THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 0058 OF 2024

(Arising from Civil Reference No. 28 of 2023 and Civil Appeal No. 250 of 2022)

MIAO HUA XIAN :: APPLICANT

VERSUS

NAMAGANDA LTD :: RESPONDENT

BEFORE: HON JUSTICE OSCAR KIHIKA, JA

(Sitting as a single Justice)

RULING OF COURT

This application was brought under Rule 2(2), 43 and 44 of the Judicature (Court of Appeal Rules) Directions seeking for orders that;

1. The order dismissing Civil Appeal No. 250 of 2022 against the Respondent be set aside.
2. An order that Civil Appeal No. 250 of 2022 be re-instated against the Respondent pending the hearing and determination of Civil Reference No. 28 of 2023.
3. The execution of the orders of the High Court Suit No. 743 of 2015 & 78 of 2016 and Civil Application No. 1019 be stayed pending determination of Civil Reference No. 28 of 2023.

The Applicant filed an affidavit in support of the application deponed by the Applicant, MIAO HUA XIAN, on 2nd February 2024 and a rejoinder on 8th April 2024. The grounds upon which this application is premised, as stated in the Notice of Motion and the affidavits of the Applicant are briefly that;

1. The Applicant lodged Civil Appeal No. 250 of 2022 against DFCU Bank together with the current Respondent.
2. The Respondent herein applied to court for deposit of additional security for costs and on 5th December 2024, the Applicant was directed to pay UGX 100,000,000/= as security for costs and UGX 220,224,000/= as security for payment of past costs in High Court Civil Suit No. 78 of 2016.
3. The Applicant filed a Reference against that decision vide Reference No. 28 of 2023 which is yet to be heard.
4. On 2nd February 2024, the Applicant discovered that the said application No. 1019 of 2023 came up on 29th January 2023 and orders were made dismissing the appeal for failure to deposit the impugned deposit.
5. The Respondents have taken steps to file execution proceedings under EMA No. 004 of 2024.
6. The Applicant has filed this application to have the dismissal order set aside since the same was done in error.
7. Some of the properties that had been attached in EMA No. 41 of 2024 are properties that belong to the estate of the late Ye Yuelin.
8. This Application has been filed without inordinate delay.

The Respondent filed an affidavit in reply deponed by one VINCENT MAWANDA, a Director of the Respondent, sworn on the 25th of March 2024 opposing the application on grounds briefly that;

1. The Applicant's impugned omnibus application seeking to set aside the dismissal order, to reinstate the appeal and stay execution proceedings is unfounded in law and is an abuse of court process.
2. Contrary to the Applicant's allegations, High Court Civil Suit No. 78 of 2016 was determined in favor of both the Applicant and the Respondent.
3. The Applicant's appeal was devoid of any merit and the same was instituted to frustrate the Respondent's possession of property comprised in LRV Folio 25 Plot 47 Nabugabo and recovery of rent accruing to the Respondent since 2016 as well as taxed costs in H.C.C.S No. 78 of 2016.
4. The Respondent's application for security for costs vide Civil Application No. 1019 of 2023 in the appeal was based on the sum of costs taxed by consent of both parties in H.C.C.S No. 78 of 2016.
5. The Respondent and its lawyers have never been served with the impugned Reference against the single Justice of this Court's decision.
6. The Ruling in Civil Application No. 1019 of 2023 was delivered on 5th December 2023 and on 24th January 2024, the

Respondent's lawyers wrote a letter to the Registrar of this Court inquiring whether the Applicant had deposited the security for costs.

7. The Registrar conformed that the same had not been deposited and the file was thus placed before the Hon. Justice Catherine Bamugemereire for issuance of the requisite consequential orders.

Representation

At the hearing of this application, Mr. Francis Sempagama appeared for the Applicant while Mr. MacDusman Kabega appeared for the Respondent. Both parties filed written submissions and the same were adopted as legal arguments.

Consideration of the Application

I have carefully considered the law applicable to this application and the authorities cited to court together with the affidavits of both parties. I have also carefully considered the submissions of both parties for and against this application, and the applicant's submissions in rejoinder. I shall proceed to determine this application bearing the same in mind.

Respondent's preliminary point of law

The Respondent's counsel raised a preliminary regarding this Court's competence and jurisdiction to grant the first two Orders sought by the Applicant. Counsel for the Respondent submitted that an objection as to jurisdiction, being so central to the authority of the

Court to undertake proceedings in a case before it, must be raised at the earliest opportunity so that the Court does not engage in a futile exercise. Counsel argued that this Court, constituted as it is *(sitting as a Single Justice of Appeal)* has no jurisdiction to set aside the decision of the Learned Justice of Appeal nor can this Court reinstate Civil Appeal No. 250 of 2022. That these two Orders can only be granted by the Full Bench of this Court. Counsel argued that the order of reinstatement sought by the Applicant, if granted, would pre-empt the impugned Reference vide *Civil Reference No. 28 of 2023* allegedly pending before the Full Bench.

Consideration of the preliminary point of law

Section 12(1) of the Judicature Act provides for the powers of a single Justice of the Court of Appeal. It provides as follows;

"12. Powers of a single justice of the Court of Appeal

(1) A single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal."

From the above excerpt, it is quite clear that a single justice if the Court of Appeal can only entertain interlocutory matters. The first two orders sought by the Applicant are certainly not interlocutory in nature. Secondly, I agree with Counsel for the Respondent when he contends that I have no jurisdiction to set aside a decision of a single Justice of the Court of Appeal. That is the remit of a full bench constituting three Justices of this Court.

This Court sitting as a single Justice clearly has no jurisdiction to grant the 1st and 2nd orders sought by the applicant. The preliminary objection is thus upheld.

STAY OF EXECUTION

The authorities of **Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990; Dr. Ahmed Muhammed Kisuule Vs Greenland Bank (In Liquidation) SCCA No. 7 of 2020** and **Gashumba Maniraguha vs Samuel Nkundiye SCCA No. 24 of 2015** re-state the principles for the grant of a substantive order for stay of execution such as one before me.

The Supreme Court in the application by **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013** clearly re-stated the principles as follows:

In order for the Court to grant an application for a stay of execution;

> *"(1) The applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal*
>
> *(2) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.*
>
> *(3) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.*
>
> *(4) That the applicant must also establish that the application was instituted without delay."*

The issue for determination by the Court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

1. *Prima facie* case with likelihood of success

On the issue of likelihood of success, the Applicant's counsel submitted that the Reference has a high likelihood of success and referred to paragraphs 8, 9 and 11 of the Applicant's affidavit in support of the application. Paragraph 8, 9 and 11 of the affidavit deponed by the Applicant do not, in any way, state any facts as to the prima facie case of the Applicant. For ease of reference, I will reproduce the same;

> *"8. On the 2nd day of February 2024, I was informed by my Advocates which information I verily believe to be true, that while on their routine checks in line with the Civil Reference, they discovered that the said Application No. 1019 of 2023 came up before Justice Catherine Bamugemereire on the 29th of January 2024 and the orders therein wherein made dismissing the entire appeal for failure to deposit the impugned deposit. A copy of the impugned Dismissal order is attached herein marked "C".*
>
> *9. I am further informed by the said advocates that they were never served or brought to notice of this proceedings or their commencement.*
>
> *11. I am advised by counsel that the dismissal of my appeal before the hearing of my reference was done in error and ought to be set aside to serve the ends of Justice."*

The grounds, as stated in the applicant's affidavit in support of the application, do not contain this very important consideration. From the paragraphs quoted above, the Applicant has not availed this court with any evidence to support the assertion that the Reference has a probability of success. Reference is only made to the orders that the single justice made, which the Applicant argues were made in error.

The Supreme Court in the case of **Gashumba Maniraguha vs Sam Nkudiye Civil Application No. 24 of 2015**, held that the likelihood of success is the most important consideration in an application for stay of execution. Therefore, it is incumbent upon the Applicant to avail evidence, or material to the court in order for it to establish whether or not the Applicant has a prima facie case on appeal.

Indeed, in the case of **Osman Kassim Vs Century Bottling Company Ltd Civil Appeal 34 of 2019**, the Supreme Court of Uganda stated thus;

> *" It is trite that in order to succeed on this ground, the Applicant must, apart from filing the Notice of Appeal, place before Court Material that goes beyond a mere statement that the appeal has a likelihood of success.....the important questions are not even mentioned in his affidavits so as to give court an idea about the possible ground of his intended appeal. We are in the circumstances unable to establish the likelihood of success in the absence of evidence"*

I therefore find that the Applicant has failed to establish a prima facie case with a probability of success.

2. Irreparable damage

The second consideration is whether the Applicant will suffer *irreparable damage or that the reference will be rendered nugatory if a stay is not granted.*

In this regard, the Applicant's counsel argued that the applicant will suffer irreparable loss considering that the property was sold fraudulently by the Bank on the premises that there were outstanding loans whereas not. However, the Applicant's affidavit in support of the Notice of Motion does not demonstrate the irreparable damage likely to be suffered should this application not be granted.

Black's Law Dictionary, 9th Edition at page 447 defined "irreparable damage" to mean;

> *"damages that cannot be easily ascertained because there is no fixed pecuniary standard measurement"*

In my understanding, the applicant has to show that the damage bound to be suffered is such that it cannot be undone. No amount of monetary recompense can restore the injured party to the position he or she was before the damage was visited on the individual.

In the instant case, the Applicant has not given this court any evidence to prove irreparable damage. The inconvenience likely to be suffered as a result of the success of the Reference can be sufficiently

be atoned for in monetary terms. I am therefore unable to find that the Applicant will suffer irreparable damage.

In the case of **American Cynamide vs Ethicon [1975] 1 ALL E.R. 504** it was held;

> *"The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the Application and the time of the trial.*

Applying the above principals of irreparable damage, I am therefore unable to find that the Applicant will suffer irreparable damage.

Having found as I have above, I find no reason to delve into the issue of balance of convenience for reasons that court should only consider the balance of convenience where it is in doubt.

Before I take leave of this matter, I must note that this is one of the cases where the Applicant's counsel has not been of help to their client. Applications such as these have laid out principles that govern the grant of an order such as the one sought in this application. Considering that evidence in this court and specifically in interlocutory applications is by way of affidavit, the principles that govern the grant of an order for stay of execution, injunction or stay of proceedings should be canvassed in the affidavits of an applicant.

This court held in the case of **Uganda Revenue Authority Vs National Social Security Fund Civil Application No. 43 of 2023** that;

> *"I am mindful of the fact that in applications such as these, the duty of court is to protect the applicants right of appeal where he or she has complied with Rule 76 of the rules of this court. Whereas I am satisfied that the applicant in this case has indeed complied with Rule 76, the applicant has sadly not provided material to this court necessary for it to exercise its discretion in protecting its right of appeal."*

In cases where an Applicant has not provided court with material to support grant of an order of stay of execution, court cannot exercise its discretion to protect their right.

Given the findings above, I find no merit in the application and order as follows;

1. The application is dismissed.
2. The costs of this application shall abide the outcome of the Reference.

I so order

Dated this ....12th....day of ....April.....2024

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OSCAR JOHN KIHIKA

JUSTICE OF APPEAL