duty is to resist leave being granted upon the merit of decision. As Spry V.P. pointed out in the SANGO BAY case (supra) at p.20:-

"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 hill have to be Made out."

It was obvious that at least the amount of security merited serious consideration. That being so, whether or not Mr. Mubiru opposed the informal application, it was the duty of the learned Judge to inquire what grounds there were on which the appeal would be taken. If, ha, the grounds were insubstantial, the learned Judge might refuse leave, or call for a formal application. However, in the circumstances which faced the Judge in the present case, the issues were simple and there was no need to call for a formal application. Indeed had the learned Judge not misdirected himself, the learned Judge would have been able to deal with the application at once and his misdirection entitles this Court to reconsider the manner in which his discretion was exercised.

The rule is that if the High Court has refused leave to appeal on a proper application, or on what the High Court considers a doubtful application, but one which should have been entertained, it is taken that the High Court has refused leave, and that an application may be made to the Appellate Court. That is precisely the point made in the Sango Bay Ltd where the application ought to have been heard. This Court has had occasion to point that out fairly recently. Accordingly, we hold that the preliminary point should be dismissed and that the matter should proceed to hearing on the merits.
The preliminary point occupied several hours and the proposer should lose the costs of that hearing, and that of the adjournment, if any, which followed. This order must be understood to stand in any event.

There is one further point which should be made, concerning the citation of the law under which the informal application was made. Much was made of the reference to Order 40 Rule 2. As we have pointed out, that was a misunderstanding for Order 40 Rule 1(2). But supposing that a wrong citation of the case is made, is it really the best opinion which would lead to limiting or striking out, that application on that basis alone? In times past, applications were either headed or were implied to have been headed; under such and such law "and all such powers thereunto enabling." Is it really, the position in Uganda today, that when a power which is not cited, is well-known or ought to be well-known, that the matter may not be put right, in such a way as not to cause embarrassment or prejudice to the other side? If, of course, such prejudice cannot be avoided; there may be a case for limiting, striking out or

dismissing the application. But, in generals the matter should be put right, on the ground that the profession, both Bench and Bar, is not giving the parties concerned their best consideration, if ignorance of the law affects a party adversely.

Delivered at Mengo, this 5th day of October 1994

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

H.G. PLATT
JUSTICE OF THE SUPREME COURT.