THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

MISCELLANEOUS APPLICATION NO 267 OF 2018

ARISING FROM MISCELLANEOUS APPLICATION NO 36 OF 2015

ARISING FROM CIVIL APPEAL NO 111 OF 2013

ARISING FROM CIVIL SUIT NO 011 OF 2003

JETHA BROTHERS LIMITED.....APPLICANT

VERSUS

1. **MBARARA MUNICIPAL COUNCIL**
2. **HILLARY KATEMBEKO**
3. **THE EXECUTRIX OF THE ESTATE OF JOSHUA MUGENYI**
4. **MARY MUGENYI**
5. **AGGREY TWIJUKKYE.....RESPONDENTS**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE, JA

(SITTING AS A SINGLE JUDGE)

This was an application for a certificate of urgency brought under section 98 of the Civil Procedure Act cap 71; rules 1 – 4 of the Judicature (Court Vacation) Rules SI 13 – 20; and rule 43 of the Judicature (Court of Appeal) Rules. The application is seeking orders that a certificate of urgency doth issue to enable this court to hear and determine Miscellaneous Application No 36 of 2015 during Court Vacation, and that costs of the application be provided for.

The application is supported by the affidavit of **Aliyullah Husainali Jetha Ismail** a Director of the applicant company. It is opposed by the applicants through the Affidavits in reply of **Hillary Katembeko** the 2nd respondent and **Mary Mugenyi** the 3rd respondent who is also the executrix of the 4th respondent. The 1st and 5th respondents did not file any affidavits in reply nor did they appear in court for the hearing of the application though the affidavit of service on record shows they were served through their respective counsel who acknowledged service

of court process by signing and stamping on the court's copy of the application served by this court's process server.

The grounds of the application as set out in the application and the supporting application are briefly that the applicant company filed a highly meritorious appeal in this court *vide* **Civil Appeal no 111 of 2013**; that the application also filed **Miscellaneous Application No 36 of 2015** for an order of stay of execution pending before this court; that this court cannot hear **Miscellaneous Application No 36 of 2015** because court is on vacation yet there is a threat of execution of the orders of the trial court appealed against to this court; that the respondents are fast altering the *status quo* in the suit property and this may render **Miscellaneous Application No 36 of 2015** and the applicant's appeal nugatory; that there is an urgency that warrants the hearing of **Miscellaneous Application No 36 of 2015** during court vacation; and that it is just and equitable and in the interests of justice that this application be allowed.

The brief background to the application is that the applicant filed a case, **Jetha Brothers V Mbarara Municipal Council and 4 Others HCT – 05 – 0011 – 2003**, against the respondents. Judgement was delivered against the applicant by Mbarara High Court on 28th November 2011. The applicant later filed an application for stay of execution **Jetha Brothers V Mbarara Municipal Council and 4 Others MA 046 OF 2012** in the same court. It was heard and dismissed on 13th July 2012. The applicant then filed **Civil Appeal No 111 of 2013** pending hearing in this court. The applicant also filed **Miscellaneous Application No 36 of 2015** and **Miscellaneous Application No 37 of 2015** in this court, for stay of execution and interim stay of execution respectively, regarding the judgement in **HCT – 05 – 0011 – 2003**. **Miscellaneous Application No 37 of 2015** for interim stay of execution was heard and dismissed by a single judge in this court on 4th February 2016. **Miscellaneous Application No 36 of 2015** the main application for stay of execution remains pending to date. The applicant filed this application for a certificate of urgency to have it heard during the current court vacation which commenced on 1st August 2018 and is to end on 31st September 2018.

Submissions of Counsel

Counsel Samuel Eyotre submitted for the applicant that the respondents are altering the *status quo*; that there is an appeal pending in this court; that in absence of an order staying execution the suit property is likely to revert to a third party; that the caveat was vacated by the trial judge rendering the threat

of execution to be more eminent; that the 2nd respondent's not vacating the suit property despite the court order means he is still in possession which poses a threat of his altering the *status quo* of the suit property. Counsel referred to paragraphs 7 and 8 of the applicant's supporting affidavit together with annexure **B** to the same affidavit and submitted that the 3rd and 4th respondents had around June and July 2018 started altering the *status quo*. He argued that the said respondent's acts shown in annexure **B** were changing the nature and character of the suit property that if the appeal was allowed the *status quo* would be different. He submitted further that the delay entailed in hearing the application for stay of execution causes irreparable loss and damages to the applicant. He invited court to allow the application with costs.

Counsel Byaruhanga Alex submitted for the 2nd respondent that there is no urgency in the matter. He stated that the applicant filed the application intended to be heard urgently in 2015; that the application has been in court for three years and counsel for the applicant cannot suddenly turn round and say it is urgent. He contended that the question of whether the applicant's loss is irreparable or not will be addressed when determining the main application for stay of execution. He further submitted that the decision in the main suit was passed in 2011, which is seven years back, and that there is nothing urgent there. He contended that the applicant is not vigilant and had not followed the matter or taken appropriate action. He submitted that the 2nd respondent had filed a cross appeal pending hearing and there is no urgency pertaining to the application for stay of execution. He argued that regarding constructing at the site, the applicant did not plead that the damage caused by the construction cannot be atoned; that the maxim of *quicquid plantatur solo solo cedit* (whatever is attached to the land becomes part of the land) will benefit the applicant if they are successful in that they will own the developments on the land. He submitted that the suit property reverted to Mbarara District Land Board which will be condemned unheard if there is stay of execution. He prayed court to dismiss the application because it does not qualify for a certificate of urgency.

Counsel Enos Tumusiime submitted for the 3rd and 4th respondents that the application was brought under a wrong law and should have been brought under Rule 21(2) of the Judicature (Court of Appeal) Rules; that the 1st applicant, being a Moslem, should have affirmed his affidavit in support of the application instead of swearing it; and that annexure **A** which is a judgement of court was

not certified by the court which issued it, and that annexure **B** has no relevance to the affidavit and should be expunged from the record which makes the affidavit in support incompetent and requires to be struck out. Counsel referred to paragraphs 6, 7, 11, 12 and 13 together with annexure **D** of the 3rd and 4th respondent's affidavit in reply which shows that the said respondents are no longer proprietors of the suit property which was transferred to a Mr. James Tumusiime and Roy Tumusiime on 5th August 201, that in view of that, it is a falsehood for the applicant to state in their paragraph 7 of their affidavit that the 3rd and 4th respondents began excavating the suit property; that it should be struck out; and that the applicant had not responded to it in his affidavit in rejoinder. Counsel submitted that since the *status quo* has changed the application has been rendered nugatory and the applicant is wasting court's time and abusing the court process.

Counsel for the 3rd and 4th respondents also submitted that annexure **A** the judgement on which the application is based was delivered on 28th November 2011 in presence of the plaintiff's counsel and that it is now 2018. He wondered where the applicant has been all this time; that similarly the caveat on the land was lifted in the same judgement where the applicant's Director was present which suggests inordinate delay. Counsel referred to annexure **C** of the 3rd and 4th respondents which is a ruling where the application for interim order of stay of execution was dismissed by this court; that under paragraph 12 and annexures **E** and **F** of the 3rd and 4th respondents' affidavit in reply reveal that a six storeyed structure has been erected on the suit property, that this has not been controverted by the applicant, and that it has changed the *status quo*. He contended that the purchasers of the suit property are not respondents in this application which means any court order against them would be made in vain which courts do not do. Counsel further submitted that the case of **Societe Basimaki Bakanobva V M/S Damco and another Miscellaneous Application No 341/2013** which is a High Court decision is not persuasive or mandatory for this court to follow, that even if it was to be followed it is distinguishable from this case because it was brought urgently in respect of perishable goods unlike in the instant case where there are no perishable goods. He finally submitted that there were only a few days to the end of the court vacation and wondered why urgency should be related to the instant case. He prayed court to strike out the application with costs.

Counsel Eyotre submitted in rejoinder to the 2nd respondent's counsel that he agrees the judgement divested the applicant of his interests and rights in the suit property and that it is for that very reason that the applicant lodged the appeal as stated in the supporting affidavit; that court should focus more on the possibility of the success of the appeal rather than the fact that the applicant failed in the lower court. On dilatory delay since the judgement was passed, Counsel submitted that an appeal was filed against the judgement and there are a number of applications including the instant one, which is consistent with the applicant's efforts to challenge the judgement; that there was no dilatory conduct on the part of the applicant and their changing of lawyers was because the former lawyers were not speedy in prosecuting the cases; that the new lawyers hastily filed a notice of change of advocates which is annexure **C** to the applicant's affidavit in rejoinder and filed this application which shows there is no delay; that omissions and negligence of the applicant's previous lawyers should not be visited on the applicant; and that the 2nd respondent's submission on the applicant's suffering irreparable loss atonable in damages can only be handled in applications for injunctions not in this application. The applicant's counsel argued that the case of **Lakony Janan V Gulu District Service Commission Miscellaneous Application No 0110/2018** cited by the 2nd respondent's counsel is distinguishable from the facts of this application in that it addressed a very different aspect of the law.

In rejoinder to the 3rd and 4th respondents' submissions, Counsel for the applicant submitted that they had no opportunity to respond to their affidavit in reply because it was delayed which means they are guilty of delay. He submitted that however some of its aspects are covered in the rejoinder to the 2nd respondent's affidavit in reply and submissions. On the application being brought under the wrong law counsel submitted that the laws he cited are correct for instance rule 43 of the Judicature Court of Appeal Rules which require this application to be brought by notice of motion. On courts not issuing orders in vain, the applicant's counsel submitted that he agreed with the principle but contended that the appellate system allows an aggrieved party to challenge judgements in higher courts of law. On the principle of *quicquid plantatur,* the applicant's counsel submitted that the reversionary interest of the applicant should be protected. On change in the *status quo* counsel invited court to look at two aspects of *status quo*, that is, change as regards ownership of property and change as to the nature and the character of the property in issue; that what the applicant is seeking a certificate of urgency for is changing

the *status quo* regarding the nature and character of the property and that regarding the six storeyed building on the land they have already entered a consent judgement with the 5th respondent who erected the building. On the non-commissioning of the applicant's annexures, counsel submitted that there a signature of the commissioner on the said annexures though the stamp was not marked; that however it is a minor technicality curable under Article 126(2)(e) of the Constitution. He further referred to paragraphs 7 and 8 of the applicant's supporting affidavit and annexures **B** and **C** and submitted that they showed that the construction started on the land is quickly rising and further altering the *status quo.* He reiterated that there is a high level of urgency in the matter that warrants grant of this application.

Consideration of the Application by Court

In considering this application, I am alive to the submissions of the 3rd and 4th respondent's counsel that the application was brought under the wrong law; and that the applicant, being a Moslem, should have affirmed his affidavit in support of the application instead of swearing it. The submissions of counsel were correct and well founded as reflected in the record. However, in the spirit of Article 126(2)(e) of the Constitution I proceeded to determine this application for the sake of effecting substantive justice. In that connection, I regarded the wrong citing of the laws or the sections in the laws as minor technicalities.

Regarding the applicant's supporting affidavit, the gist is that it was commissioned before a Commissioner for Oaths who signed and stamped it, only that the words *"sworn"* instead of *"affirmed"* were used, since the applicant is a Moslem. On the same counsel's submissions that annexure **A,** which is a judgement of court, was not certified by the court which issued it, I agreed to expunge it from the record for lack of authenticity. The same judgement, certified by the court which issued it, is however annexed as **A** to the 3rd and 4th respondent's affidavit in reply, and that is the evidence this court will rely on in as far as the judgement in question is concerned.

Counsel for the 3rd and 4th respondents also submitted that annexure **B** to the applicant's supporting affidavit has no relevance to the affidavit and should be expunged from the record. He argued that this makes the affidavit in support incompetent and requires to be struck out. Counsel however did not advance convincing reasons as to why the annexure should be expunged, other than stating it was irrelevant to the affidavit. This, in my opinion, only goes to discredit the evidential value of the annexure, or to challenge its credibility. This

is different from attacking its admission as the applicant's evidence for purposes of expunging it from the record. Secondly, even if it was expunged, counsel did not convince court that it renders the entire supporting affidavit incompetent to the extent of having it struck out from the record.

I will now proceed to determine the application on the merits.

Rule 21(2) of the Judicature (Court of Appeal Rules) Directions SI 13 – 10 of 2015 provides that no business will be conducted during a vacation unless the Chief Justice Directs, or unless it is a delivery of judgement and when the matter is shown to be of urgency. Urgency was defined in **Kavurega V Registrar General (1998) 1 ZLR 188** by Chatikobo J, as he then was, as follows:-

> *"What constitutes urgency is not only the imminent arrival of the day of reckoning,* ***a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the Rules.*** *It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non - timeous action if there has been delay...."* (emphasis mine).

This principle has been adopted in Ugandan courts when handling applications of certificates of urgency aimed at hearing cases during court vacations. See **Lakony Janan V Gulu District Service Commission Miscellaneous Application No 0110/2018.** I am persuaded to apply this principle which was articulated in a country that applies common law, including observing court vacations, just like Uganda. The principle is very relevant to the dynamics and characteristics of situations which require cases to be heard urgently during court vacation which in Uganda, is normally a period of one month.

In this application the affidavit evidence from both sides, albeit from different angles, shows that the *status quo* on the suit property has been altered. The applicant's supporting affidavit is to the effect that the respondents have been altering the *status quo* since around June and July 2018 which was changing the nature and character of the suit property. The respondents' affidavit evidence in paragraphs 6, 7, 11, 12 and 13, together with annexures **D** and **E**, of the 3rd and 4th respondent's affidavit state that the *status quo* has changed in the sense that the said respondents are no longer proprietors of the suit property which was transferred to a Mr. James Tumusiime and Roy Tumusiime on 5th August 2015; and further that a six storeyed building has since been erected on the suit land.

The respondent's affidavit evidence, which was not controverted by the applicant, shows that the persons who are changing the *status quo* are third parties who are not party to this application, which renders paragraph 7 of the applicant's supporting affidavit a falsehood. In addition the mere fact that the *status quo* of the suit property has been altered, regardless of how it has been altered, in my opinion, renders the application for urgency nugatory. The applicant's counsel's submissions that he had no opportunity to controvert the respondent's affidavit evidence is not convincing considering that he never raised the matter before court at the commencement of his submissions, since he was the first to begin when the hearing started. In any case, he himself informed court in his submissions in rejoinder that the matters raised in the 3rd and 4th respondent's affidavit in reply are directly or indirectly handled in the applicant's affidavit in support and in the affidavit in rejoinder to the 2nd respondent's affidavit in reply, as well as in counsel's submissions.

Secondly the affidavit evidence and the record shows that the applicant filed **Miscellaneous Application No 36 of 2015** (the main application for stay of execution intended to be heard urgently) in 2015. It has been in this court for three years. It was filed together with **Miscellaneous Application No 37 of 2015**, the application for interim stay of execution which was heard and dismissed on 04th February 2016, as shown by annexure **C** to the 3rd and 4th respondents' affidavit in reply. It is now more than two years since the application for interim stay of execution was dismissed. There is no apparent move discernible from the record to show that the applicant pursued the main application for stay of execution after the dismissal of the application for interim order of stay of execution. Further, annexure **A** to the 3rd and 4th respondents' affidavit in reply, which is a copy of the judgement in the main suit (**Jetha Brothers V Mbarara Municipal Council and 4 Others HCT – 05 – 0011 – 2003**) shows that the decision in the main suit was passed by Mbarara High Court seven years ago on 28th November 2011.

The record shows the applicant has only been vigilant in changing their lawyers rather than pursuing the main application for stay of execution. Prudence alone would suggest that the applicant should have vigorously pursued the hearing of the main application for stay of execution the moment the application for interim stay of execution was dismissed by this court in 2015. The applicant sat back when the application for interim stay was dismissed instead of pursuing the hearing of the main application.

Thus the applicant's statements that there is an appeal pending in this court; that in absence of an order staying execution the suit property is likely to revert to a third party; that the caveat was vacated by the trial judge rendering the threat of execution to be more eminent; or that the 2nd respondent's not vacating the suit property despite the court order means he is still in possession which poses a threat of his altering the *status quo* of the suit property, *etcetera,* should have been raised by the applicant years back the moment their application for interim stay of execution was dismissed. In that connection, they should have vigorously pursued the hearing of **Miscellaneous Application No 36 of 2015** the main application for stray of execution. I agree with both counsel for the 2nd, 3rd and 4th respondents that this constitutes dilatory conduct on the part of the applicant. I do not accept the applicant's counsel's arguments that the mistakes of the applicant's former lawyers should not be visited on the applicant, simply because there is no evidence nor anything on record to indicate that the applicant gave instructions to his lawyers to promptly pursue the relevant applications and they did not oblige.

I find it baffling that the applicant is treating an application which was filed three years back to be an urgent application for this particular court vacation, more so, after the *status quo* on the suit property has already changed in a number of ways as indicated in the above court findings. It may be further noted that some of the foregoing applicant's averments like the likelihood of the suit property passing on to third parties have already come to pass in reality, making the averments to be stale or overtaken by events. I agree that urgency which stems from a deliberate or careless abstention from action until the deadline draws near, as is the case in the instant application, is not the urgency contemplated by the court vacation principles.

Thirdly, the applicant averred in paragraph 5 of their supporting affidavit that there is serious threat of execution. However, as averred by the 2nd respondent in paragraph 8 of his affidavit in reply, apart from making the averment, the applicant has not availed court any strong evidence to show such threat, for instance no copy of the application for execution has been attached to his supporting affidavit. In addition, looking at the entire affidavit evidence, it is clear the *status quo* on the suit property has changed which in my opinion infers even the threat of execution, in as far as it concerns the applicant's interests, has been overtaken by events.

The application also raised questions of whether the applicant's loss is irreparable or not. The 2nd respondent's counsel argued that regarding constructing at the site, the applicant did not plead that the damage caused by the construction cannot be

atoned; that the maxim of *quicquid plantatur solo solo cedit* will benefit the applicant if they are successful in that they will own the developments. These matters will be addressed when determining the main application for stay of execution.

The 2nd respondent's counsel, in his submissions, also stated that the 2nd respondent had filed a cross appeal pending hearing hence no urgency pertaining to the application for stay of execution. The aspect of the cross appeal however is tantamount to giving evidence from the Bar since it is not mentioned in the 2nd respondent's affidavit in reply. However, I agree with the 2nd respondent's counsel's arguments that since the *status quo* has changed the application has been rendered nugatory and the applicant is wasting court's time and abusing the court process.

All in all, based on the authorities cited above, I am of the opinion that certificates of urgency are not issued as a matter of course. The application for a certificate of urgency should satisfy court that there exists exceptional circumstances that merit the hearing of the case in issue during court vacation, which is lacking in this case.

In that connection, having addressed the background and all the circumstances of this application as contained in the body of this ruling, as well as analyzing the affidavit evidence of both sides, it is my finding that there is no urgency discernible from this application and its supporting affidavit that **Miscellaneous Application No 36 of 2015** should be heard urgently during court vacation. The application is accordingly dismissed with costs to the 2nd, 3rd, and 4th respondents who defended this application.

Dated at Kampala this 27th day of August 2018.

Percy Night Tuhaise

Justice of Appeal.