

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
Coram: Muzamiru Kibeedi, JA (Single Judge)

CIVIL APPLICATION NO. 70 OF 2020

(Arising from Civil Application No. 69 of 2020 - COA, High Court Miscellaneous Application No. 555 of 2018, and Original HCCS No. 207 of 1993 & HCMA No. 192 of 2000)

BETWEEN

MS BASHASHA & CO. ADVOCATES APPLICANT

AND

1. TUMWIJUKYE MPIRIRWE]
2. BUSINGYE NOAH]
3. BABIGUMIRA JENNIFER]
4. MUHEREZE ABEL]
5. BANUHIGA HILLARY]
6. ALIHO JUSTUS]
7. SERESTINE NGABIRANO]
8. DAVID TINFAYO]
9. MILTON BAMPABURA]
10. BENON BUTERE]
11. LT.COL. KABAREEBE DAVID]
12. KAGABA JOSHUA]
13. MILTON TWEHANGANE]
14. KATURA ONESMUS RESPONDENTS

RULING

This is an application by way of Notice of Motion stated to be “*under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act and Order 43 Rule 4 of the Civil Procedure Rules*” (sic!) seeking from this court an Interim Order “*staying execution and enforcement of the orders in H.C.M.A No. 555 of 2018 Tumwijukye Mpirirwe & Others Vs Lt. Col. Kabareebe & others ... until the hearing and disposal of the appeal.*” (Sic!) The Applicant also sought an order that the costs of this application be provided for.



Background Facts

From the record of this Court, this application has its roots in the Test Case heard by Hon. Justice Ignatius Mukanza (RIP) namely, High Court Civil Suit No. 207 of 1993 Benon Turyamureeba & 132 Others Vs Attorney General, by which government was ordered to compensate each one of the plaintiffs Ugx 12 Million with interest thereon of 6% percent per annum for being wrongfully evicted from Kibale Forest Reserve by government. The application of the court award in above Test Case was subsequently extended to another 1097 evictees through High Court Miscellaneous Application No. 192 of 2000 Steven B. Rwahuta & 1096 Others Vs Attorney General.

By the agreement entered on the 11th of April 2003 between the government of the Republic of Uganda and a one Benon Turyamureeba who was stated to be the attorney of the Judgment creditors in HCCS No 207 of 1993 and Miscellaneous Application No 192/2000, modalities were set out for settlement of the decretal sum of Ugshs.13,164,000,000/= and the agreed interest at the time put at Ugshs. 3,969,946,000/= .

The agreement also provided that payment was to be made by government "through the lawyers of the judgment creditors, 'MULENGA & KAREMERA ADVOCATES'" in five installments spread over four Financial Years.

Initially, the principal players in the recovery of the money from government appear to have been Benon Turyamureeba (now deceased) , M/S Didas Nkurunziza & Co advocates (as the successors to M/S Mulenga & Karemera Advocates) and M/S Bashasha & Co Advocates who was stated to represent approximately 600 Judgment creditors. After the government had effected part payment of the decretal sums and interest, complaints were raised by some of the Judgment Creditors (beneficiaries) to diverse public offices including the President's office and the Uganda Police regarding the alleged mishandling of the money by their representative/attorney, Benon Turyamureeba.



Further, numerous interests and stakeholders emerged in the form of new/additional attorneys of some of the Judgment creditors/ beneficiaries, funders, advocates and so on. In paragraph 37 of the Affidavit in Reply of Lt. Col. Kabareebe David filed in this matter on 1st April 2020 it is stated, "... after M/S Nyanzi Kiboneka & Mbabazi Advocates won the case many law firms including M/S Mushabe, Munungu & Co Advocates, M/S Bashasha & Co Advocates , M/S Geoffrey Nangumya & Co advocates , M/S Twinomugisha Shokoro & Co advocates , M/S Sebanja Abubakari Advocates, M/S Mukiibi Kyeyune & Co Advocates , Ms Owen Murangira & Co. Advocates, M/S Muwanguzi & Co Advocates, Ms Patel & Co Advocates , M/S Newman Advocates and many others got instructions from several groups from the 1097 claimants or the late Benon Turyamureeba."

The financial stakes in the judgment debt created for the different stakeholders appear from the court record, especially Annexure "F" of the Affidavit of Ms Joan Namanya sworn on the 13th March 2020 in support of this application, and Annexure "E2" to the Affidavit in Reply of Lt Col Kabareebe David, to be thus:-

- a) Ms Bashasha & Co Advocates20%
- b) Mr. Twinomugisha Shokoro & Co advocates not disclosed.
- c) Mr. Sebanja Abubakari Advocates.....3%
- d) Mr. Mukiibi Kyeyune & Co advocates.....not disclosed
- e) Mr. Didas Nkurunziza & Co advocates.....3%.
- f) Ms Nyanzi, Kiboneka & Mbabazi Advocates5%.
- g) Ms Mushabe Munungu & Co advocates.....5%.
- h) Ms Newman Advocates Not disclosed.
- i) Ms Davanti Union Ltd.....9%.
- j) Mr. Pius Kwesiga, Mr. Henry Makmot, Mr. Mugira Nicodemus & Mr. Michael Mawanda 10%
- k) Mr. Amon Bahumwire6%
- l) Ms Geoffrey Nangumya & Co advocates.....5%

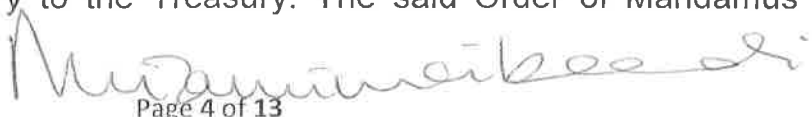
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In short, on the face of it the total financial stakes of the persons claiming to be the holders of Powers of Attorney of the judgment creditors, funders and advocates of the judgment creditors appear to be standing at a whopping 66 % of the judgment debt!

As a result of those apparent high financial stakes of the different players and their inability to harmoniously handle adversity in the same subject matter, some players have sought to outdo or even exclude the others; claims and counter claims have emerged about some advocates being clothed with "superior" instructions while others are clothed with "inferior" instructions and some powers of attorney have been labeled non - genuine and so on. This resulted in numerous applications being made before the lower court including: High Court Miscellaneous Application No. 622 of 20 Ivan Nsigazi & 5 others Vs Benon Turyamureeba & Attorney General, and High Court Miscellaneous Application No. 555 of 2018 Tumwijukye Mpirirwe & others Vs Lt Col Kabareebe David & 3 others (respondents) and Ms Bashasha & co advocates & 13 others (interested parties).

Matters were made worse by the death of the original attorney of the Judgment Creditors, Benon Turyamureeba, and the subsequent withdrawal from the matter by Ms. Didas Nkurunziza & Co Advocates the law firm that appears to have been the acceptable collector of the judgment debt from the government by virtue of the agreement signed between the government of the republic of Uganda and Benon Turyamureeba on 11.04.2003 which I have already referred to hereinbefore. Withdrawal by Ms. Didas Nkurunziza & Co Advocates from the further involvement in the dispute was by their letter dated 7th September 2016.

In order to bring the recovery efforts back on course, on 7th June 2017 Dr. David Gureme Mushabe of Ms Mushabe, Munungu & Co. Advocates applied for an order of Mandamus from the High Court (Hon Lady Justice Lydia Mugambe) directing government to pay the outstanding balance, which was stated at the time to have arisen to Ug shs 20,251,814,400/=, to the 1097 Judgment Creditors under High Court Miscellaneous Application No 318 of 2016 Stephen Rwehuta & 1096 Others Vs Attorney General & Secretary to the Treasury. The said Order of Mandamus was



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granted with costs by the Learned Trial Judge on 20th April 2018 and a copy is attached to the Affidavit of Lt Col. David Kabareebe filed in this application as annexure "D".

Subsequently, on 24th September 2018 Tumwijukye Mpirirwe and 10 Others represented by M/S Geoffrey Nangumya & Co Advocates filed Misc Application No 555 of 2018 against Lt Col Kabareebe David & 3 others (respondents) and M/S Bashasha & Co Advocates & 13 others (interested parties) seeking *inter alia* declarations as to who was the lawful Collection Agent for the judgment debt due from government, declarations as to who were the lawful attorneys of some of the judgment creditors and declarations as to the entitlement to compensation of some of the so called funders and attorneys of some of the judgment creditors. The application was attached as annexure "F" to Ms Joan Namanya's Affidavit in support of this application.

In her ruling delivered on 21st March 2019, Hon Lady Justice Lydia Mugambe not only dismissed the application with costs but also went ahead to make further orders and declarations namely:

- i. *The suit money shall be paid to the Mpokya claimers [judgment creditors] through M/S Mushabe, Munungu & Co Advocates who are their lawyers at this material time.*
- ii. *Once received, some of this money shall be released for the verification process of the 1097 Mpokya Claimants.*
- iii. *The verification process of the rightful claimants shall be made within a maximum of one month on receipt of the money and prior to paying the claimants.*
- iv. *The verification process will determine the original Mpokya claimants or their agents or successors and how much each is entitled to. This verification shall be carried out by the office of the Auditor General, Police, LCS of the area and other relevant officials.*
- v. *Any other persons claiming including lawyers should present their claims to the Auditor General for verification and payment.*



- vi. *While paying out, all illegal champerty and maintenance agreements should be avoided.*
- vii. *Once full payments are made, accountability for the payments should be furnished in court, in all event not later than three months from today.*

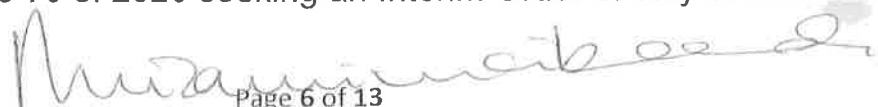
M/S Bashasha & Co Advocates, one of the parties to Misc Application No 555/2018, was aggrieved with the decision of the learned High court Judge and filed a Notice of Appeal in the High Court on 22nd March 2019. The grounds of grievance that can be discerned from the Affidavit of Ms Joan Namanya in support of the instant Notice of Motion since no Memorandum of appeal has been filed as yet, appear to revolve around the trial judge having made orders outside what had been pleaded in the Notice of Motion which were prejudicial to the interests of the applicant and without giving the applicant an opportunity to be heard in respect thereof.

On the same date of 22nd March 2019, the applicant also applied for a Certified True copy of the court proceedings.

Subsequently M/S Bashasha & Co Advocates filed Civil Application No 100 of 2019 and No 103 of 2019 in the Court of Appeal seeking respectively a stay of execution and an Interim Order of Stay of execution. But both applications were found by Hon. Mr. Justice Ezekiel Muhanguzi, JA (as he then was) to have been prematurely filed in the Court of Appeal instead of being first filed in the High Court that had made the Orders to be appealed against. As such, he dismissed the said applications with costs.

M/S Bashasha & Co Advocates then filed High Court Miscellaneous Application No HCT -00-EXD-MA-0094-2020 M/S Bashasha & Co Advocates Vs Tumwujukye Mpirirwe & 13 others seeking an order of stay of execution. The application was on 10th March 2020 dismissed by the High Court with no order for costs.

Thereafter, on 13th March 2020 M/S Bashasha & Co Advocates came back to the Court of Appeal and filed Civil Application No 69 of 2020 seeking a stay of execution and Civil Application No 70 of 2020 seeking an Interim Order of stay of execution,



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In the meantime, M/S Mushabe, Munungu & Co Advocates by their letter dated 07.02.2020 addressed to the Permanent Secretary, Secretary to the Treasury and the Attorney General of Uganda had demanded for the payment of Ug.shs. 22,044,807,040/= due to the 1097 Judgment Creditors through M/S Mushabe, Munungu & Co Advocates. The demand letter was attached to the Affidavit of Ms Joan Namanya in support of his Application and marked "I"

Representations

Owing to the directions that had been issued by the President of the Republic of Uganda, the Ministry of Health and the Chief Justice of Uganda aimed at controlling the spread of Covid-19 Pandemic in Uganda at the time this application was scheduled to be heard by me on 26th March 2020, I directed the parties to file written submissions contemporaneously with filing their respective Affidavits in Reply/Rejoinder. Thereafter the Ruling would be delivered on notice.

MS Bashasha & Co Advocates filed the applicant's Written Submissions on 25th March 2020 while M/S Mushabe, Munungu & Co Advocates filed only the 11th Respondent's Affidavit in Reply on 1st April 2020 together with the Written Submissions on behalf of the 11th - 14th respondents. Counsel for the 1st -10th respondents, M/S Geoffrey Nangumya & Co Advocates, filed the Affidavit in Reply on 14th May 2020 deponed upon by a one Aliho Justus. However, at the time of writing my Ruling there were no Written Submissions filed on behalf of the 1st -10th respondents on the Court file that were submitted to me.

Preliminary Points of Law

In their Written Submissions, Ms Mushabe, Munungu & Co Advocates raised what they termed "Preliminary Points of Law" against the application namely:

- a) That the applicant cannot approbate and reprobate;
- b) That the applicant Law Firm does not have valid legal instructions.



As regards the first objection, Counsel for the 11th – 14th respondents submitted that since Ms Bashasha & Co Advocates never objected to the legal instructions to Ms Mushabe, Munungu & Co. Advocates while it (Ms Mushabe, Munungu & Co. Advocates) was prosecuting the application for mandamus on behalf of the judgment creditors, they (Ms Bashasha & Co Advocates) are estopped, under the principle of “approbation and reprobation”, from subsequently objecting to payments to the claimants/judgment creditors being made through the same law firm.

As regards the 2nd objection, Ms Mushabe, Munungu & Co. Advocates submitted that the applicant has no locus to institute any appeal because at different times the firm has been giving contradictory numbers of clients/beneficiaries/judgment creditors that the firm represents. According to Ms Mushabe, Munungu & Co. Advocates, this contradiction without explanation amounts to the firm having no valid legal instructions.

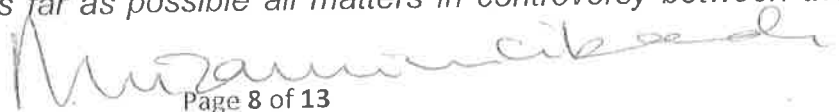
I have carefully read and considered the objections raised by Ms Mushabe, Munungu & Co. Advocates. In my opinion, these objections which go to the root of the appeal itself are best raised by way of cross-appeal for consideration by the full bench of this court – subject, of course, to meeting the standards set by the Rules of this court. As such, I decline to pronounce myself on the two objections for want of jurisdiction.

The Law applicable to the Application

The Notice of Motion filed in this application states that it was brought “*Under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act and Order 43 rule 4 of the Civil Procedure Rules.*”

In my opinion, Section 33 of the Judicature Act does not apply to the proceedings in the Court of Appeal. It provides:

*“The **High court** shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in response of any legal or equitable claim properly brought before it, so as that as far as possible all matters in controversy between the*



parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of these matters avoided.” [Emphasis added]

Clearly Section 33 of the Judicature Act is applicable to the High court and not the Court of Appeal.

Similarly Section 98 of the Civil Procedure Act, Cap 71 (CPA) and the Civil Procedure Rules, SI No 71-1 do not govern the procedure before the Court of Appeal. Section 1 of the CPA expressly provides for the scope of the application of the CPA thus:

“This Act shall extend to proceedings in the High court and magistrates courts.”

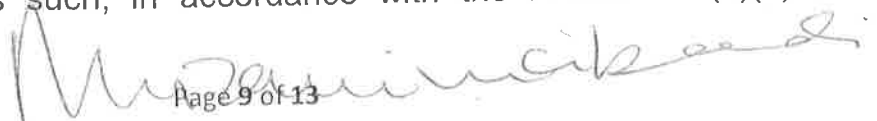
In the premises aforesaid, it is crystal clear that the application was brought under a wrong law.

Even the wording of orders sought in the Notice of Motion leaves a lot to be desired. The Order sought was stated thus:

“An interim order doth issue staying the execution and enforcement of the orders in H.C.M.A No 555 of 2018 Tumwijukye Mpirirwe and others Vs Lt. Col. Kabareebe David and others be stayed until the hearing and disposal of the appeal.” [Emphasis added]

When compared with the orders sought in the substantive application for stay of execution filed before this court namely, Civil application No 69 of 2020, it becomes crystal clear that after the applicant had prepared the Notice of motion in Civil Application No 69 of 2020, all that he did was to “copy and paste” the orders sought in C.A.69/2020 and then write before the copied materials the words “An interim order doth issue staying...”. My unsolicited advice to Counsel is that even with the ease afforded by modern I.T facilities, Counsel are expected to do much better than simply “copying and pasting”.

The aforesaid observations notwithstanding, the substance of the application cannot be mistaken to be that it seeks an Interim Order of stay of execution of the orders of the High court in H.C.M.A. No 555 of 2018 pending disposal of the substantive application for stay of execution, Civil Application No 69 of 2020, by a panel of three Justices of this Court. As such, in accordance with the Article 126(2)(e) of the



Constitution of the Republic of Uganda I would exercise my discretion and go ahead to dispose of this matter on its merits.

As regards the quoting of a wrong law, I will adopt the decision of this court in **Saggu Vs Roadmaster Cycles (U) Ltd [2002]1 EA 258 (CAU)** where it was held that where an application omits to cite any law or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity is not of a fundamental nature and can be ignored and the correct law inserted.

In my opinion, the laws applicable to the instant application for an Interim Order of Stay of execution by this court are Sections 12(1) of the Judicature Act, Cap 13 and Rule 2(2) of the Court of Appeal Rules, S.I No. 13 -10.

S.12(1) of the Judicature Act, cap 13 provides:

“A single judge of the court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the court of Appeal.”

On the other hand, Rule 2(2) of the Court of Appeal Rules provides:

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the 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 judgements which have 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.”

Counsel’s Arguments on the Merits of the Interim Order Application.

The arguments of the learned counsel for the parties in this matter will be considered alongside each and every ground of the application to which they relate. However I note that there has been a general overlap between arguments applicable to the substantive application for the stay of execution which is supposed to be heard by a full bench of three Justices of this court and the arguments applicable to an interim order of stay of execution which is supposed to be heard by a single Justice of this court. This is an erroneous approach as an Interim Order application is not one and the same as the substantive application. The main purpose of an interim order is to



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preserve the right of the parties to have the substantive application for stay of execution heard on its merit and prevent the said substantive application from being rendered nugatory. The interim order application is not intended to pre-empt the disposal of the substantive application for the stay which is the mandate of a full bench of 3 Justices of this court.

Consideration of the Merits of the Interim Order Application

It is settled law that the grant of an Interim Order of stay of execution is a discretionary matter exercisable judiciously while being guided by the settled principles that have been pronounced by the courts of law time and again.

According to the oft-quoted dictum of Hon. G.M. Okello, JSC (as he then was) in Hwang Sung Industries Limited Vs Tajdin Hussein & others S.C. Civil Application No. 19 of 2008, after court being satisfied that the Notice of Appeal has been lodged in accordance with the Rules of Court, “...it suffices [for the applicant] to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the substantive application.

It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”

In the instant matter, there is no contest that the applicant has already filed a Notice of Appeal in the High Court of Uganda. It is attached to Ms Joan Namanya’s Affidavit in Support of the Notice of Motion as “G”. The Notice of Appeal indicates that it was received by the Registry of the High Court on 22nd March 2019, a day after the High Court had delivered the impugned Ruling.

There is also no contest that there is pending before this court the substantive application for stay of execution. The record of the Civil Registry of this Court indicates that the reference number for the substantive application for stay of execution is Civil Application No. 69 of 2020. It has no hearing date assigned to it as yet.



As such, the first two conditions have been met by the Applicant.

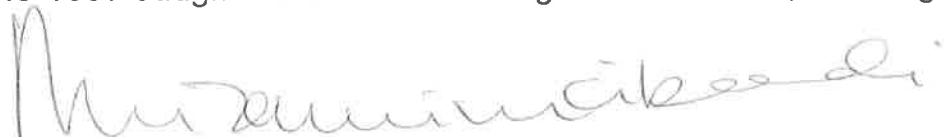
As regards the existence of “*a serious threat of execution before the hearing of the substantive application*”, the applicant has submitted that it is in the form of the Certificate of Order of Payment that was issued against government and the two demand letters written by Ms Mushabe, Munungu & Co. Advocates to the Ministry of Finance, copies of which were attached to the applicant’s Affidavit in Support of the Notice of Motion as annexure “I”.

On their part, Ms Mushabe, Munungu & Co. Advocates appear not to have directly addressed this point.

I have carefully looked at the Affidavits in this matter. Execution proceedings were commenced way back in May 2016 when the Court issued the Certificate of Order against Government in accordance with Section 19 of the Government Proceedings Act, Cap.77. The said Certificate is attached to the applicant’s Affidavit in Support as annexure “E”. It indicates that it was received by the Directorate of Civil Litigation on behalf of the Attorney General on 19th May 2016.

Subsequently, on the application of Ms Mushabe, Munungu & Co. Advocates in High Court Miscellaneous Application No 318 of 2016 Stephen Rwehuta & 1096 Others Vs Attorney General & Secretary to the Treasury, the Hon Lady Justice Lydia Mugambe issued an Order of Mandamus on 20th April 2018 directing government to pay the outstanding balance, which was stated therein to be Ug shs 20,251,814,400/=, to the 1097 Judgment Creditors. A copy of the said Order of Mandamus was attached to the Affidavit of Lt Col. David Kabareebe filed in this application as annexure “D”.

The said Order of Mandamus has since been followed by among others, the letter of Ms Mushabe, Munungu & Co. Advocates dated 07.02.2020 addressed to the Attorney General and the Permanent Secretary/Secretary to the Treasury, Ministry of Finance, Planning and Economic Development demanding for payment of Ugx 22,044,807,040/= to the 1097 Judgment Creditors through Ms Mushabe, Munungu &



Co. Advocates. The said letter was attached to Ms Joan Namanya's Affidavit in Support of the Notice of Motion as "1".

It is further stated in paragraphs 24 & 25 of Ms Joan Namanya's Affidavit in Support of the Application that the said letter has since been served on government and that there is an imminent threat of payment being effected following the Ruling of Court. In reply to this claim, the 11th Respondent in paragraph 45 of his Affidavit in Reply simply stated that according to information from his advocates "...a demand does not amount to execution".

In the premises, the key averment of an imminent threat of payment was neither denied nor rebutted in substance by the Respondents. So the applicant has satisfied the last requirement as set out in the case of Hwang Sung Industries Limited (above).

Decision of Court

In the final result, I allow this application and grant an Interim Order staying execution and enforcement of the Orders of the High Court in HCMA No. 555 of 2018 Tumwijekye Mpirirwe & Others Vs Lt. Col. Kabareebe David & Others until the disposal of the substantive application for stay of execution pending before this court, Civil Application No. 69 of 2020, or until further orders of Court.

The Registrar of this court is urged to fix the hearing of Civil Application No. 69 of 2020 at the earliest possible time.

The costs of this application shall abide the outcome of the substantive application for stay of execution.

I so Order.

Dated at Kampala this 19th day of June 2020.


MUZAMIRU KIBEDI
Justice of Appeal

19/06/2020