

THE REPUBLIC OF
UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 174 OF 2015
(Arising out of HCCS No. 169 of 2001)

UGANDA AIR CARGO CORPORATION LIMITED

VERSUS

APPLICANT

1. MOSES KIRUNDA

2. ROGATINO MIGISHA

3. JACKCALNAN

4. THE ADMINISTRATOR OF THE ESTATE

OF THE LATE JOSEPH NYAKANA

RESPONDENTS

5. DICK BWEBALE KABALI

6. BUMALI MUWANGA

CORAM:

HON. JUSTICE S.B.K.KAVUMA, DCJ HON. JUSTICE
ELDAD MWANGUSYA, JA HON. JUSTICE RUBBY AWERI
OPIO, JA

RULING OF THE COURT

Introduction

This is an application for leave to appeal and a stay of execution pending appeal. It is brought under **Rules 2, 40 (2) (b), 43 and 44 of the Judicature (Court of Appeal Rules) Directions S.I.13-10**. It is by way of Notice of Motion which is supported by an affidavit sworn by

Major Eria Nantamu the corporation secretary of the applicant on the
30th of

June 2015.

Background

The background to the application as discerned from the pleadings and affidavit evidence on record is that the applicant company was sued by the respondents vide High Court Civil Suit No. 169 of 2001 and the applicant's counsel, the Attorney General, entered into a consent judgment allegedly without authorization from the applicant company to its detriment. The applicant company was prompted to instruct a new counsel to set aside the said consent judgment vide High Court Miscellaneous Application No. 385 of 2013 where court ruled against the applicant. The applicant company is dissatisfied with the decision of court and seeks leave to appeal to the Court of Appeal and to stay execution of the Consent Judgment.

Representation

At the hearing of the application, the applicant was represented by Mr. Fredrick Ssentomero and Mr. Godfrey Himbaza, (counsel for the applicant). The respondents were represented by Mr. Nsubuga Richard and Mr. John Baptist Kakooza (counsel for the respondents).

The case for the applicant

Counsel for the applicant heavily relied on the affidavits in support of the application in his submissions and sought to extend time for leave to appeal. He made the application informally under Rules 43, 5, and 2 (2) of the Rules of this Court. He contended that they were applying for extension of time after filing this application which is allowed by this rule. He submitted that this Court has very extensive powers to extend time subject to sufficient reason. He cited the case of **Mugo and others v Wanjiru and another [1970] EA 481** in

support of his submission.

Counsel stated that several and difficult issues arise in this matter, citing the first question as to the power of this Court to extend time under Rule 5 of the Rules of this Court. He noted that this is a very wide power limited only by the words “*for sufficient reason*” and this has been the subject of several reported decisions of this Court.

Counsel referred to **The Inspectorate of Government vs. UVETISO Association Ltd & 3 others, Civil Application No. 409 of 2014**, where Court considered the time between 17th of November 2014 and 10th of December 2014 and held that was not undue delay. He argued that this appeal raised important legal questions to be resolved. He singled out the question of whether the Attorney General, as counsel for a government institution, could enter into a consent judgment without instructions from the Accounting Officer of that institution in light of the provisions of **Article 164 (2)** of the Constitution of Uganda and the Public Finance and Accountability Act, No. 6 of 2003.

Counsel contended that although the consent judgment was entered into in 2001, the issue for court to consider was the period between when the application for leave was dismissed by the lower court and when another application was filed before this Court. He prayed that this application to extend time be allowed.

The main application

Counsel submitted that this application was brought under Rule 40 (2) (b) of the Rules of this Court which provides for applications being lodged in this Court where a similar application has been rejected by the lower court. He referred to the decision in **The Inspectorate of Government vs. UVETISO**

Association Ltd (supra), where court found that although no leave was denied by the lower court, the applicant could file the application in this Court.

Counsel contended that the applicant is a public institution set up by an Act of Parliament, viz: the Uganda Air Cargo Corporation Act. He opposed the claim that the judgment in issue was for general damages for the respondents' imprisonment in the Democratic Republic of Congo.

Counsel referred to the case of **Esso Standard Eastern Inc v Income Tax E.A. 127 at 140**. To him, this matter was of public importance. He cited another authority **Electoral Commission vs Bigirwa Bernadette, Civil Appeal No. 12 of 1997** where it was held by Justice Manyindo, the then Deputy Chief Justice, that this was the first time ever the applicant, a nominal defendant as it were, had been condemned in costs. That it would be right and proper to argue that point on appeal since the applicant would have to pay the costs out of public funds.

Counsel prayed that this application for leave to appeal be granted so as to enable the important points of law involved to be determined on appeal. This was especially so because the question of whether the

Attorney General could enter into consent judgments without instructions from the Accounting officer of the particular institution as per **Article 164** of the Constitution was being tried and addressed by court for the first time. To counsel, this too, justified the grant of leave and extension of time within which to file the required documents. He further prayed that the costs of this application be in the cause.

The case for the respondents

Relying on the affidavits in opposition to the application, counsel

for the respondents submitted that this case had a chequered history stretching from 2001 to date which he recounted in detail. He contended that a grant of the application would only serve to unjustifiably prolong the already long delay in the realization of the respondents' fruits of their judgment with grave hardship and repercussions to them and the members of their families.

To counsel, there was nothing of great public importance involved in the possible sale of the applicant's attached property since the applicant was a private limited liability company incorporated under the Companies Act.

He faulted the applicant's coming to this Court before exhausting the necessary procedures at the High Court. He prayed Court to dismiss the application with costs for want of merit.

Rejoinder by the applicant

Counsel for the applicant, by way of a rejoinder, contended that the submissions of counsel for the respondents had, unfortunately, dwelt on the history and merits of the appeal which, according to him, were not matters for Court's consideration and resolution at this stage of litigation.

He contended further, that the applicant is established by an Act of Parliament, viz; the Uganda Air Cargo Corporation Act, and having commenced on 15th December 1994, that Act takes precedence over the Memorandum and Articles of Association referred to by counsel for the respondents.

As to the legality of the Notice of Appeal, counsel submitted that the same stated that it was an appeal arising from the ruling and orders of the Hon. Stephen Musota, J, of the High Court Civil Division delivered on the 24th September 2014 vide Miscellaneous Application No. 385 of 2013. He explained that Miscellaneous

Application No. 385 of 2013 was one for setting aside the consent judgment, and when it was dismissed, a Notice of Appeal was filed in respect of that dismissal. He added that they, however, opted to file an application to set aside the dismissal of the application vide Miscellaneous Application No. 185 of 2015 and that it was this application that was fixed for 31st August and hence the one still pending. Counsel explained further that the applicant was still trying to exhaust the remedies in the lower court when the respondents sought to execute. He expressed concern that although the applicant applied for stay of execution before the High Court Execution Division, which granted it, that court gave such extremely difficult conditions that the applicant could not fulfill them, hence their resort to this Court.

Referring to **The Inspectorate of Government vs. UVETISO Association Ltd** (supra), counsel submitted that this Court has concurrent jurisdiction with the High Court in matters of granting leave to appeal and prayed that this Court invokes its extensive powers to grant this application.

Court's consideration of the application

This application is for both leave to appeal and a stay of execution of the consent judgment that was entered into by both parties. The application for leave to appeal becomes relevant because the one filed in the High Court to set aside the consent judgment in issue was rejected and the application to set aside the rejection is yet to be heard.

The application for leave to appeal was brought informally under Rules 43, 5, and 2 (2) of this Court. Rule 2 (2) of the Rules of this Court provides:

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power

of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay. ”

Rule 43 (3) (a) of this Court’s Rules allows for applications made in the course of the hearing to be made informally. We find that this was the case in this matter with counsel for the applicant applying for extension of time for leave to appeal. In **Lawrence Musiitwa Kyazze v Eunice Busingye, SCCA No. 18 of 1990**, it was held that this Court can entertain such an application in order to safe guard the right of appeal although the applicant has to prove special circumstances. In this case, counsel submitted that an application for stay of execution had been filed in the lower court but this was granted with conditions too harsh for the applicant to comply with. That it would have, therefore, been unrealistic to re-apply for a stay in the same court.

The law governing the granting of leave to appeal is well settled. In the case of **Sango Bay Estates Ltd & Others vs Dresdner Bank AG [1971] EA 17**, Spry V.P at page 40 stated the principle upon which leave to appeal may be granted as follows:

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration...”

The instant case raises matters that deserve the attention and consideration by court. Among these are matters that have been

raised

by counsel for the applicant especially that regarding the question as to whether the Attorney General, as counsel for a public institution, can enter into a consent judgment without taking instructions from such institution. The question of the targeted settlement money being part of public funds has also been raised. At this stage of litigation we are satisfied that the grant of leave to appeal is necessary to protect the applicant's right of appeal and for attaining the ends of justice in the instant case.

The application for a stay of execution stems from the High Court orders in Miscellaneous Application No. 1262 of 2014 in which a stay was granted but with conditions too harsh for the applicant to comply with, which resulted in a travesty of justice.

This court has jurisdiction to entertain, *inter alia*, an application for a stay of execution under Rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions S.l.13-10, which provides:

6. Suspension of sentence and stay of

execution “(1) ...

(2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may

(a) ...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules,

order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just”

In National Housing & Construction Corporation & Another, SCCA No.6 of 2002 , the Supreme Court, while handling an application similar to the instant one, addressed itself to a number of authorities including; Wilson v Church (1879) 12 Ch. D 454, National Enterprises Corporation Ltd v Mukisa Foods Ltd Misc. Application No. 7 of 1998. The Supreme Court referred to its ruling in Mukisa Foods Ltd (supra) where it held:

“The only issue to be resolved is whether the applicant has established that it is likely to suffer substantial loss or irreparable damage.”

In **American Cyanamid v Ethicon Ltd (1975) AC 396**, the House of Lords clarified that what was required for a grant of an injunction of this nature, is, *inter alia*, the demonstration by the applicant that there is a serious question to be tried by the court on appeal. It is also trite that in applications of this nature where the court is in doubt on any one of the two above requirements, then court would determine the application on a balance of convenience.

In the instant case, the applicant’s major contention to justify the grant of a stay of execution pending the hearing and determination of the appeal is that it involves very important and serious questions that need to be addressed and answered by this Court. These include, *inter alia*, the question of whether the Attorney General, as counsel for a public

institution, can enter into a consent judgment without taking instructions from the authorized officer of such an institution; whether the impugned consent judgment was obtained through collusion or is tainted with fraud; whether the situation in which the applicant finds itself involves matters of public importance and whether, in the circumstances of the instant application, a mistake of counsel can be visited on the applicant.

Basing on the authorities cited above, particularly on the aspect that there should be a serious question to be tried, we are satisfied that there are indeed serious questions for court's consideration raised in this application. The pleadings and the affidavit evidence for the applicant, on record, support this view.

We further find that if no stay of execution is granted and the applicant's attached property is sold following its advertisement for sale, the applicant will suffer irreparable damage. Damage that cannot be adequately atoned or one not compensatable in terms of damages.

On the balance of convenience, we appreciate the hardship the respondents are experiencing by reason of the non final resolution of the dispute between them and the applicant. We, however, note the seriousness of the dispute between the parties to the application on the question of the impugned consent judgment. We further note the significance of the notion of the protection of a party's right of appeal in our legal system. Taking all these into account, we find that the balance of convenience in the instant application tilts in favour of the applicant.

Furthermore, we take note of the fact that this application has been brought without undue delay and it, therefore, cannot be defeated on the ground of inordinate delay. See **Kyambogo University v Prof. Isaiah Omolo Ndiege, C.A. Civil Application No. 341 of 2013.**

We, therefore, come to the conclusion that it is proper and fitting, given the unique circumstances giving rise to this application, for this Court to exercise its discretion in favor of the applicant by granting the application, as we indeed hereby do.

In the result, we make the following orders:

- 1. Leave is hereby granted for the extension of the time within which the applicant is to serve the respondent with the necessary Memorandum of Appeal to within 21 days from the date hereof.**

- 2. A stay of execution of the impugned orders and decree of the High Court in Miscellaneous Application No. 308 of 2014 is hereby granted until the hearing and final disposal of the applicant's appeal.**

- 3. A stay of execution of the Consent Judgment in Civil Suit No. 169 of 2011 is hereby granted pending the hearing and final disposal of the applicant's appeal.**

4. The Registrar of this Court is directed to ensure that the hearing of the intended appeal is fixed during the next convenient session of this Court.

5. The cost of application to abide the outcome of the appeal.

We so order

Dated at Kampala this 22nd day of October 2015

S.B.K. Kavuma

DEPUTY CHIEF JUSTICE

Elidad Mwangusya

Justice of Appeal

Rubby Aweri Opio

Justice of appeal

