THE REPUBLIC OF UGANDA:.....

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 004 OF 2023

{ARISING FROM CIVIL APPEAL N0. ... 2023}

{ARISING FROM COURT OF APPPEAL CA N0.120 OF 2019 AND HIGH COURT}

{ADMINISTRATION CAUSE N0.1588 OF 2018}

Kasolo Robins Ellis.....Applicant

Versus

Julius Joseph Delahaije Geertruda.....Respondent

Ruling of Mwondha JSC (Single Justice)

This application was brought under Rule 2 {2,} 6 (2), 42 and 43 (1) of the Judicature {Supreme Court rules}, S.I 13 10 and s. 6 {1} of the Judicature Act seeking for orders that:

(a) An interim order to stay execution be issued against the respondent and his agents, restraining them from executing the part of the orders of the Court of Appeal in Civil Appeal N0. 120 OF 2019, to reseal the uncertified grant of probate from the High Court of Kenya against an earlier decision by the High Court of Uganda vide HCCS No. 235 of 2017 for lack of jurisdiction to grant probate in respect of movable property/shares of the deceased's Estate who was domiciled in the Netherlands pending the hearing and determination of the main application for stay of execution pending in this honourable court.

(b) Costs of the Application be provided in the cause.

The Application was supported by the grounds contained in an affidavit deponed by Kasolo Robins Ellis, the applicant and briefly, they were as follows: -

1) That on the 23rd of January, the Court delivered its judgment in Civil Appeal N0.120 OF 2019 in favour of the Respondent.
2) The applicant was dissatisfied with part of the orders of the said judgment and filed a Notice of Appeal in the Court of Appeal and filed a Copy in the Supreme Court Registry.

3) That the Notice of Appeal is competent, among others.
4) That the Applicant had earlier written a letter requesting for the typed certified copy of the record of proceedings on the 23rd day of January 2023 and served a copy to Ms K&K Advocates Counsel for the Respondent.
5) That the applicant had filed in this court a substantive application for stay of execution pending the hearing and determination of the intended appeal.
6) That the intended appeal has a high likelihood of success given the proposed grounds of appeal as stated in the substantive application for stay of execution.
7) That there is emminent threat of execution of part of the orders of the judgment of the court of appeal to reseal the said uncertified grant of probate by the High Court of Kenya at Nairobi in succession cause N0.584 of 2018. That it's a direct order to execute the resealing of the grant by the Court of Appeal itself before the final determination of the substantive application pending hearing before this court.
8) That if the interim order of stay of execution is not granted by this court, the applicant's substantive application for stay of execution and the intended appeal will be rendered nugatory, as the order to reseal uncertified grant of probate from the High Court of Kenya would have been resealed which is sought to be challenged in the intended appeal.
9) That this application has been bought without undue delay.
10) That it is fair and just, and equitable that the application for the interim order to stay execution of part of the judgment is issued pending the determination of the substantive application of stay of execution.

The Respondent, in his reply, opposed the application in his affidavit in reply. The grounds he based on to oppose included the averment that the orders of the Court of Appeal have already been completed and have rendered the application moot and academic. Further that the applicant's intended appeal and main application for stay of execution had no merit or prospects of success. He prayed that the application for the interim order of stay of execution is dismissed with costs.

Representation

At the hearing, the applicant was represented by Mr Richard Mugenyi of Kasolo and Kiddu Advocates and was assisted by Michael Mayambala.
Mr Esau Isingoma of K&K Advocates represented the Respondent.

Both Counsels filed written submissions.

Applicant's Submissions

Counsel for the applicant substantiated on the grounds of the application and submitted that there are three considerations to be proved by the applicant before the court can grant an interim order of stay of execution. He relied on the Supreme Court **Case Alcon International Ltd V. New Vision Printing and Publishing Co. Ltd and Another Civil Application N0. 03 OF 2010 and Hwan Sung Industries Ltd v. Tajdin Hussein and 2 others Civil Application N0. 19 of 2008.** The court being satisfied that the notice of appeal has been lodged in accordance with Rules of this Court it has to satisfy itself on evidence that a substantive application is pending before it, and that there is a serious threat to the act complained of before the Substantive application is heard and determined.

Counsel also submitted further that His Lordship GM Okello JSC held further that there's no need to preempt consideration of matters of the substantive application. That it is important at this stage to avoid rendering the pending substantive application nugatory.

Counsel submitted that the applicant had proved all the three conditions required, so he prayed that the Court may be pleased to allow the application.

Counsel added and submitted further that there were a number of illegalities and irregularities committed by the lawyers of the Respondent when they failed to secure the approval of the Decree that they executed as required by law. That the purported and illegal reseal on the 9th day of February 2023 of an irregular grant of probate from the High Court of Kenya Nairobi was in Contravention with the mandatory rule 35 (2) (c) and (d) of the Judicature (Court of appeal Rules) Directions, by the Registrar of the Court of Appeal.

He relied on the case of **Makula International Ltd V. Rev Father Kyeyune** where it was held, *among others, that a Court of law cannot sanction what is illegal and illegality once brought to the attention of the Court overrides all questions of proceedings, including admissions therein.*

Counsel reiterated his earlier prayer to Court to grant the application.

Respondent's Submissions

The Respondent started by arguing a preliminary objection on a point of law as follows:

(i) That the application is incompetent and irregularly brought before Court since it should have been brought before the Court of Appeal first. That Rule 41 (1) of the rules of this court provides that where an application may be made to this Court or to the Court of Appeal, it shall be made to the Court of Appeal first. Rule 41 (2) provides that notwithstanding sub-rule (1) of this rule in any civil or criminal matter, the Court may, in its discretion or on its own motion, give leave to appeal and make any consequential order to extend the time to appeal of any act as the justice of the case requires, or entertain an application under rule 6 (2) (b) of these rules to safeguard the right of appeal notwithstanding the fact that no application has first been made to the Court of Appeal. He relied on **Attorney General v. Kwizera and Electoral Commission and Electoral Commission v. Kwizera Consolidated Constitutional Appeal Application N0. 1 of 2020 UG SC.** Counsel submitted that the Court interpreted the above provisions and held *that Rule 41(1) is not intended to negate or render Rule 41 (1) redundant, and this cannot be read in isolation of rule (1). The sub-rule, while acknowledging the general provision of the law as envisaged in sub-rule (1) takes cognizance of the fact that there are circumstances where the interests of justice would not be served through strict adherence to sub-rule (1). Both the provisions of this rule should therefore be read in totality to derive the intention of the drafters.* Consequently, an application which proceeds under Rule 41(2), as an exception to the general rule, must establish that they were aware of the general rule but had good cause for coming straight to the Supreme Court. Counsel relied on the case of **Basajjabalaba and another v. Attorney General Supreme Court Misc Application N0. 4 of 2018,** where the Court held that *the applicant must establish exceptional circumstances to warrant the Court to exercise its discretion under Rule 41 (2).* Counsel prayed that the application is dismissed for being irregular before this Court.

In the submissions in reply, Counsel argued that three considerations to be proved namely:

(a) Whether there's a competent notice of appeal
(b) Whether the substantive application was pending in this Court
(c) Whether there is an emminent or serious threat of execution before determination of the substantive application.

Before submitting on the three considerations, Counsel for the Respondent submitted that the application had been overtaken by events and, therefore moot and academic with no practical legal value. Counsel relied on **Kwesiga and 2 Others V. Senyonga and 2 Others Civil Application N0. 43 of 2021,** where the Supreme Court defined when a matter could be taken to be moot and noted, *"An appeal is moot when the decision will have no effect of restoring some ...affecting or particularly affecting parties.*

Counsel also relied on the **Legal Brains Trust (LBT) Limited v. Attorney General of the Republic of Uganda (2012) KLR.**

Counsel argued that in the averment of the respondents affidavit in paragraph 6, he stated that on the 9th February 2023, the Court of Appeal resealed the grant of probate issued by the High Court of Kenya in Nairobi as ordered in the Court of Appeal Judgment Civil Appeal N0. 120 of 2019. Therefore this application had no practical value.

Counsel further submitted that the contention of the applicant was to stop the execution of that specific part of the orders of the court of Appeal to reseal the uncertified grant of probate from the High Court of Kenya.

However, the status quo was that the grant was resealed. So, there was nothing like preserving the status quo, so the application cannot be justified to be granted.

On the consideration of there being a competent notice of appeal and the presence of a substantive application pending in this court, Counsel submitted that there was no substantive application filed and pending in this court. There was only the first page of the alleged substantive application.

On considerations of the eminent or serious threat of execution, Counsel submitted that there was no demonstration that the applicant would suffer any prejudice of execution, among others. Counsel, therefore, submitted that the

applicant had not sufficiently justified his case to be granted the order sought. He prayed that the Court dismisses the application with costs.

Consideration of the Application

This application originated from a High Court Civil Suit N0. 235 of 2017, which the respondent filed against the applicant jointly with one late John Kisembo and was dismissed with costs for lack of jurisdiction and the respondent was advised to obtain probate from the Netherlands. The respondent was dissatisfied with the judgment of the High Court, and he appealed to the Court of Appeal Vide Civil Appeal N0. 120 Of 2019. The Court of Appeal decided in favour of the Respondent in its judgment dated 23rd January 2023. The applicant was dissatisfied with the judgment and orders of the Court of Appeal, so he filed a Notice of Appeal in the Court of Appeal and the Supreme Court as required and requested for the certified record of proceedings in the Civil Appeal N0. 120 of 2019.

The application was brought under Rules 2(2), 6 (2), 42, and 43 (1) of the Judicature (Supreme Court) Rules Directions SI 13-10 and S.6 (1) of the Judicature Act.

The application seeks an interim order of stay of execution pending the determination of the substantive application for stay of execution. However, before disposing of this issue, I will address the preliminary objection on point of law raised by the Counsel for the respondent.

Counsel for the respondent categorically objected to or opposed the application on the ground that the application was irregularly brought before the Court since it should have been filed in the Court of Appeal first as per Rules 41(1) of the Rules.

I am alive to the fact this Court has attempted to interpret the provisions in Rule 41(1) and 41 (2) in the case of Kwizera and Electoral Commission and Electoral Commission and Kwizera Consolidated application and Basajjabalaba and Another v. Attorney General Supreme Court Application (**supra**) relied on by Counsel for the respondent in his submission.

This court has held over and over again that jurisdiction is a creature of Statute. In the case of **Baku Raphael v. Attorney General SC Civil Appeal No. 1 of 2005** this court held *that there is no such thing as inherent appellate jurisdiction.*

Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied (emphasis mine).

Rule 2 (1) of the Supreme Court rule provides for the application of the rules and states, *"the practice and procedure of the Court in connection with appeals and intended appeals from the court of appeal in connection with appeals to the Court shall be set out In the rules".*

My well-considered opinion is that the provision does not in any way infer concurrent jurisdiction upon the Court of Appeal to sit and hear the application for the interim stay. as if the party is seeking for leave to appeal to supreme court. if it were so, the law would have specifically provided so. I believe that the requirement of filing Notice of Appeal in the court of appeal and filing a copy in the supreme court was to enable the court of appeal to prepare and forward the certified record of proceedings to the supreme court. In addition, it would make matters easier for the supreme court to follow up for disposal expeditiously the application

Secondly, even if the court of appeal had concurrent jurisdiction with the Supreme court, which is not the case, it would be breaching the Constitution **Article 126 (2)e,** which directs that the substantive justice should be administered without undue regard to technicalities. Suffice it to say that technicalities and rules of procedure are handmaidens of justice and not intended to defeat it.

Going by principles of interpretation of the Constitution and Acts of Parliament/ legislation as guided by this Court and courts in other jurisdictions in the commonwealth, the purpose, intention, and effect of the makers of the Constitution or legistlation have to be considered. The case of **David Wesley Tusingwire v. Attorney General Consitutional Appeal No. I of 2016 cited the PK Ssemwogere and another v. attorney General Consititutional Appel N0. 1 of 2002 and Attorney General of Tanzania v. Rev. Christopher Mtikila 2010 EA 13** held, among others that *the purpose or intention of the makers of the Constitution or any other law has to be considered hence the need to read all the provisions together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness.*

Taking all that in account and considering the purpose, intention and effect of the legislation as made by the drafters, it is clear in my mind that rule 41 {1} above the Supreme Court rules as stated above, in rule 2 (1) thereof, was not to bestow concurrent jurisdiction on both courts.

In a result, the preliminary objection on the point of law is overruled.

Turning to the resolution of issues, it is settled that in such applications like this one, there are three main considerations:

(1) That there is a competent notice of appeal
(2) That there is a substantive application pending in this court
(3) That there is an eminent or serious threat of execution before the hearing of the substantive application for stay (see **HwanSung Industries limited v. Tajdin and others supra), Zubeda Mohammed and Another v. Laila Kaka Wallia and others SC CR N0. 09 of 2016**

Upon careful perusal of the affidavits of both the applicant and respondent and upon consideration of the submissions of both Counsel and the authorities relied upon, I find the following: -

(1) Whether there is a competent notice of appeal

I was satisfied that there is a competent notice of appeal as the law provides.

(2) Whether there is a pending substantive application for stay of execution, according to the documents on the Court record, there was only the draft first page of the application, there was no number given and no signature of the applicant.The applicant in the affidavit in support of his application he stated it specifically in paragraph 5 that he has attached that one page. As long as it was not a full application, no number and no signature of whoever filed it remained a mere partial draft It was clear to me, therefore, that there was no substantive application for stay of ~~application for stay of execution~~ execution pending in this court. In Zubeda Mohammed and Another v. Laila Kaka Wallia and Others (**Supra**), a reference was filed against an interim order that was granted, and this court held among others that and I quote, *"... the interim order dated 17th May 2016 is not open-ended but makes a reference to a non-existent application as well...it was not based on a substantive application for stay and therefore has no legs to stand on". Needless to say that apparently this*

instant application without the substantive application for stay of execution had no legs to stand.

It suffices to say therefore that this instant application is incurably defective as it is not based on the existence of a substantive application for stay of execution.

(3) Whether there is an eminent or serious threat of execution before the substantive application is determined. It is apparent that there cannot be an eminent or serious threat on a non-existent application.

Counsel of the respondent was so clear that the probate had been resealed, however the applicant did not adduce any evidence to the contrary. The averments about illigalities and irregularities were merely arguments not supported by any evidence. In any case,this was not the subject of this application as it is limited to either granting or not granting depending on the already known considerations for the grant.

I am inclined to accept Counsel for the respondent's submission that the application had been overtaken by events and, therefore, moot, and academic, with no practical value (See Kwesiga and 2 Others v. Senyonga and 2 Others, **Supra**).

From the above foregoing, it's clear that the Applicant has failed to adduce sufficient reasons to entitle him to be granted the interim order he sought for.

The application is dismissed with costs.

Dated at **Kampala** this ..14th day of March 2023.

Mwondha

Justice of the Supreme Court