THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL MISCELLANEOUS APPLICATION NO. 105 OF 2014

(ARISING FROM CIVIL MISCELLANEOUS APPLICATION

NO. 104 OF 2014 AND CIVIL APPEAL NO. 27 OF 2014)

HAJJI ALI CHEBOI .....APPLICANT

VERSES

KIROKO MESULAMU.....
.....RESPONDEDNT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

(Single Justice)

RULING OF THE COURT

This is an application for an interim order of stay of execution pending appeal to this court. The application is brought under Rules 1(2), 6(2), 42(2) 43(1) and 44(1) of the rules of this court

The applicant in his notice of motion filed on 20th March 2014 seeks to stay the decree of the High Court at Mbale, in High Court Civil Appeal No. 22 of 2013. The decision being appealed from was made by His Lordship Henry I. Kawesa J on 14th January 2014.

The appellant states that he has filed an appeal herein, Civil Appeal No. 27 of 2014. The memorandum of appeal is on record, and I have also been able to ascertain that the record of appeal

has also been filed in this court. The appeal therefore, is now pending before this court as a second appeal. The applicant has also filed at this court Civil Miscellaneous Application No. 104 of 2014 seeking a substantive order of stay of execution and it is also pending hearing. It was also filed on the same day 20th March 2014.

This matter first came up before me for hearing on 9th April 2014.

At that time **Mr. Emmanuel Emoru** appeared for the applicant while **Mr. Deo Obedo** appeared for the respondent.

The parties appeared not to have been ready to proceed and upon an application by the applicant the matter was adjourned to 24th April 2014, and later to 15th May 2014.

On 15th May 2014 the applicant was in Court, his counsel Mr. Emoru was reportedly sick. The applicant sought an adjournment. The respondent's counsel Mr. Obedo opposed the applicant's application for adjournment.

I declined to grant the adjournment and I dismissed the application and I gave the brief decision why.

This ruling gives the detailed reasons for my decision.

The applicant was an appellant in High Court of Mbale, Civil Appeal No. 22 of 2013. That appeal was heard by Hon. Justice Henry Kawesa and dismissed on 14th January 2014. The applicant immediately filed an appeal in this court. First by lodging a notice

of appeal and subsequently the appeal itself. It is Court of Appeal Civil Appeal No. 27 of 2014.

The applicant in his affidavit in support of the notice motion contends that he is in occupation of the suit land, that he faces an imminent threat of eviction by the respondent and that if he is evicted therefrom he will suffer substantive loss. The respondent on the other hand contends that the applicant was evicted from the suit land on 18th March 2014 before this application was filed in court. That it is the respondent now who is in possession of the suit land and therefore there is nothing for this court to stay.

An application of this nature, which seeks an order of stay of execution pending an appeal before in this court, is an interlocutory matter. A single Justice of this court has power to hear and determine it. It does not require a full bench of this court. Section12 of the Judicature Act provides as follows:-

> ***"12(1) A single Justice of the court of appeal may exercise <u>any power vested in the court of appeal in any interlocutory cause or matter</u> before the court of appeal."***

I don't think that Rule 53 of the Rules of this court which appears to bar a single Justice of this court from hearing an application for stay of execution, injunction or stay of proceedings is relevant to

the proceedings such as these before me. The Judicature Act takes precedence over the rules of this court.

Rule 53 stipulates as follows:-

"53 (1) 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;

(c) an application to strike out a notice of appeal or an appeal."

It appears to me that this rule is in respect of proceedings pending appeal from this court to the Supreme Court. Such

matters are not of interlocutory nature in this court as this court would have disposed of the appeal.

The law and procedure regarding applications for stay of execution pending appeal from the High Court to this court was well set out by the Supreme Court in the case of ***Lawrence Musiitwa Kyazze verses Eunice Businghye (Supreme Court Civil Application No 18 of 1990***) 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 the time the above decision was made in 1990, appeals from the High Court went to the Supreme Court. This court had not yet been established. However, the above principles of law are still applicable and this decision has never been overturned.

In that case, above cited, the Supreme Court went on to conclude that for an application of this nature to be entertained directly by this Court without first being heard by the High Court the following conditions must exist.

(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"

I am very well aware of the authorities of this court and the Supreme Court which are to the effect that this court has jurisdiction to entertain applications such as this one of stay of

execution or stay of proceedings without the same having first been filed at the High Court. I agree that indeed this Court and the High Court have concurrent jurisdiction to do so. Such an application may be filed in the High Court or in this court. However, as I have already noted above the conditions set out in the ***Lawrence Musiitwa Kyazze*** (Supra) case must be in existence before an application of this nature is filed first in this court.

Indeed this is the procedure provided for in Rule 42 of the Rules of this Court. That Rule 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 read together with the decision in ***Lawrence Musiitwa Kyazze*** (Supra) in my view require that except in rare and exceptional circumstances an application of this nature ought to be filed in the High Court first. The use of the word 'shall' in Rule 42(1) (supra) appears to suggest that the Rule is mandatory.

In this particular case no reason has been advanced as to why this application was not filed at the High Court first.

I have not found any special or rare circumstances that would require this court to hear and determine this application first.

The question that I am required to answer in this application would be better answered by the High Court Judge who tried the case.

The issue of whether the applicant is in possession of the suit land as he asserts in this application or whether he was evicted by the respondent before the institution of this application would be better investigated and resolved by the High Court at Mbale than by this court.

This is not only the word and spirit of Rule 42 of the Rules of this Court, but it also makes good sense.

There is no reason why litigants should bring to this court applications of this nature when in fact they could have been easily been disposed of by High Court Judges. It is faster and cheaper.

I accordingly decline to entertain this application.

I hereby dismiss it with costs.

The applicant is free to file a fresh application in the High Court where the appeal emanates.

This ruling also disposes of Miscellaneous Application No. 104 of 2014 for a substantive order of stay of execution between the same parties herein which is also hereby dismissed with no order as to costs.

Dated at **Kampala** this 21st day of May 2014.

HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL