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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISC. APPLICATION NO. 223 OF 2019
(ARISING FROM MA No. 1015 of 2016)
(ARISING FROM CS NO. 695 OF 2016)

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THE GOVERNMENT OF THE UNITED KINGDOM:..... APPLICANT
VERSUS

KAGORO EPIMAC:..... RESPONDENT
BEFORE: HON. JUSTICE ESTA NAMBAYO

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RULING

The Applicant, the Government of the United Kingdom, filed this application under **S.33 of the Judicature Act, S.66 and S. 98 Civil Procedure Act, Order 44 Rules 1 (2), 3 & 4 of the CPR**, against the Respondent seeking for orders that;

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1. The Applicant be granted Leave to appeal against the ruling in High Court MA No. 1015 of 2016, delivered by Justice Lydia Mugambe on the 26th March, 2019, to the Court of Appeal.
2. This court be pleased a stay of proceedings in Civil Suit No. 695 of 2016 pending the hearing and disposal of this application and the appeal.
3. Costs of this application be provided for.

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The grounds of this application are set out in the affidavit in support of the application sworn by Juliet Moriku Balikowa, but briefly are: -

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1. By Notice of Appeal dated 9th April, 2019, the Applicant intends to appeal against the ruling and order of Her Lordship Lydia Mugambe
2. There are serious questions of Law or fact that merit judicial consideration by an appellate court
3. It is just and convenient that this court be pleased to stay the proceedings in HCCS No. 695 of 2016, pending the outcome of the appeal.
4. It is in the interest of justice that leave to appeal be granted to the Applicant

The Respondent opposes this application.

35 **Back ground to the application.**

The brief background to this application is that when the Applicant's workers, agents, officers and/or servants fixed a steel grille in the storm drain on its property in 2016, it blocked the Respondent's system, causing the stormy waters to rise and wash away the Respondent's property. The Respondent then filed Civil Suit No. 695 of 2016 against the Applicant seeking for damages. When the matter came up for hearing, the Applicant raised an objection vide; MA No. 1015 of 2016 that this court had no jurisdiction to hear the main suit against the Applicant/Respondent on grounds of sovereign immunity. The trial Judge over ruled the objection arguing that the suit before court was a commercial transaction to which restrictive immunity does not apply, hence this application.

45 **Legal representation**

M/S S&L, Advocates represent the Applicant while Abbas Advocates are for the Respondent. Written submissions have been filed by the parties as directed by court.

Issues raised for trial are: -

1. Whether the Applicant meets the conditions for grant of leave to appeal.
- 50 2. Whether there is need to stay execution
3. What remedies are available

Resolution

Issue 1. Whether the Applicant meets the conditions for grant of leave to appeal.

Submissions for the Applicant

55 Counsel for the Applicant submitted that in cases of leave to appeal, the test is a prima facie test and the court does not need to fully evaluate the merits of the grounds of appeal. He relied on the case of *Sango Bay Estates Limited & others –v-Dresdner Bank A.G [1971] EA 17* where Spry V.P set out the test for leave to appeal in the following terms;

60 *“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 seriously judicial consideration”*

Counsel also relied on the case of *Hajji Numani Mubi Akulamusa –v- Friends Estate Limited & Another CACA No. 241 of 2011* where the Court of appeal held that all the court is required to do is to determine whether or not prima facie there are grounds of appeal that merit serious consideration. He further relied on the case of *Ayebazibwe Raymond –v-*

Barclays Bank Uganda Limited & 3 others; MA No. 292 of 2014 where it was held that in order to determine whether there are grounds which merit judicial consideration on appeal, the Applicant has to demonstrate grounds of objection showing where the court erred on the question or issues raised by way of an objection.

70 Counsel submitted that in this case, the application and supporting affidavit sufficiently demonstrate the issues meriting judicial consideration by an appellate court.

On the ground of sovereign immunity, Counsel submitted that the court erred in law when it failed to consider and apply the test under the restrictive theory of sovereign immunity doctrine. That the Court ought to have gone further to consider that installation of a grille
75 by the British High Commission does not amount to a trading activity by the British High Commission with the Respondent and it is not a commercial activity with the Respondent or at all. That it was wrong for the court to find that the British High Commission was engaged in trading or commercial activity because the Respondent replaced a broken wall and needs compensation for expenses incurred.

80 Counsel averred that the decision of the court raises serious issues of both law and fact, concerning the legal treatment of the Applicant's activities with third parties both directly and indirectly; particularly in regard to upholding the immunity of the Applicant. He prayed that in view of the above, this court be pleased to find that this application merits judicial consideration and review by the appellate court and grant this application.

85 **Submissions for the Respondent**

In reply, Counsel for the Respondent submitted that the Applicant has not established any grounds of appeal that merit serious judicial consideration. That the principle of immunity raised by the Applicant as a preliminary point of law doesn't pass the test.

Counsel submitted that in this case, there is no way that the issue of immunity as a
90 preliminary point of law can be substantially handled at appellate level as a major issue for appeal without arguing the merits of that assertion in this court since it is the crux of the main case in CS No. 695 of 2016. He relied on the cases of *Sango Bay –v- Dresdner Bank(supra)*, *Ayebazibwe –v- Barclays Bank Uganda Ltd & 3 others (supra)*, *Kengazi –v- Meti (U) Ltd MA No. 471 of 2015* and *Uganda Southern Sudan Grain traders & Suppliers Association Ltd –v- Government of the Republic of Southern Sudan MC No. 17 of 2012*
95 and prayed that this application be dismissed so that the case is heard on its merits.

Analysis

Order 44 rule 2 of the Civil Procedure Rules provides that: -

100 “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.”

In the case of *Sango Bay Estates Ltd & Others -v- Dresdner Bank (1971) EA 17*, Spry V.P stated the principle upon which leave to appeal can be granted as follows: -

“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.”

105 In *Degeya Trading Stores (U) Ltd -v- Uganda Revenue Authority, Civil Application No. 16 of 1996* the Court of appeal noted that: -

“An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct”.

110 In this case, the issue leading to this application is whether this court has jurisdiction to hear the main suit where the Applicant/Defendant is a sovereign State. It was the trial Judge’s finding that the Applicant was engaged in trading or commercial activity and as such the High Court had jurisdiction to hear the main suit.

The doctrine of foreign sovereign immunity provides generally that a foreign state is
115 immune from the jurisdiction of the courts of another sovereign state. Reasons for conferment of Diplomatic immunity have been discussed in various authorities. In the case of *Thai Europe tapioca Service Ltd –v- Government of Pakistan Ministry of Food and Agriculture Supplies Imports and Shipping Wing [1975]3 ALLER 961* cited in the case of *Ministry of Defence of the Government of United Kingdom –v- Ndegwa CA No.31 of 1982*
120 *at page 965*, Court noted that;

*“the general principle is undoubtedly that except by consent, the court of this country will not issue process so as to entertain a claim against a foreign sovereign for a debt or damages. The reason is that if the courts have once entertained the claim, and in consequence gave judgement against the foreign sovereign they could be called to enforce
125 it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee”*

In this case, the Respondent’s claim against the Applicant in the main suit is that the Applicant fixed a grille in their drainage system which interrupted the water drainage on the Respondent’s side and caused damage. The Respondent contends that he incurred
130 expenses to repair his side of the wall and wants the Applicant to reimburse him the incurred costs. The trial Judge found that there was a commercial transaction between the parties.

Art. 31 (1) of the Diplomatic Privileges Act Cap 201 provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy
135 immunity from its civil and administrative jurisdiction, except in the case of: -

(a) –

(b) –

(c) *an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.*

140 In the case of *Uganda South Sudan Grain Traders and Suppliers Association Limited –v-The Government of the Republic of South Sudan, MC No. 17 of 2012*, court noted that;

145 “pursuant to the restrictive principle of sovereign immunity, where a sovereign state descends into the market place and carries out, conducts or indulges in commercial transactions, a suit can legally be brought against such a state in domestic courts of another state in relation to such commercial transactions.”

It is my finding that in this case, there is need for the appellate court to re-evaluate the evidence on record and come up with its own finding as to whether or not there was a commercial transaction between the parties so that this court is guided on whether or not it has jurisdiction to hear the main suit.

150 Considering the Respondent’s claim against the Applicant in the main suit and the finding of the trial Judge that there is a commercial transaction between the parties, it is my finding that the Applicant meets the conditions for grant of leave to appeal and I would therefore answer the 1st issue in the affirmative.

The 2nd issue is whether there is need to stay execution.

155 Counsel for the Respondent submitted that he would have no objection to the 2nd issue in the event that this court answered the 1st issue in the affirmative. I find no reason not to grant the 2nd issue.

Therefore, this application is allowed with orders that: -

- 160 1. Leave to appeal be and is hereby granted to the Applicant to appeal against the ruling and orders of Hon. Justice Lydia Mugambe in the case of *Government of the United Kingdom –v- Kagoro Epimac, MA No. 1015 of 2016*.
2. Proceedings of this court in High Court Civil Suit No. 695 of 2016 be and are hereby stayed pending the outcome of the appeal.
3. Costs of this application abide the outcome of the appeal

165 I so order.

Dated, signed and delivered by mail at Kampala on this 1st day of June, 2023.

Esta Nambayo

170 JUDGE

1st /6/2023.