**THE REPUBLIC OF UGANDA**

**IN THE HIGH COPURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**MISCELLANEOUS APPLICATION NO.2 OF 2012**

**(Arising out of Misc. Application No. 616 of 2007)**

**(Arising out of High Court Civil Suit No. 469 of 2001)**

**DR. SHEIK AHMED**

**MOHAMMED KISUULE:::::::::::::::::::::::::: APPLICANT/ DEFENDANT**

**VERSUS**

**M/S GREENLAND BANK LTD**

**IN LIQUIDATION::::::: ::::::::::::::::::::::::::::RESPONDENT/PLAINTIFF**

**BEFORE THE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This is an omni-bus application by notice of motion brought under Order 44 rules 1,2,3 & 4 and Order 51 rule 6 of the Civil Procedure Rules (CPR), sections 96 & 98 of the Civil Procedure Act (CPA), section 33 of the Judicature Act, and Article 126(2) (e) of the Constitution of Uganda.

It is for orders:

1. That the applicant be granted extension of time within which to lodge his application for leave to appeal against the decision of Stella Arach-Amoko, J (as she then was) in Misc. Application No. 616 of 2007, delivered on 24/10/2008.
2. That the applicant/defendant be granted leave to appeal the said decision.
3. That cost of this application be provided for.

The grounds of the application are set out in the affidavit of the applicant and the salient grounds are contained in the Notice of Motion. The brief grounds are that the applicant has sufficient reasons for his inability to lodge his application for leave to appeal within the prescribed period namely:-

* His successive lawyer’s error of judgment, lapses or sheer ineptitude.
* The applicant having been sued in this court for recovery of the sum stated in the application judgment was passed erroneously against him on 3/10/2005.
* The applicant sought for a review of that judgment on the grounds that he had found a new and important matter of evidence which he could not produce at the time of the trial.
* The letter had confirmed that the interest on the loan in issue had been frozen but the applicant’s application was erroneously dismissed on the 24/10//2008.
* The applicant’s former lawyers through error of judgment out rightly appealed the said decision to the Court of Appeal and later to the Supreme Court without applying for leave to appeal.
* The applicant’s subsequent appeal was dismissed for being incompetent for lack of leave.
* The applicant maintains he has an arguable case worth considering on its own merit.

An affidavit in opposition to the application was sworn by Mr. Benedict Sekabira in his capacity as the Director Commercial Banking at Bank of Uganda (BOU) and the agent of BOU in charge of liquidation of the respondent bank.

He deposed among other things that the applicant had not shown sufficient cause to be granted the order sought for extension of time. Further that there was inordinate delay in bringing this application and coupled with the fact that the applicant has since filed ten different miscellaneous applications to delay justice, it is not only prejudicial to the liquidation process of the respondent bank but is a mockery of justice and the judicial process in this country. He also deposed that this application is frivolous, offends the legal principle that there must be an end to litigation and the intended appeal has no likelihood of success.

An affidavit in rejoinder was sworn by the applicant to rebut what was stated in the affidavit in reply.

At the hearing of this application the applicant was represented by Mr. John Mary Mugisha and the respondent by Mrs. Patricia Basaza Waswa. Mr. Mugisha commenced his submission by justifying the omni-bus manner in which this application was brought. He relied on the authority of ***Magemu Entreprises v******Uganda Breweries Ltd C.S No. 462 of 1991 at page 7*** to the effect that an omin-bus application of this nature is possible where the applications are of the same nature and one supersedes the other. Thus it is for expeditious disposal of matters and for avoidance of multiplicity of suits.

He then prayed to be allowed to argue the applications concurrently in an omni-bus manner and for counsel for the respondent to respond in the same way as the grounds are intertwined. Counsel for the respondent did not oppose that prayer and it was granted.

Counsel for the applicant relied on the affidavit in support of this application and submitted that the grounds of the intended appeal are that:

1. The learned trial judge erred in law and fact when she dismissed the applicant’s application for review on the basis that it had no merit.
2. She erred in law and fact when she failed to consider the letter dated 14/07/1998 when hearing the application for review on the ground that the said letter was suspect.
3. The learned trial judge erred in law and fact when she failed to evaluate the evidence on record and chose to believe the respondent’s case and not the applicant.

He contended that the intended appeal raise several points of law which need to be resolved by the court of appeal namely;

1. On which party is the burden of proving the assertion of forgery of the alleged new evidence discovered in an application for review?
2. What are the parameters upon which the learned trial judge is supposed to exercise his/her discretion for purposes of granting an application for review?
3. Whether the appellate court can interfere with the discretion of the learned judge in the circumstances.
4. Whether the trial judge exercised her discretion judiciously.
5. Whether the applicant’s application did not satisfy conditions sine qua non for granting such application.
6. To what extent can a trial judge evaluate evidence before him or her while entertaining an application for review?

He argued that there is no dilatory conduct on the part of the applicant who promptly instructed his former lawyer to take an appropriate action immediately the decision was handed and so the lapse or error of judgment of applicant’s former lawyer should not be visited on him. He contended that the applicant stands to suffer irreparably if this application is not allowed while on the other hand the respondent will suffer no prejudice.

He submitted that the affidavit in reply by Mr. Benedict Sekabira does not rebut in material particular the affidavit in support of this application as it did not negative the ineptitude of the applicant’s former lawyers which is the cracks of the applicant’s case. Further that it neither proved non-existence of sufficient cause on which this application is buttressed nor specifically countered the points of law which the appellate court is going to address. Further still that it did not disprove the existence of the salient grounds of appeal and there is no iota of evidence that the intended appeal is a sham.

Counsel for the applicant contended that this application does not offend the principle of finality in as much as the applicant was denied his last opportunity to have his matter determined on merit by the highest court in the land. Further that this application is not intended to make a mockery of justice but intends to address and redress the gross injustices the applicant has suffered because of his successive lawyer’s negligence. He submitted that the applicant should not be a victim of his lawyer’s ineptitude because he had no hands in how they handled his matter as he trusted their professionalism.

As regards extension of time, he relied on the case of ***Mulowooza &******Brothers Ltd v N. Shan******and Co. Ltd. S.C.C A. No. 20 of 2010***where it was held at pages 6 & 7 that what constitutes sufficient cause/reason includes mistakes and lapses by counsel. He submitted that this authority is applicable to the instant case where the former lawyers knew that they had to seek leave but did not do so.

He also referred to the case of ***Julius Rwabinumi v Hope******Bahimbisomwi S.C.C.A No. 14/2009*** where it was held at page 8 that it would be a great injustice to deny an applicant such as this one, to pursue his rights of appeal simply because of the blunder of his lawyers when it is well settled that an error of counsel should not necessarily be visited on his client.

He further relied on the case of ***Yowasi Kabiguruka v Samuel Byarufu C.C.A No.******18 of 2008***, where it was held that once a party instructs counsel , he assumes control over the case to conduct it through out, the party cannot share the conduct of the case with his counsel.

He concluded that as regards the first leg of this application, the applicant had proved why he did not file the application in time. He prayed that this court exercises its discretion in the applicant’s favour and grants him chance to belatedly file his application for leave to appeal.

As regards the application for leave to appeal, he submitted that the leading authority is the case of ***Sango Bay Estates Ltd and Others v Dresdner Bank A.G******[1971] E.A 70*** where it was held that the key test is whether there is an arguable case. Further that this holding was followed in the case of ***G.M Combined v A.K Detergents S.C.C.A******23/94 at page 67*** as well as in ***H.M Nsamba & Sons Ltd v Mpoza Muhammed******and Others C.A No.******41 of 2001***.Further that it was also followedin ***Charles Sempewo and 134 others v Silver Springs Hotel (1969) Ltd C.C.A No. 103/03***. He also referred to ***Tusker Mattresses (U) Ltd v Royal Care Pharmaceuticals******C.A No.******258/2001*** where this court applied these tests although that application was not successful.

He submitted that the applicant has satisfied the test namely; that there are arguable grounds of appeal which the affidavit in reply did not rebut or even trivilise. He concluded that all the rules and provisions under which this application was brought have been fully satisfied and prayed that court finds this as a fit and proper case to exercise discretion in favour of the applicant to grant his omni-bus application with costs to be borne by the respondent who took advantage of the applicant’s injustice.

Counsel for the respondent in rebuttal to the submissions, relied on the affidavit in reply. She pointed out that the arguments of counsel for the applicant on leave to appeal were made out of context and undertook to draw the arguments into their proper context in her reply. She contended that the argument on the extension of time in her humble view was secondary to the argument for leave to appeal. She stated that she would dwell more on the primary aspect of leave to appeal.

She then submitted that it was the position of the respondent that the applicant does not have an arguable case and the grant of this application cannot be justified. She referred to paragraphs 3 and 5 of the affidavit in reply and submitted that the applicant did not have a right of appeal against the decision dismissing the application for review.

Further that those are the dictates of Order 44 rule 1 (2) and (3). For the applicant to get leave to appeal following that order, he had to satisfy the test under Order 46 rule 3 (2) which is to the effect that for an application for review where the applicant is relying on the ground of new matter of evidence which the applicant alleges that was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, such allegation had to be strictly proved.

In the application for review, that is, Misc. Application No. 616/2007 against which the applicant seeks leave to appeal, the applicant relied on that ground that he had discovered a letter that is attached to the affidavit in support of that application as annexure “E”. She argued that in accordance with the provisions of Order 46 rule 3 (2) the applicant had to strictly prove that that letter was new evidence which he failed to do and the trial judge found that it was not new evidence.

She submitted that the question before this court now is, “whether there is an arguable case that merit consideration by the appellate court”. She contended that the position of the respondent is that the applicant has failed to show that there is arguable case and that all the points raised in paragraphs (vi) & (vii) of the application and paragraphs (20) and (21) of the affidavit in support are misconceived.

She referred to the case of ***Venonah Margaret Bray v Raymond Jack Bray [1957] EALR 302*** which is to the effect that the court hearing an application of this nature should look at the ruling of the trial judge to assess whether there is an arguable case. She then referred to pages 18 and 19 of the ruling of the trial judge sought to be appealed against and submitted that in paragraph 4 on page 18 the judge quoted the testimony of the applicant where he stated in the last line that ***“the bank did not waive interest”*** and on page 19 where the judge again quoted the applicant in the 1st and 2nd paragraphs that; ***“They did not communicate to me, but in my belief there should be a record of what took place”***. ***“I do not have my communication that my request was not accepted”***.

She argued that annexture ”E” to the application was a letter of 24/7/1998 that was discovered almost two years after judgment and it states in the 2nd paragraph that the bank accepted to waive interest which is contrary to the applicant’s testimony in court. Further that the existence of the letter was also contrary to what the applicant told court in his oral testimony that the bank did not communicate to him. She contended that on that basis clearly the applicant has no arguable case and prayed that this court finds that it will serve no purpose to grant this application as no sufficient cause has been shown.

As regards the timing of this application, she submitted that this application has come with an inexcusable/inordinate delay as it ought to have been made in 2008 after the court’s ruling. While she agreed that it is settled law that the mistake of counsel should not be visited on his client, she prayed that this court consider the fact that the respondent is in liquidation. Further that the original case was filed in 2001 and for the last 11 years this matter has been in Court this being the 11th application with two appeals and in all these the applicant has been unsuccessful.

She concluded that all these are prejudicial to the respondent in terms of astronomical costs of litigation and delay in the time it is taking for the Central Bank to finalise its liquidation process. She prayed that this application be dismissed with costs and the prolonged litigation is put to an end since it is only intended to delay the course of justice.

Mr. Mugisha in a brief rejoindercontended for the applicantthatcounsel for the respondent misdirected her submission to the merits of the case by submitting as though she was arguing the appeal itself thereby delving on what should be reserved for the Court of Appeal to determine. He maintained that there are many arguable issues that merit consideration by the appellate court.

On the submission that this application is delaying the liquidation process by the Central bank, he submitted that it was mere speculation as no evidence was produced from the Central Bank to that effect. He reiterated his earlier submission that the applicant had made out his case on both applications and prayed that the omni-bus application be allowed with costs.

I have looked at the notice of motion and the supporting affidavit as well as the affidavit in reply and that in rejoinder. I have also heard the submissions of both counsel and looked at the authorities relied upon. As regards the first leg of this application, the issue is whether the time within which the application for leave to appeal should be filed can be extended in the circumstances of this case.

Order 51 rule 6 under which this application was brought gives this court 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. This application was brought after three years of expiration of the time appointed. The circumstances that gave rise to this delay was explained in the application and the supporting affidavit and submitted upon by counsel for the applicant.

Counsel for the respondent did not quite address court on this first leg of the application apart from submitting that there was inordinate delay that is affecting the liquidation process of the respondent bank. She did not address court on whether or not the reason given for the delay is sufficient to warrant grant of the application for enlargement of time.

For the applicant, it was submitted at length how he instructed lawyers to handle his case and due to their mistake, ineptitude and or/error of judgment they appealed out-rightly without first seeking leave of court. The principle that mistake of counsel should not be visited on a litigant as stated in many authorities was relied upon to make a case that the applicant should not be penalized for the mistake/ineptitude of his lawyers. Many authorities to that effect were provided and I must commend counsel for doing so.

I agree with counsel for the applicant that indeed the circumstances under which there was delay in bringing this application cannot be blamed on the applicant who had instructed lawyers to handle his case. The blunder of appealing without first seeking leave was made by the applicant’s professional advisors to whom he had entrusted the conduct of his case.

In the case of ***Yowasi Kabiguruka*** (supra) the Court of Appeal referred to its earlier decision in the case of ***Hajati Safina Nababi v Yafesi Lule, Civil Appeal No. 9 of 1998*** where it had held inter-alia that; *it is axiomatic that a party instructs counsel, he assumes control over the case to conduct it through out, the party cannot share the conduct of the case with his counsel. He must elect either to conduct it entirely in person or to entrust it to his counsel.*

The rational for this principle was stated by Oder, JSC while giving its background in the case of ***Banco Arabe Espanol v Bank of Uganda SCCA No. 8/1998 [1997-2001] UCL 1***,to the effectthat:-

*“The question of whether an “oversight”, ‘mistake”, “negligence”, or “error”, as the case may be, on the part of counsel should be visited on a party the counsel represents and whether it constitutes “sufficient reason” or “sufficient cause” justifying sufficient remedies from courts has been discussed by courts in numerous authorities. Those authorities deal with different circumstances; and may relate to extension of time for doing a particular act, frequently in cases where time has run out;……. But they have a common feature whether a party shall, or shall not, be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default of his professional advisor or advisor’s clerk.”*

Clearly, as seen from that background, the principle was developed in the interest of substantive justice and its rationale is that a litigant should not be permanently deprived of the right of putting forward his case by reason of the default of his professional advisor or advisor’s clerk. Litigants do not have control on how the instructions they give to their advocates are carried out because the latter as legal experts/professional advisors are presumed to know the law, procedures and practice of court. It is therefore logical that where the advocate blunders in carrying out the instructions the innocent litigant is not made to suffer the consequence of that blunder.

In the instant case, the applicant’s advocates were better placed to know the mandatory requirement for leave to appeal since there was no automatic right of appeal given by the law. Their failure to apply for leave caused the delay in bringing this application since the appeal that was filed without leave first went up to the Supreme Court which then ruled that the appeal was incompetent due to lack of leave. It was only then that the applicant got to know that this application was necessary in the first place and immediately filed it though belatedly.

In the circumstances, I find that there was sufficient ground for failing to bring the application in time as the reason for delay cannot be blamed on the applicant. In the result, I will grant the first leg of the application and it is accordingly granted by enlarging the time for filing the application for leave to appeal. Since the application for leave to appeal has already been argued concurrently with the one for enlargement of time, I now proceed to consider it.

The principle upon which leave to appeal can be granted was stated in the cases that counsel for the applicant relied upon. In ***Sango Bay Estates Ltd & Others*** (supra) ***Spry V.P***. stated at page 40 that:

*“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”*.

The Supreme Court of Uganda referred to that principle in ***G.M. Combined (U) Ltd*** (supra)and it was subsequently followed in many other cases that include ***Alley Route*** ***Ltd v UDB HCMA No 634 of 2006 (2),*** ***Degeya Trading Stores (U) Ltd v Uganda Revenue Authority, Civil Application No. 16 of 1996*** and those cited by counsel for the applicant as already indicated above.

Applying that principle to the instant case, the applicant must show that prima- facie there are grounds of appeal which merit serious judicial consideration. I do not think this requires considering the merits of the intended appeal or its chances of success, but I believe it would suffice if the applicant shows that there are arguable grounds of appeal worth considering by the appellate court. This was the holding in ***Charles Sempewo and 134 others*** (supra) where the Court of Appeal held that in an application of this nature, it is not necessary to consider the merits of the intended appeal or the chances of success on appeal.

Counsel for the applicant has raised three grounds of the intended appeal and formulated some questions for consideration by the appellate court. He argued very strongly that those grounds are arguable and prayed that this court finds so since the appeal is intended to address and redress the gross injustices the applicant has suffered because of his successive lawyer’s negligence. Indeed I agree with him that the appeal raises some questions of law as formulated that merit consideration by the appellate court.

At this juncture, I wish to observe that the circumstance of this application is quite unique in that it was brought after the 1st appeal to the Court of Appeal and 2nd appeal to the Supreme Court were declared incompetent by the Supreme Court for lack of leave to appeal. I am mindful that the original suit from which this application arose was filed in 2001 and there have been several applications since then. As submitted for the respondent, there is no doubt that justice for the respondent/plaintiff has been delayed for eleven years and it is likely to be delayed further if this application is granted. But as for the contention that this case is delaying the process of liquidating the respondent bank, I agree with counsel for the applicant that the respondent did not adduce any evidence from Bank of Uganda to prove that this was the only case delaying that process. I therefore have no basis for finding so.

On the other hand, I am also mindful that justice is not only for one party. I believe that a court of law must ensure that justice is done to all the parties to before it. Even though one party will ultimately lose, there should not be an excuse that an opportunity to exhaust all the appeal process was denied especially where the intended appeal passes the test discussed above. Counsel for the applicant has pleaded that the applicant should be granted an opportunity to present his case to the highest court in the land so that it is heard on its merit. Surely, that is a cry for justice that this court cannot turn a deaf ear to in the circumstance of this case.

While I am sympathetic with the respondent for the length of time this matter has taken in court, I feel inclined to grant this application so that the applicant can be given a chance to present his case as craved. I believe the applicant is prepared to face the consequences, in terms of accrued interest, damages and costs in the event that he does not become successful after exhausting all the judicial process.

In the circumstances, the second leg of this application also succeeds and accordingly, leave is granted to the applicant to appeal against the decision of Stella Arach-Amoko, J (as she then was) in Misc. Application No. 616 of 2007 delivered on 24th October 2008.

As regards the costs of this application, section 27 (1) of the CPA gives this court discretion to determine by whom it should be paid. Order 51 rule 6 under which time was enlarged also gives this court power to determine the terms of enlargement of time, if any, as the justice of the case requires. I believe those terms may include costs. Much as the applicant is the successful party in this application, the justice of this case requires that costs shall not follow that event. To my mind, it would be unfair to award costs against the respondent who did not in any way contribute to the bringing of this application. In the circumstances, I exercise my discretion to award costs of this application to the respondent.

In the result, both legs of the omni-bus application are granted and costs are awarded to the respondent.

I so order.

Dated this 20th day of April 2012

………………………………

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.00pm before Mr. John Mary Mugisha for the applicant and Mr. Sam Ogwang holding brief for Mrs. Patricia Basaza Waswa for the respondent. Both parties were absent.

**JUDGE**

**20/04/2012**