THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPLICATION NO. 147 OF 2014

(Arising from Civil Application No. 146 of 2014)

AIDS HEALTH FOUNDATION ==========

APPLICANT

-VERSUS-

DR. STEPHEN MIREMBE KIZITO ==========

RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

(Single Justice)

RULING

This application is brought under ***Rules 42(1) (2)*** and ***6 (2)*** of the Rules of this Court. The applicant seeks an interim order of stay of execution pending a substantive application for stay of execution. The substantive order of stay of execution itself is pending the hearing and determination of the appeal herein.

The application seeks to stay the order of The Hon. Lady Justice Margaret C. Oguli-Oumo, J in High Court Miscellaneous Application No. 107 of 2013, itself arising out of Civil Suit No. 25 of 2005. In

her decision dated 20th February 2014 the learned judge awarded Shs.10,000,000/= as general damages to the respondent. She also awarded him Shs. 15,000,000/= as punitive damages and costs.

This application seeks to stay the execution of the order of the High Court pending appeal. I presume that this application was fixed before me as a single justice of appeal for disposal pending the hearing and determination of the substantive application for stay of execution because it was assumed that a single justice of appeal has no jurisdiction to hear and determine a substantive application for stay of execution.

This presumption is based probably on the reading of ***Rule 53*** of the Rules of this Court.

This Rule provides as follows;-

"53. Hearing of applications

(I) Every application, other than an application included in subrule (2) of this rule, shall be heard by a single judge of the court; except that any such application may be adjourned by the judge for determination by the court.

(2) This rule shall not apply to-

(a) an application for leave to appeal or for a certificate that a question or questions of great public or general importance arise:

(b) an application for a stay of execution, injunction or Stay of proceedings."

However ***Section 12*** of the Judicature Act stipulates as follows:-

"12(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."

An application for stay of execution, injunction or stay of proceedings pending an appeal in this Court is an interlocutory matter. A single justice of this Court therefore has jurisdiction to entertain it under the Judicature Act. The Judicature Act takes precedence over the Rules of this Court.

It seems to me that **Rule 53** above refers to stay of execution, injunction and stay of proceedings pending appeal from this Court to the Supreme Court and not application pending appeals to this Court.

Be that as it may, ***Rules 6 (2)*** and ***Rule 42*** of the Rules of this Court seem to grant a single Justice of this court jurisdiction to hear and determine such applications without restrictions.

It is my considered view that applications under ***Rules 6 (2)*** and ***42*** of the Rules of this Court may be heard and determined by a Single Justice of this Court provided they relate to interlocutory matters.

I will therefore proceed to consider this application as if it were a substantive application for stay of execution.

This court has before determined such applications and will continue to do so. However, the High Court too has concurrent jurisdiction over such matters. The High Court has jurisdiction to hear and determine an application for stay of execution pending appeal to this Court, an injunction, and a stay of proceedings.

The Rules of this Court require that where this Court and the High Court have concurrent jurisdiction over a matter, such a matter ought to be brought in the High court first.

In this regard ***Rules 42*** of the Rules of this Court provides as follows:-

"42. Order of hearing applications

(1) Whenever an application may be made either in the court or in the High Court it shall be made first in the High Court.

(2) Notwithstanding subrule (1) of this rule, in civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any as the justice of the case requires, or entertain an application under rule 6 (2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court."

The above Rule therefore requires that such an application be brought before the High Court first.

This was the decision and the guidances provided by the Supreme Court in the case of **Lawrence Musiitwa Kyazze vs Eunice Busingye, Supreme Court Civil Appeal No.18 of 1990**.

In that case the Supreme Court observed and held as follows;-

"The practice that this Court should adopt, is that in general application for a stay should be made informally to the judge who decided the case when judgment is delivered. The judge may direct that a formal motion be presented on notice (Order XLVIII rule 1.), after notice of appeal has been fi1ed. 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 the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be ex parte 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 Rule 4(3). However there may be circumstances when this Court will intervene to preserve the status quo. In cases where the High Court has doubted its jurisdiction or has made some error of law or fact, apparent on the face of the record which is probably wrong, or has been unable to deal with the application in good time to the prejudice of the parties in the suit property, the application may be made direct to this Court. It may however be that this Court will direct that the High Court would hear the application first, or that an appeal be taken against the decision of the High Court, bearing in mind

the interests of the parties and the costs involved. The aim is to have the application for stay speedily heard, and delays avoided"

At that time in 1990 appeals from the High Court went straight to the Supreme Court as this court had not yet been established.

However, the position of the law has not changed. The above decision is still good law, the recent authorities including that of **Margaret Kato and Joel Kato vs Nuulu Nalwoga (Supreme Court Civil Application No. 11 of 2011) (unreported)** which was cited to me by learned counsel for the applicant notwithstanding.

In the **Lawrence Musiitwa Kyazze** case (supra) the Supreme Court set out the conditions that must be present before an applicant may file an application in this Court first, without having filed it at the High Court.

These conditions were set out as follows;-

(1) There must be substance to the application both in form and content;

This court would prefer the High Court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However, if the High

Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reason, or there is great delay, this court may intervene and accept jurisdiction in the interest of justice.

(2) 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 interests of justice to the parties. But before the court can so act it must be apprised of all the facts"

The reason why applications of this nature ought to be filed in the High court first is apparent to me. It saves time and resources. The High Court which issued the decree or order is better placed to hear and determine the matter without delay. There are more High Court judges stationed throughout the country. It takes longer for applications of this nature to be heard and determined in this Court.

No reason whatsoever was adduced by the applicant as to why this application could not be heard and determined by the judge who issued the decree.

No reason was advanced by the applicant as to why they did not comply with the provisions of ***Rule 42 (1)*** of the Rules of this Court.

I have found no reason to suggest that the issues raised in this application constitute rare and special circumstances that require this Court to entertain it first.

I accordingly dismiss it.

The applicant is advised to comply with ***Rule 42 (1)*** of the Rules of this Court and file the application before the High Court, if he so desires.

The applicant shall pay the costs of this application.

This decision also applies to Miscellaneous Application No. 146 of 2014 the main application herein, which is also hereby dismissed under ***Rule 2 (2)*** of the Rules of this Court with no order as to costs.

Dated at **Kampala** this 22nd day of May 2014.

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HON. KENNETH KAKURU

JUSTICE OF APPEAL.

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