THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 295 of 2017

(ARISING OUT OF CIVIL APPLICATION NO. 294 OF 2017)

(ARISING OUT OF CIVIL SUIT NO. 874 OF 2014)

AUGUSTINE MUKIIBI :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. **HOSANNA EVANGELISTIC MISSION**
2. ***MUGAMBWA JOEL ROBINSON*** (The Administrator of the estate of the late Hannington Mugambwa)
3. **JOEL ROBINSON**
4. **JESCA TEZIKYABIRI**
5. **DR. JUSTINE NAMWAGALA** **RESPONDENTS**

RULING

BEFORE: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA

This application was brought under the provisions of Sections 10 & 12 of the Judicature Act Cap 13 and Rules 2, 6(2), 43, and 44 of the Judicature (Court of Appeal Rules) Directions SI 13-10. It is for orders that:-

i. An interim order of stay of execution and/or enforcement of the decree and Judgment in Civil Suit No. 874 of 2014 doth issue pending the hearing and determination of the applicant's main application for stay of execution.

ii. Costs of the application be provided for.

The grounds of the application are contained in the Notice of Motion and 30 Affidavit in Support of the application sworn by Augustine Mukiibi, the

applicant and dated 20th September 2017, but briefly, the grounds are that:-

a) The applicant instituted Civil Suit No. 874 of 2014 in the High Court of Uganda at Kampala and a declaration that the 3rd, 4th and 5th respondents were validly appointed as well as others were made.

b) Being dissatisfied with the decree and Judgment of the court, the applicant lodged a notice of appeal against Justice Elizabeth Jane Alividza's judgment and filed a letter requesting for proceedings which he duly served on the respondents.

c) The applicant's appeal intended appeal has a high likelihood of success and/or there is a prima facie case on the appeal.

d) It is in the interest of safeguarding the applicant's right to appeal and the main application for stay filed in this court against the impugned judgment and decree.

e) The respondents have already taken steps to enforce the decree of the High Court.

f) The applicant's main application for stay of execution and the appeal may be rendered nugatory if the respondents are not halted from executing the decree.

g) The applicant is likely to suffer irreparable damage if the suit is heard without determining the application for leave.

h) It is only fair, just, equitable and in the interest of justice that this application be granted.

The 2nd respondent filed an affidavit in reply dated 18th October, 2017 as a director of the 1st respondent and on behalf of the 4th and 5th respondents. In opposition to the application, he stated

a) The application and the affidavits contain falsehoods, misrepresentations and untruthfulness.

b) The court found that the 3rd, 4th, and 5th respondents were validly nominated as directors of the 1st respondent and mandated to run it with the applicant.

c) The intended appeal is frivolous, vexatious and has no likelihood of success.

d) The application of stay of execution is premature since none has ever been sought and denied in the High Court and the respondents have not been served with the main application.

e) The respondents and the applicant are in agreement with the terms of the Judgment and have taken steps to enforce it together.

f) The directors of the 1st respondent were mandated by court to safe guard the managerial and financial efficiency of the 1st respondent which action has already been undertaken rendering this application to be overtaken by events.

g) The applicant has failed to disclose any sufficient cause for the exercise of this court's discretion in granting this interim order.

h) The applicant has not come to court with clean hands to warrant the grant of this application.

i) It is in the interest of justice that this application be dismissed with costs for being an abuse of court process.

At the hearing of the application, the applicant was represented by Counsel Katrima Joan appearing together with Counsel Ibrahim Walusimbi, while Counsel John Mary Muwaya represented the respondents.

Counsel for the respondents raised a preliminary objection premised on Rule 42(1) of the Rules of this court which provides that whenever an application may be made to this Court or in the High Court, it shall be made first to the High Court. He submitted that this provision was mandatory. Counsel relied on ***Lawrence Misiitwa Kyazze vs. Eunice Busingye Supreme Court Civil Application No. 018 of 1990*** to state that for an application for an interim order to be determined in this court, it must be substantive in form and content, as this Court would prefer the High Court to deal with it on its merits and this court could hear the same in special and rare circumstances where the High Court has refused to grant the same or where there has been substantial delay.

It was submitted for the respondents that the applicant had neither furnished proof of applying for stay of execution in the High Court nor exhibited rare/special circumstances of an urgent nature so as to exempt him from filing this application in the High Court. He concluded that the application was improperly before court, a waste of court's time and prayed that the same be dismissed with costs.

In reply, Counsel for the applicant submitted that this application was made under Rule 2(2) of the Rules of this Court which grants wide discretion to this Court to handle such matters. Further, that Rule 42(2) provides that notwithstanding that such an application ought to be filed in the High Court first under sub-rule 1, this court may on its own motion entertain this application under Rule 6 (2) (b) in order to safe guard the right of appeal.

He referred court to ***Olok Francis vs. Reverend William Pasha, Civil Application No. 059 of 2015 whe***re Kasule, J held

that this court may entertain an application brought under Rule 6(2) of the Rules of this Court in order to safe guard the right of appeal, notwithstanding the fact that no application for that purpose had first been made to the High Court.

Counsel stated, as evidence from the bar, that an application for stay of execution was filed in the High Court in July, 2017 but there was no Judge to hear it. When the parties appeared before the Registrar, they were given guidelines within which to file submissions.

Further, that according to the Judgment of the lower court, the parties are supposed to appear in court on 27th November, 2017 (6 months after the judgment was delivered), and so any said appearance will amount to execution of the decree which will render the appeal nugatory.

He concluded that Rule 42(1) was not a mandatory requirement and this court had the discretion to grant the application in order to safeguard the intended appeal.

In rejoinder, Counsel for the respondent submitted that submissions regarding filing the application in the lower court were made from the bar, were not backed by any evidence, and had not been pleaded or averred to the affidavit in support of the motion. Further, that the submissions of the applicant did not bring out any special or urgent reason as to why the application was not filed in the High Court.

Further, that the applicant only referred to one order made in the Judgment of the lower court regarding reporting back to the court in 6 months to report on persons appointed as directors. The applicant had sufficient time between May and now to stay execution but he did not. Moreover, if the Judges were absent as alleged, the Registrar had the power to hear and determine the application for an interim order of stay of execution.

I have carefully considered the Notice of Motion, the affidavits, the annextures thereto as well as the law and authorities relied upon. I have also considered the submissions of counsel for and against the preliminary objection.

The preliminary objection is premised on ***Rule 42 of the Rules of this court*** which states

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 sub rule (1) of this rule, in any 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 act 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 requires that such an application be brought before the High Court first.

In Lawrence Musiitwa Kyazze versus Eunice Busingye, Supreme Court Civil Appeal No. 018 of 1990, the Supreme Court observed and held as follows:-

"The practice that this court should adopt is that general applications 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 XL VIII rule 1.), after a 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 the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application maybe 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 similar condition similar to those set out in 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 maybe 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 that the interest of the parties and the costs involved. The aim is to have the application for stay speedily heard, and delays avoided." (Emphasis added.)

In 1990 when the above case was determined, 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.

In ***Lawrence Musiitwa*** (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 fled it at the High Court. These are:-

i. *There must be substance to the application both in form and content;*

ii. *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 reasons, or there is great delay, this court may intervene and accept jurisdiction in the interest of justice.

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 find that applying to the High Court first in applications of this nature serves to save time and resources since the court which issued the decree or order is better placed to hear and determine the matter without undue delay.

The applicant herein sought to rely on their submissions which were made at the hearing of the application wherein it was submitted that an application for an interim order of stay of execution was made to the High Court but there were no Judges to hear and determine it. I note that the Judgment and orders sought to be stayed were made on 25th May, 2016 and this application was filed on 21st September, 2017, four months later. No such formal application for stay was made and no letter regarding follow up on the application in the High Court was presented. There is therefore no proof that the application was rejected or that there was likely to be a delay in handling that matter at that level, ever since judgment was delivered.

The reason advanced by the applicant as to why he did not comply with the provisions of Rule 42(1) of the Rules of this court was that it was not a mandatory requirement and the court could follow sub rule 2 of Rule 42 in an application made under Rule 6(2) of the Rules of this court. I find that sub-rule 2 (supra) is subject to sub-rule 1 and an application ought to have been made to High Court first, or else special circumstances ought to have existed to warrant the application to this court without complying with Rule 42(1). It was not the case in the present matter.

Having failed to demonstrate any rare or special circumstances for not making this application in the High Court first, the applicant has failed to show sufficient cause to justify grant of an interim order of stay of execution in this case under Rule 42(2) of the Rules of this Court.

I, therefore, allow the preliminary objection by counsel for the respondent and hereby dismiss Civil Application No. 295 of 2017 with no order as to costs.

I so order.

Dated at Kampala this day of 25th October 2017

Elizabeth Musoke

JUSTICE OF APPEAL