

IN The COURT OF APPEAL

At MENGO.

(CORAM: WAMBUZI, P., MANYINDO, V-P., LUBOGO, AG J.A.)

CIVIL APPEAL NO. 13 OF 1984.

BETWEEN

MUGENYI & COMPANY ADVOCATES..... APPELLANT

AND

NATIONAL Insurance CORPORATION. . . . .RESPONDENT

(Appeal from a Judgment and Order of the High Court of Uganda (Ouma, Ag J)

dated 9<sup>th</sup> July, 1984.

CIVIL SUIT NO.306 OF 1982).

JUDGMENT OF WAMBUZI, P.

This is an appeal from the judgment and order of the High Court (Ouma, Ag. J) granting stay of execution pending an appeal to this court. The application for stay of execution was made under Order. 19 Rule 26 of the Civil procedure Rules and section 101 of the Civil Procedure Act.

The facts of this case are a little involved. It appears that the appellant was a decree holder in civil suit 703 of 1981 and had levied execution on the Respondent's property. The Respondent filed objection proceedings seeking the execution levied to be, set aside which was refused by the High Court (Asthana, J as he then was). The Respondent then filed civil suit 306 of 1982 against the appellant pursuant, to the provisions of rule 60 Order 19 of the Civil Procedure Rules seeking to establish some right in the property against which execution had been levied in Civil suit 703 of 1981. Civil suit 306 of 1982 was dismissed with costs) (Kato, Ag J.) under Order 9 rule 19 when the respondent as plaintiff, failed to appear at the hearing. An application was made to reinstate civil suit 306 of 1982 which was refused (Allen, J., as he then was) A notice of appeal against this decision was filed. It appears that upon dismissal of civil suit 306 of 1982 the appellant instituted execution proceedings for coats. The respondent then applied for and was granted a stay of execution (Ouma Ag. J.). This is the subject matter of this appeal. The 9 grounds of appeal argued by Mr. Mugenyi, counsel for the appellant relate to two broad issues. Firstly that the High Court has no

jurisdiction to order stay of execution pending appeal and secondly that the conditions necessary for an order of stay of execution to issue were not satisfied.

Rule 26 of Order 19 of the Civil procedure Rules Provides,

“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”

The learned trial judge held that under this rule the High Court had jurisdiction to grant a stay of execution. The learned judge said,

“In Addi Halfani v Hamisi Binti Athumani (1962) E.A. 761. Sir Ralph Windham C.J. as he then was, considered the wording of Order XXI rule 29 of the Indian Civil Procedure Rules and held, inter alia, “The words of, Order XXI rule 29 impose no condition regarding the nature of the pending suit, or the effect of a stay of proceedings granted under the rule as regards adjustment of claims or prevention of multiplicity of execution proceedings; all the rule requires is that there shall be a pending suit, which in the absence of limiting words mean any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be executed.”

With respect to the learned Judge however the facts of that case were a little different from the facts of the case before him. In that case the pending suit and the application for stay of execution were all in the same court, that is, in the Magistrate’s court. The matter had gone to the High Court on appeal against the Magistrate’s Court’s refusal to grant a stay of execution but in the Court of Appeal. On the wording of the rule I must agree with Mr. Mugenyi that a pending suit in any court be against the holder of a decree in that court and it is that court which may on terms as it thinks fit stay

execution of the decree until the pending suit has been decided. Here the only pending case was the intended suit appeal pending in a different court. Civil suit 306 of 1982 having been dismissed by Kato, Ag J. was no longer pending in the High Court and could not be the basis of the application for stay of execution within the meaning of the rule. Further it was argued before us although not in the Court below, that the applicant was not a decree holder within the meaning of rule 26, The word “decree” is defined in section 2 of Civil Procedure Act and does not include any order of dismissal for default, I would hold this as a valid objection and I have no doubt that if it had been advanced in the court below the learned judge would have come to a different conclusion on the issue. The extract quoted above which was relied on by the learned judge decided merely that the nature of pending suit is immaterial but stays nothing as to which court the suit must be pending in or indeed which decrees fall to be held under the rules I would hold that the present case did not fall within the scope of rule 26 of Order 19.

The learned trial judge went on to hold that the High Court has inherent jurisdiction under section 101 of the Civil Procedure Act to stay execution. Mr. Mugenyi has attacked this decision. He submitted in effect that the wide jurisdiction of the High Court must be exercised subject to the written law. We were referred to section 3 (2) (b) of the judicature Act. According to the written law jurisdiction to stay execution pending appeal to this Court is conferred only on this Court. The learned counsel referred to rules 5 and 2 of the, rules of this Court and to some authorities to he effect that where express provision is made in the law that section 101 of the Civil Procedure Act cannot be invoked.

With respect to the learned counsel the rules o this Court are made pursuant to Section 43 of the judicature Act 1967 which provides,

“ (1) The President of the Court of Appeal, after consultation with the Attorney General, may, by Statutory Instrument, make rules of Court for regulating the practice and procedure of the Court of Appeal with respect to appeals to that Court.”

These rules therefore are not intended to confer jurisdiction on any court regulate the procedure and practice of the High Court. Whether the High Court has power or not to make an order, in this case to stay execution, is a matter of jurisdiction not procedure or practice of the Court of Appeal. I think it is well established that the High Court has inherent jurisdiction to stay any of its orders, see Joanita Kaggwa v Olive Amelia Kawalya-Kaggwa (Administration Cause No. 21 of 1972. Ujagar Singh v Runda coffee Estates Ltd 1966 E.A. 265. In the latter case Sir Clement de Lestang Ag. V.P. interpreting the meaning of the word “appeal” in rule 33 of the Court of Appeal for Eastern Africa Rules, 1954, considered the jurisdiction of the Court of Appeal under the Kenya Law, Section 3 (2) of the Appellate jurisdiction Act, 1962 as quoted by The learned Ag. V.P. at page 266 provides as follows,

“For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Ordinance, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction vested in the court from which the appeal is brought.”

The learned Ag V.P. then said,

“Since there can be no doubt that the High Court has power to order stay of. execution either in the exercise of its inherent jurisdiction or under O XLI r 4 it follows that a like jurisdiction is conferred on this Court by the section above quoted.”

The Kenya section 3(2) of the Appellate Jurisdiction Act, 1962, is virtually the same as our section 40 (2) of the judicature Act. The point to note here is that the learned Ag. Vice President did not say that jurisdiction of the High Court to stay execution was conferred by rule 53 of the Court of Appeal for Eastern Africa Rules, 1954, which was then in operation. In his dissenting judgment Newbold, P. said at page 271.

“Every Court has an inherent jurisdiction to stay its own order and the jurisdiction of the High Court to stay its own order does not depend solely on O XLI.”

I must reject Mr. Mugenyi’s argument that the repeal of rule 53 deprives the High Court of Jurisdiction to order stay of execution pending an appeal. For The reasons I have given, grounds of Appeal 1, 2, 4 and 6 questioning the jurisdiction of the High Court to order a stay of execution must fail.

Having decided that the High Court has jurisdiction to hear the application for stay of execution pending appeal I now turn to the merits of the application. It is common ground that Civil Suit 306 of 1982 was dismissed in default of appearance. We are informed by Mr. Mugenyi, and Mr. Mulira does not refute the claim, that the execution which was stayed and is the subject of this appeal was in relation to costs which had been taxed when Civil Suit 306 of 1982 was dismissed. The respondent applied to reinstate Civil Suit 306 of 1982 and that application was refused. The Learned judge in the Court below considered the fact of the case and said,

“I agree with the assertion of the counsel for the respondent that this court, not being a Court of Appeal would not be in a position to y whether or not the appeal is likely to succeed. In fact, I would go even further to say that it is not the function of this court to express any opinion as to whether or not the appeal is likely to succeed, as in effect that would perhaps be pre judging the appeal. However, this Court has no other alternative but to reconsider, for the purpose of determining whether this is a proper application for the exercise of the Court’s discretion under Order 19 rule 26 of the civil Procedure Rules, to order a stay of execution. With the material before me, in this instant application, it is hard to say whether or not the appeal is likely to succeed. However, in the event the applicant eventually succeeds, in his appeal, his success would be of no use unless the money paid into Court is protected in the meantime. Accordingly, this application is allowed with costs of the application to the respondent.”

With respect to the learned Judge an order for stay of execution must be intended to serve a purpose. It must assist the parties in balancing their claims in the long run, if the pending appeal in this case succeeded, that is that Civil suit 306 of 1982 was ordered to be reinstated there would be no way where the order for costs made by Kato Ag. J., on dismissal of the suit in default of appearance could be affected. The best the Court of Appeal could do in those circumstances would be to allow costs of the appeal and in the court below which will mean costs for applying for reinstatement which would not include the costs incurred upon dismissal in default. I fail to see the purpose for the order for stay of execution. On this ground alone I would allow the appeal and discharge the order for stay of execution. On this ground alone I would allow the appeal and see no need to consider other grounds of appeal on this issue. I would accordingly allow the appeal and discharge the order for stay of execution I would grant costs of this appeal and in the court below to the appellant. As the learned V.P. and Lubogo Ag. J.A. agree it is so ordered.

W.W. WAMBUZI

P R E S I D N T

DATED AT MENGO 29<sup>th</sup> DAY OF May 1986

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JUDGMENT OF LUBOGO, AG J.A.

I have had the advantage of reading in draft the judgment prepared by Wambuzi, p. I agree with it and have nothing useful to add.

DATED AT MENGO THIS 29<sup>TH</sup> DAY OF May 1986

Sgd: (D.L.K. LUBOGO)

AG.  
JUSTICE OF APPEAL.

Mr. Mugenyi of Mugenyi & Co. Advocates.  
Mulira of Mulira & Co. Advocates.

I certify that this is a true copy of Original

**(M.K.KALANDA)**  
REGISTRAR OF COURT OF APPEAL.

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JUDGMENT OF MANYINDO V-P.

I have read the judgment of the learned President. I agree that this appeal must succeed for the reasons stated in that judgment. I also agree to the order for costs in the terms proposed by him.

DATED AT MENGO THIS 29<sup>TH</sup> DAY OF MAY 1986

(S.T. MANYINDO)

VICE-PRESIDENT