THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPLICATION NO. 709 OF 2022

(Arising from Miscellaneous Application No. 1149 of 2021, Arising from Miscellaneous Application No. 583 of 2022, Arising from High Court Civil Suit No. 464 of 2021)

1. **EQUITY BANK UGANDA LIMITED**
2. **LUWALUWA INVESTMENTS LIMITED** **::::::::::APPLICANTS**
3. **KATENDE, SSEMPEBWA AND COMPANY ADVOCATES**

VERSUS

1. **SIMBAMANYO ESTATES LIMITED** **::::::::::::::::RESPONDENTS**
2. **PETER KAMYA**

CORAM. HON. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

The applicants brought this application by Notice of Motion under the provisions of Sections 10, 12 (1) of the Judicature Act, Rules 2 (2), 6 (2) (b), 42, 43, 44 of the Judicature (Court of Appeal Rules) Directions S1 13-10 seeking for orders that; an interim order for stay issues; staying the proceedings of the High Court in Civil Suit No. 464 of 2020 pending the hearing and determination by this Court of the Applicants' substantive application for stay of proceedings against

the ruling and orders of the High Court in Miscellaneous Application No. 583 of 2022 and that costs of the application be provided for.

The application is supported by an affidavit in support and a supplementary affidavit in support, both by sworn by Ms. Nayiga Elizabeth Wamala, the Head of the Legal Department of the 1st applicant. The application is opposed by the respondents through an affidavit in reply sworn by Arch Peter Kamya, the 2nd respondent, who is also a Director of the 1st respondent. The applicants also filed an affidavit in rejoinder, deponed by Ms. Nayiga Elizabeth Wamala.

Background

The background to the application that is discernible from the notice of motion and affidavits in support is that the respondents filed HCCS No.464 of 2021 in the Commercial Division of the High Court challenging the legality of the sale of mortgaged property by the 1st applicant to Meera Investments Limited and to the 2nd applicant respectively which is pending hearing. While hearing of the main suit is pending, the respondents filed High Court Miscellaneous Application No. 583 of 2022 seeking for inter-alia; orders for inspection of and taking certified copies of certain accounts in the 1st applicant bank held by the 3rd and 5th respondents and orders that the managing director of the 1st applicant bank makes a discovery on oath regarding certain alleged email correspondences and an alleged executed performance bank guarantee. The application was opposed by both the applicants and the other parties thereto.

It is apparent from the pleadings that Miscellaneous Application No. 583 of 2022 was first heard on 6th July 2022, whereof, the learned trial Judge upheld the objection raised by the applicants herein (respondents in the said application) to the competence of the affidavit in support of the application. The court struck out the said affidavit in support, together with all the annexures thereto on ground that the contents of the affidavit had been procured from an undisclosed whistle blower and that the evidence and the averments were all based on hearsay from an undisclosed source. Subsequently, on the 9th day of August 2022, the Court, upon consideration of the parties' respective written submissions allowed the application, and ordered that; the 1st applicant herein furnishes the respondents herein, under oath of an appropriate officer, within fourteen (14) days of the order, for inspection and taking certified copies of the 3rd applicant's dollar account statement for acount number 1036200727349, for the period 1st August, 2020 to 30th October, 2020; for inspection and taking certified copies of the dollar account statement for account number 1002201586895 operated by the 2nd applicant's for the period from 25th September, 2020 to 10th October, 2020; certified copies of email exchanges addressed to the 1st Applicant's Managing Director's email address on the subject entitled "Performance Based Guarantee" which related to the sale of the Respondent's properties as follows; (i) email from Sim Katende sent on Friday 25th September, 2020 at 2:09 pm sent /copied to Sim Katende and Samuel Kirubi (ii) email from Walusimbi Nelson sent / copied on Friday, 25th September,2020 at 2:57 pm to Sim Katende, Sudhir Ruparelia, Samuel Kirubi

and Gunn, as well as the executed copy of the "Performance Based Guarantee" referred to in those email correspondences between the 1st Applicant, the 2nd applicant and the 5th applicant. The order was on 13th September 2022 amended under the slip rule to correct the period for which the statement of account was required.

Being dissatisfied with ruling and the said orders of the High Court, the applicants herein, who were some of the respondents to Miscellaneous Application No. 583 of 2022 filed a notice of appeal, and further requested for a certified typed record of proceedings to enable them prepare and file their intended appeal. They also filed Miscellaneous Application No. 1130 of 2022 for leave to appeal the decision of the High Court. Further, the applicants also filed Miscellaneous Application No. 1149 of 2022 for stay of proceedings in the High Court.

It is further indicated that when the applications came up for hearing, the learned trial Judge declined to hear Miscellaneous Application No. 1130 of 2022 ordering the 1st applicant to first comply with the orders of the Court in Miscellaneous Application No. 583 of 2022. It is noteworthy that those are the very orders which the applicants were seeking leave to appeal from. On the 15th day of September 2022, the 1st applicant lodged a complaint with the Chief Inspector of Courts about the manner in which the trial was being conducted by the Court. Pursuant to the complaint, the Chief Inspector of Courts requested the learned Judge to hand over custody of the case file HCCS No. 464 of 2021 and all Miscellaneous Applications arising therefrom before the close of business

of 19th September 2022. That notwithstanding, on 20th September 2022, the learned Judge proceeded to hear both Miscellaneous Application No. 1130 of 2022 and Miscellaneous Application No. 1149 of 2022 and dismissed them with costs to be paid by the applicants herein.

Aggrieved with the ruling dismissing their applications in the High Court, the applicants aver that they filed in this Court, an application seeking leave to appeal the decision of the High Court in Miscellaneous Application No. 583 of 2022. The applicants further filed Misc. Application 708/2022, a substantive application for stay of proceedings. They aver that the said applications are pending before this court. The Applicants further state that they then filed the instant application for an interim order of stay of proceedings in HCMA No. 464 of 2021 pending hearing and determination of the substantive application.

Grounds of application

The grounds in support of the Application are contained in the notice of motion and they are elucidated in the affidavits in support. The gist of the grounds is that the applicants have filed in this Court, an application seeking leave to appeal against the orders of the trial court, which orders have an adverse impact on the main suit pending before the High Court. That they have also filed in this Court, a substantive application for stay of proceedings in the main suit. Pending determination of the said applications, the applicants aver that they filed the instant application for an interim order of stay of proceedings in order to safeguard their right to apply for leave to appeal and for stay of proceedings, otherwise, if the orders sought herein are not granted, they contend that the

main application for stay of proceedings and ultimately the main application for leave to appeal, both of which have a high likelihood of success and raise serious questions of law and fact, will be rendered nugatory.

The applicants further contend that the failure to grant the order for an interim stay of proceedings will unduly prejudice them as defendants in the main Suit HCCS 464 of 2021 who have been ordered to produce for inspection or make discovery on oath in relation to documents whose existence they are disputing in the main suit and that has the effect of unduly shifting the burden of proof onto them. The applicants contend that, it is in the interests of justice that orders for interim stay of proceedings be issued as the alleged documents in issue are material to the proceedings of HCCS NO. 464 of 2021and orders rendered by the High Court are prejudicial to them in the conduct of their defences in the said suit particularly where they, as the defendants, intend to put the respondents (Plaintiffs) to strict proof as the existence of the documents in dispute. The applicants claim that they will suffer irreparable and substantial loss if this application is not granted as the respondents have already filed in the High Court, an application for contempt of court and for striking out the 1st applicant's written statement of defence, which has been fixed for hearing. The applicants claim that, it is in the interest of Justice that the proceedings in H.C.C.S No. 464 of 2021 be stayed, pending the hearing and determination of their main application and that it is just, fair and equitable and for purposes of protecting the rights in HCCA NO. 464 of 2021 and maintenance of the status quo that this

application, which is brought without undue delay is granted in the terms sought.

Grounds in Opposition

The application is strongly opposed by the respondents. The gist of the respondent's opposition as set out in the affidavit in reply deponed by Arch Peter Kamya is that there is no valid notice of appeal envisaged under Rule 76 of the Court of Appeal Rules. The respondents further aver that the applicants are in contempt of the orders of the High Court in Misc. Application No. 583 of 2022 and that the grant of an interim order of stay is prejudicial and will delay the hearing and determination of the main suit. They further contend that the applicants have not satisfied the conditions precedent for the grant of an interim order of stay of proceedings. The respondents pray that the application be dismissed with costs.

Representation

At the hearing of the application, the 1st and 3rd applicants were represented by learned counsel, Mr. Sim Katende, who was also holding brief for Mr. Stephen Opolot, counsel for the 2nd Applicant. The Respondents was represented by learned counsel, Mr. Oscar Kihika SC, Mr. Ebert Byenkya and Mr. Anthony Bazira. Also present in court were Mr. Golooba Muhammad, the legal manager of the 2nd Applicant and Mr. Peter Kamya, the 2nd Respondent who also doubles as the managing director of the 1st Respondent.

Applicants' Submissions

It was submitted by learned counsel for the Applicants that, in an application for an interim order of stay of proceedings in the High Court, this court derives its jurisdiction from Rule 6(2) (b) and Rule 2(2) of the Judicature Court of Appeal Rules) Directions. In support of their submissions, counsel cited the recent decision of this court in ***Civil Application No. 457/2022 Kelspo Sekandi Luswanga versus Administrator General,*** in which this court reiterated its discretionary powers derived from Rule 6(2) (b) and Rule 2(2) of the Judicature Court of Appeal Rules) Directions to grant an interim order of stay of proceedings in the High Court pending determination of the substantive application for stay of proceedings.

Counsel also submitted that the conditions precedent for the grant of an interim order of stay were set out in ***Hwan Sung Industries Ltd vs. Tajdin Hussein and 2 others Civil Application No. 19 of 2008*** where Okello JSC, stated thus;

> *"For an application for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending 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."*

Court's attention was drawn to Rule 2(2) of the Judicature (Court of Appeal Rules) Directions, which according to counsel for the applicants, grants this court discretionary powers to make such orders, inter-alia as may be necessary for achieving the ends of justice. Citing the Supreme Court decision in ***Civil***

Reference No. 07/2016 Zubeda Mohamed & Sadru Mohamed Versus Laila Kaka Walia and the Administrators of the Estate of late Sunder Kaka Walia, counsel submitted that, in cases of urgency, this Court is empowered under Rule 2 (2) of the Rules of the Court to issue interim orders in order to achieve the ends of justice. It was contended that applications for interim orders are heard by a single justice of the Court and that an interim order is a stop gap measure to ensure that the substantive application is not rendered nugatory. Applicants' counsel further submitted that the applicants have satisfied the conditions precedent for the grant of an interim order of stay of proceedings to wit; that, they have duly filed a competent notice of appeal under circumstances enumerated in the affidavit in support, they have filed in this Court, they also filed an application for leave to appeal against the impugned orders of the High Court, and a substantive application for stay of proceedings, both of which are pending before this Court. Counsel contended that, in the meantime, there is a serious and imminent threat of execution by virtue of the fact that the respondents and the trial Court are taking steps towards hearing of the main suit, out of which these matters have arisen. The other threat as submitted by counsel is that the respondents have already filed in the High Court, an application for contempt of court and for striking out the 1st applicant's written statement of defence, all arising out of the same court orders which the applicants intend to challenge in this court if granted leave of Court. Counsel invited court to consider the averments in the affidavits in support of the

application and find that a case has been made out for the grant of an interim order of stay of proceedings.

Respondents submissions

The respondents' counsel opposed the application and submitted that the application is incompetent. They contended that there was no application for leave to appeal filed by the applicants and therefore, the notice of appeal had no foundation. That the applicant's application for leave to appeal had been declined by the High Court and none had been filed in this court and that on that ground, the notice is incompetent and cannot form the basis of an application for an interim order of stay of proceedings, as there is no pending appeal. Counsel cited ***Civil Application No. 06/2014 Lukwago Erias versus KCCA and Civil Reference No.07/2016 Zubeda Mohammed & Anor versus Laila Kaka & Anor.*** The second ground of objection is that an application for stay of proceedings is a matter reserved by law for a panel of three justices. Counsel relied on Rule 53 of the Rules of this Court and the decision in ***Civil Reference No. 174/2015 Jomayi Property Consultants Ltd versus Andrew Maviiri***

Further, it was counsel's contention that the notice of appeal is incompetent on ground that it was not drawn and lodged in the High Court in the manner prescribed by Rule 76 (1) & (5) and 11 of the Rules of this Court, it having not been endorsed by the Registrar of the High Court. Counsel cited ***Civil Application No. 63/2022 Mukwaya Joseph & Others versus Twaha Jaffari Kizito.*** It was also contended that notice was non-complaint with the prescribed form D in the 1st Schedule to the Rules and was therefore defective. It was also

argued that there is no evidence of a pending substantive application for stay of proceedings and that none had been attached to the instant application yet it is a requirement to do so in an application for interim orders. Counsel cited ***Civil Reference No.07/2016 Zubeda Mohammed & Anor versus Laila Kaka & Anor.*** Counsel contended that the application does not satisfy the high standard required to justify the issuance of any order of stay of proceedings, which standard is high and stringent. Counsel relied on in ***Civil Appeal No. 40/2018 Kenya Wild Life Service versus James Mutembuli.*** They invited court to find that the applicants are in contempt of court and have not come with clean hands, since they have not complied with the orders of the High Court neither have they purged themselves. They prayed for dismissal of the application with costs.

Analysis

I have carefully read the pleadings and affidavit evidence filed by the parties. I have also read the rival submissions of the parties and a number of authorities of the Supreme Court and of this Court, some which were cited by the learned counsel for the parties in support of their respective legal arguments. There is no doubt that the common thread in the said decisions is the fact that the law and the principles governing the grant or otherwise of an interim order of stay of execution or stay of proceedings are well settled, as is hereinafter demonstrated. From the submissions of learned counsel for the respondent, preliminary objections were raised to the jurisdiction of the court and the competence of the application. I am inclined to first determine the said objections before considering the merits of the application.

At the hearing and in their submissions, learned counsel for the respondents expressed strong reservations as to whether a single Justice of this Court has jurisdiction to hear and determine the instant applications for an interim order of stay of proceedings. It was contended that an application for stay of proceedings is a matter reserved by law for a panel of three justices and not a single Justice of this Court. Counsel cited Rule 53 of the Rules of this Court and the decision of this Court in ***Civil Reference No. 174/2015 Jomayi Property Consultants Ltd versus Andrew Maviiri.***

In response to the objection, learned counsel for the applicants contended that a single Justice of this Court has the jurisdiction to hear and determine the instant application, it being an application for an interim order of stay of proceedings. They contended that the jurisdiction is prescribed under Section 12 of the Judicature Act which confers upon a single Justice of this Court, the jurisdiction to determine interlocutory applications in the Court of Appeal. In counsel's view, section 12 being a provision in a substantive Act (the Judicature Act) overrides any contrary provision in the Court of Appeal Rules including Rule 53 relied on by the respondents. Counsel cited the decisions of this Court in ***Civil Ref. No. 116/2013 Herman Kalisa versus Gladys Nyangire & Others and Civil Ref. No. 63/2013 Mugabo Peter Bagonza & Others versus Kimala & Others***, which dealt with similar objections.

I must state from the onset that, in my view, an application for an interim order of stay of proceedings falls in the same realm as the application for an interim order of stay of execution. Indeed, the law and legal principles applicable to the

grant or otherwise, of an application for an interim order of stay of execution are applicable albeit *mutatis mutandis* to an application for an interim order of stay of proceedings. The applicable law for both orders is principally Rule 2(2) and 6(2) (b) of the Rules of this Court. See: ***Civil Application No. 457/2022 Kelspo Sekandi Luswanga versus Administrator General.*** It would therefore follow that where a single Justice of this court has jurisdiction to hear and determine an application for an interim order of stay of execution, then a single justice would equally have jurisdiction to hear and determine an application for an interim order of stay of proceedings.

Historically, in this court, a practice developed whereby applications for interim orders of stay of execution or interim orders of stay of proceedings would be heard and determined by a single Justice of this Court pending determination of the substantive application for stay. Such interim orders would be given in the exercise of the inherent power of this Court under Rule 2(2) read together with Rule 6(2) (b) of the Rules of this Court. This is the practice that was subsequently alluded to, with approval, by the Supreme Court in ***Civil Application No. 06/2014, Erias Lukwago Lord Mayor KCCA Versus AG and KCCA,*** where the court held that;

> *".....however, a practice has developed where a single Judge or even a Registrar may hear an application for an interim order for stay of execution pending the hearing of the main application in urgent cases. Such interim orders are given in exercise of inherent power of the Court under Rule 2 (2) of the Rules of the Court of Appeal."*

The said practice was a subject of subsequent scrutiny by this Court, after contentions were raised that the jurisdiction to hear and determine applications for stay of execution or stay of proceedings inclusive of applications for interim orders thereof were reserved for the full bench of three Justices and not a single Justice of this Court. The contention, similar to the one now raised by the respondents herein, was premised on the wording of Rule 53 of the Rules of this court. The rule provides:

"53(1) Every application, other than an application included in sub rule (2) shall be heard

by a single Judge of the Court: except that any such application may be adjourned by the Judge for determination by the Court.

(2) This rule shall not apply;

(a) To an application for leave to appeal, or for a certificate that a question or questions

for great public or general importance arise; or

(b) To an application for a stay of execution, injunction or stay of proceedings; or

(c) To an application to strike out a notice of appeal or an appeal; or

(d) To an application made as ancillary to an application under paragraph (a) or (b)

or made informally in the course of hearing, including an application for leave or

to extend time if the proceedings are found to be deficient in the matters in the course of hearing"

Nevertheless, there was a second school of thought that justified the jurisdiction of a single Justice of this Court to determine an application for an interim order of stay of execution or stay of proceedings. This was premised on section 12 of the Judicature Act, which provides:

> *"12 (1) A single Justice of Appeal may exercise any powers vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal."*

It therefore became apparent that there was a contradiction between section 12 of the Judicature Act and Rule 53 of the Rules of this Court in so far as the jurisdiction of a single justice to hear and determine interlocutory applications before this Court are concerned. Fortunately, this court had the occasion to consider the conflicting provisions of section 12 of the Judicature Act and Rule 53 of the Rules of this Court on the question of jurisdiction of a single Justice to determine interlocutory applications for interim stay and stay of execution and stay of proceedings. In ***Civil Reference No. 116 of 2013 Herman Kalisa v. Gladys Nyangire*** (supra) Justice Kakuru, JA, analyzed Rule 53 of the Rules of this Court vis-à-vis section 12 of the Judicature Act. His Lordship concluded thus;

> *".....with the coming into force of Practice Direction No. 1 of 2004, a Registrar could grant an interim order of stay of execution, injunction or stay of proceedings while a single Justice of Appeal would be precluded from*

doing so by Rule 53. This contradiction however is cured by the provisions of section 12 of the Judicature Act that grants power to a single Justice of Appeal to exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal."

Subsequently, in ***Civil Reference 63 of 2013) Bagonza & 9 Ors. Vs. Kimala & 4 Ors. [2013],*** this court; Solome Balungi Bbosa JA, (as she then was), faced with a similar question as that raised by the respondents in the instant application. Construing section 12 of the Judicature Act and Rule 53 of the Rules of this Court, her Lordship alluded to the decision in ***Civil Reference No. 116 of 2013 Herman Kalisa v. Gladys Nyangire*** and held thus;

"To the extent that sub rule (2)(b) specifies an application for stay of execution, injunction or stay of proceedings as one of the applications that cannot be heard by a single judge, I agree that it contradicts s. 12 of the Judicature Act. To my mind, a rule cannot override a statutory provision. Moreover, the Rule was enacted after the statutory provision. In any event, the Rule should be read subject to s. 12 of the Judicature Act..."

The conclusion by the court in the said decisions is that a single Justice of this court has jurisdiction, pursuant to section 12 of the Judicature Act to hear and determine an interlocutory application. That in my view is the correct position of the law. Inclusive among the relevant applications that can be heard by a single judge, is an application for an interim order of stay of execution and stay of proceedings.

I have carefully read the decision in ***Civil Reference No. 174/2015 Jomayi Property Consultants Ltd versus Andrew Maviiri*** cited by learned counsel for the respondent as the basis for their objection. The decision does not support counsel's objection. In the lead decision of FMS Egonda-Ntende, JA, with whom the other members of the Court of Appeal agreed, his Lordship held that;

> *"In my view, Section 12 of the Judicature Act, being an Act of Parliament, overrides the provisions of rule 53 of this court and must now be taken to be the primary legislation providing for jurisdiction of a single Justice of this court. It follows that the question that is before us is whether or not the application that was heard by the single Justice of this court was an interlocutory matter or not. If it was an interlocutory matter, the single Justice of this court had jurisdiction. If it was not an interlocutory matter, the single justice was not clothed with jurisdiction to hear the same (emphasis added)."*

It is clearly apparent that the decision is in tandem with the aforementioned decisions of this Court that a single Justice of this Court has jurisdiction to hear and determine an interlocutory matter such as this one before court. However, on the facts of that case, the court found that a single Justice had no jurisdiction to hear an application for leave to appeal out of time, where the appeal had been struck out by the full bench. The court noted that the full bench, having struck out the appeal on account of it having been filed out of the prescribed time, there remained no proceedings pending in the court. Therefore, any subsequent application filed after the striking out of the appeal could not be considered to be an interlocutory matter, hence, a single Justice was not clothed with

jurisdiction. The conclusion of the court was guided by the peculiar facts of the case.

It suffices to equally note that, in exercising the jurisdiction to determine the application for an interim order of stay of execution, the court derives its discretion from Rules 6(2) (b) and 2(2) of the Rules of this Court. The said provisions are equally applicable to consideration of an application for an interim order of stay of proceedings. I note that the applicants brought the instant application inter-alia under Section 12 of the Judicature Act and Rules 2 (2), 6 (2) (b), 42, 43, 44 of the Judicature (Court of Appeal) Rules S1 13-10, which confer jurisdiction and discretion upon this court, presided over by a single Justice to hear and determine the application. I therefore find that the application is properly and competently before me. The first objection is therefore overruled.

The second objection raised by counsel for the Respondents is that regards the competence of the application and that there is no valid notice of appeal from which this application and the substantive application arise, envisaged under Rule 76 of the Court of Appeal Rules.

In the instant case, it is averred in the notice of motion and affidavits in support that the applicants filed an application for leave to appeal the decision and orders of the High Court in Miscellaneous Application No.583 of 2022 and that the application is pending in this court. It is not disputed that the order of the High Court in Miscellaneous Application No.583 of 2022 is not one from which an appeal lies as of right in the context of Order 44 (1) of the CPR. It is an order that

requires an aggrieved party to first seek leave of the trial Court or leave of this Court in the event the trial Court declines to grant leave. This is the import of Order 44 (1) (2) of the CPR. The applicants must have been alive to the fact that the nature of the orders granted by the High Court in HCMA No. 583 of 2022 required leave of court before an appeal could be preferred. Therefore, aggrieved with the said orders, the applicants filed a notice of appeal and a letter requesting for typed proceedings to the High Court. They further sought leave to appeal from the High Court pursuant to Order 44 (1 (2) & 3 of the Civil Procedure Rules vide; Miscellaneous Application No. 1130 of 2022 and further sought a stay of proceedings vide; Miscellaneous Application No. 1149 of 2022. The two applications were dismissed by the High Court. It is upon the dismissal of the said applications that the applicants contend that they filed an application for leave to appeal in this Court, a substantive application for stay of proceedings and the instant application.

What appears to be in dispute though, is whether upon dismissal of the aforementioned applications by the High Court, the applicants actually filed an application for leave to appeal in this Court as is required Order 44 (1) (2) of the CPR. The respondents contend they verified the ECCMIS system of this Court and found that no such application for leave to appeal was filed by the applicants in this Court and that other than the applicant alluding to it in the Notice of Motion and supporting affidavit, none was attached to the instant application. They contended that in the absence of an application for leave to appeal, the notice of appeal would be rendered incompetent and cannot form a basis for an

application for an interim order of stay of proceedings. They cited ***Lukwago Erias Versus KCCA, Civil Application No. 06/2014.*** In rejoinder to the respondent's submissions, applicant's counsel submitted that the applicants filed in this court, an application for leave to appeal vide; Civil Application No. 706 of 2022 on 26th September 2022 which was admitted by the Court on 27th September 2022. They further contended, and rightly so in my view, that in applications of this nature, it is not necessary that the applicant must first obtain leave to appeal before lodging a Notice of Appeal. They cited Supreme Court ***Miscellaneous Application No. 7 of 2010 Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (In liquidation)*** in support of their argument.

Upon careful perusal of the application and affidavits in support, I note that the applicants indeed alluded to the filing of an application for leave to appeal but did not attach a copy. It would have been prudent to do so to avert objections of this nature. Nevertheless, the suggestion and submission by the respondents that the omission is fatal and means no such application was filed appears not to be supported by any law. My view is that, attaching a copy of an application for leave to appeal is a matter of prudent practice but not a mandatory requirement of the law and the omission to do so is not fatal, provided that the application was actually filed and is on Court record. This is especially now, with the automation in judiciary and E-filing that the court simply has to verify from the registry or on ECCMIS, if such an application was indeed filed and is on court record.

I note that the filing of applications in this matter was all done through the Court's ECCMISS system. I was therefore constrained to cross check with the system to allay any concerns and fears that the applicants never filed the application. The Court's ECCMIS system confirms that the Applicants filed three Applications in respect of this matter to wit; Civil Application No. 706/ 2022; an application for leave to appeal, Civil Application No. 708 of 2022; the substantive application for stay of proceedings and Civil Application No. 709, which is the instant application for an interim order of stay of proceedings. The contention by the Respondents therefore, that the applicants never filed an application for leave to appeal has no merit. In the context of the decision of this Court in ***Reference No. 174/2015 Jomayi Property Consultants Ltd versus Andrew Maviiri,*** the instant application is an interlocutory application, it arises from a notice of appeal and the pending application for leave to appeal. The Second objection lacks merit and is therefore overruled.

The third preliminary objection raised by the respondents was that the Notice of Appeal marked as annexture "A" and attached to the affidavit in rejoinder of Nayiga Elizabeth Wamala was neither valid nor properly lodged in the High Court pursuant to Rules 76 and 11 of the Rules of this Court because it was not endorsed by the Registrar and did not bear a date, stamp or seal of the High Court. I will deal with this objection later in this ruling.

It is now settled law that this court has inherent power to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the

process of Court. The jurisdiction and discretionary power of this Court are derived from Rule 2 (2) of the Judicature (Court of Appeal Rules) Directions.

Rule 2(2) provides:

"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

Further, it has been severally held by this court that the Court may, in exercise of its discretion, grant an interim stay of proceedings whenever it considers it equitable to do so. This discretionary power is derived from Rules 6(2) (b) of the Judicature (Court of Appeal Rules) Directions, which provides that;

> *"In any civil proceedings, where a Notice of Appeal has been lodged in accordance with Rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just".*

The rationale for the grant of an interim order of stay of execution or stay of proceedings under Rule 2(2) and 6(2) (b) of the Rules of this Court is to achieve the ends of justice by preserving the status quo so that the main application for stay of execution or stay of proceedings is not rendered nugatory. I find the decision of the Supreme Court in ***SC Constitutional Application No. 04 of***

2014 Hon. Theodore Ssekikubo and others v The Attorney General and others very instructive on the matter. In that case, the Supreme Court held that;

> *"Rule 2(2) of the Judicature Supreme Court Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of justice. One of the ends of justice is to preserve the right of appeal.*

In my view, the granting of interim orders is meant to help parties to preserve the status quo and then have the main issues between them determined by the full bench of this Court in the substantive application for stay of proceedings. In an application for an interim order of stay of proceedings or even interim order of stay of execution, it is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay. I am fortified by the Supreme Court decision in ***SC Civil Application No. 19 of 2008; Hwang Sung Industries Limited v Tajdin Hussein & Others.*** The position of the law is that, in order to succeed in an application for an interim order of stay of proceedings or even stay of execution, it suffices for the applicants to show that; a substantive application for stay of proceedings is pending and that there is a serious threat of execution before the hearing of the substantive application. This is the position reiterated by the Supreme Court in ***Civil Reference No.07 of 2016; Zubeda Mohamed & Anor vs. Laila Wallia & Anor,*** where it was held that;

> *".....Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before hearing of the*

substantive application. Needless to say, there must be a Notice of Appeal...."

In essence therefore, all that is required is for the applicants to demonstrate by affidavit evidence or otherwise that they have satisfied the three conditions precedent to justify the grant of an interim order namely; i) that they have filed a competent Notice of Appeal before the Court; ii) they have filed a substantive application for stay of proceedings and iii) that, pending determination of the said substantive application for stay and there is a serious threat of execution. The question for this court to determine is whether the applicants have indeed, on the evidence before court, satisfied the three pre-conditions justifying the grant of the interim order of stay of proceedings. In my view, the answer to the question requires an analysis of both the applicable law and the evidence on record.

The first condition is proof that a Notice of Appeal has been filed in accordance with Rule 76 of the Rules of this Court. I note that, whereas, the applicants contend that this requirement has been satisfied, the respondents on the other hand in paragraph 7 of Arch Peter Kamya's affidavit in reply and in their submissions, contend that; there is no valid notice of appeal on record as is required by Rule 76 of the Court of Appeal Rules.

Whereas I have already disposed of the 2nd objection herein above which relates to the competence of this application and the notice of appeal, filing of a notice of appeal is a pre-condition for the grant of applications of this nature and I will

therefore, deal with each segment of the Respondent's objection to the competence of the notice of appeal.

The respondents first objection is that the applicants never filed an application for leave to appeal and that the notice of appeal therefore has no foundation in law. I have already found herein above that the applicants filed Civil Application No. 706/ 2022, an application for leave to appeal. The import of Rule 76 (4) of the Court of Appeal Rules, that where an appeal lies to this Court with leave, the intending appellant may lodge a Notice of Appeal even before obtaining leave to appeal. It is therefore not mandatory for an intending Appellant to first obtain leave before lodging a notice of appeal. ***See Miscellaneous Application No. 7 of 2010 Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (In liquidation.*** To that extent therefore, I find no merit in the respondent's objection to the competence of the notice of appeal on that ground.

It has also been contended by the respondents that the notice of appeal is defective on grounds that; it is not endorsed by the Registrar of the High Court, and therefore contravenes Rule 76 (1) & (2) and Rule 11 of the Rules of this Court. In support of their contention, the respondents relied on the decision of this court in ***Civil Application No. 63/2022 Mukwaya Joseph versus Jaffari Kizito 7 Anor***. In rejoinder, the applicants' counsel submitted the obligation placed upon the applicants is to file the notice of appeal in the High Court, which they did by filing it on the ECCMIS system. That upon filing, the applicants have no duty under Rule 76 (1) & (2) and Rule 11 of the Rules of this Court to cause the endorsement of the document filed. The duty is imposed on the Registrar of

the Court. Applicants' counsel invited court to distinguish the decision in ***Mukwaya Joseph (Supra)*** where the notice of appeal was found to be incompetent for not being endorsed by Court from the instant matter, where the filing was through the court's ECCMIS system. Counsel referred Court to the Regulations 5 and 8 of Constitution (Integration of ICT into the Adjudication Process for Courts of Judicature) Practice Directions 2019 (under Article 133 (1) (b) of the Constitution,) and submitted that in the High Court, Commercial Division, filing and service of Court process on the other party, is done electronically on the ECCMIS system.

In the instant matter, there is no dispute that where a notice of appeal is lodged in the High Court under Rule 76 of the rules of this Court, it can only be served on the opposite party upon it being endorsed by the court. The duty to endorse the notice of appeal and show the date and time when it was lodged lies with the Registrar of the High Court and so is the duty to transmit a copy to this Court. This is the import of Rule 76 read together with Rule 11 of the Rules of this Court. I am fortified by the decision of my learned brother, Chibita JSC in ***Civil Application No. 57 of 2021 Global Capita Save 2004 Limited & Anor versus Alice Okiror*** cited by the respondent's counsel. In that case, the competence of the notice of appeal was challenged on ground that it had been served out of time. The question that court was invited to determine was; when is the process of lodgment of a notice of appeal deemed to be concluded. His Lordship held that;

".....It is safe to say that the process of filing the Notice of Appeal started on 7th with the payment of the requisite fees, receiving and stamping the documents with the court stamp and culminated in the final act of being dated and signed by the Registrar as duly lodged on 9th of July 2020. The date that is of essence therefore, is the final date of the process, which in the instant case is the 9th of July 2020".

It is quite apparent from decision that the duty of the aggrieved party is limited to filing the notice of appeal and having it received by the Court. The process of dating and signing is the mandate of the Registrar over which the party filing has no control. I have also carefully read the decision in ***Mukwaya Joseph***. The court was dealing with a notice of appeal which had been filed in the High Court but had not been signed by the Registrar of the High Court. The court held that the unendorsed notice of appeal, which had not been served was incompetent. What is clear in both decisions, is that emphasis was placed on the notice of appeal being signed and dated by the Registrar. The courts in the said decisions were dealing with a notice of appeal that had been filed physically at the Court under the hitherto existing system of physical filing of documents. Their Lordships in both decisions did not consider the position that would apply in the event of a notice of appeal being filed electronically via ECCMIS. With respect, I find that the decisions are not helpful in determining the competence of a notice of appeal filed through the Court's ECCMIS system.

In the instant case, it is not disputed that filing of the pleadings and other incidental court documents at the High Court Commercial Division is now by ECCMIS. Indeed, the averment that the ruling in HCMA No 583 of 2022 was equally delivered by ECCMIS is not controverted. It is also not disputed that the notice of appeal, the subject of contention in this matter was filed electronically through the ECCMIS system. I agree with the applicant's submission that the filing of pleadings and documents through the ECCMIS system is governed the Constitution (Integration of ICT into the Adjudication Process for Courts of Judicature) Practice Directions 2019. Indeed, regulation 5 thereof embraces an e-filing system and service of documents electronically. Further, regulation 8 thereof provides that all parties to judicial proceedings shall sign up with the court registry providing an electronic address to which service of documents may be effected. Therefore, the filing, validation of the filed documents and service thereof is done electronically. In my view, where a notice of appeal is filed electronically through the Court's ECMISS system, then Rule 76 (1) & (2) and Rule 11 of the Rules of this Court must be construed in a manner that embraces the e-filing system and validation of documents, so as not to render the Constitution (Integration of ICT into the Adjudication Process for Courts of Judicature) Practice Directions 2019 redundant. In the premises, it is my finding that; once the applicants electronically filed the notice of appeal on the High Court's ECCMIS system on 17th August, 2022 and the same was validated by the Court on the same day, they complied with their duty in terms of filing. The rest of the process including electronic validation by the Registrar and service

thereof was for the Court. I am not persuaded by the respondent's submissions in support of the objection, as they are premised on the physical filing system rather than the e-filing system. To that extent, again, I find that the notice of appeal is competently before the court.

The respondent's last objection to the competence of the notice of appeal is that; it contravenes Rule 76 (5) of the Rules of the Court which requires a notice of appeal to be substantially in Form D in the First Schedule. Counsel cited the decision in ***Civil Application No. 259 of 208 Yoram Kasinde & Anor versus Kihonde Samuel & Anor*** where the Court held that a notice of appeal was not compliant with Rule 76 (5) of the Rules of this Court and was defective, by stating that the decision and orders of the trial judge were made on the 10th July 2017 but the judgment was delivered on 26th September 2017. The notice did not clearly specify when the decision of the judge was made or delivered as required by Form D. Counsel contended that the notice of appeal in the instant matter has a heading reading "In Court of Appeal of Uganda" and in their view, it indicates that the notice of appeal was lodged in the Court of Appeal and not the High Court as required by the rules. That; the applicant indicated in the notice of appeal that they would seek leave to appeal, which is contrary to Form D; that the notice of appeal does not have a date when the lawyers signed, contrary to Form D; that it was not addressed to the Registrar of the High Court Commercial Division and that, it bears no provision for lodging the said notice.

In response to the said objection, the applicants contended that the ***Civil Application No. 259 of 208 Yoram Kasinde & Anor versus Kihonde Samuel & Anor*** is distinguishable and not relevant in this case, because in that case, the defect in the notice was in the substance of the notice, as it was unclear which ruling the appeal was being made against, whether the ruling on 10th July 2017 or 26th September 2017. Counsel contended that this was different from a variation in the form of the documents. Counsel further argued that Rule 76 (5) of the rules of this Court requires that a notice of appeal be substantially in Form D of the First Schedule but does not require that the notice must be identical in content with what is stated in Form D. Counsel further contended that the notice of appeal filed by the applicants was substantially in Form D of the First Schedule and was indeed signed for and on behalf of the applicants on 17th August 2022 and filed with the High Court registry. There was a provision for the Registrar to sign the said notice, which signatures are now done electronically by the Registrar.

In the alternative, counsel contended that the clerical errors with the form of the notice, are not prejudicial as there is no dispute that the notice of appeal was filed and that; it is clear as to who the parties are; the ruling they are appealing from and the parties to whom notice should be served and that; it was filed in time. Counsel cited the decision of Odoki JSC (as he then was) in ***Civil Appeal No. 16 of 1995 Stephen Mabosi versus URA.*** Counsel further cited ***HCMA No. 603 of 2008 Kibuuka Musoke versus Tour and Travel Centre*** where the court held that;

" .....the question should be whether the irregularity is serious enough to prevent the Court from hearing the application and determining it on its own merits. That the answer would depend on whether the non-observance of the procedural rule in issue would lead to injustice. If it would not then the court would be willing to overlook it, otherwise it would not. Article 126 (2) (e) of the Constitution requires court to administer substantive justice without undue regard to technicalities.

I have carefully scrutinized the impugned notice of appeal. I agree with the respondent's counsel that; it is laden with the identified errors or irregularities. However, as was rightly noted by the court in ***Kibuuka Musoke versus Tour and Travel Centre (supra)***, in such circumstances, the relevant question that court must determine is whether such errors or irregularities are serious enough to prevent the court from hearing and determining the application on its merits, taking into account its mandate under Article 126 (2) (e) of the Constitution, which is to administer substantive justice without undue regard to technicalities. In my view, it is not desirable for courts to place undue emphasis on form rather the substance. Courts should not construe pleadings with such meticulous care or in such a highly technical manner capable of defeating merited actions on trivial grounds. I am fortified by the guidance of the Supreme Court in ***Civil Appeal No.3 of 2017 Uganda Telecom Limited versus ZTE Corporation.*** In that case, the Court of Appeal faced with poorly drafted pleadings held thus;

"In spite of the sloppy and indisputable careless drafting of the plaint, a cause of action is made out upon which this action can be found"

On appeal to the Supreme Court, the above finding was upheld by the Supreme Court. I am equally of the humble view that; litigants should not ordinarily be penalized on account of carelessness in the drafting of pleadings by their legal counsel, save where the defect or omission is one of a fundamental nature, that it goes to the substance and root of the entire claim. I find useful guidance in the decision in ***Nanjibhai Prabhudas v. Standard Bank, Judgment, File No. 13 of 1968 (EACA, July 10, 1968),*** where it was held that;

"The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as if so fundamental, a nature that it results in a complete nullity and vitiates everything following would appear to me to be completely unreal unless there is a very good reason for this distinction between the service of the summons and the service of a notice"

Applying the above decisions to the facts in the matter before me, whereas I agree with the respondents' submission that the notice of appeal was carelessly drafted and is laden with identified errors, nevertheless, it is clear that the notice was filed in the High Court, the parties to the intended appeal are set out and the decision sought to be appealed is clear, as well as the date when it was delivered.

The Respondents have not claimed or demonstrated to have been adversely prejudiced by the errors in the form of the notice. The fact that the notice of appeal erroneously states that the applicants will seek leave to appeal is a mere irregularity of form. A similar irregularity was considered by the Supreme Court in ***Civil Appeal No. 16 of 1995 Stephen Mabosi versus URA,*** where the competence of the notice of appeal was contested on ground inter alia, that; it included a request for certified typed record of proceedings and thus departed from the form set out in Rule 81 of the Supreme Court Rules. Applying Article 126(2) (e), Odoki JSC (as he then was), held that the omission was a curable defect and that the notice substantially complied with Rule 81 of the Rules. I am therefore satisfied that, notwithstanding the errors of form in the notice of Appeal, it substantially complies with Rule 76 (5) of the Court of Appeal Rules.

I now turn to the second pre-condition. It is a legal requirement that the Applicants must prove that they have filed in this Court a subsisting substantive application for stay of proceedings. I have already found that the Court's ECCMIS system shows that the Applicants filed three Applications in respect of this matter on 26th September, 2022 to wit; Civil Application No. 706/ 2022, an application for leave to appeal, Civil Application No. 708 of 2022, the substantive application for stay of proceedings and Civil Application No. 709, which is the instant application for an interim order of stay of proceedings. The contention by the respondents that there is no substantive application for stay of proceedings lacks merit. I therefore find that the second requirement has equally been satisfied.

The last consideration is the question of whether there is a serious threat of execution before hearing of the substantive application. I have considered the affidavit evidence of the applicant and the averments in the affidavit in reply. I have also perused the orders of the High Court in Misc. Application Misc. Application No. 583 of 2022, which are set out in Paragraph 4 of the Notice of Motion. The order was equally attached to the affidavit in reply marked as annexture "PK". I note that, prima facie; the said orders have an impact on the manner in which the main suit will proceed. These are the very orders that the applicant seeks to challenge on appeal, if granted leave by this Court. I note that the attempts by the applicant to seek leave and stay of proceedings before the High Court were unsuccessful after the High Court dismissed both applications. It is also averred by the applicants that the main suit is fixed for hearing on the 21st November 2022 and that the respondents have since filed an application to the High Court for an order that the applicants herein be found in contempt of the orders of the Court in Misc. Application Misc. Application No. 583 of 2022 and that consequentially, their written statement of defence to the suit should be struck out. The said application arises out of the orders of the High Court in Misc. Application No. 583/2022, which are the subject of the intended appeal. These averments are not disputed by the respondents. Ultimately, if the application to strike out the defence is heard and the same is struck out, the suit will have to proceed ex parte as against the applicants herein. That has the effect of compromising the applicant's right to be heard, both in the application for leave to appeal and in the suit itself. Therefore, the fact that there is urgency

and need for protection is quite apparent. ***In Civil Reference No. 07/2016 Zubeda Mohamed & Sadru Mohamed Versus Laila Kaka Walia and the Administrators of the Estate of late Sunder Kaka Walia***, it was held that;

> *".....in case of urgency, however this Court is empowered under Rule 2 (2) of the Rules of the Court to issue interim orders in order to achieve the ends of justice. Applications for interim orders are heard by a single justice of the Court. An interim order is a stop gap measure to ensure that the substantive application is not rendered nugatory...."*

I also note that all the subsequent steps taken by the respondents before the trial court, alluded to by the applicants in their affidavits stem from the orders of the High Court in Misc. Application No. 583 of 2022, which the applicants seek to contest before this Court, if granted leave to appeal. It is also apparent, that on the face of the orders granted by the High Court, and the intended grounds of appeal enumerated in the motion and the affidavit in support, the determination of the application for leave to appeal or the appeal, if ultimately leave is granted, will ultimately have an impact of the issues or contentions in the main suit, pending before the High Court. The substantive application for stay is pending before this court and is not yet fixed. If it is not fixed, heard and determined before the pending application in the High Court is determined and before the date fixed for hearing of the main suit, nothing will stop the High court from proceeding with the hearing of the application to strike out the Applicant's defence and the suit itself. Consequently, the reliefs sought in the substantive

application for stay of proceedings and ultimately in the main application for leave to appeal will be rendered nugatory.

Further, I am alive to the respondents' contention in the affidavit in reply and in their submissions that; the applicants are in contempt of the orders of the trial court. However, other than the bare averment in the affidavit in reply, I have not seen any ruling or order of the trial court to the effect that the applicants are in contempt. What is stated is that the respondents have filed an application for contempt against the applicants herein which is attached as annexture B to the affidavit in rejoinder. It has also been contended by the respondents that the applicants' intended appeal and the application for leave to appeal lack merit with no likelihood of success. The position of the law has been settled that, in an application for an interim order of stay of execution or stay of proceedings, it is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay. See: ***SC Civil Application No. 19 of 2008; Hwang Sung Industries Limited v Tajdin Hussein & Others.*** Therefore, the issues raised by the respondents touching the merits of the application for leave to appeal and the intended appeal can only be considered at the time of hearing the substantive application for stay of proceedings. The authority of ***Kenya Wildlife Service versus James Mutembuli Civil Application No. 40/2018*** cited by the respondent's counsel was cited out of context, as it relates to the principles applicable to consideration of the substantive application for stay of proceedings and not an interim order

of stay of proceedings. I am therefore unable to consider the rival submissions of the parties to that extent.

In view of the foregoing, I find that the Interim Order sought by the applicants is necessary to preserve the status quo until the substantive application for stay of proceedings is heard and determined. In the circumstances of the instant application, I do find that the grant of an interim order of stay of all proceedings in High Court in Civil Suit No. 464 of 2020 pending the hearing and determination by this Court of the Applicants' substantive application for stay of proceedings against the ruling and orders of the High Court in Miscellaneous Application No. 583 of 2022 would be in the interest of justice. I do hereby grant the interim order as prayed for.

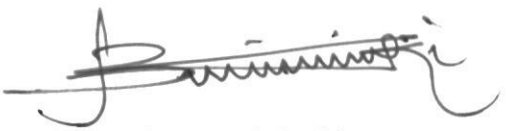
The net effect is that the application is allowed. An interim order is hereby issued staying all proceedings of High Court in Civil Suit No. 464 of 2020 inclusive of any other applications arising out of the orders of the High Court in Miscellaneous Application No. 583 of 2022, pending the hearing and determination by this Court of the Applicants' substantive application for stay of proceedings against the ruling and orders of the High Court in Miscellaneous Application No. 583 of 2022. Costs of the application shall abide by the outcome of the substantive application.

In view of the fact that the applications emanate from a suit whose subject matter is highly valuable property and taking into account the concerns by the respondents of the need to have the substance of the dispute expeditiously determined, I direct the registrar of this court to ensure that the substantive

application for stay of proceedings and the application for leave to appeal are fixed before the full bench at the next convenient session of the court.

I so order.

Dated at Kampala this 19th day of October 2022.



Cheborion Barishaki

JUSTICE OF APPEAL