**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**
**(COMMERCIAL COURT DIVISION)**

**HCT-00-CC-MA-0702 OF 2005**
**(Arising from HCT-00-CC-MA-0105-2004 and HCT-00-CC-CS-0079-2004)**

**MUKABURURA FOUNDATION INVESTMENTS LTD :::::::::::::::::::::::::::::**
**APPLICANT**

**VERSUS**

**SOUTHERN INVESTMENTS LIMITED ::::::::::::**
**RESPONDENT**

**BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**R U L I N G:**

This is an application under 0.40 r 2, 0.48 rr. 1 and 3 of the Civil Procedure Rules and S. 98 of the Civil Procedure Act. It is for the orders that the Applicant be granted leave to appeal against the order of this Court (per M.S. Arach – Amoko, J) dated 9/11/2004 and that costs of the application be provided for.

From the evidence, the Applicant had undisclosed business dealings with the Respondent. In a letter dated 7/3/2001 addressed to Standard Chartered

Bank, Kampala, the Applicant authorized the said bank to “irrevocably and unconditionally debit our Account NR 32–9-04-33229-00-1 held with your bank by US $118,800 (one hundred eighteen thousand and eight hundred US Dollars) only, and transfer the said amount to the following account without any further notice:

Bank: Tropical Africa Bank Ltd Kampala – Uganda.

Beneficiary: Mukaburura Foundation Investments Ltd.

Account NR: 2122999847

Best regards,

Habib Kagimu MUYANJA MBABALI

CHAIRMAN EXECUTIVE DIRECTOR”

It is claimed by the Applicant that upon presentation of the same to the bank, it was dishonoured. The Applicant sued the Respondent under 0.33 of the Civil Procedure Rules to recover the amount stated in the above instructions. The Respondent applied for leave to appear and defend wherein it sought to adduce evidence to prove that the transfer of funds was conditional. The learned Trial Judge, inter alia, considered the affidavit evidence and proceeded to grant leave to appear and defend. The Applicant wants to appeal against that order.

From the records also, following the grant of the said leave to the Respondent, the Applicant felt aggrieved by the decision of the Court and appealed to the Court of Appeal. In the Court of Appeal, counsel for the Respondent successfully challenged the competence of the Appeal which had been filed without leave being sought and/or granted. The Appeal was dismissed on account of that. Applicant now seeks to start the process all over again. Hence this application. The Respondent has raised two major grounds in opposition of this application:

1. That there are no grounds meriting serious consideration by the Court of Appeal.

2. That the Appeal was dismissed and not struck out. Therefore, no Appeal can

again lie to that Court on the same facts and circumstances.

I will start with the second ground. Under Rule 93 (4) of the Court of Appeal Rules, 1996, if all the parties to the Appeal do not consent to the withdrawal of the Appeal, the Appeal shall stand dismissed with costs. It does not state the effect of such a dismissal. Be that as it may, under Rule 81 thereof, a person on whom a notice of Appeal has been served may at any time, either before or after the institution of the Appeal, apply to the Court to strike out the notice or the Appeal as the case may be, on the ground that no Appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The Rule does not state that such

challenge can also be made in the lower Court, this Court. I would leave it to the Appellate Court itself to determine the competence of the Appeal before it. This ground in my view lacks merit. I would disallow it and I do so.

As regards the second ground, Mr. Karugire's argument is this: that the Applicant filed a suit to enforce the said payment instructions; and that the Respondent applied for leave to appear and defend. The application was based on two major grounds:

1. That it did not receive any consideration for issuance of the payment instructions.
2. There was no evidence that the instructions had actually been presented and dishonoured.

Mr. Karugire's point is that the trial Judge accepted the 2 grounds and granted leave to the Respondent to defend the suit. That her decision will not cause any prejudice to the Applicant.

Mr. Babigumira does not agree. His argument is that by allowing the Respondent to advance its reasons for seeking leave to appear and defend, the Judge admitted evidence to prove lack of consideration and non-presentation of the instructions to the Bank, which evidence she should not have considered at all. Hence his conviction that the Applicant has grounds of Appeal which merit serious consideration by the Court of Appeal.

I have addressed my mind to the able arguments of both counsel. The law as understood by this Court is that before leave to appear and defend is granted, the Defendant/Applicant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. Where there is a reasonable ground of defence to the claim, the Respondent/Plaintiff is not entitled to summary Judgment.

That much was stated by the learned Trial Judge in her Ruling. The Defendant is not expected to show a good defence on the merits but should satisfy the Court that there is an issue or question in dispute which ought to be tried and the Court should not enter upon the trial of the issues disclosed at this stage. As to whether such decision, once made by Court, to grant leave is appealable or not, the law was well stated in Sango Bay Estates Ltd & Others –Vs- Dresdner Bank [1971] EA 17. Simply put, 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. However, where 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.

There is no doubt in my mind that the order which the Applicant seeks to challenge on appeal was made in exercise of a judicial discretion. The

Applicant filed a suit under summary procedure. He wants to enforce payment instructions issued by the Respondent. The Respondent does not deny issuance thereof. Its case is that both parties knew at the time of its execution that the instruction was subject to occurrence of some future event; that there was no consideration for the instructions and that in any case there is no evidence that the instructions were presented to the bank and dishonoured. From the records, the Applicant was deemed a holder for value from the moment the instructions were issued. Every person whose signature appears on it is prima facie deemed to have become a party thereto for value. However, this is a rebuttable presumption. It can be rebutted by adducing evidence to show that the document was affected by fraud, duress or force and fear or even illegality. There is no way the Respondent can be heard on the matter if it is not allowed to file a defence. To hold that the Respondent must pay without question when it has raised issues relating to the enforceability of the instructions would be to condemn it unheard. It would be in contravention of the principles of natural justice that no man can be condemned unheard. It is noteworthy that the Applicant is, up to this point in time, reluctant to disclose what business deal it was. At its face value, the claim could as well be ex turpi causa; an illegal claim which this Court cannot lend a hand in its enforcement. Therefore, whether or not the instructions were supported by any consideration is a triable issue which ought to be investigated and remedied. The Court with competence to

do so is this one. If the Court gets it wrong, the Court of Appeal will be there to do the needful.

Besides, this Court has before it the said transfer instructions dated 7th March 2001. The copy which the Applicant itself relies on shows no evidence of presentment to the bank or dishonour thereof. In a case of this nature, the cause of action arises when the bill of exchange is dishonoured. In the absence of any such evidence of dishonour, the Defendant would be entitled to raise the issue of the plaint disclosing no cause of action. Again, the Court with competence to determine that is this one. The Respondent would have no way of challenging such a bill of exchange if it is not allowed to file a defence and defend itself against the suit.

In my view, no amount of argument would lead any Court to circumvent these two grounds on appeal. Accordingly, the exception stated in Spry, V.P's observation in the Sango Bay case, supra, clearly supports the Respondent's argument that it ought to be heard in its defence of the suit. Whether the defence would succeed or not would be for another day. The Court exercised a judicial discretion in granting leave to the Respondent to appear and defend. The intended appeal therefore lacks any ground that would merit serious judicial consideration. The Applicant stands to lose nothing since any decision of this Court would be open to challenge on appeal.

I would accordingly allow Mr. Karugire's argument on this point and disallow, respectfully, Mr. Babigumira's. I do so.

In the result, for reasons stated above, this application fails. It is dismissed with costs to the Respondent. Since the Respondent has already filed a defence in the main suit, the case shall be set down for a scheduling conference on 17/2/2006 at 10 a.m. It is so ordered.

Yorokamu Bamwine
**J U D G E**
28/11/2005