

UGANDA / JUDGMENT

Kagoro v Jotena and Another (Miscellaneous Application 1985 of 2022) [2022] UGHCCD 302 (12 December 2022) [2022] UGHCCD 302

COURT

HC: Civil Division (Uganda)

BEFORE

Asiimwe, J

CASE / FILE NUMBER

Miscellaneous Application 1985 of 2022

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO.1985 OF 2022 ARISING FROM
MISCELLANEOUS APPLICATION NO.942 OF 2022**

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KAGORO EPIMARC

APPLICANT

VERSUS

1. JOTENA

..... RESPONDENT

**2. EDWARD NSUBUGA..... BEFORE THE HON. MR. JUSTICE TADEO
ASIMMWE RULING:**

Background:

This an application brought by way of notice of motion under Section 98 of the Civil Procedure Act and Order 44 Rules 2, 3 and 4 of the Civil Procedure Rules seeking for orders that leave be granted to the applicant to appeal the court's ruling in Miscellaneous Application No.942 of 2022 arising from High Civil Court Suit No.943 of 2022 and that costs of the application be provided for.

At the hearing, the applicant was represented by Counsel Kamusiime Bright while the 2nd respondent was represented by Musa Nsimbe. The first respondent never participated in the matter.

Grounds for the application:

The grounds for the application are briefly stated in the application but are further expounded in the affidavit in support of the application sworn by Kagoro Epimac, the applicant.

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In summary the grounds are that the applicant is aggrieved by the ruling of this Honorable Court made in High Court Miscellaneous Application No. 942 of 2022 pending determination of Miscellaneous Application No.943 of 2022 which further arises from civil suit no.59 of 2010. That the decision of court in Miscellaneous application No. 942 of 2022 where the application was dismissed is not appealable as of right hence the need for leave in this application.

Both advocates were directed to file submissions which they did.

Counsel for the applicant submitted relying on the affidavit of the applicant that the applicant has arguable grounds which she intends to raise on appeal as she believes it has a likelihood of success in the Court of Appeal and as such wishes to be allowed to exercise her right of appeal in the circumstances. He cited a number of authorities to support his position including the case of Sango Bay Estates Ltd and Others v Dresdner Bank [1972] EA 17 where caught considered similar application for leave to appeal.

He further argued that the learned trial judge while dismissing the application for stay relied on lack of a pending appeal which needs to be interpreted by the appellate court to pronounce itself on the same to avoid rendering appeal nugatory.

He further argued that the applicant still has pending misc. applications which have an effect to this application and that this application has been filed without delay and therefore the applicant is not guilty of dilatory conduct.

On the other hand, counsel for the second respondent argued that there are no grounds to grant leave to appeal since there are no substantial questions of law to be decided by the appellate court. He further argued that this court rightly found that the costs of the subject of the application for stay of execution had not been appealed against by the applicant. Secondly that the arrest of the applicant could not prevent the respondent from executing

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his decree in HCCS No.59 of 2010. In any case these are two different matters in his view.

Counsel referred to the case of Herbert Sekandi t/a Land order developers Vs crane Bank Ltd HCMA No. 44 of 2007 where court guided that what amounts to a question of law is that the issue raised or involved is one of general principle which is yet to be decided for the first time or where the question involved is one upon which further argument

of a superior court would be to public advantage.

That the applicant has not disclosed in his application that the questions of law involved are indeed ones of general principle that are to be decided for the first time. Leave should therefore be denied.

He concluded by opposing the prayer for stay of execution arguing that a similar application was determined by this court and there are no new grounds raised.

Resolution:

I have had the opportunity to consider both the pleadings, the affidavits for and against this matter and the submissions of parties, and wish to state that both lawyers have ably argued for their respective sides and raised the relevant issues. However, the applicant's counsel included an additional prayer for stay of execution under M. A no 942 of 2022.

I wish to state that this Court pronounced itself on the issue of stay of execution between the parties which is a subject of these proceedings where the applicant is seeking leave to appeal. Therefore this court still stands by its earlier decision delivered on 24th October 2022 as no new grounds have been cited. Accordingly, the prayer for stay in this matter is not granted. I will now proceed to deal the issue of leave.

Order 44 Rule 2 of the Civil Procedure Rules provides that an appeal under these rules shall not lie from any other order except with the leave of the court making it a precondition for a to seek for leave to appeal an

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order of such nature to the court which issued the order before a party may seek to for orders before the court which an appeal would lie if leave were not given.

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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. Further in the case of Herbert Sekandi t/a Land Order Developers v Crane Bank Ltd HCMA No 44 of 2007 court held among others that an applicant for leave to appeal to the Court of Appeal must show that the application for leave to appeal bore substantial questions of law to be decided by the appellant court and that the intended appellant has a bonafide and arguable case on appeal with what amounting to a question of law is that the issue raised or involved one of general principle which is to be decided for the first time or where the question is one upon which further argument and a decision of the superior court would be to the public advantage.

From the submissions of the applicant the major contention is that the court in its ruling of the 24th day of October 2022 made a finding denying the applicant stay of execution for which he was dissatisfied hence this application on grounds of lack of a pending appeal. In counsel's view this is an arguable ground of appeal for he maintains that existence of an appeal is not a requirement for grants of stay of execution.

In such applications, the applicant must clearly show the grounds upon which he or she intends to appeal and must further illustrate the likelihood of success of such an application on appeal by laying out those grounds. It's not enough for an applicant to aver that one is aggrieved with a decision of the court as it were for that would not suffice with this being the position taken by the court in the case of *Alley Route Ltd v Uganda Development Bank Ltd* H. C. M. A No 634 of 2006 while citing with approval the view held by the court in the case of *Degeya Trading Stores (U) Ltd v URA CACA* No 16 of 1996 for it was noted that an applicant

seeking leave to appeal must show either that the intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct. In this application under paragraph 9 the applicant raises arguable grounds which merit appellate consideration.

Therefore, it is the considered view of this court that the applicant has satisfied the requirements for this court to exercise its discretion and grant the applicant leave to appeal its earlier decision.

That being the case, it is the finding of court that the application has merit and the same is hereby granted by giving leave to the applicant as prayed for.

No order as to costs **HANNAMA TADEO/ASHMWE JUDGE** 12/12/2022.

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