THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 110 OF 2018

(ARISING FROM MISC. APPLICATION NO. 497 OF 2015)

(ARISING FROM MISC. APPLICATION NO. 01 OF 2015)

(ARISING FROM MISCELLANEOUS CAUSE NO. 187 OF 2014)

1. **PROF. DDUMBA SSENTAMU**
2. **PROF. MUKADASI BUYINZA**
3. **MAKERERE UNIVERSITY--- APPLICANTS**
4. **PROF. OKELLO OBURA**
5. **DR. GEORGE W. KIYINGI**

VERSUS

PROF. ELISAM MAGARA……………………………………………….. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for extension of time within which to seek leave to appeal and also seeking leave to appeal against the ruling of this Court in Miscellaneous application No. 497 of 2015 brought under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 44 rules 1, 2 ,3 &4 and Order 52 rules 1 & 3 of the Civil Procedure Rules.

The applicants have filed this joint or omnibus application to extend the time within which to file an application for leave to Appeal and also leave to appeal against the ruling of court delivered on the 29th day of September 2017.

The applicants were represented by *Ms Aida Wada* and the respondent was represented by *Dr James Akampumuza*. In the interest of time court directed the counsel for both parties to file written submissions.

The main grounds for this application are set out in the notice of motion and briefly are that;

a) The court delivered part of the said ruling on 28th September, 2017 without pronouncing itself on the orders sought by the respondent and counsel for the applicants, (the respondents in the said application) could not make an informal application for leave to appeal the partial ruling.
b) On 19th December 2017 the trial Judge informed counsel for the parties that the complete ruling in the said ruling would be delivered on 5th February, 2018 but of the said date no such ruling was delivered by court and counsel for the applicants picked a complete ruling dated 28th September, 2017 from the clerk to the Trial judge.
c) The applicants were prevented by sufficient cause from filing an application for leave to appeal in time.
d) The applicants have filed a Notice of Appeal against the said ruling.
e) The applicants' intended appeal has reasonable chances of success.
f) The applicants have valid grounds of appeal which merit serious judicial consideration.
g) The pending appeal involves substantial sums of public funds which are gravely contested by the Applicants.
h) The pending appeal involves questions of great and/ or general importance.
i) The application has been brought without undue delay.

This application was supported by an affidavit of *Anyuru Simon Kanyonga* which set out in full details the basis of the said application. It was also supplemented by the affidavits of *Aruho Kenan* and *Prossie Katongole Kyazze*.

The respondent filed any affidavit in reply to this application and vehemently opposed the application on main ground that the court delivered the ruling on 28th September 2017.

The facts upon which this application is premised are set out in the affidavit of *Anyuru Simon Kanyonga* as hereunder;

- The court delivered part of the said ruling on 28th September, 2017 without pronouncing itself on the orders sought by the respondent and but had found the applicants to be in contempt of the Court Orders by their failure to lift the respondent's suspension from his service with the 3rd applicant.
- The judge informed the counsel for the parties including myself that a complete ruling with the said orders was to be delivered on notice. And the Court fixed the main cause for hearing on 21st November 2017 at 11:00am.
- The applicants' lawyers filed a Notice of Appeal against the said partial ruling under which the applicants were found to be in contempt and also filed a letter addressed to court requesting for a typed and certified copy of the entire court record.
- The said Notice of Appeal was served and letter requesting for proceedings were served on the respondent's Lawyers M/s Akampumuza & Co Advocates who scribbled on the said notice and letter the following words: "*Salvo jure" No Order is served"*
- On 19th December 2017 the trial Judge informed counsel for the parties that the complete ruling in the said ruling would be delivered on 5th February, 2018 but on the said date no such ruling was delivered by court and counsel for the applicants picked a complete ruling dated 28th September, 2017 from the clerk to the Trial judge.
- That in the said ruling the court made the following awards in favour of the respondent
    - a) General damages of Ug shs 250,000,000/=
    - b) Exemplary damages of Ug shs 317,545,020/=

c) Half salary arrears from the date of issuing the order till the date of the ruling; and full salary from the date of the ruling until determination of the main application;
d) Reputational damages in the sum of Ug shs 50,000,000/=

- That on 22nd February, 2018 counsel for the applicant wrote a letter to the University Secretary Makerere University demanding for payment of the said sums set out in the order.
- That the respondent extracted the order on 14th February 2018 and filed it in court for signing and served it along with the letter dated 22nd February 2018.

The respondent's counsel raised some preliminary objections to the application under the following heads;

No appeal lies against the Interlocutory Orders

The respondent's preliminary objection on this point is that the applicants filed a Notice of Appeal and letter requesting for the typed proceedings before court had granted them the leave to appeal.

The Court of Appeal in the case of ***Kampala Pharmaceutical Industries 1996 Ltd vs Ushillano Gallibhai Court of Appeal Civil Application No. 39 of 1997***, held that failure to obtain leave before lodging the Notice of Appeal where an appeal lies only with leave is not fatal to the Notice of Appeal. Leave may be obtained before or after lodging the Notice of Appeal.

Lack of Jurisdiction owing to unpurged Contempt of Court.

Incompetent application based on lies and contemptuous scandalizing of court.

The respondent's contends that the applicants have re-enacted facts by alleging that the court delivered an incomplete ruling in which she delivered an incomplete ruling.

It is the finding of this court that the Learned trial judge indeed delivered an incomplete ruling 28th September 2017 and the final and complete ruling was delivered on 5th February 2015. I'm buttressed by the fact that the respondent as

the successful party extracted the said Order on 14th February 2018 and filed it in court on 21st February 2018 as can be seen on the stamp of the cashier. The respondent also wrote a letter to the 3rd applicant on 22nd February 2018 attaching the said order. Therefore it cannot be that the ruling had been delivered on 28th September 2017 but the respondent decided to inform the 3rd applicant after about 5 months later on 22nd February 2018.

The applicants were found guilty of Contempt of Court and they have never purged themselves of the said Contempt.

The respondent contends that the application for leave to appeal is made to court in absence of jurisdiction due to their unpurged contempt of court. It is his submission that the applicants do not have a right to be heard in the instant application unless they purge themselves of the contempt.

The applicants wish to exercise their right of appeal as enshrined in the Constitution and this right cannot be denied because a court has already condemned the party in contempt proceedings.

The decisions in ***Housing Finance Ltd & Another vs Edward Musisi HCMA No. 158 of 2010*** and ***Conform Uganda limited vs Megha Industries (U) Ltd HCMA 1084 of 2014*** should applied in the context of the nature of the contempt and not as a rule that once there is a contempt of court order, then the party cannot have any proceedings in the appellate court seeking to overturn the decision.

Therefore, an appeal or an application to set aside contempt order is an exception to the general rule that a contemnor must first purge the contempt before a hearing.

The application is time barred

The respondent submitted that the instant application is time barred and as a result it is an abuse of court process. The said application was supposed to be made within 14 days.

Since the ruling was delivered on 5th February 2018, the respondent should have filed 19th February 2018 but the application was filed on 28th February 2018. To

that extent it was filed out of time but this application is itself an application for extension of time to file the applicant's application for leave to appeal.

The said concerns are addressed in this application and this preliminary objection is misplaced since it comes in an application for extension of time.

The application is an abuse of court process

The respondent contends that, the applicants are simply calling upon the court to overrule itself and awards it made. That is not sufficient cause as the matter is res judicata.

Secondly that the applicants in the instant application are essentially inviting this court to sanction illegalities and disrespect of the integrity of courts by invoking the appeals process after being found guilty of Contempt.

This objection does not make sense to court. I do not understand what the point is in this submission. It appears, the same is repeated in the main submission.

Abuse of Court Process was defined in Black's Law dictionary (6th Ed) as

> "***A malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words a perversion of it***."

In the case of **Benkay Nigeria Limited vs Cadbury Nigeria Limited No. 29 of 2006** (*Supreme Court of Nigeria*), their Lordships held:

> "*In Seraki vs Kotoye (1992) 9 NWLR (pt 264) 156 at 188, this court on abuse of court process held….the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.*

The Court further observed that;

> "*….to constitute abuse of court process, the multiplicity of suits must have been instituted by one person against his opponent on the same set of facts*"

This objection is baseless and devoid of any merit. The present application is not an abuse of court process since the applicants are genuinely aggrieved by the decision of court to hold them in contempt and the colossal sums of money awarded as general damages, punitive damages and fine to the tune of 617,545,000/=. The application is to allow them to appeal against the decision.

Objections to incurably defective affidavits in support of the application.

The respondent has submitted that affidavit of Prossie Katongole is incurably defective because she doesnot state the information on the basis of her personal knowledge. Secondly she is not a party to the suit.

Secondly that the respondent's lawyers Kateera & Kagumire Advocates had no instructions to appeal.

These two preliminary objections are baseless for the following reasons; The law allows a person who swear an affidavit in support of an application based on her belief. Her affidavit shows her source of the information contained in her affidavit.

The respondent's counsel's submission from the bar, that Kateera & Kagumire Advocates had no instructions is not supported by any evidence in his affidavit in support.

Prossie Katongole is a legal officer of the 3rd applicant and nothing stops her to depose an affidavit in support and especially like the one of this nature which is purely on legal matters that are within her knowledge and none of the applicants would know since they never attended court on that day.

Whether there was a delay in commencing this application?

This application was filed in on 28th February 2018. According to the evidence on record, the said ruling was not delivered but rather it was handed over to the applicants on 5th February 2018. This would mean that the applicants ought to have filed an application for leave to appeal within 14 days i.e on 19th February 2018.

It would mean that the applicants filed the application 9 days out of time. This would have been the basis of the argument whether the 9 days was inordinate delay. This is also premised on the earlier finding that indeed, the court never delivered the ruling but handed it over to the parties on 5th February 2018.

The delay in the filing was caused by the court's failure to formerly deliver the ruling and instead opted to hand it over to the applicants.

In the case of ***Horizon Coaches Ltd vs Edward Rurangaranga SCCA No. 18 of 2009***, the court found that the delay of 4 months to file an application for extension of time would not amount to inordinate delay.

The delay of 9 days is not inordinate delay to bring an application of this nature.

Be that as it may, even if this court had considered the date of delivery of the ruling as reflected thereon as 28th September 2017. The period of 5months would not be inordinate delay due to the confusing circumstances of this case surrounding the partial delivery of the ruling.

The question of whether a given period of time is inordinate delay is determined on the peculiar circumstances of each case and the same is not cast in stone.

The applicants are granted an extension of time within which to file the application for leave to appeal. The same is by way of validation accepted as filed in this joint application.

Leave to appeal

The law governing the application for leave to appeal is set out in Order 44 rule 2 of the Civil Procedure Act and it provides as follows;-

An appeal under these rules shall not lie from any order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.

This is an application to grant leave to appeal against the ruling of this court given under Miscellaneous Application 497 of 2015. This application was seeking orders for contempt and compensation, damages and fines for the said contempt.

In the case of **Sango Bay Estate vs Dresdner Bank & Attorney General** *Spry V.P* stated the principle upon which an leave to appeal may be granted as follows:

> "**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….**"
>
> The Court further noted that;
>
> " **At this stage of litigation we are satisfied that the grant of leave to appeal is necessary to protect the applicant's right of appeal and for attaining the ends of justice in instant case**."

The issue for determination is;

Whether there are sufficient grounds to grant leave to appeal?

The main consideration for the grant of leave is whether prima facie there are grounds of appeal which merit serious judicial consideration. In the present application the applicants contend that the court held them in contempt and ordered them to pay a total sum of 617,000,000/=.

The applicants have set out 8 grounds of appeal which are supposed to be considered in the intended appeal. According to me these grounds merit serious judicial consideration; the learned trial Judge erred in law and fact in:

a) Holding that the applicants were in contempt of the temporary order of injunction is as far as the said order did not lift the Respondent's suspension or order for the respondent's reinstatement on duty pending the hearing and determination of the main cause.
b) Granting remedies that were not sought for by the Respondent in his application vide HCMA No. 497 of 2015
c) Issuing orders in HCMA No. 497 of 2015 that had the effect of entirely determining the main Judicial Review cause vide HCMC No. 2014.
d) Awarding the respondent unpaid half salary arrears that he did not seek for in the said application.

e) Awarding the respondent general damages that he did not specifically seek for in the said application and in principle the said award was erroneous and an injustice to the applicants.
f) Awarding the respondent exemplary damages that he did not specifically seek for in the said application and in principle the said award was erroneous and an injustice to the applicants.
g) Awarding the respondent reputational damages that he did not seek for in the said application and in principle the said award was erroneous and injustice to the applicants.
h) The awards of General damages, exemplary damages and damages for loss of reputation in the total sum of 617,545,020/= are in principle inordinately high to amount to an erroneous estimate of the damage suffered by the respondent.

The court should take into account the intending appellant's strong feelings of injustice when considering whether to grant permission, at least where those feelings are arguably objectively justified.

The applicants' justification lies in the fact that the said awards are excessively high and part of it is to be paid out of the public funds. Secondly, the said ruling has the effect of disposing off the main judicial review cause.

Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard.

In the case of **Swain v Hillman [2001] 1 All ER 91** *Lord Woolf, MR* noted;

> "that a real prospect of success means that the prospect for the success must be realistic rather that fanciful. The court considering a prospect for permission is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is real prospect of success"

See also **Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority Court of Appeal Civil Application No. 16 of 1996**

Considering the attainment of justice

This is the second consideration premised on equity and fairness. The applicants have stated that the respondent demanded recovery of the colossal sums awarded as damages in a total of 617,545,020/=.

I am satisfied that the grant of leave to appeal is necessary to protect the applicants' right of appeal and for attaining the ends of justice in the instant case.

The applicants are granted leave to file the appeal.

In the result for the reasons stated herein above this application is allowed with no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
9th /07/2018