

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 17 OF 2022
(Arising Out of Civil Application No. 16 of 2022)
(Arising Out of Court of Appeal Civil Appeal No. 91 of 2021)

Sgt. Oumo Joshua 1st Applicant
Attorney General 2nd Applicant

versus

Paul Wanyoto Mugoya 1st Respondent
Mugisha Patrick alias Kantu Allan 2nd Respondent

Ruling of Percy Night Tuhaise, JSC
(Single Justice)

This application was filed under Rules 2 (2), 6 (2) (b), 42 and 43 of the
Judicature (Supreme Court) Rules, Statutory Instrument 13-11 seeking
orders that:-

1. An interim order doth issue staying execution and/or effecting of
the decision and orders of the ruling of the Court of Appeal Civil
Appeal No. 91 of 2021 pending the hearing and determination of
the main application.

2. A stay of execution of the ruling and all orders arising out of Anti-Corruption High Court Miscellaneous Application No. 31 of 2020 until the final disposal of the main application.
3. Costs of and incidental to this application be provided for.

The application was supported by the affidavit of Sgt. Oumo Joshua the 1st Applicant. It was opposed by the Respondents through their respective affidavits in reply.

At the hearing of this application, Mr. Ojiambo Bichachi, State Attorney, appeared for the Applicants. Mr. Jude Byamukama appeared for the Respondents. The 1st Applicant and the 2nd Respondent were in court at the hearing of this application.

At the commencement of the hearing, learned Counsel for the Respondents raised four preliminary objections regarding the competence of the application. Counsel for both sides made oral submissions on the preliminary objections as well as the merits of the application.

Background to the Application

The Respondents, who were among the accused persons in Criminal Case No. 75 of 2019 at the High Court Anti - Corruption Division, sought orders from the same court *vide* High Court Miscellaneous Application No. 26 of 2020 to halt the criminal proceedings against

them, on the ground that the non - derogable rights of Mugisha Patrick *alias* Kantu Allan (the 2nd Respondent in this application) had been violated. The High Court (Anti - Corruption Division) made a finding that there was no sufficient evidence of proof of torture of Mugisha Patrick *alias* Kantu Allan as to justify the halting of criminal proceedings against them in the same court.

The 1st Respondent (Paul Wanyoto Mugoya) appealed against the decision to the Court of Appeal, which found in his favour, that the human rights of Mugisha Patrick *alias* Kantu Allan had been violated when he was tortured by the 1st Applicant (Sgt. Oumo Joshua) while in custody; that this had the effect of nullifying the trial of the Respondents. The Court of Appeal accordingly allowed the 1st Respondent's appeal, and made declarations and orders, which, for purposes of making the intricate and fact-packed background clearer, are reproduced below, that:-

"1. The conduct and actions of the respondent no.1 as an investigating officer of torturing a one Patrick Mugisha alias Kantu Allan, A4 in Criminal Case No. 75 of 2019 by inserting sticks tied with rubber band between his fingers commonly known as "baibbuli" and coercing him to hand over his certificate of title and land comprised in Busiro Block 312 Plot 841 land at Kalambi that was eventually sold to the Applicant, violated, contravened and infringed upon the said Kantu Allan's non derogable

rights and freedoms from torture, cruel, inhuman and degrading treatment guaranteed under Article 24 and 44 (a) of the Constitution.

2. The process leading to the initiation of criminal proceedings against the Applicant under s. 3 (3) of the Anti-Money Laundering Act, having acquired property from the said Patrick Mugisha alias Kantu Allan, who, unknown to the Applicant had been tortured by the Respondent no. 1 before reaching a decision to dispose of the subject property, violates and contravenes the Applicant's fundamental rights and freedoms to liberty, to just and fair treatment guaranteed under Articles 23, 42 and 45 of the Constitution.

3. The non derogable rights and freedoms, and other fundamental rights of the appellant and Patrick Mugisha alias Kantu in Criminal Case No. 75 of 2019 have been violated and infringed upon through use of torture by the respondent no. 1.

4. The trial of the appellant and Patrick Mugisha alias Kantu in criminal case No. 75 of 2019 is a nullity for the blatant violations and infringement of the accused persons' non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment, and other human rights and freedoms guaranteed under Articles 23, 24, 42 and 44(a) of the Constitution by the Respondent no. 1.

5. I would direct the Registrar of this court to transmit to the Director of Public Prosecutions, a copy of this judgment, in light of the functions of the

Director of Public Prosecutions under article 120 (1) & (2) of the Constitution.

The appellant also sought compensatory orders for the gross and blatant abuse of the fundamental rights of the appellant. Unfortunately, Mr. Mugisha Patrick alias Kantu is not a party to this appeal and I am not in a position to make an award of damages to a person who is not a party to this appeal. However, Mr. Mugisha Patrick was a party in the court below. In the interests of justice, I would refer this portion of the appellant's claim back to the High Court of Uganda, to the learned trial judge, to cause a hearing to be done in respect of the original applicants, including the appellant and determine the appropriate compensation for the appellant and Mr. Mugisha Patrick alias Kantu Allan.

.....

The charges against the appellant and Patrick Mugisha alias Kantu Allan in High Court Anti-Corruption Division Criminal Case No. 75 of 2019 are nullified. A stay of prosecution against the appellant and Patrick Mugisha in respect of the charges in High Court Anti-Corruption Division Criminal Case No. 75 of 2019 is ordered."

The 2nd Respondent (Patrick Mugisha *alias* Kantu Allan), pursuant to the orders of the Court of Appeal, instituted Anti-Corruption High Court Miscellaneous Application No. 31 of 2020 seeking determination of appropriate compensation.

On 10th October 2022, the High Court (Anti - Corruption Division) awarded him, in Uganda shillings, general damages of 40,000,000/=; aggravated damages of 10,000,000/=; exemplary damages of 10,000,000/=; and costs. The general and aggravated damages were to be paid jointly and severally while the exemplary damages were to be paid by Sgt. Oumo the 1st Applicant in this application.

The Applicants now seek this Court to issue an interim order of stay of execution against the orders of the Court of Appeal, and also to issue a stay of execution of the orders of the High Court (Anti - Corruption Division) that were issued pursuant to the Court of Appeal orders.

Applicants' Submissions

Learned Counsel for the Applicants submitted that, under rules 2 (2) and 6 (2) (b) of the Rules of this Court, this Court is empowered with discretion to grant this application to ensure that the substantive application is not rendered nugatory. He submitted that the Applicants were dissatisfied with the Court of Appeal decision; that they filed a notice of appeal; that there is a substantive application; and that when the appeal was filed, the Respondents embarked on execution of the orders. He argued that the proceedings in High Court Miscellaneous Application No. 31 of 2020 (Anti-Corruption Division) were for enforcement on quantum of damages, and that therefore, it is in a process of execution.

Counsel prayed that, under rule 2 (2), this Court grants an interim order staying execution of the orders of the Court of Appeal, for ends of justice; and that, under Rule 6 (2) (b), Court issues an order for stay of execution of the orders of the High Court (Anti - Corruption) issued in Miscellaneous Application No. 31 of 2020.

Respondents' Submissions

Learned Counsel for the Respondents first raised four objections to the application, that:-

1. The application is moot, academic and an abuse of court process because the orders of the Court of Appeal were already implemented partly by the Director of Public Prosecutions (DPP) and partly by the trial Court, as demonstrated by the annexures to the Respondents' affidavits in reply. The discharge orders were issued on 14th July 2022, that is, before 22nd September 2022 when this application was filed. In addition, Annexure B to the 1st Respondent's affidavit is the amended indictment consented to by the DPP indicating the dropped charges against the Respondents, and, further, the quantum of damages was made by the High court as shown by annexure A to the 2nd Respondent's affidavit in reply. Thus, based on that, the application is an abuse of court process, is moot, and a waste of this Court's time.

2. There is no pending competent appeal before this Court, for three reasons; first, that the notice of appeal has never been served on any of the Respondents as required by rule 74 of the Rules of this Court; secondly, that the memorandum and record of appeal has also never been served on any of the Respondents as required under rule 84, that to the best of the Applicants' knowledge, no record of appeal has ever been filed in this Court; and thirdly, that the notice of appeal attached as annexure A1 to the 1st Applicant's supporting affidavit clearly indicates that the 2nd Respondent was never party to Court of Appeal Civil Appeal No. 91 of 2021, meaning only the 1st Respondent was the appellant in that appeal. In conclusion, based on the three reasons, there was no competent appeal that can be filed before this Court against the 2nd Respondent.

3. The Applicants have no *locus* to interfere with the DPP's discretion to drop charges, in light of the Court of Appeal decision. The Applicants want this Court to make it difficult to proceed with the amended indictment, which would offend Article 120 of the Constitution of Uganda which gives the DPP powers to make any appropriate decisions regarding the administration of justice.

4. The orders and ruling in Miscellaneous Application No. 31 of 2020 have never been appealed against, and it would therefore be

highly improper for this Court to stay execution of orders made by the High Court when there is absolutely no appeal pending against the quantum of damages. Since the order of the High Court can only be executed at High Court, the Applicants cannot move this Court to stay orders made by the High Court. If the Applicants were aggrieved by the High Court award of damages, they needed to prefer an additional appeal against the order, which they had not done. The emerging practice of this Court has been that parties invoke rule 41 (1) to seek reliefs of this nature. The Applicants have not demonstrated why they misled this Court to file the application in this Court and not in the Court of Appeal.

On the substance of the application, learned Counsel for the Respondents submitted that there is no order capable of execution against the Applicants except for quantum of damages. He contended that it is clear that only the DPP would be the aggrieved party against the dropped criminal charges and no such grievance was registered by the DPP; and that the 1st Applicant who is a Police Officer cannot dictate to the DPP. He also submitted that, as the Applicants demonstrate, there is no threat of any execution because there is nothing to be executed arising out of the Court of Appeal decision; that therefore, the application is an abuse of court process.

Counsel prayed that this application be struck out, or be dismissed with costs.

Applicants' Submissions

In rejoinder, the Applicants' Counsel submitted that the instant application is for interim stay; that since the Applicants were not arguing an appeal, it is not necessary to file a memorandum of appeal or serve a notice of appeal; and further that rule 6 (2) (b) of the Rules of this Court under which the application was brought does not require filing of a memorandum or notice of appeal. VDT

Regarding the discharge order, Counsel submitted that the Applicants are not parties to the criminal proceedings, and thus, cannot interfere with the discharge order. He contended that the application does not interfere with the DPP's powers, including amending charges; and that the Applicants' concern, however, was in regard to annexure A to affidavit of the 2nd Respondent, where the Court of Appeal ordered that the money is to be paid jointly between the Applicants.

In reply to the fourth preliminary objection, that the Applicants should have filed an application to the Court of Appeal first, the Applicants' Counsel invoked rule 2 (2) of the Rules of this Court which provides that Court may entertain an application under rule 6 (2) (b) to safeguard right of appeal.

In reply to the second preliminary objection, learned Counsel for the Applicants submitted that, much as the 2nd Respondent was not party to the appeal pending before this court, he is a beneficiary, and is using the Court of Appeal decision to enforce his benefits arising from the decision of that court.

Counsel prayed that all the preliminary objections raised by the Respondents' Counsel be overruled, and that the application be granted with costs.

Consideration of the Preliminary Objections

I will first consider the preliminary objections raised by the Respondents' Counsel, since their resolution will determine whether to proceed to resolve the application on its merits or not.

I will resolve the first and the third objections together, to avoid repetition, because some of the issues arising from the two objections are somehow related. (M)

The Respondents' first and third preliminary objections are, respectively, that the application is moot and an abuse of court process because the orders of the Court of Appeal were already implemented partly by the DPP and partly by the trial court before the application was filed on 22nd September 2022; and that the Applicants have no *locus* to interfere with the DPP's discretion to drop charges against the


Respondents, otherwise it would offend Article 120 of the Constitution of Uganda.

Learned Counsel for the Applicants conceded in his submissions that the Applicants are not parties to the criminal proceedings, and cannot therefore interfere with the discharge order; that the application does not interfere with the DPP's powers under Article 120 of the Constitution, under which the discharge orders were issued, including amending charges; and that the Applicants' concern was in regard to the High Court's orders that the assessed damages were to be paid jointly between the Applicants.

The evidence to support the Respondents' first objection is Annexure **A** to the affidavit in reply of the 1st Respondent and Annexure **B** to the affidavit in reply of the 2nd Respondent, which annexures are copies of a discharge order indicating that the Respondents were discharged from criminal prosecution in Criminal Case No. 75 of 2019 on 14th July 2022. In addition, Annexure **C** to the 2nd Respondent's affidavit in reply and Annexure **B** to the 1st Respondent's affidavit in reply, which are copies of the Amended Indictment signed by the DPP following the discharge of the Respondents, do not include the two Respondents among the persons to be indicted under the amended charges to Criminal Case No. 75 of 2019. The 2nd Respondent indeed attended the hearing of this application.

On basis of the evidence availed, that is, the Respondents' release orders and the amended indictment in respect of Criminal Case No. 75 of 2019 in which the Respondents do not feature as accused persons, I would agree with learned Counsel for the Respondents that the application is moot, and that it has been overtaken by events by virtue of the Respondents' release/discharge.

This would dispose of the first prayer of this application, which sought an interim order staying execution and/or effecting of the decision and orders of the ruling in Court of Appeal Civil Appeal No. 91 of 2021 pending the hearing and determination of the main application.

The first preliminary objection succeeds only with respect to the first prayer in this application. It does not dispose of the Applicants' second prayer which relates to staying execution of the orders of the High Court (Anti-Corruption Division) *vide* Miscellaneous Application No. 31 of 2020. This would require me to address the remaining objections to fully resolve the matter, much as this could touch on aspects already rendered moot by the resolving of the first objection. 

The Respondents' second objection is that there is no pending competent appeal before this Court for the reasons that, first, the notice of appeal has never been served on the Respondents as required by Rules 74 of the Rules of this Court; secondly, that the memorandum and record of appeal have also never been served on any of the

Respondents as required under rule 84 of the same Rules; and thirdly, that the notice of appeal attached as annexure A1 to the 1st Applicant's supporting affidavit clearly indicates that the 2nd Respondent was never party to Court of Appeal Civil Appeal No. 91 of 2021; that only the 1st Respondent was the appellant and that, therefore, there is absolutely no competent appeal that can be filed in this Court against the 2nd Respondent.

The Applicants' Counsel, on the other hand, submitted that since the Applicants were not arguing an appeal, it is not necessary to file a memorandum of appeal or serve a notice of appeal; and further, that rule 6 (2) (b) of the Rules of this Court under which the application was brought does not require filing of a memorandum or a record of appeal.

Rule 6 (2) (b) of the Rules of this Court, under which the instant application was filed, requires a notice of appeal to be lodged in accordance with rule 72, which requires such notice of appeal to be lodged in duplicate with the registrar of the Court of Appeal. Rule 74 of the same Rules requires an intending appellant, before or within seven days after lodging the notice of appeal, to serve copies of it on all persons directly affected by the appeal, except where on application, the court directs otherwise. WAK

Regarding the first aspect of the second preliminary objection, that the notice of appeal has never been served on the Respondents, annexure

A1 to the 1st Applicant's supporting affidavit shows that a notice of appeal was filed and received by the Court of Appeal on 12th July 2022, which was within the time of the judgment delivered on 8th July 2022. Annexure A2 to the same supporting affidavit reveals that the 2nd Applicant wrote a letter dated 12th July 2022, addressed to the Registrar Court of Appeal requesting for typed proceedings. The letter indicates that it was copied to the Registrar of the Supreme Court and the Respondents' counsel. The notice of appeal (annexure A1) and the letter to the registrar of the Court of Appeal (Annexure A2) were both filed and or received by the Court of Appeal on 12th July 2022. Annexure A2 shows that a one Mulindwa Muwonge endorsed an acknowledgement of receipt on Annexure A2 on 12th July 2022, on behalf of the Respondents' counsel, but there is no such acknowledgement on the notice of appeal (Annexure A1).

It is the Applicants' submission that since they were not arguing an appeal, it is not necessary for them to serve a notice of appeal. However, though rule 6 (2) (b) expressly requires the filing of a notice of appeal under rule 72 and is apparently silent about the requirement to serve a notice of appeal, it should be read with rule 74, already spelt out above, which clearly requires an intending appellant who has lodged a notice of appeal in the Court of Appeal to serve it on all persons directly affected by the appeal, unless court has directed otherwise. There is no evidence on record that court directed otherwise.

This Court has consistently held that failure to serve a notice of appeal upon the respondents as required by law is mandatory rather than procedural, that such unserved notice of appeal is incompetent. Rule 74 is to ensure that the rights of any party who is likely to be directly affected by the result of an appeal should not be so affected without giving the party an opportunity to be heard. In **Miriam Kuteesa V Edith Nantumbwe & Others SCMA No. 20 of 2014**, this Court struck out a notice of appeal which was not served on persons directly affected by the appeal. In **Kasule Samuel V Mubeezi James SCMA No. 24 of 2015** it was held that service of notice of appeal is to be filed within the required time, and is mandatory. Also see **Kasirye, Byaruhanga & Co. Advocates V Uganda Development Bank SCCA No. 2 of 1997**. WRT

Regarding the second aspect of the second preliminary objection, that the memorandum and record of appeal have never been served on any of the Respondents, rules 6 (2) (b) and 72 clearly do not require filing of a memorandum or a record of appeal in this Court before an application for stay of execution, whether substantive or interim, is filed. The granting of interim orders is meant to help the parties preserve the *status quo* where there is imminent threat of execution. A court in such circumstances will focus on whether there is a competent notice of appeal, a pending substantive application and imminent threat of execution, as opposed to focusing on whether a competent appeal has been instituted, in which case a memorandum and record of appeal


would be required for purposes of determining the appeal on the merits.

Indeed, the record before me does not reflect that a memorandum and record of appeal were filed in this Court, or that the record of appeal was eventually availed to the Applicants by the registrar of the Court of Appeal in response to the request reflected in annexure **A2** to the 1st Applicant's supporting affidavit. The question of serving the said documents on the Respondents would, therefore, in the circumstances of the instant application, not arise.

The third aspect of the Respondents' second objection is that the 2nd Respondent was never party to Court of Appeal Civil Appeal No. 91/2021, and that, therefore, there is absolutely no competent appeal that can be filed in this Court against the 2nd Respondent. The Applicants' Counsel, however, contends that though the 2nd Respondent is not a party Court of Appeal Civil Appeal No. 91 of 2021, he is a beneficiary to the decision in the said appeal, he is using the decision in the appeal to enforce it and benefit from the same, and that is why the applicants have made the second prayer in the application.

Annexure **A1** to the 1st Applicant's supporting affidavit, which is a copy of the notice of appeal filed by the Applicants in the Court of Appeal, clearly shows that the 2nd Respondent was not party to Court of Appeal Civil Appeal No. 91 of 2021. The only party to the appeal named in

Annexure A1 is Paul Wanyoto Mugoya, the 1st Respondent. In that regard, I would agree with the Respondents that no competent appeal can be filed in this Court regarding the 2nd Respondent. The 2nd Respondent was improperly joined to the instant application.

The Respondents' fourth preliminary objection is that since the orders and ruling in Miscellaneous Application No. 31 of 2020 have never been appealed against, it would be highly improper for this Court to stay execution of orders made by the High Court; and that since the order of the High Court can only be executed at High Court, the Applicants cannot move this Court to stay orders made by the High Court unless they have invoked rule 41 (1) first. 


The Applicants, on the other hand, contend that their application was filed under rules 2 (2); 6 (2) (b); 42 and 43 of the Rules of this Court; and that their application does not fall under rule 41 (1); that it rather falls under rule 41 (2) which empowers this Court to entertain an application under 6 (2) (b) to safeguard a right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

I have considered the rules cited by both counsel pertaining to this application together with the submissions. Rule 41 (1) of the Rules of this Court provides that where an application may be made either to the Supreme Court or to the Court of Appeal, it shall be made to the Court of Appeal first. Rule 41 (2) (b) provides that, notwithstanding sub

rule (1) of this rule, in any civil or criminal matter, the court may, in its discretion, on application or of its own motion, give leave to appeal and make any consequential order to extend the time for the doing of any act, as the justice of the case requires, or entertain an application under rule 6 (2) (b) to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

Thus, in my considered opinion, rule 41 (2) read together with rules 2 (2) and 6 (2) (b), avails an exception to rule 41 (1), by availing a discretion to this Court to entertain an application under rule 6 (2) (b) to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

The record shows that the assessment of damages by the High Court (Anti - Corruption Division) arose from a consequential order issued by the Court of Appeal, for compensation of the Respondents. Under the said order, the said High Court, as the trial Court, assessed and determined the quantum of damages to be paid to the 2nd Respondent, who was the sole applicant in Miscellaneous Application No. 31 of 2020. The affidavit evidence on record, that is, paragraph 5 and annexure B to the 1st Applicant's supporting affidavit, together with paragraph 6 and annexure A to the 2nd Respondent's affidavit in reply, clearly reveal that the orders of the Court of Appeal on compensation of the 2nd Respondent were eventually enforced by the High Court (Anti

- Corruption Division) *vide* its ruling in Miscellaneous Application No. 31 of 2020. This is to be considered with Annexures A1 and A2 to the 1st Applicant's supporting affidavit, which reveal the Applicants' intention to appeal against the whole judgment of the Court of Appeal. The nexus between the decision in Court of Appeal Civil Appeal No. 91 of 2021, and the orders issued by the High Court (Anti - Corruption Division) *vide* Miscellaneous Application No. 31 of 2020, as outlined above, would render it appropriate not to sever the two decisions, otherwise it would jeopardize the interests of justice and potentially lead to a multiplicity of suits. 

It is in that perspective that the instant application, which was filed under rules 2 (2) and 6 (2) (b) of the Rules of this Court, could be entertained by this Court to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

This position would be relevant only to the second prayer for stay of execution of the orders issued by the High Court (Anti - Corruption Division) *vide* Miscellaneous Application No. 31 of 2020. The 1st Respondent, who was the sole appellant in Court of Appeal Civil Appeal No. 91 of 2021, was not party to the said application, albeit that the Court of Appeal consequential order on compensation covered him. The only party affected by Anti-Corruption High Court Miscellaneous

Application No. 31 of 2020 is the 2nd Respondent, who, however, has been found to have been improperly joined to this application. That notwithstanding, however, even if the Applicants' prayer for stay of execution was to be addressed under any other exceptions or discretions availed by the Rules of this Court, rule 50 (1) & (2) (b) would not allow it to be heard by a single justice. This therefore would render the second prayer, redundant or incompetent.

Thus, in conclusion, based on the findings, the reasons given, and the law applicable in resolving the four preliminary objections, I find that, substantially, this application is incompetent and an abuse of court process. It is accordingly struck out with costs to the Respondents.

I find it not necessary to delve into the merits of this application since the resolution of the preliminary objections have disposed of all aspects of the application.

Before I take leave of this matter, it is pertinent that I highlight what I would call anomalies or peculiarities I have observed on the face of the record.

The record shows that the Applicants filed this application on 22nd September 2022. The quantum of damages was assessed and determined by the High Court (Anti - Corruption) Division on 10th October 2022, as revealed by Annexure A to the 2nd Respondent's affidavit in reply.

This means that the High Court ruling on assessments and determination of quantum of damages was delivered after the filing of this application. In fact, paragraph 5 of the 1st Applicant's supporting affidavit, read with annexure B to the said affidavit show that the 2nd Respondent's application for assessment of the damages or compensation by the High Court (Anti - Corruption Division) was pending hearing by the time the application and its supporting affidavit were filed. Annexure B which is a copy of the hearing notice shows that the application was scheduled for hearing on 22nd August 2022. However, the second prayer in the instant application, seeking a stay of execution of the ruling and orders Anti-Corruption High Court Miscellaneous Application No. 31 of 2020, is included in an application which was filed well before the said order was issued; and the substantive application (filed in this Court on 22nd August 2022) does not contain any prayer relating to orders of the Anti-Corruption High Court Miscellaneous Application No. 31 of 2020.

Dated at Kampala this^{4th} 27th day of ..February... 2023.

.....*Percy Night Tuhaise*.....

Percy Night Tuhaise
Justice of the Supreme Court