REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KATUREEBE, CJ.; ARACH-AMOKO, TIBATEMWA-EKIRIKUBINZA, BUTEERA, J J. S.C. TUMWESIGYE; AG. JSC)

CIVIL APPLICATION NO: 18 OF 2016

BETWEEN

KASOMA FRED :: APPLICANT

AND

SEMBATYA JAMES ::::::::::::::::::::::::::::::RESPONDENT

RULING OF THE COURT

This is an application by way of Notice of Motion brought under rules 2 and 39 (1) of the Judicature (Supreme Court Rules) Directions for orders that: -

1. A certificate of importance to appeal to the Supreme Court be granted to the applicant.

2. Costs of the application abide the result of the appeal.

The facts giving rise to the application as accepted by the Court of Appeal are as follows:

The respondent worked in Japan doing odd jobs commonly known as "kyeyo". He bought a number of vehicles including two lorries the subject of this application. He bought them from a company known as Three Star Trading Company. He obtained original receipts of the two vehicles as chassis No. F.K 337K – 40135 and F.K 17 – 5072 as proof of purchase. He kept the said two vehicles with one Sadako Iwamoto, the director of Car Staff Company. The respondent was deported back to Uganda leaving his cars in Japan. He requested his friend Sewanyana who was going to Japan to check on his vehicles at the Car Staff Company. He gave him photocopies of the receipts and logbooks.

Sewanyana did not find the vehicles. He found out that the director of Car Staff Company had disposed of the vehicles and had changed the frame of the vehicles and their chassis

numbers. The respondent with that information reported the theft of his cars to Interpol (police) in Kampala.

The vehicles were later found in the possession of the applicant and impounded by police. The applicant stated that he had bought the two vehicles from Car Staff Company Ltd in Japan and brought them to Uganda. The respondent successfully filed Civil Suit No. 35 of 2010 in Nakawa Chief Magistrate's Court for the recovery of the vehicles. Being dissatisfied with that decision, the applicant appealed the decision in the High Court which also held against him. The applicant then filed a second appeal in the Court of Appeal which also dismissed it.

Being dissatisfied with the decision of the Court of Appeal, the applicant filed Misc. Application No. 199 of 2015 in the Court of Appeal for a certificate of importance to be able to file a third appeal to this court. However, before the Court of Appeal could hear and determine the above-mentioned application, the applicant filed this application for a certificate of importance.

The grounds of the application in the notice of motion were framed by the applicant as follows:-

1. That the applicant filed Civil Appeal No. 78 of 2011 in the Court of Appeal which was dismissed with costs as a second appeal.

2. The applicant wishes to appeal on important questions of law to the Supreme Court.

3. The applicant has filed a Notice of Appeal arising out of Civil Appeal No. 78 of 2011.

4. The applicant had applied for a certificate of importance in the Court of Appeal but it was not granted.

5. The application was brought without delay.

The Motion is supported by the affidavit of the applicant, sworn on the 10th day of November, 2016 where he avers, among other things, that it was a matter of great public importance for this court to determine the question of jurisdiction for the trial of this matter that arose in Japan but was tried in Uganda.

Presentation

At the hearing of this application, Mr. Omongole Richard appeared for the applicant whereas the respondent was unrepresented. The respondent was also not in court. The court allowed the application to proceed ex parte. Counsel for the applicant adopted his written submissions and also orally addressed the court.

Counsel for the applicant's submissions

Mr. Omongole Richard, counsel for the applicant submitted that the law permits an applicant whose application for the grant of a certificate of importance has been denied in the court of appeal to make the same application in the Supreme Court. He relied on rule 39(1) (a) & (b) of the judicature (Supreme Court Rules) Directions. He submitted that this is a proper case for the grant of the said certificate based on paragraphs 7 of the applicant's affidavit in support of the application which states that the learned justices of the Court of Appeal did not perform their duty as required by law leading to a miscarriage of justice.

He relied on the case of **Ongom John Bosco vs. Uganda** Criminal Appeal No. 21 of 2007, and **Bogere Moses vs. Uganda** SCCA No. 1 of 1997 to argue that the Court of Appeal was obliged to question the findings of the trial court and the first appellate court because there was no evidence on record to support the findings of both courts.

Counsel went on to highlight the findings of the Court of Appeal regarding the issue of ownership of the vehicles stating that the court was wrong to find that the suit vehicles were obtained illegally or through conversion since there was no evidence on record to that effect and more so that the international police had cleared the applicant of theft and yet the basis of the respondent's suit was theft. He thus argued that the Court of appeal failed in its duty as the 2nd appellate court to re-evaluate the evidence on record.

Counsel also argued that the issue of jurisdiction of the trial court constituted a matter of great public importance warranting the grant of a certificate of importance. He stated that the Court of Appeal erred in finding that the learned appellate judge did not err in finding that there was no failure of justice in having the matter

heard in Uganda rather than Japan. He submitted further that this conclusion was reached in total disregard of section 215 (4) of the Magistrates Courts Act cap 16 which requires that in matters arising out of contract, the case has to be tried where the cause of action arose.

Resolution

Whether this court has jurisdiction to entertain this application.

Section 6(2) of the Judicature Act, Cap. 13 provides;

"Where an appeal emanates from a judgment or order of a Chief Magistrate or a Magistrate grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, **a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard".**

(Emphasis mine)

However, the procedure for bringing a third appeal to this court is governed by Rule 39(1) of the Judicature (Supreme Court Rules) Directions which provides as follows:

"Application for certificate of importance or leave to appeal in civil matters.

In civil matters-

(a)Where an appeal lies if the Court of Appeal certifies that a question or questions of great public importance arise, application to the Court of Appeal shall be made informally at the time when the decision of the Court of Appeal is given against which the intended appeal is to be taken; failing which a formal application by Notice of Motion may be lodged in the Court of Appeal within fourteen days after the decision, the costs of which shall lie in the discretion of the Court of Appeal; and

(b)If the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of the sub rule, an application may be lodged by Notice of Motion in the court within fourteen days

after the refusal to grant the certificate by the Court of Appeal for leave to appeal on the ground that the intended appeal raises one or more matters of great or general importance which would be proper for the court to review in order to see that justice is done." (Emphasis mine)

It is clear from the above quoted rule that the application for leave to appeal has to be made to the Court of Appeal first and only when the Court of Appeal refuses to grant the certificate should the application be brought to this Court.

In the instant case, the applicant filed an application for a certificate of importance in the Court of Appeal, however, before the application was fixed for hearing, he filed another application for the same in this court. He later withdrew the application for the grant of a certificate of great public importance in the Court of Appeal.

Part of the record of proceedings in respect of applicants application in the Court of Appeal reads as follows:

"Mr. Omongole

Most obliged. My lords in light of the circumstances I apply to withdraw this application without any orders as to costs.

Justice Kakuru

This application is dismissed having been withdrawn, we make no order as to costs."

Therefore, the application was withdrawn by counsel for the applicant and not refused by the Court of Appeal. The applicant swore an affidavit in support of the notice of motion and in paragraph 6 thereof he stated: "**That I first applied for a certificate of importance in the Court of Appeal but the said court rejected the appeal**." This obviously is not true. The same false claim is repeated in the applicant's counsel's written submissions. We take great exception to the conduct of counsel who drew the appellant's affidavit and applied to withdraw the application and therefore clearly knew what the true position was.

This application therefore infringes r. 39 (1) (b) of the Judicature (Supreme Court Rules) Directions which prescribes when an application for a certificate of importance should be lodged in this court. We find the argument by counsel for the applicant that the Court of Appeal delayed to fix a date for hearing the application and that therefore this amounts to refusal by that court to hear the application ingenuous because as a lawyer he should know that procedure is laid down by law to be followed and not to be circumvented by contrived excuses.

Similarly the suggestion by counsel for the applicant that this court had granted stay of execution without the Court of Appeal first entertaining the application for stay of execution and that therefore the same should apply to an application for a third appeal to be filed in this court cannot stand because the rules governing stay of execution are not the same as rules for application for a third appeal. The former is governed by Rule 6(2) (b) of the Supreme Court Rules whereas the latter is governed by Rule 39(1) of the same. Therefore on this ground alone this application fails.

There is yet another ground in respect of which this application would not succeeded either. In an application for a third appeal the applicant must show that the intended appeal raises a question or questions of great public or general importance.

The alleged question of great public or general importance which the applicant claims to arise in the appeal, and which allegedly was not properly handled by the trial court is that the case should have been tried in Japan and not in Uganda.

The applicant does not show how the trial court mishandled the question of jurisdiction in this case. There is no record of proceedings or judgment relating to the trial of this matter for this court to decide whether the matter of jurisdiction was raised in the trial court and if so, how the court considered it. This court cannot decide whether a question of great importance arises without reading the court record of the trial court.

Counsel for the applicant himself cited s.216 of the Magistrates Courts Act which states:

"No objection as to the place of suing shall be allowed on appeal unless the objection was taken in the court of first instance and unless there has been a consequent failure of justice."

How does the applicant through his counsel expect this court to know that the applicant raised objection concerning the place of suing without showing this court the record of the trial court?

It is not enough for the applicant to state that a question of great public or general importance arises without showing the court how it arose. The court will not depend on mere claims of the applicant. The court must be satisfied through the reading of the court record and those of subsequent appellate courts that indeed the question was raised in the trial court and that it was not properly handled. Mere allegations by the applicant that there is a question of great public or general importance will not suffice.

Therefore, since the applicant failed to attach the trial court's and appellate court's record for this court to properly consider the matter, this application must equally fail on this ground.

In the result, this application fails and is accordingly dismissed with costs.

Dated at Kololo this January .....7th.....of .....Feb.....2019

Bart M. Katureebe

CHIEF JUSTICE

Stella Arach

JUSTICE OF THE SUPREME COURT

Tibatemwa.

Lillian Tibatemwa-Ekirikubinza

JUSTICE OF THE SUPREME COURT

Richard Buteera

JUSTICE OF THE SUPREME COURT

Jotham Tumwesigye

AG. JUSTICE OF THE SUPREME COURT