

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CIVIL REFERENCE No. 69 of 2020

{Arising from Civil Application No. 85 of 2012 and Civil Appeal No. 121 of 2011 and Civil Appeal No.16 of 2009}

Coram: Hon. Lady Justice Catherine Bamugemereire, JA;
Hon. Mr. Stephen Musota JA;
Hon. Mr. Justice Muzamilu Mutungula Kibeedi, JA

REMEGIO OBWANA.....APPLICANT

VERSUS

REGISTERED TRUSTEES OF TORORO
DIOCESE.....RESPONDENT

RULING OF HON. JUSTICE CATHERINE BAMUGEMEREIRE

This is a reference to a full bench comprising of three Justices of the Court of Appeal from the Ruling of the Hon. Lady Justice Hellen Obura JA sitting as a Single Justice of Appeal in Civil Application No. 85 of 2012 dated 1st June 2020.

In the decision, the learned Justice dismissed an application made to her as a Single Justice of Appeal in which the Applicant had sought orders for Stay of Execution of an order of this court vide Miscellaneous Application No. 156 of 2009 and a stay of the Decree passed in the Civil suit No. 2 of 1994.

In the application for the Stay of Execution, the Applicant relied on ten grounds but specifically that it was likely to take a long time before his

application was heard and therefore that in the interest of justice, the orders sought were to preserve the status quo pending Appeal.

It was the case for the Applicant that the Learned Justice erred in law by issuing an order to dismiss an application for stay of execution, thereby imperilling an application for leave to appeal, which was pending before this Honourable court, the intended appeal to the supreme court of Uganda, and occasioning a miscarriage of justice. The Applicant in this reference relies on four grounds as stated in the Memorandum of Reference as follows:-

1. The Learned Justice of Appeal erred in law and fact by issuing an order to dismiss an application for stay of execution comprised in Civil Application No. 85 of 2012 there by imperilling an application for leave to appeal in pending before this Honourable court, the intended appeal to the supreme court of Uganda, and occasioning a miscarriage of justice.
2. The Learned Justice of Appeal erred in law and fact when she premised all her orders on a purported dilatory conduct of the Applicant in fixing an application for a stay of execution after an interim order of stay of execution was granted by disregarding the fact that the Applicant was diligent in processing the application to stay by submitting all the necessary scheduling conferencing notes in accordance with the schedules of time made by the learned Registrar of court there by issuing erroneous orders.
3. That the Learned Justice of Appeal erred in law and fact by disregarding the fact that the Applicant pleaded and satisfied the necessary conditions for a grant of stay of execution, and occasioned a miscarriage of justice.
4. That the Learned Justice of Appeal erred in law by dismissing an application for stay of execution after finding and holding that the affidavit in reply filed by both Mr. silver Ebu and Fr. Centurion Olabora for the Respondent were incompetent and occasioned a miscarriage of Justice.

The Applicant also seeks Orders that;

- a) The reference be allowed.
- b) The order of Hon. Lady Justice Hellen Obura, J.A dismissing the application for stay of execution in civil application NO. 85 of 012 be reversed and/ or set aside.
- c) For stay of execution pending appeal be granted.
- d) Cost of the reference be provided for.

The Respondents opposed the application and agree with the findings of the single Justice's Ruling.

Representation

The Applicant was represented by Counsel Peter John Nagemi of M/S Nagemi & Co. Advocates while the Respondent was represented by Counsel Deogratius Obedi of M/S Owori & Co. Advocates.

Legal Arguments

Arguments for the Applicant

Counsel sought to argue ground 1, 3, and 4 of the reference concurrently.

The Applicant contended that the order for stay of execution pending appeal is necessary to preserve the status quo until the application seeking leave to appeal the decision of the Court of Appeal. Counsel submitted that court must ensure that an appeal is successful and is not rendered nugatory. He relied on the case of Kyambogo University v Prof Isaiah Omolo Ndeige Civil Application No. 341 OF 2013.

Counsel's case was that he made an application seeking leave to appeal the decision of this court to the Supreme Court. The Respondent applied for the warrant to give vacant possession and an award of 6,638,500/= being taxed costs. The Applicant filed a stay of execution and interim

order for stay of execution and this application for substantive stay of execution.

Arguments for the Respondent

Counsel for the Respondents submitted that the dismissal of the application for stay of execution did not and has not in any way imperilled the Application for leave to appeal.

Counsel for the Respondent submitted further that an Appeal does not operate as a stay of execution, per Rule 6(2) of the Rules of this court. According to counsel, this means that the law recognises that not all orders and or decrees appealed from must be stayed. An appeal can be heard without orders for stay of execution. It is upon the Applicant to satisfy court that grounds exist for grant of stay of execution.

Counsel for the Respondent relied on the case of Hon. Theodore Ssekikubo & Others v. Attorney General, Constitutional Application No. 06 of 2013. Which clearly restated the principles for the grant of stay of execution;

1. That the Applicant must establish that his/her appeal has a like-hood of success or a prima facie case of his/her right to Appeal.
2. It must also be established that the Applicant will suffer irreparable damage or the Appeal will be rendered nugatory of a stay is not granted.
3. If 1 or 2 above has not been established, court must consider whether the balance of convenience lies.
4. That the Applicant must also establish that the application was instituted without delay

Counsel further relied on the case of Kyambogo University v. Prof Isaiah Omolo Ndeige Civil Application No. 341 OF 2013.

1. That the Applicant has lodged a notice of appeal in accordance with Rule 76 of the Rules of this Court.
2. That a substantive application for stay of execution has been filed in this court and is pending hearing.
3. That the said substantive application and the appeal are not frivolous and they have a likelihood of success.
4. That there is a serious and imminent threat of execution of the decree or order and that if the application is not granted the main application and the appeal will be rendered nugatory.
5. That the application was made without unreasonable delay
6. The applicant is prepared to grant security for due performance of the decree.
7. That refusal to grant the stay would inflict greater hardship than it would avoid.

Ground No.2: Arguments for the Applicant

Counsel for the Applicant noted that a great deal of the Ruling of the Learned Justice of the appeal dwelt on the alleged or purported dilatory conduct of the Applicant to fix for hearing civil application No. 85/ 2012. Counsel argued that there was compelling evidence to show and prove that the said application was readily conferenced pursuant to the conference letter issued by the learned Registrar of court as articulated in the brief background facts giving rise to the reference. And the matter was left exclusively in the discretion of this honourable court to render a ruling thereon.

Arguments for the Respondent

Learned Counsel for the Respondent argued that the dismissal prompted the Applicant to ensure that Misc. Application No. 131 of 2011 was fixed and has been heard by this honourable court and it's pending a ruling on notice. Without the dismissal, the application would perhaps still be pending fixing to date.

Counsel submitted that since 24th October 2012, when the order was extended until the determination of the substantive application vide 85/2012, the Applicant was content, comfortable, and not vigilant to have the substantive application fixed because he knew he was in possession with no interference.

Considerations and findings of the Court

The main issue for consideration of this court is whether a stay of execution ought to be granted. The principles under which an application of stay of execution can succeed were well espoused in the case of Lawrence Musiitwa Kyazze v Eunice Businge, Supreme Court Civil Application No 18 of 1990, but more pronounced in the Supreme Court Case of Hon Theodore Ssekikubo and Ors v The Attorney General and Others, (supra) they include:

1. The applicant must show that he lodged a notice of appeal
2. That substantial loss may result to the applicant unless the stay of execution is granted.
3. That the application has been made without unreasonable delay.
4. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

This court in Kyambogo University v Prof. Isaiah Omolo Ndiege, (Supra) expanded the list to include:

1. There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory
2. That the application is not frivolous and has a likelihood of success.
3. That refusal to grant the stay would inflict more hardship than it would avoid

The learned Single Justice of Appeal saw no merit in the application since it was found that there was no likelihood of the appeal succeeding in the Supreme Court. The Applicant was critical of the learned Justice's decision when she found that it was based on his dilatory conduct which counsel contends was not an act of his making but the doing of this court's system.

On the likelihood of success, the honourable Justice noted;

“It must be satisfied that the appeal raises issues which merit consideration by the supreme court. A perusal of the record, particularly the ruling of this court as well as the memorandum of appeal does not establish that the intended appeal raises serious issues or any new and important questions to be determined on appeal. The questions this court determined in Civil Application No. 156 of 2009 are matters of law and I do not see how the decision which is grounded on law can be successfully challenged on appeal.”

The Learned Single Justice noted with concern the laggard manner in which the Applicant treated this matter. Regarding the dilatory conduct of the Applicant, the learned justice observed as follows:

“It is noteworthy that the applicant did file an application for leave to appeal against the decision on 23/06/2011 but has since not prosecuted the same. His focus was on the application for interim order for stay of execution filed on 3/5/2012 which was heard ex parte and granted on 11/5/2012 for a period of 7 days. Upon expiry of the 7 days, it was extended to 23/5/2012 when the application was heard inter parties and the interim order extended for 4 months. When the 4 months elapsed on 24/10/2012, the interim order was further extended pending the hearing and determination of application for substantive order of stay of execution which was never fixed for hearing until April 2018.”

An order for stay of execution should ideally be granted unless the Applicant is guilty of unexplained or inordinate delay in seeking the indulgence of the court.

In the instant case, the Applicant took over 8 years without prosecuting the appeal. His main focus as noted by the Learned Justice was on the interim stay of execution. He further took 8 years before fixing the main application for stay.

It was held in Andrew Kansiime Kananura v Richard Kaijuka Civil Reference No. 15 of 2016 that,

“A party that is dissatisfied with the decision of any Court is required to take the essential steps within the prescribed time to file an appeal against the decision, under the relevant applicable laws. A loosing party who only springs in action when the successful party sets in motion the process of realizing the fruits of his or her Judgment, cannot be allowed to use the Court to frustrate or delay the execution process. There must be finality in litigation.”

While it is the paramount duty of a Court to which an application for stay of execution pending an appeal is made is to see that appeal, if successful, is not rendered nugatory, the Applicant must not be guilty of dilatory conduct. Equity aids but the vigilant.

I do agree with the Single Justice that the Applicant unduly delayed in prosecuting this application while he had an interim stay. He has taken over 8 years to fix the application for leave to appeal. If this application is granted, he will certainly take more years to have it fixed in the Supreme Court at the detriment of the Respondent, who has waited for over a decade to exercise his rights.

On the principle that the application is not frivolous and has a likelihood of success, I have perused the Judgment of this court and the application. I agree with the Learned Single Justice that the Applicant does not raise pertinent appealable issues of uttermost importance to be determined by the this Court.

It should be noted that at this stage we are not required to look at the Judgment substantively. Rather, it is sufficient to establish whether there are grounds with a probability of success. It is clear from the ruling of this court that the Applicant's appeal was precluded by section 68 of the Civil Procedure Act. I do not to find any likelihood of success.

In the circumstances, therefore, I find that the Learned Single Justice did not err in dismissing the Application.

For the above reasons, I find no merit in the application dismiss it accordingly.

Signed this18th..... day ofMarch.....2021



Hon. Lady Justice Catherine Bamugemereire

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL REFERENCE NO. 069 OF 2020

REMEGIO OBWANA ::: APPELLANT

VERSUS

REGISTERED TRUSTEES OF

TORORO DIOCESE ::: RESPONDENT

(Arising from Civil Application No. 85 of 2012 and Civil Appeal No. 121 of 2011 and Civil Appeal No. 16 of 2009)

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I had the benefit of reading in draft the ruling of my sister Hon. Justice Catherine Bamugemereire, JA.

I agree with it and the orders proposed.

Whereas it is the duty of this court to see that the appeal, if successful, is not rendered nugatory, the applicant must not be guilty of dilatory conduct. In this case, the applicant unduly delayed the prosecution of this application while he had an interim stay by taking over 8 years to fix the application for leave to appeal.

This was prompted by the fact that when the order was extended until the determination of the substantive application vide application No. 85 of 2012, the applicant was content, comfortable and not vigilant to have the

substantive application fixed because he knew he was in possession with no interference.

I therefore agree that the learned single justice did not err in dismissing the application.

Dated at Kampala this.....18th.....day ofMarch.....2021



Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
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VERSUS

**REGISTERED TRUSTEES OF TORORO
DIOCESE.....RESPONDENT**

RULING OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Ruling prepared by my Lord, the Hon. Lady Justice Catherine Bamugemereire, JA. I agree with the reasoning and Orders as proposed.

Dated at Kampala this ^{18th} day of ^{March} 2021



Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL