

UGANDA / JUDGMENT

Omayya v Elijo and Another (Miscellaneous Application No. 44 of 2021) [2023] UGHCCD 80 (31 March 2023)

[2023] UGHCCD 80

COURT

HC: Civil Division (Uganda)

BEFORE

Serunkuma, J

CASE / FILE NUMBER

Miscellaneous Application No. 44 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

LAND DIVISION

MISC. APPLICATION NO.044 OF 2021

[ARISING FROM MISC. APPLICATION NO.0032 OF 2019]

[ARISING FROM CIVIL APPEAL NO.0024 OF 2018]

and

(From the judgement and orders of the Chief Magistrate's court of Nebbi at Nebbi in Civil Suit No. 028 of 2011 delivered on 14th December, 2017.)

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$\vdash$ ===== $\stackrel{\star}{=}$ APPLICANT OMaya John Samson
=====

VERSUS

ELIJO ODONGWUN 1.

OWONDA JUSTINO $\$=\$ 2.\$$

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BEFORE: Hon Justice Isah Serunkuma**RULING**

This application is brought under Order 44 Rule (1), (2), (3) & 4 and Order 51 and 52 of the Civil Procedure Rules, SI 71-1 and Sections 76(1) and 98 of the Civil Procedure Act for orders that;

- 1) Leave be granted to the applicant to appeal to the court of appeal against the ruling/order/ decision of the High court in Miscellaneous Application No.0032 of 2019 delivered on the 7th day of May, 2021.
- 2) Costs of the application be provided for.

25 Background

The applicant filed Civil Suit No. NEB OOCV-CD 0028 of 2011 against the respondents jointly and severally for a declaration that he is the rightful owner of the suit land, declaration that the respondents are trespassers, a permanent injunction and costs of the suit. The suit was heard interparty and decided in favor of the respondents on the 14th day of December, 2017 with costs.

On the 28th day of August, 2018 the applicant filed a notice of appeal against the said orders. 30

The applicant on the 16th day of September, 2019 then filed Miscellaneous Application No.0032 arising from Civil Appeal No. 0224 of 2018 for orders that the applicant be granted leave to appeal out of time and that the notice of Appeal and memorandum of Appeal filed by the applicant be deemed to have been filed within time and costs of the application. The application was dismissed with costs to the respondent on the 7th day of May, 2021 thus the current application.

The applicant laid out grounds in support of his application in his affidavit in support of this application and are briefly as follows;

- 1) That the applicant was the applicant in Miscellaneous Application No.0032 of 2019, which was dismissed by this honorable court on grounds that the application had no merit.
- 2) That the applicant has at all material times since the ruling been desirous of appealing against the ruling/order.
- 3) That the applicant has a high chance of winning the appeal if given an opportunity.
- 4) That the applicant's advocate has taken a diligent step to bring the application within reasonable time, immediately after instruction.

In opposition to this application the respondents separately filed their affidavits in reply though I found content to be the same and stated summarily as thus;

- 1) That in 2011 the applicant filed a suit against me and the 2nd respondent at Nebbi Chief Magistrates Court vide land case N0. NEB - 00 - CV - LD - 0028 - 2011 in respect of the suit land.
- 2) That judgment was delivered on the 14th day of December 2017 in favor of the respondents. (Copy of the decree was attached).
- 3) That the applicant did not take any steps to promptly challenge the decision but waited for nearly two years on the 28th of August 2018 when he lodged a notice of appeal and about a year later, he filed an application in this honorable court for leave to appeal out of time.
- 4) That the learned judge found no merit in the application and dismissed the same with costs to the respondent.
- 5) That the respondent was informed by his lawyers that the mere fact that the applicant does not have an automatic right of appeal against the dismissal of his

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application and that the intended appeal concerns land and has a high likelihood of success is not a sufficient ground for granting him leave to appeal against the rejection of his application for leave to appeal out of time.

- 6) That the applicant has not advanced any ground upon which this court can exercise its discretion to grant him leave to appeal to court of appeal.
- 7) That the said application does not have merit and is a waste of time and resources, an abuse of court process, brought in bad faith in attempt to prolong litigation that had long been concluded and the parties peacefully and quietly enjoying their respective portions of suit land.

10 Representations.

Counsel Komakech Dennis Atine of M/S Legal Aid Clinic – ULS represented the applicant while Counsel Pirwoth Micheal of M/S Donge & Co. Advocates represented the respondents. Both parties didn't file their submissions despite being given timelines to do so. In the result court decided to enter a ruling basing on the available affidavits from both parties.

15 According to the affidavit, the applicant is seeking leave to appeal to the court of appeal against his application in which he was seeking for validation of his notice of appeal and extension of time within which to appeal that was dismissed for lack of merit by this honorable court.

In his current affidavit in support of this application under paragraphs, 3 & 4 the applicant states that since the ruling he has always been desirous of appealing against the decision and that he has taken reasonable steps to ensure the application is filed on time.

An order granting leave to appeal to the Court of Appeal is a discretionary one and so an interlocutory appeal there from cannot succeed simply because the appellate court might have reached a different conclusion. The applicant ought to know that at one moment litigation comes to an end.

\$25\$ The appellate court will only interfere with the exercise of that discretion in very exceptional circumstances to prevent miscarriage of justice. In cases where the question relates only to exercise of discretion (not law) just like in this application leave should generally be refused.

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In the case of *Olweny & Ors v Oyoo & Ors* (Civil Appeal no. 0032 of 2018) [2020] UGHC169(27 February 2020) it was stated that;

"The interlocutory appeals provisions under Order 44 of the CPR were enacted precisely so that difficult legal issues of significant importance could receive appellate consideration before conclusion of trial.

$\$S\$$ The regime for interlocutory appeals was not designed against routine procedural and evidentiary rulings, not determinant of the rights of the parties made in the ordinary course of a trial."

According to the affidavit in support of this application the applicant did not raise any question of law. Therefore, allowing such a litigant to go on to the court of appeal would be promoting abuse of court process. Given the fact that court cannot facilitate an illegality once the same has been brought to its eyes this application is hereby dismissed with costs to the respondents for lack of merit.

I so order.

Dated and Delivered this 31st Day of March 2023

Isah Serunkuma

JUDGE

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