THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 004 OF 2023
ARISING FROM LABOUR DISPUTE REFERENCE NO.49 OF 2020
(All arising from Labour Dispute Complaint No.KMP/CB/078/2016)

BATALE ALFRED BESULAPHA::APPLICANT

VERSUS

MAKERERE UNIVERSITY KAMPALA:::RESPONDENT

Before:
The Hon. Mr. Justice Anthony Wabwire Musana

Panelists:
1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

Representation:
1. Mr. John Fisher Ssengooba of M/s. John F. Ssengooba & Co. Advocates for the Applicant
2. Ms. Fiona Natukunda of Makerere University Directorate of Legal Affairs for the Respondent.

RULING

Introduction

[1] This ruling concerns an application for leave to appeal to the Court of Appeal against the decision of the Industrial Court[1] declining to reinstate Labour Dispute Reference No. 123 of 2016.

[1] Per Ntengye H.J, Namara, Nabirye and Matovu.

The applicant anchored his application on Order 44 Rules 1(2), (3) (4), and 2 of the Civil Procedure Rules S.I 71-1(*from now CPR*), contending that the mistakes of Counsel ought not to be visited on him.

[2] The Respondent opposed the application. In his affidavit in reply, Mr. Yusuf Kiranda deposed that the finding of the Industrial Court was that the Applicant was guilty of dilatory conduct and the Applicant did not disclose a point of law of a question of jurisdiction from which the appeal lies.

[3] Counsel were invited to address the Court by way of written submissions. From the pleadings and submissions of the parties, the issue for determination would be;

- *Whether the Applicant should be granted leave to appeal to the Court of Appeal.*

[4] Concurrently, the Applicant filed Miscellaneous Application No. 007 of 2023, seeking leave to apply for leave to appeal to the Court of Appeal out of time. The grounds for that application were not dissimilar from the grounds herein. For reasons of economy and optimal use of scarce judicial resources, the Applicant should have filed an omnibus application for an extension of time and leave to appeal. We have therefore decided to consolidate and consider that application together with the application for leave to appeal out of time. In his affidavit supporting the application for an extension of time to file an application for leave to appeal, the Applicant attached numerous receipts from M/S DAB Advocates dating from October 2021 until the 19th of January 2022, indicating various payments relating to legal services. Annexure H to the affidavit supporting the motion bore the words *"Transport to Court of Appeal."* The date of October 2021 is important because the main claim was dismissed on the 17th day of September 2021. M/S Dab Advocates filed a notice of appeal on the 13th of October 2021. We find that the Applicant duly instructed Counsel who did not diligently file or pursue the necessary applications. We are therefore persuaded that the Applicant makes an arguable and objective case for a grant of extension of time out of time. Under Rule 6 of the Industrial Court (Arbitration and Settlement)(Industrial Court Procedure) Rules, 2012, and exercising our discretion, we hereby validate the application for an extension of time to deal effectively with the substantive question of whether the Applicant deserves leave to appeal. In effect, Miscellaneous Application No. 007 of 2013 is hereby allowed.

Analysis and Decision of the Court.

Submissions of Counsel for the Applicant

[5] Mr. Ssengooba, appearing for the Applicant, submitted that the Applicant's numerous Advocates had been negligent, which negligence should not be visited on him. Counsel cited the case of **Re: Christine Mary Tebajukira [1992-1993] HCB 85** for the proposition that substantive justice requires that disputes be heard on merit and that errors and lapses do not debar a litigant from pursuing his legal rights. Counsel suggested that Article 44(c) of the 1995 Constitution guarantees the right to a hearing. Counsel relied on Order 51 Rule 6 CPR for the expansion of time.

Submissions of the Respondent

[6] Ms. Natukunda, appearing for the Respondent, submitted that under Section 22 of the Labour Dispute(Arbitration and Settlement) Act 2006(*from now LADASA*), an appeal lies from a decision of the Industrial Court to determine whether the Industrial Court has jurisdiction over the matter. Counsel referred to Rule 23 of the Labour Disputes(Arbitration and Settlement) (Industrial Court Procedure) Rules S.I 8 of 2012(*from now Rules*), which reiterates the LADASA provision. Counsel cited the case of **Lubanga Jamada v Dr. Ddumba Edward C.A.C.A No. 10 of 2011** for the proposition that a point of law means that the lower Court's finding got the relevant law wrong or misapplied. It is a misapplication or misapprehension of the law. It was Counsel's view that the Applicant had not demonstrated a point of law or a matter relating to jurisdiction to be considered by the Court of Appeal. It was submitted that the Applicant was guilty of dilatory conduct and had been paid his retirement benefits per the decision in **Kisambira Masaba v Makerere University LDC 013 of 2014**. Counsel invited this Court to consider there being no dispute between the parties.

Submissions in rejoinder

[7] In rejoinder, it was suggested that the test for a grant of leave to appeal is whether the appeal is likely to succeed. Counsel cited the cases of **Sango Bay Estates v Dresdner Bank[1973[EA 17** and **Management Committee of Rubaga Girls School v Dr. Bwogi Kanyerezi [1998-2000] HCB 40** in support of this proposition. Mr. Sengooba submitted that the serious question for trial is the extent to which negligence of an advocate should be imputed on the litigant to occasion joint liability for mistakes or lapses.

Decision of the Court

[8] It is trite that appeal is a creature of statute. Under Section 22 of the Labour Disputes (Arbitration and Settlement) Act 2006 as amended (*from now LADASA*), an appeal shall lie from a decision of the Industrial Court to the Court of Appeal only on a point of law or to determine whether the Industrial Court had jurisdiction over the matter. This provision is repeated in Rule 23(1) and (2) of the Labour Disputes (Arbitration and Settlement) (Industrial Court Procedure) Rules, 2012. These rules do not set a threshold for a party seeking leave to appeal.

[9] The decision of the Industrial Court that the Applicant seeks to appeal from was rendered on the 17th of September 2021 in Miscellaneous Application No. 049 of 2020, by which the Industrial Court dismissed an application to set aside an order of dismissal of Labour Dispute No. 23 of 2016. Miscellaneous Application No. 049 of 2020 was filed under Order 9 Rule 23 of the Civil Procedure Rules S.I 71-1(*from now on, CPR*). Under Order 44 Rule 2 CPR, decisions of the Court entered under Order 9 Rule 23 CPR are not appealable as of right. Therefore, the intending appellant would be required to seek leave.

[10] To satisfy the Court for a grant of leave to appeal, an applicant must demonstrate that the intended appeal has reasonable prospects of success. Under Order 44 rule 2 CPR, it is provided that 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. Mr. Ssengooba relied on the case of **Sango Bay Estate vs. Dresdner Bank & Attorney General [1971] EA 17**. In that case, Spry V.P observed thus:

> *"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...."*

[11] In the case of **Musa Sbeity & Anor v Joan Akello** [2], the Honourable Mr. Justice Musa Ssekaana cited the case of **Swain v Hillman [2001] 1 All ER 91** where Lord Woolf, MR noted:

> *"That a real prospect of success means that the prospect for success must be realistic rather than 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 a real prospect of success"*

[2] HCMA 249 of 2018

The threshold, therefore, is that there must be grounds of appeal with prospects of success.

[12] Mr. Ssengooba argued that the extent to which negligence of an advocate should be attributed to the litigant so as to occasion joint liability for mistakes or lapses merited serious judicial consideration. There is ample jurisprudence on mistake of counsel. We will refer to a few cases on the point;

(i) In the case of **Capt. Phillip Ongom v Catherine Nyero Owota**[3] the Honourable Justice Mulenga JSC (*as he then was*) summed the principle to be that a litigant's "right to a fair hearing in the determination of civil rights and obligations", which is enshrined in Article 28 of the Constitution should not be defeated on ground of his/her lawyer's mistakes. His Lordship did not consider the apportionment of blame as between a litigant and his negligent lawyer.

(ii) In the case of **Joel Kato & Anor v Nuulu Nalwoga,**[4] the Supreme Court held that it was not right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These matters squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why the Court believed the applicants found it necessary to engage new lawyers to deal with them.

(iii) In **Banco Arabe Espanol v Bank of Uganda,**[5] Oder J.S.C observes that *"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 discretionary remedies from Courts has been discussed by Courts in numerous authorities....."*His Lordship adds, *"But, they have the 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 and of his professional advisor or advisor's clerk. The interests of the party who has obtained, or is in a position to obtain, a permanent advantage by reason of such default, and of the unfortunate and perfectly innocent party who has been deprived of a right through no fault of his own are*

[3] SCCA No. 14 of 2001
[4] Misc. Application No 04 Of 2012 [2012] UGSC 2;
[5] SCCA No. 8 of 1998

irreconcilable. The Courts have always found difficulty in deciding who is to suffer."

His Lordship traced English jurisprudence on the point in the cases of **Re Helsby (1894) IQB 742, Coles v. Ravenshear (1907) 1KB 1, Baker v. Faber (1908) WN, Kevorkian v. Burnev (1937) All E.R 97, Gatti v. Shoosmith (1939) 3 All E R 916** and the Ugandan cases of **Hajji Nurdin Matovu v. Ben Kiwanuka S.C. Civil Application No. 12 of 1991** and **Alexander Jo Okello v. Kavondo & Co. Advocates. S.C Civil Application No. 17 of 1996** before concluding that the error on the part of counsel in the form of a mistaken belief that a bank guarantee would suffice, should not be visited on the appellant, mainly because the appellant showed an intention to bring cash.

[13] In the matter now before us, Mr. Ssengooba adverts to apportion blame between Counsel and the Applicant. There may be a need for further judicial consideration of the point. The submission of the Respondent that the Applicant has yet to demonstrate a point of law does not gain much purchase. We respectfully disagree and hold that the Applicant's contention reflects a point of law with a prospect of success. That would account for the first consideration.

[14] Another consideration for a grant of leave to appeal is fairness and equity. According to the Honourable Mr. Justice Ssekaana,[6] in the Sbeity case(supra), His Lordship found that the matter had not been heard on its merits and granted the application for leave.

[15] Applying that dictum to the matter before us, Miscellaneous Application No. 049 of 2020 sought to set aside another order of dismissal of Labour Dispute Reference No. 123 of 2016. The main reference was dismissed for non-appearance of Counsel. What is apparent is that the main cause was not heard on its merits. In the interest of justice, we would find that the main cause was not heard on its merits. It is our finding that the applicant has met the threshold for a grant of leave to appeal to the Court of Appeal. Leave is hereby granted.

Orders of the Court

In the final analysis, we make the following orders:

[6] Ibid

(i) Labour Dispute Miscellaneous Application No. 007 of 2023 is allowed. The Applicant is granted leave to apply for leave to appeal out of time.

(ii) The Applicant is hereby granted leave to appeal to the Court of Appeal against the decision of the Industrial Court in Miscellaneous Application No. 49 of 2020 dated the 17th of September 2021.

(iii) In keeping with our dictum in Joseph Kalule v GIZ [7] we do not find the unsuccessful party guilty of any misconduct and decline to grant the Applicant costs of this application.

Dated at Kampala this 29th day of August 2023

Anthony Wabwire Musana
Judge, Industrial Court

The Panelists Agree:

1. Hon. Adrine Namara
2. Hon. Suzan Nabirye
3. Hon. Michael Matovu

Ruling delivered in open Court this 29th day of August 2023 at 9.51 a.m. in the fore/noon in the presence of:

1. Mr. Hudson Musoke holding brief for Ms. Fiona Natukunda for the Respondent.
2. The Applicant is absent.

Court Clerk: **Mr. Samuel Mukiza.**

Anthony Wabwire Musana,
Judge, Industrial Court

[7] LDR 109 of 2020