THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

COA – CV – CL – 0209 – 2019

(ARISING OUT OF CIVIL APPLICATION NO 208 OF 2019)

(ARISING FROM CIVIL APPEAL NO 52 OF 2018)

(ARISING FROM EMA NO 1839 OF 2017)

(ARISING OUT OF HIGH COURT LAND DIVISION CIVIL SUIT NO 132 OF 2011 CONSOLIDATED WITH H.C.C.S. NO. 57 OF 2011)

KANSIIME K ANDREW} .....APPLICANT

VERSUS

1. **HIMALAYA TRADERS LTD**
2. **KAMUKAMU ASSOCIATES LTD**
3. **TREASURE TROVE (U) LTD**
4. **TEJWANT SINGH**
5. **GULZAR SINGH**
6. **JAMIL KIYEMBA**
7. **COMMISSIONER LAND REGISTRATION**
8. **UGANDA LAND COMMISSION**

.....RESPONDENTS

RULING OF JUSTICE CHRISTOPHER MADRAMA IZAMA

The applicant lodged this application under Rule 2 (2) & 6 (2) (b) and 43 (1) and (2), 44 (1) of the **Judicature (Court of Appeal Rules) Directions** for an interim order of stay of execution restraining the respondents, their agents and someone's from executing judgment and decree or warrant in execution in HCCS No. 132 of 2011 consolidated with HCCS No. 57 of 2011 pending disposal of the main application for stay of execution. Secondly, it is for an order for the costs of this application to be provided for.

The grounds of the application as set out in the notice of motion are that:

1. The applicant/plaintiff is dissatisfied with the judgment and decree of the trial judge in HCCS No 132 of 2011 consolidated with HCCS No 57 of 2011.

2. The applicant has filed an appeal in this court in Civil Appeal No 52 of 2010 which has a high chance of success.
3. The applicant has also filed in the main application for an order of stay of the division of the judgment and decree in HCCS No. 132 of 2011 consolidated with HCCS No 57 of 2011.
4. The applicant's application for stay of execution before the High Court of Uganda was dismissed.
5. If the application is not granted, the appeal will be rendered nugatory and the applicant shall suffer substantial loss of his land and business which cannot be relocated outside the city.
6. The applicant undertakes to furnish security for the due performance of the decree by complying with the final orders from the appellate court in respect of the suit property once the appeal is disposed of and ruled against him though he believes he has a high likelihood of success.
7. It is in the interest of justice that the application is granted.

The application is further supported by the affidavit of the applicant Mr Kansiime K. Andrew. The respondents each filed affidavits in reply opposing the application.

At the hearing of the application learned counsel Mr Candia Alex together with learned counsel Mr Oundo David appeared for the applicants. Learned counsel Mr Swabur Marzuq together with learned counsel Mr Moses Lwanyaga represented the second and sixth respondents. Learned counsel Ms Sarah Kisubi appeared for the third, fourth and fifth respondents while learned Counsel Mr Albert Byamugisha represented the first respondent.

Before the matter could proceed, the first respondent's counsel Mr Albert Byamugisha objected to the application on the ground that it was *res judicata*. Secondly, that the remedy of the applicant lay in a reference to the full bench of the Court of Appeal from an earlier decision of a single justice in the same matter dismissing an application for stay of execution. He relied on the deposition of the first respondent, through its Company Secretary Mr Bhavesh Upadhyay for the facts in support of the objections to the application. The facts deposed to are that the applicant filed High Court Miscellaneous Application No 1900 of 2017 for stay of execution of the decree in the suit. Secondly, the applicant also filed High Court Miscellaneous Application No 1901 of 2017 for an interim order of stay of execution of the decree in the main suit. When

advocates of the parties appeared before the registrar for hearing of the High Court Miscellaneous Application No 1901 of 2017, they found that the applicant had filed a notice of withdrawal of the application in the High Court as attached to the affidavit. The applicant then filed Court of Appeal Civil Application No 279 of 2017 against the respondents for stay of execution of the decree in this suit and the same was heard on the merits and dismissed with costs according to a copy of the ruling of the court of appeal attached to the affidavit. Thereafter, the applicant filed High Court Miscellaneous Application No 1995 of 2017 against the respondents also for stay of execution of the decree in the main suit which was dismissed on 10th June, 2017 according to a copy of the ruling annexed to the application.

The first respondent's counsel submitted that the above applications demonstrate that the current application for stay of execution is barred for being *res judicata* and the remedy of the appellant lay in a reference from the dismissal to the full bench and not in filing other applications in the High Court as he did. Learned counsel Mr Swabur Marzuq associated himself with the submissions of the first respondent's counsel and further submitted that the application was an abuse of the process of the court. Secondly, he submitted that the application in the Court of Appeal had been heard on the merits and had been dismissed and therefore the current application is an abuse of the process of the court.

Learned counsel Ms Sarah Kisubi associated herself with the submissions of counsel objecting to the application.

In reply, Mr Candia Alex submitted that the application in the Court of Appeal namely Civil Application No 279 of 2017 had not been heard on the merits but had been dismissed because the applicant was required to first file an application in the High Court under Rule 42 of the Rules of this court. When he did file the application in the High Court, it was dismissed and hence he further filed this application for stay of execution having exhausted his remedies in the High Court as required by Rule 42 of the Rules of this court.

In rejoinder, the respondent's counsel Mr Albert Byamugisha, Mr. Swabur Marzuq and Ms Sarah Kisubi submitted that the application which had been heard by a single justice of the Court of Appeal had been decided on the merits and the option of the applicant was to file a reference to the full bench of the Court of Appeal instead of filing another application in the High Court. In conclusions all the applications demonstrate an abuse

of the process of the court by the applicant. They prayed that the application is dismissed with costs.

Consideration of the objection

I have carefully considered the objection of the respondent's counsel to the application of the applicant as well as the submissions in reply. I have also considered the authorities referred to by counsel.

The decree, the subject matter of the application, declares that the plaintiff who is the applicant to this application is a trespasser and has no lawful interest whatsoever in the suit land comprised in Plots 20 – 30 Sadler Way Naguru. Secondly, it declares that the applicant's occupation and continued stay on the suit land is illegal and unlawful. Thirdly, the first, second, fourth, fifth and sixth defendants are the lawful registered proprietors of the respective plots of land on the suit land as reflected in their respective leasehold certificates of title. Fourthly, it is decreed that the first, second, fourth, fifth and sixth defendants are entitled to quiet possession of their respective plots of the suit land without any disturbance or interference from the plaintiff or such other person claiming interest under him. Fifthly, the plaintiff was ordered to give immediate vacant possession of all the suit land to the defendants as reflected in their respective lease certificates of title, the failure of which the applicant shall be lawfully evicted therefrom. Lastly the plaintiff was ordered to pay the costs of the suit. The decree is dated 14th July, 2017.

Thereafter, the applicant applied for stay of execution of the said decree. I need to not specifically refer to High Court Miscellaneous Application Nos 1900 of 2017 and 1901 of 2017 filed by the applicants and which had been withdrawn according to annexure R4 to the affidavit of Bhavesh Upadhyay before the registrar of the Execution and Bailiffs Division of the High Court. The notice of withdrawal which was endorsed by the registrar as an order of the court reads that:

1. That following the Notice of Withdrawal filed by the Applicant in both Miscellaneous Applications No. 1900 of 2017 and No. 1901 of 2017, the applications be and are hereby withdrawn.
2. That the costs in the above said applications are awarded to the Respondents".

The applications in the High Court were not considered on the merits and the applicant was free to file another application. After the said withdrawal effective on 12th September, 2017, the applicant filed a main Civil Application No 279 of 2017 in the Court of Appeal for stay of execution of the High Court decree and the application was heard and decided by a single justice of this court; Hon. Lady Justice Solomy Balungi Bossa.

In the decision of Hon. Lady Justice Solomy Balungi Bossa dated 13th December, 2017, she ruled that the applicant failed to satisfy her that the application was properly before the court for the reasons she had stated earlier and dismissed it with costs.

The applicant's counsel argued that this was a preliminary ruling whose effect was to strike out the application on the ground that it ought to have first been filed in the High Court. The crux of his submission is founded on Rule 42 of the Rules of this court. The respondents on the other hand submitted that the application for stay of execution had been handled on the merits and dismissed by this court. Therefore the applicant's option was to file a reference from that decision dated 13th December, 2017 to the full bench and not to file a fresh application for stay of execution.

I have carefully considered the chronology of events relating to the various applications for stay of execution. As noted above, Miscellaneous Applications Numbers 1900 and 1901 of 2017 that had been filed in the High Court had been withdrawn by the applicants with costs. The matter was not heard on the merits. Pursuant to the withdrawal of the High Court applications under the hand of the registrar disposing of the Miscellaneous Applications Number 1900 and 1901 of 2017, the applicant filed Court of Appeal Miscellaneous Application No 279 of 2017 which was also dismissed with costs. Thereafter the applicants filed yet another application before the High Court in Miscellaneous Application No 1995 of 2017 for stay of execution and the same was dismissed with costs on 10th June, 2019 by Hon. Justice Duncan Gaswaga of the Execution and Bailiffs Division of the High Court. Thereafter the applicant filed the current application for stay of execution in the Court of Appeal for the second time.

The learned High Court judge carefully considered the various applications that the applicant had filed referred to above including Civil Application No. 279 of 2017 that had been dismissed by the Court of Appeal. The same objection had been raised before the judge of the High Court as stated at page 4 of his ruling in the following words:

> All the counsel for the respondents raised similar arguments that this application is a total abuse of court process as it had already been heard on merits and disposed of in the Court of Appeal. That it was *res judicata*. Further that the Court of Appeal dealt with the issue of irreparable damage and substantial loss and that the applicant cannot raise the issue of furnishing security for costs. Counsel for the applicant submitted that this matter is not *res judicata* as it was not properly before the Court of Appeal and hence it cannot be said that it was concluded on merit. Counsel further submitted that the applicant has shown that there are special circumstances that warranted stay of execution and that the applicant is now properly before the right court as ordered by the Court of Appeal.

On the issue of whether the application was res judicata, the learned High Court judge seemed to agree and after citing several authorities on the question of *res judicata* he held that the matter had been determined on the merits. In other words, once the matter was determined on the merits, then it is *res judicata* subject to the right of appeal. This is what the learned High Court judge held:

> The reading of the above segment of the ruling draws an inference that the learned Justice of Appeal after analysing the conditions to be satisfied before the grant of an application for stay of execution, and thorough reading of the High Court judgment, found that the applicant had failed to satisfy the said conditions warranting the grant. The Court of Appeal found that the applicant had not proved an irreparable damage which could not be compensated for by damages and further that his appeal was not meritorious. It is clear from the record that the applicant has been moving from one court to another in disguise of filing applications at the detriment of the respondents who won the matter in the first place, thereby wasting or buying court's time.

It is clear that the learned trial judge found that the Court of Appeal had handled the matter on the merits. That being the ruling of the court on record, it meant that the learned judge determined that he could not hear the application and therefore did not have to determine it. Filing another application in this Court under those circumstances would be an abuse of the process of court because the ruling could only be appealed and rule 42 of the Rules of this Court which apply to refusal of an application on the merits did not apply. The question on appeal would be whether the learned trial judge had no jurisdiction to entertain the application. The doctrine of *res judicata* is a statutory doctrine under section 7 of the Civil Procedure Act Cap 71 laws of Uganda which provides that:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in the former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been substantially raised, and has been heard and finally decided by that court.

Explanation 2 of section 7 of the Civil Procedure Act clearly provides that for purposes of this section the competence of the court shall be determined irrespective of any provisions as to the right of appeal from the decision of that court. It is my finding that the learned High Court judge in Miscellaneous Application No 1995 of 2017 held that the Court of Appeal had decided the applicants application for stay of execution on the merits. That is a binding decision which ought to have been appealed rather than filing another application in the Court of Appeal after the application for stay of execution in the High Court had been dismissed.

Going back to the arguments of the applicant's counsel that the Court of Appeal had not decided the application for stay of execution on the merits, learned counsel for the applicant in interpreting Rule 42 of the Rules of this court brought to my attention the ruling of the Court of Appeal at page 8 thereof that the applicant failed to satisfy that the application is properly before the court. I will still revisit this issue despite finding that the High Court had already decided that the matter was *res judicata* having been decided by the Court of Appeal. It is true that the learned Court of Appeal justice considered Rule 42 of the Rules of this court and held that an application for stay of execution has to first be filed in the High Court. This is what the learned Court of Appeal justice held about the matter:

> Furthermore, the applicant has not shown that there are special circumstances that require this court to intervene to preserve the status quo. Since the applicant has not satisfied the above conditions, this application is incompetent. For all the above reasons, this application is dismissed with costs to the respondents. Civil Application No 28 of 2017 for an interim order is also dismissed for the same reasons....
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> Apart from failing to submit the judgment to indicate the merits of the appeal, there is no proof of irreparable damage. If he were to succeed on appeal, his developments could be compensated for by damages.

Notwithstanding the finding that the application was incompetent, the learned justice of appeal found that the applicant's developments could be compensated for by damages

if he won. The applicant had sought and obtained interim orders of stay of execution pending the hearing of the main application. This was considered by the learned justice of appeal at page 6 of her ruling. In other words, the application proceeded on the merits in the main application. Both the interim applications for an order of stay of execution as well as the main application for stay of execution were dismissed.

The genesis of the matter is that the applicant had applied in the High Court in Miscellaneous Application No 1900 and the second application in Miscellaneous Application No 1901 of 2017 and withdrew both applications. The withdrawal was with costs. The effect of the order of withdrawal of the application was considered by the learned Justice of Appeal in her ruling dismissing the applicant's application in the Court of Appeal whereupon she found that the applicant was guilty of abuse of the court process. This is after considering the withdrawal of the two applications in the High Court. I will reproduce her ruling in full as follows:

> The issuance of the said order indicates three things. The first is that the High Court Registry was functional and if the applicant and his counsel had desired it, the main application would have been heard. Secondly, all the other counsel attended the High Court that the except the applicant's counsel. The applicant was also absent. Thirdly the respondents had no knowledge that the applications had been withdrawn.
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> It is also apparent that the applicant and his counsel did not wait for the hearing date of 12th September, 2017, which counsel and requested for to file an affidavit in reply, before he withdrew both applications; *Miscellaneous Application No 1900 of 2017* and the *Miscellaneous Application No 1901 of 2017*. As I have already noted, the interim order of stay had been extended to that date. Instead, the applicant chose to withdraw both applications before that date, without even informing his colleagues.
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> The applicant then proceeded to file the present application in this court on 7 September 2017, 5 days before the scheduled hearing of Miscellaneous Application No. 1900 of 2017 in the High Court. He also filed Civil Application No 280 of 2017 for an interim order.
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> ... The chronology of the above events paints a picture of a litigant who is bent on abusing court process. The applicant has not come to this court with clean hands.

Having found that the applicant had not come to the Court of Appeal with clean hands in addition to not having complied with the procedure, the application was dismissed. Filing yet another application after the High Court had arrived at a decision that the

Court of Appeal had determined the matter on the merits, makes this application incompetent. The applicant ought to have filed a reference from the decision of the Court of Appeal to the full bench of the Court of Appeal under rule 55 (1) (b) of the Rules of this court. Furthermore section 12 (2) of the Judicature Act gave the applicant a right of reference to the full bench of the justices, which the applicant did not pursue but instead filed a fresh application before the High Court. The applicant was satisfied with the decision of the Justice of Appeal. However the same decision held that the applicants would be compensated by way of damages if the appeal fails.

In the premises, the applicants application for an interim order of stay of execution, after the same had been refused to by the High Court pursuant to the decision of the Court of Appeal after withdrawing earlier applications in the High Court for stay of execution is incompetent for being *res judicata* and an abuse of the process of this court. In the premises, the objection of the respondents is sustained and the applicant's application stands dismissed with costs.

Dated at Kampala the 8th of August 2019

Christopher Madrama Izama

Justice of Appeal

Ruling delivered in the presence of: