

9

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPLICATION NO. 39 OF 1997

CORAM: [G.M. OKELLO, JA., J.P. BERKO, JA. & A. TWINOMUJUNI, JA.]

BETWEEN

KAMPALA PHARMACEUTICAL INDUSTRIES 1996 LTD.....APPLICANT

AND

USHILANO GALLIBHAI.....RESPONDENT

[Appeal from the order of dismissal by the High Court
(Hon. Principal Judge) dated 13-10-97 of the applicant's
objection to an attachment pursuant to the decree in
H.C.C.S No. 393 of 1993]

RULING OF THE COURT

The applicant brought this application by Notice of Motion under Rules 5 (2)(b), 42(1)(2), and 43 of the Rules of this Court seeking an order of this Court for a stay of execution of the decree of High Court Civil Suit No. 393 of 1993 pending the disposal of the appeal against the dismissal by the High Court of the applicant's objection to the attachment of the applicants properties pursuant to the decree.

Gupta Sudhir is the General Manager of the Applicant company. He swore an affidavit dated 14th October 1997 in support of the application. There were three other supporting supplementary affidavits sworn by Alex Resida as Counsel who was conversant with the facts of the applicant's case.

The facts of the application, as could be discerned from the above affidavits run as follows:-

The Respondent had sued Kampala Pharmaceutical Ltd in the High Court Civil Suit No. 393 of 1993. The nature of the claim is not material to this application. The Respondent obtained a decree against Kampala Pharmaceutical Ltd. Execution was ordered and a warrant of attachment was issued against it.

On 26/9/97 Oscar Associates Court Bailiff proceeded to the Applicant's premises on Plot 444B Ntinda Industrial Area and attached properties which the applicant claimed were its own and were in its possession. The properties attached were listed in an inventory marked SC III to Studhir's affidavit. They were subsequently advertised for sale on 17th October 1997.

The applicant who was not a party to the decree filed an objector proceedings challenging the attachment of its properties as not being liable for attachment. The application was heard by the learned Principal Judge on 8/10/97. On 13/10/97 a Ruling was delivered dismissing the application.

Dissatisfied with that order of dismissal, the applicant filed a Notice of Appeal on 14/10/97. On 15/10/97 it filed this application.

Three grounds of the application were set as follows:-

- (1) that the applicants have sunk in a colossal sum of money in the investment worth over US4.4,000,000/= and stand to be subjected to irreparable loss which cannot be atoned by damages.

- (2) The applicants have high probability of success in the appeal and yet if the threatened sale/execution goes on the whole appeal would be rendered nugatory.
- (3) The applicants have made the application without unreasonable delay after learning that their objection proceedings in the High Court were rejected/dismitted with costs.

The Respondent opposed the application and filed an affidavit in reply dated 20th October 1997 deponed to by Ms. Anne Mugenyi as Counsel authorised to do so. Paragraph 6 of that affidavit sets out a ground of objection to the application. It reads,

“That from my perusal of the court files, the Counsel for the applicant/objector has never made an application for leave to appeal against the said ruling in Misc. Application No. 884 and Decree No. 393 of 1993 which they seek to stay the execution thereof.”

We understand the above paragraph to be raising an objection that the application is incompetent as the notice of appeal upon which it is based was lodged without the leave to appeal having first been obtained. This raises the question of the propriety of the application before us.

In his argument, Mr. Nangwala, learned Counsel for the applicant responded to the above averment that under Rule 75(4) of the Court of Appeal Rules, it was not necessary to obtain leave before lodging Notice of Appeal. We agree. That is the law. The relevant sub-rule 4 of Rule 75 of the Rules of this Court says:-

“When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain the leave or certificate before lodging the Appeal.”

We think that the above effectively answers the issue raised by paragraph 6 of Ms Anne Mugenyi's Affidavit in reply. Failure to obtain leave to appeal before lodging the Notice of Appeal where an appeal lies only with leave is not fatal to the Notice of Appeal. The leave may be obtained before or after lodging the Notice of the Appeal. (See rule 40(1) of the Rules of this Court. (Legal Notice No. 11 of 1996).

Another point canvassed by Mr. Yese Mugenyi, Counsel for the Respondent, at the hearing was that the Applicant being a stranger to the decree in High Court Civil Suit No. 393 of 1993 can not seek a stay of its execution. Only a party to a decree can seek a stay of its execution. We understand that to be a challenge to the propriety of the application before us.

On the other-hand, Mr. Nangwala's view on that submission was that the applicant was not seeking a blanket ban on the execution of the decree. It was only concerned with the attached properties which it claims interest in. It seeks to preserve them until the disposal of its pending appeal.

We believe that where there is a right there must be a remedy. O.19 r.55 of the C.P.R. gives the applicant who claims interest in the properties attached in execution of the decree in High Court Civil Suit No. 393 of 1993 the right to raise objection to the attachment and the court must investigate that objection. That is what the applicant had done. It had raised objection to the attachment of those properties. The court investigated that objection and dismissed it. Dissatisfied with that dismissal order, the applicant appealed against it. It has now brought this application to enlist the assistance of this court as was stated by the Supreme Court in J.W. Kazzora v Rukaba Civil application No. 4 of 1991 to ensure that if its appeal succeeds, it is not rendered nugatory. It is not seeking a general ban on the execution of the decree in High Court Civil Suit No. 393 of 1993 against the right party: We think the point raised by Mr. Mugenyi is not meritorious. We rejected it.

Rule 5(2)(b) of the Court of Appeal Rules empowers the court to grant a stay of execution where Notice of Appeal has been lodged within the prescribed period. Rule 41(1) of the Rules of the Court gives the procedural order of presenting such applications under Rule 5(2)(b). The Supreme Court has made a series of decisions setting out a practice procedure which the court should adopt in exercising the power given it under Rule 5(2)(b) of the Rules of the Court. In Lawrence Mussiitwa Kyazze vs Eunice Buserigye Civil Application No. 18 of 1990 (unreported) on page 8, of the Ruling the Supreme Court said,

“..... in general, application for a stay should be made informally to the Judge who decided the case when the judgment is delivered. The Judge may direct that a formal Motion be presented on Notice (Order XLVIII r I) after Notice of Appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet conditions set out in order XXXIX r 4(3) of the Civil procedure Rules. The temporary application may be exparte. If the application is refused, the parties may then apply to the Supreme Court under Rule 5(2)(b) of the Court of Appeal Rules where again they should be prepared to meet conditions similar to those set out in order XXXIX 4(3)”.

The above practice procedure was summarised in J.W.R. Kazoora vs M.L.S Receive Civil Application No. 4 of 1991 (SCU 1993) III KALR 23 at 27 as follows:-

- (1) As every court has an inherent jurisdiction to stay its own order, it follows that the High Court has power to order a stay of execution pending an appeal from one of its orders to the Supreme Court.
- (2) Rule 41 illustrates the sound general principle that disputes should first be adjudicated in the lowest courts having

jurisdiction. Its provisions may be implied as being directory rather than mandatory with regards to applications for a stay of execution since both the High Court and the Supreme Court have jurisdiction.

- (3) There must be substance to the application for a stay of execution both in form and content. It is preferable for the High Court to deal with the application on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction for manifestly wrong reasons, or there is great delay, the Supreme Court may intervene and accept jurisdiction in the interest of justice.
- (4) This court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interest of justice to the parties. But before the Court can so act, it must be appraised of all the facts."

Under the above practice procedure, emphasis is placed on the fact that application for a stay of execution should preferably first be made in the High Court. The instant application was presented to us as if the Applicant had earlier made a similar application to the High Court and had been refused. In response to our question however, Counsel for the applicant conceded that he had not first made the application to the High Court. He gave from the bar two reasons for that failure. Firstly, that the Ruling was delivered on 13/10/97 by a Registrar who declined jurisdiction over grant of a stay. Secondly, that there was pressure of time as the attached properties were advertised to be sold on 17/10/97; yet the cause list of the High Court work for the week had already been out and it was unlikely that he could get the application heard by the High Court before 17/10/97. Another reason raised by Counsel for the applicant for the failure was that because the objection had challenged the execution and was rejected by the High Court it was likely that the

special circumstances to justify the applicant bringing the application direct to this court. We are satisfied that the application is therefore properly before us.

On the merits of the application, Mr. Nangwala submitted that the properties attached are machineries used in the applicant's Pharmaceutical Industries business. They were listed in the inventory S.C III to the affidavit of Sudhir and were stated as worth US\$4,242,293. It was the contention of Counsel for the applicant that if the threatened sale went ahead, the applicant would suffer irreparable loss which could not be atoned for by payment of damages. He further stated that even the payment of damages was not foreseeable because the Respondent has left the country and is now living in Australia outside the jurisdiction of the court. This last assertion was conceded to by Counsel for the respondent who confirmed that the Respondent is out of the country and was willing to return to Uganda but fears for his life.

Mr. Nangwala further submitted that there was a bright prospect of the appeal succeeding and that if the application was not granted and the attached properties were sold, the appeal, if it succeeds, would be rendered nugatory.

Of course, the principal purpose of a stay of execution pending appeal, is to preserve the properties attached so that if the appeal succeeds, it is not rendered nugatory. See Kazzora vs Rukaba above. Given the circumstances of this application; the value of the properties attached, their importance to the applicant's business, the absence of the Respondent from the country and the threat to sell them by 4/11/97, it

is necessary that the application should be allowed to preserve the properties attached so that its appeal, if it succeeds, is not rendered nugatory.

Accordingly, we allow the application and order that the sale of the properties attached in execution of the decree in High Court Civil Suit No. 393 of 1993 advertised for 4/11/97 be stayed pending the disposal of the applicant's pending appeal. Cost of this application is to abide the result of the pending appeal.

Dated at Kampala this..... of October, 1997.

G.M. OKELLO/J.A.

J.P. BERKO/J.A.

A. TWINOMUJUNI/J.A.

dated at Kampala this 31st day of Oct. October, 1997.

Gentlemen

G.M. OKELLO/J.A.

[Signature]

J.P. BERKO/J.A.

[Signature]

A. TWINOMUKUNI/J.A.