

THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEOUS APPLICATION NO. 764 OF 2014

(ARISING OUT OF CIVIL APPEAL NO. 13 OF 2014)

(ARISING OUT OF CONSTITUTIONAL PETITION NO. 22 OF 2014)

MK FINANCIERS LTD:.....: APPLICANT/APPELANT

VERSUS

N. SHAH & CO.LTD:.....:RESPONDENT

RULING

This is an application brought by notice of motion under Article 137 of the Constitution, Sections 98 and 64 (c) & (c) of the Civil Procedure Act (CPA) and Order 52 r 1 of the Civil Procedure Rules (CPR) for orders that:-

- (1) The proceedings in Misc. Application No. 452 of 2014 arising from Civil Appeal No. 22 of 2014 and all other applications arising therefrom be stayed until final determination of Constitutional Petition No.22 of 2014 and any other appeal that may arise therefrom.
- (2) All proceedings in Misc. Application No.452 of 2014 and Civil Appeal No. 13 of 2014 be stayed until the final determination of all Misc. Applications arising therefrom.
- (3) Costs of this application be provided for, to the applicant. The application is also supported by the affidavit of Mr. Male H. Mbirizi Kiwanuka, the applicant's managing director

It is important to give the history of this case so that the ruling in this application is understood in that context. The applicant was the plaintiff in Mengo Civil Suit No. 849 of 2014 and the applicant in Misc. Applications No.414 & 415 of 2014 arising from that suit. I have not had the benefit of looking at the pleadings in that suit and the applications so I am not able to state the nature of the applicant's claim therein and the orders sought for in however what is important is that the on 5th of June the learned chief magistrate, mengo Her worship Atukwasa Justine delivered a ruling in mengo civil suit no.849 of 2014 and misc. Application no.414 and 415 of 2014. I have also not had the benefit of looking at the ruling and orders but I can glean

from the preliminary ruling of Madrama, J in misc. application no. 563 of 2014 that the applicant's suit was dismissed by the chief magistrate

Being dissatisfied with that ruling and orders, the applicant filed Civil Appeal No, 13 of 2014 at the Commercial Court challenging the same. He also filed Misc. Application No. 456 of 2014 for an interim order of stay of execution of the order of the chief Magistrate and Misc. Application No. 452 being the main application for stay of execution. Despite the presence in court of the respondent's country director and counsel, the learned registrar of this court heard the application for interim order of stay ex-parte on 19th June 2014 having ruled that counsel had no audience since the respondent had not filed an affidavit in reply. His Worship then made a brief ruling in the following words:

-" Application granted Interim order of stay of execution against the applicant issued and it shall remain in force till 25/08/2014 when the application no. 452 of 2014 shall be heard' Costs of this application shall abide the outcome thereof "

Following that ruling, an interim order was extracted for the registrar's signature in the following words:

"ITS HEREBY ORDERED AS FOLLOWS:

1. An interim order doth issue staying the execution of the ruling and orders of the learned Chief Magistrate of mengo Her Worship Atukwasa Justin in Mengo Civil Suit no.849 of 2014 and Misc. Application No.414 and 415 of 2014 delivered on 5th June 2014 until 25th August.
2. An interim order doth issue maintaining the status quo of the parties pending the hearing and determination of Misc. Application no.452 of 2014.
3. Costs be in the cause. "

The learned registrar duly signed that order on 19th June 2014. However, on 24th September 2014, the respondent filed misc. Application no.850 of 2014 under section 98 and 99 of the CPA seeking for Amendment, correction and or review of the above order by deleting clause 2 thereof on the ground that it was not contained in the learned registrars ruling and order reproduced above.

■ . An affidavit in reply and opposition to that application was deposed by the managing director of the respondent (applicant herein). Mr. Male H. Mbirizi Kiwanuka who averred that the learned Registrar had no jurisdiction to entertain the

application for review of his orders and the respondent would raise a preliminary objection if the matter is called before the same Registrar.

The records show that when the application came up for hearing, the respondent's managing director who represented the respondent objected to the proceedings on the grounds that they had applied for recusal of the learned Registrar from hearing the case. He then prayed that the Registrar steps down from hearing the case. The learned Registrar then made a brief ruling stating that he had studied the letter asking him to step down but he did not see any plausible ground for doing so. He stated that he believed it was within his jurisdiction to hear the application. He overruled the objection and ordered that the application be heard on its merits.

The records indicate that after that ruling Mr. Male caused confusion in court and he was drugged out by police and the application proceeded ex-parte and was granted with the following orders.

"IT IS HEREBY ORDERED that:-

1. This application is granted.
2. The Interim Order in Misc. Application No. 456 of 2014 be extracted in the very words used in the riding therein.
3. Costs of this application shall be in the cause. ”

Pursuant to that ruling an amended/corrected interim order was extracted in the following words:-

"ITS HEREBY ORDERED AS FOLLOWS:

1. This application is granted.
2. The interim order of stay of execution against the respondent is issued and it shall remain in force till 25/8/2014 when misc. Application no.452 of 2014 shall be heard.
3. Costs of this application shall abide the outcome of Miscellaneous Application No. 452 of 2014. ”

The applicant then filed an appeal against that ruling in addition to many other applications which I will keep highlighting as I proceed with this ruling. On the other hand, upon the request of counsel (or the respondent another hearing notice with an earlier date of 4 July 2014 was issued for the hearing of Miscellaneous Application No. 452 of 2014. It should be noted that the respondent through its managing director wrote protesting the issuance of that hearing notice and even filed two applications, namely;

(1) Misc. Application No. 524 of 2014 seeking for a declaration that the respondent's act of extracting a hearing notice for Misc. Application No. 452 of 2014 was irregular and amounts to contempt of court and the hearing notice so extracted was null and void and should be set aside, He also prayed that the respondent be committed to civil prison for contempt of court or in the alternative be made to pay UGX 10,000,000/= as punitive remedies.

(2) Misc. Application No. 528 of 2014 seeking a declaration that the respondent's act of moving court to fix an earlier date than the one indicated in the court order and the notice of motion and extracting a hearing notice for Misc. Application No. 452 of 2014 dated 23rd June 2014 was irregular and amounts to contempt of court and abuse of the court process. The applicant also sought a declaration that the Deputy Registrar's act of acting on a letter written by the 1st respondent's counsel after delivering the ruling and order and issuing a hearing notice was null and void because he was functus officio having issued a court order for a life span of up to 24th August 2014.

On a date which is not indicated on the records, when Misc. Application No. 452 of 2014 came before Madrama, J. he inquired why the matter was coming up that day when it had already been fixed for 25th August 2014. Counsel for the respondent then explained that on 19 June 2014 he appeared before the Registrar and the application was heard *ex parte* and he later sought indulgence of the registrar requesting that the application comes sooner because the effect of the interim order was that the applicant would not pay rent for four months. The learned judge then stated *inter-alia* that "after discussions application is fixed for 10th of July 2014 at 11; 30" it is not clear from the records what transpired subsequently but I note a letter dated 7th July 2014 written to Hon.Judge Christopher Madrama by the respondents managing director by which he requested to meet the Hon.Judge in chambers in company of counsel for the respondent so that he could put to him his grounds for asking the Hon. Judge to recuse himself from handling the case. In that letter he alluded to the judges clerks meeting with the respondents country director and also accused the Hon. Judge of hearing misc. application no. 452 of 2014 on 4th July 2014 when it had been fixed for 25th August 2014 and violating the applicants right to be properly represented by its managing director when he refused him to sit at the bar with the other advocates .Mr. Male described the proceedings of that day as "an extraordinary court session, the likes of which are nowhere to be seen in the common law legal system"

The applicant also filed Misc. Application No 563 of 2014 on 7th July 2014 seeking for recusal of the trial Judge, Mr. Male deposed an affidavit in support and a supplementary affidavit in support of that application on the same day, On the 9th of July 2014 Mr. Male notified the trial Judge by a letter that he was going on to refer certain questions touching on his conduct to the Constitutional Court for interpretation. On 10th July 2014 the trial Judge delivered a preliminary ruling on his recusal wherein he gave the chronology of events that took place in his court when Misc. Application No. 452 came up for hearing and criticised the procedures adapted by Mr., Male in presenting his complaints against the Hon Judge and generally his conduct which he described as contempt of court. He also did not see the need for a constitutional petition against his alleged conduct when he could recuse himself from handling the case so that it is re-allocated to another Judge since he had not heard it on the merits. The net effect of that preliminary ruling is that he recused himself and sent the file for re-allocation to another Judge. Subsequently; the applicant filed constitutional petition no. 22 of 2014 on 30th July 2014 challenging among

other things the alleged act of the trial Judge of hearing a case earlier than the date indicated in the application and in a court order as being inconsistent with the constitution. We anxiously await the constitutional court decision on that matter because of its uniqueness that a party who comes to court does not want his matter to be heard early! It is also noteworthy that the respondent also filed misc. application no.589 of 2014 seeking for leave to appeal part of that ruling and stay proceedings in civil application no. 13 of 2014 and all application arising therefrom .He also filed a notice of appeal.

I must also point out in this ruling that upon Madrama, J. recusing himself from hearing the applicants cases, the files were re-allocated to another Judge who also recused himself when Misc. Application No. 452 of 2014 came up for hearing before him. The reason for his recusal is said to be personal as no record of proceedings is on the file but the respondent's managing director attempted to explain it in his letter of 26th August 2014 that he had made an oral application for stay of proceedings pending the determination of the constitutional petition which the Judge did not agree with and upon their insistence the new trial Judge said he could not hear the case.

The file was reallocated to yet another Judge who also recused herself from hearing the case upon the respondent's managing director notifying her by letter dated 8th September 2014 that they would appear before her in chambers and request her to recuse herself from handling the respondent's cases and if she declined they would then proceed to file a formal application. There is no record to confirm whether they appeared or not but it is noteworthy that a formal application for recusal was filed on the same day 8th September 2014. However, on 29th October 2014 The Hon. Judge sent all the applicant's files for re-allocation and it was re-allocated to yet another Judge. Interestingly, the records show that the applicant had also requested the trial Chief Magistrate to recuse herself from handling the matters that gave rise to the appeal and the numerous applications and the constitutional petition!

It is against the above elaborate background that the applicant then filed this application seeking to stay proceedings in Civil Appeal No. 13 of 2014 and Misc. application no. 452 of 2014 until final determination of constitutional petition no.22 of 2014 when this application came up for hearing Mr. Male said he would represent the applicant they agreed to file written submissions which are considered in this ruling. The applicant framed three issues for courts determination namely:-

1. Whether the proceedings should be stayed due to pendency of 'Constitutional Petition No. 22 of 2014,
2. Whether the proceedings in Misc. Application should be stayed until determination of all the applications arising out of it.
3. What remedies are available to the applicant?

On the first issue, the applicant cited Article 137(6) of the Constitution which states that once a matter goes to the Constitutional Court for interpretation, the Constitutional Court shall give its decision and the Court in which the issue arose shall dispose of the case in accordance with that decision, He then argued that the import of that article is that there is no way a court in which a question of constitutional interpretation arose can proceed with the hearing until the Constitutional Court has determined the petition so that it proceeds with the hearing in line with the decision of the Constitutional Court, He submitted that on the basis of the above principle this application should be granted.

He also relied on the case of Hon. Sekikuubo and 3 ors v AG and 4 Others, Constitutional Petition No.6 of 2013 where it was stated that it is trite that where a party is exercising its unrestricted right of appeal and the appeal has a likelihood of success, it is the duty of court to make such orders as will prevent the appeal, if successful from being nugatory. The applicant also cited the case of Tusingwire v Attorney General, Constitutional Court Application No. 06 of 2013 where it was held that for an application for an injunction or an order of stay of proceedings to succeed the applicant has to show that; (1) he or she has a prima facie case, (2) the failure to grant would cause irreparable damage and, (3) if court is in doubt on the two then it will determine the application on the balance of convenience. He then submitted that Constitutional Petition No. 22 of 2014 has a likelihood of success as it seeks to declare null and void the proceedings before Madrama, J that contravened Articles 21 (1), 28 (1), 44 (c) and 126 (2) (a) & (b) of the Constitution, He also submitted that irreparable damage which cannot be atoned for in terms of monetary damages would result if this application is not granted. He therefore concluded that the balance of convenience favours granting this application and prayed that this court finds so.

On the 2nd issue, the respondent submitted that it is incumbent upon court to first deal with Misc. Applications Nos. 528, 563 & 589 of 2014 all of which arise from Misc. Application No. 452 of 2014 and Civil Appeal No. 13 of 2014. He therefore prayed that in the event that all the proceedings are not stayed due to pendency of Constitutional Petition No. 22 of 2014, then Misc. Applications Nos. 528, 563 & 589 of 2014 be heard before Misc. Application No. 452 of 2014 and Civil Appeal No. 13 of 2014.

Finally, on the last issue, the applicant prayed that this application be allowed with costs since it had notified the respondent about the need for stay of proceedings.

Counsel for the respondent only addressed the first issue by submitting that Constitutional Petition No. 22 of 2014 will not lead to a decision that this Court should follow since such decision would have no bearing on Civil Appeal No. 13 of 2014 and applications arising therefrom. He argued that the allegations that the trial Judge had heard the application was false as he ruled that he could not hear anything regarding the applicant and directed that the file be re-allocated to another Judge. He therefore submitted that the allegation in the Constitutional Petition that the trial Judge had heard the application earlier than the date fixed was not true. He further submitted that a decision whether or not the applicant's managing director should be allowed to sit at the bar will have no impact on Civil Appeal No. 13 of 2014 and the applications arising therefrom. On the basis of these submissions, counsel for the respondent submitted that no prima facie case had been proved and neither will

the applicant suffer irreparable damage if the application is not granted. He prayed that the application be dismissed with costs since the balance of convenience is in favour of the respondent.

I have carefully considered the grounds of this application and read a copy of Constitutional Petition No. 22 of 2014 attached to the affidavit in support. I have also perused the preliminary ruling of Madrama, J. in Misc. Application No. 563 of 2014. While I agree with the principle stated in Article 137 (6) of the Constitution and the one stated in the case of Hon. Ssekikubo (supra), I should point out from the onset that they are not applicable to the instant case for reasons that I will state shortly. The matter for interpretation envisaged by Article 137(6) in my view is those that directly relate to the dispute before the trial court and of the constitutional question relating thereto by the Constitutional Court would then guide the trial court. In that case, there is no way the trial court can proceed with the case before a decision is made by the Constitutional Court.

However, in the instant case, I must confess that I have stretched and strained my mind in an attempt to see how the alleged constitutional questions referred to the Constitutional Court vide Constitutional Petition 22 of 2014 would guide this court in determining Civil Appeal No. 13 of 2014 and Misc. Application No. 452 of 2014 and the numerous other applications arising therefrom. I also do not see how proceeding with the hearing of Civil Appeal No. 13 of 2014 and Misc. Application No. 452 of 2014 would render Constitutional Petition No. 22 of 2014 nugatory as argued by the applicant.

It is clear from the above history of the case that the learned Judge did not hear Misc. Application No. 452 of 2014 and that is why proceedings therein is sought to be stayed by this application. The only proceeding was in respect of the applicant's application for recusal of the Judge and the preliminary ruling was squarely on that and not on the merits of the application. Therefore if any proceedings are to be declared null and void by the Constitutional Court it would be that recusal proceedings which are embodied in the pleadings and the ruling since the Judge determined it on the basis of the affidavit evidence without hearing submissions from the parties.

I also need to emphasize that the petition is challenging the alleged conduct of the Judge of not allowing Mr. Male who is not an advocate to sit at the bar with the other advocates. The decision of the Constitutional Court on whether by that action the Judge violated the alleged non-derogable right of the applicant enshrined in the Constitution would not in my view have any effect on Civil Appeal No. 13 of 2014 which seeks to set aside the ruling and order of the Chief Magistrate and Misc. Application No. 452 of 2014 which seeks to stay execution of the Chief Magistrate's order.

I have also looked at the grounds of the petition to see if a prima facie case is made out as required by case law and I agree with the respondent that what is being challenged as misconduct by the trial Judge, to my mind appears to be the exercising of his inherent power as he presides over his court without delving into the merits of the case, I do not see any prima facie case made out in the petition that would justify granting this application. Similarly, have failed to see the alleged irreparable damage that the applicant would suffer if this application is not granted in the event the applicant did not precisely show the form of injury it would suffer neither did it elaborate on how that irreparable damage would result if his application is not granted

In the circumstances, this court is not convinced about the need to grant this application. For that reason it is not inclined to stay proceedings as there is no valid reason except the applicant's obvious ploy to delay prosecution of the main application for stay of execution and the appeal itself as the applicant takes advantage of the interim order which has been in place since June 2014 due to the numerous applications brought by the applicant in an effort to frustrate progress of the case.

Granting a stay of proceedings under such circumstances would only serve the applicant's said intention and unnecessarily waste courts time yet matters brought before this court are expected to be disposed of expeditiously. In the result, the orders sought in this application are denied and the application is dismissed with

Costs.

Before I take leave of this matter, I wish to observe that there were far too many unnecessary applications by the applicant which in my view is an abuse of the court process. This could have been avoided if the applicant was represented by an advocate and not its managing director who having attained a law degree believes he is competent enough to represent the applicant in court. He turned the court into an arena to prove his legal competence other than a place for seeking justice. It can be noted from the history of the case that any guidance by the court was interpreted to be bias thus accounting for the several applications for recusal. He also failed to separate himself from the case because he was both a litigant and counsel. A qualified advocate who has learnt the art of advocacy and professional conduct and who is alive to his duty to court as an officer of court would have taken the guidance of court in humility instead of interpreting it as bias against the party. I would therefore strongly recommend that the applicant seeks the services of an advocate for more orderly and professional conduct of its case.

I so order.

Dated this 11th day of January 2016

ALIVIDZA,J

JUDGE

