THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 736 OF 2022

(ARISING FROM MISC. APPLICATION NO. 734 OF 2022)

(ALSO ARISING FROM HIGH COURT CIVL SUIT NO.1049 of 2019)

1. MUKWAYA EDDIE

2. VICTORIA ERIYO/MUKWAYA ::::::::::::::::::: **APPLICANTS**

VERSUS

3. BEN LUWAGA ::::::::::::::::::::::::::::::::::::::**RESPONDENTS**

RULING OF CHRISTOPHER GASHIRABAKE, J.A

(SINGLE JUSTICE)

INTRODUCTION

This is an Application brought under Rules 6(2) (b) and 43 of the Judicature (Court of Appeal) Rules SI 13-10 (hereinafter referred to as the "Rules of this Court"), section 12 of the Judicature Act.

The Applicants seek orders that:-

a) An Interim order does issue staying execution of the Judgment and Decree of the High Court Commercial Division suit No.

1049 of 2019 delivered by the Hon. Justice Susan Abinyo on the 14th September 2022

b) The costs of this Application be provided for.

The Application is supported by the affidavits of Mr. Mukwaya Eddie the first Applicant which briefly states;

a) That the Applicants have filed a substantive Application for grant of an Order to stay Execution before this Honourable court Vide Misc. Application No. 73 4 of 2022.

b) That the Applicants who are dissatisfied with the Judgment and decree of the High Court in Civil Suit Commercial Division No. 1049 of 2019 filed a Notice of Appeal and have subsequently requested for a record of proceeding

c) That the Applicants' Appeal challenging the decision and decree of the High Court civil suit commercial division No. 1049 of 2019 raises triable issues at law that warrant judicial consideration and the Applicants have a prima facie case with a high likelihood of success.

d) That the Applicant shall suffer irreparable damage considering that the suit was for a value of 11,400 USD whereas the execution process seeks to deprive them of a house and shelter for the 2nd Applicant and her children.

BRIEF FACTUAL BACKGROUND

The Applicants contend that they were not served with summons to file the Defence in the original suit of civil suit NO 1049 OF

2019. On the other hand the Respondents contend in his affidavit in Reply, those summonses were served on the Applicants on 7/1/2020 at their home in Busega in Rubaga Division Kampala. The Applicants did not file the defence within 15 days as prescribed by order 9 rule 1 of the C.P.R. Since the suit was for recovery of a liquidated sum of US $ 11,200.00 The Respondents applied for default judgment in accordance with Order 9 rules 5 and 6 of the C.P.R. On 5/8/2020 the High court entered default Judgment against the Applicants. The Applicants submit that they were condemned unheard and were not accorded a fair trial at the High court as they were locked out of the proceedings before the High court.

REPRESENTATION

The Applicants were represented by Mr. Akena Alex while Ms Nasingwa Vivian appeared for the Respondent.

Court's findings

Submissions for the first and second Applicants

Submissions for the Respondent

Counsel for the Respondent submitted that the Applicant's contention that they were not served was not true because the Applicants Approached the Respondents Advocates for settlement of

the suit. He submitted that the Applicants quoted High court civil suit no 1049 of 2019.He argued that the Applicants cannot therefore claim not to have received summons.

It was submitted by the counsel for The Respondent that the Applicants had filed an Application on 8/12/2020 for stay of execution of the decree and setting aside the decree.

Counsel for the Respondent also submitted that under Rule 42 (1) of the Judicature (court of Appeal) Rules it is mandatory for the Applicants to first file an Application for stay of execution in the High court but the Applicants did not. He therefore argued that the Application was incompetent on that ground.

He further submitted that the Respondent had not been served with a record of Appeal and the time for serving it had expired. He further submitted that the Notice of Motion for civil Application No 734 of 2022 has never been served on counsel for the Respondent.

He prayed that the Applicants be ordered to deposit in court a sum of 200,000,000/= to cater for the principal sum, accruing interest at the rate of 25%p.a computed from 11/17/2011,costs for the main suit and all the three Applications which were dismissed with costs.

Submissions in Rejoinder

In rejoinder counsel for the Applicant submitted that the Respondent submitted that the Respondent failed to adhere to the timelines set by court and thus prayed that the Respondents

submissions ought to be struck out. He submitted that the Respondent ought to have filed his submissions by 18th November but instead filed them on 12th December.

Counsel for the Applicants submitted that the Applicants attached their memorandum of Appeal which set down the grounds of Appeal. He further submitted that the Applicants filed a Civil Application seeking leave to adduce additional evidence which shall show that the process server Jimmy Serwanga is not registered process server.

He argued that the effect of the new evidence is that there was no competent service of summons as claimed by the Respondent. He submitted that this court should inquire into the service of the court summons because the applicants did not acknowledge the said service.

He further submitted that the Respondent's assertion that the Applicants approached the Respondent for a settlement was false. He submitted that the Applicants' lawyer only approached them to know at what stage the matter had reached.

With regard to the fact that the Application was not filed in the high court first counsel for the Applicants submitted that this court and the High court have concurrent jurisdiction in these matters. He relied on the case of **Kyambogo University v Prof. Isaiah Omolo Ndiege** Civil Application no. 341 of 2013.

He further argued that the Applicants had special circumstances requiring the Application to be fixed in this court due to the fact that the Applications were dismissed in the lower courts.

Resolution

I have read the pleadings and the submissions of both counsel for which I am grateful.

Rule 6(2)(b) of the Rules of this Court provides for stay of execution and states: -

> *" (2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—*
> *(a) ...*
>
> *(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just."*

This is the Rule which provides for stay of execution whether interim or substantive. However, there are different principles which the Court must consider when considering an interim stay on the one hand and a substantive stay on the other.

In the instant Application for an interim stay of execution, this Court, in addition to considering that a Notice of Appeal has been filed, it is necessary for the Court to also consider the principles articulated in the case of **Patrick Kaumba Wiltshire v Ismail**

Dabule (Supra), where the Supreme Court relied on the decision of **Zubeda Mohammed & Anor v. Laila Wallia & Anor** (supra) where it was held;

> *"The principles followed by our courts were clearly stated in the celebrated case of Hwang Sung Industries Limited v. Tajdin Hussein & Others, Supreme Court Civil Application No. 19 of 2008 where Okello JSC, as he then was, said;*
> *For an Application for an interim stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."*

In the case of **Patrick Kaumba Wiltshire v. Ismail Dabule** (Supra), the Court further held;

> *"In summary, there are three conditions that an Applicant must satisfy to justify the grant of an interim order;*
>
> *i) A competent Notice of Appeal;*
>
> *ii) A substantive application; and*
>
> iii) *A serious threat of execution.*

This position of the law has been followed by this court in numerous applications of this nature. That this Court must ensure that an appeal if successful is not rendered nugatory. In my view this is the most important ground that court must consider in an application of this nature.

From the above the applicant ought to satisfy the following conditions;

1. That the applicant has lodged a notice of appeal in accordance with Rule 76 of the Rules of this Court.
2. That a substantive application for stay of execution has been filed in this court and is pending hearing.
3. That the said substantive application and the appeal are not frivolous and they have a likelihood of success.
4. That there is a serious and imminent threat of execution of the decree or order and that if the application is not granted the main application and the appeal will be rendered nugatory.
5. That the application was made without unreasonable delay
6. The applicant is prepared to grant security for due performance of the decree.
7. That refusal to grant the stay would inflict greater hardship than it would avoid.

In the case of **Kitende Apollonaries Kalibogha and 2 others vs. Mrs. Eleonora Wismer; *(Supreme Court Miscellaneous Application No. 6 of 2010)*** Justice Okello, JSC, had this to say;

"I agree with the principle stated by this Court in ***Hwang Sung Industries Ltd*** *(Hwang Sung Industries Ltd vs. Tajdin Hussien and 2 others Supreme Court Miscellaneous Application No. 19 of 2008) regarding grant of an interim order of stay of execution. The applicant*

must show by evidence that there is a pending substantive application for stay of execution and that there is a serious threat of execution of the decree before the hearing of the substantive application for an interim order to issue".

Following the decision of the **Supreme Court in Lawrence Musiitwa Kyazze v Eunice Busingye Civil Application No. 18 of 1990,** an application of this nature ought to have been made at the High Court first. In that case the Supreme Court stated as follows at page 10;

"This court would prefer the High court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However if the High Court refuses to accept the jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is great delay, this court may intervene and accept jurisdiction in the interest of justice"

This application was decided by the Supreme Court in 1990 before this Court was established. Back then appeals from the High Court went straight to the Supreme Court.

The above position of the law is also set out **Rule 42 (1)** of the Rules of this Court which stipulates is as follows:

"42 (1) wherever an application may be made either in the court or in the High Court it shall be made first in the High Court.

In the case of **Kyambogo University v Prof. Isaiah Omolo Ndiege** Civil Application no.341 of 2013, this court held as follows;

It is now settled law that this court and the High Court have concurrent jurisdiction in this matter. It appears to me that applications of this nature should be first filed in the High Court as a general rule, and should only be filed in this court, where exceptional circumstances exist. I have found no special circumstances requiring this application to be fixed in this court first. This application ought to have been filed in the High Court.

The application is accordingly struck out.

I so Order.

Dated at Kampala this ..... day of ..... 2023.

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL