THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISC. APPLICATION NO. 860 OF 2023

(ARISING FROM HIGH COURT CIVIL SUIT NO. 274 OF 2021)

UGANDA REVENUE AUTHORITY……APPLICANT

VS

JOHN IMANIRAGUHA ……RESPONDENT

BEFORE JUSTICE RICHARD WEJULI WABWIRE

RULING

INTRODUCTION AND BACKGROUND

The present application seeks that the proceedings in HCCS 274 of 2021 be stayed pending determination of a civil appeal currently before the Court of Appeal. Additionally, the application seeks costs related to this process.

To provide a succinct background, during the initial stage of hearing the main suit, the Respondent presented two objections against the Applicant's Written Statement of Defence (WSD). These objections were rooted in alleged violations of O.6 Rules 8 and 10 of the Civil Procedure Rules (CPR), as well as the doctrine of Res Judicata under Section 7 of the Civil

Procedure Act (CPA). This resulted in the striking out of the WSD. As a consequence, a judgment in default was rendered in favor of the Plaintiff. Subsequently, the Applicant initiated this application.

The Application is supported substantiated through the Affidavit of Tayahwe Sheba, who is a practicing Advocate within the Applicant's Legal Services and Board Affairs Department. This affidavit outlines the grounds of the application which briefly are, that:

a) The Ruling and orders on a preliminary objection in HCCS No. 274 of 2021 raise substantial questions of law that are of great public importance, which merit judicial consideration.

b) Colossal sums of money involved in HCCS 274 of 2021 amounting to over UGX 50,0000,000,000/= (fifty billion), if awarded to the Respondent will be to the detriment of all Ugandans as the claims in the plaint are not due to the Respondent, which will cripple Government business as the funds will be drawn from the consolidated fund.

c) The Appeal has very high chances of success and raises serious bona fide arguable grounds of appeal that merit judicial consideration.

d) If the prayers are not granted, the Applicant will suffer irreparable damage that cannot be atoned for in damages due to the colossal sums of money involved, amounting to over UGX 50 billion.

In response, the Respondent has submitted an Affidavit in Reply contesting the merits of the application. The Respondent urges the dismissal of the application in its entirety and seeks to be awarded costs.

The application hinges upon these considerations.

REPRESENTATION

The Applicant was represented by Mr. Ronald Baluku and Mr. Alex Alideki, while Mr. MacDusman Kabega and Mr. Enoch Barata represented the Respondent.

ISSUE FOR DETERMINATION

The ultimate issue for determination, is whether or not a stay of proceedings should be granted.

SUBMISSIONS BY COUNSEL

Counsel representing the Applicant submitted that the present Application, aimed at securing a stay of the proceedings in the principal suit, draws inspiration from the precedent set in **Ham Enterprises Ltd Vs. Diamond Trust Bank (U) Ltd and Another, SCCA No. 13 of 2021**. That in this precedent, the Supreme Court upheld the principle that the right to a fair hearing must be preserved. The Application, therefore, seeks to stay the proceedings in order to safeguard the right to appeal, which is afforded under Order 6 Rule 30(2) of the Civil Procedure Rules.

Conversely, Mr. Barata, representing the Respondent, vehemently opposed the Application for the stay of proceedings as proposed by the Applicant. He argued that stay of proceedings is a recourse that is typically granted under exceptional circumstances, given its substantial impact on the justice process. He stressed that the right to a fair hearing extends not only to the party seeking a stay, but also to the opposing party. Reference was made **to Halsbury's Laws of England 4th Edition, Volume 37,**

Pages 330 and 332, as well as the case of **Karim Somani and Another v. MKM Trading Ltd and Another – CA-MA 96/2005,** to fortify this stance. The history of the instant case, allegedly spanning almost two decades, was cited as evidence of prolonged litigation without a final resolution.

The Respondent's counsel argued that the exceptional grounds required for a stay of proceedings were not established by the Applicant. They emphasized that the right to a fair hearing functions as a two-way principle and contended that the denial of this right to the Respondent should not be the consequence of granting the Application.

Regarding the argument that the monumental sums involved in the main suit could adversely impact the consolidated fund, the Respondent countered that the greater concern is the public interest and an ordinary citizen's access to justice. They underscored the need for a balance in the scales of justice that takes into account public welfare.

Addressing concerns about the absence of a Notice of Appeal, the Respondent's counsel argued that the Applicant's failure to serve the Notice indicated a lack of intent to appeal in line with Rule 76 of the Court of Appeal Rules.

The Respondent further pointed out that the Applicant had simultaneously filed a similar application in the Court of Appeal, hinting at forum shopping tactics.

In rejoinder, Mr. Ssali Alex Alideki, Counsel for the Applicant, refuted the Respondent's claims of a parallel application in the Court of Appeal. He contended that this assertion was mere speculation and not substantiated by evidence.

Mr. Alideki emphasized that the Applicant's sole obligation was to demonstrate the existence of a Notice of Appeal, without the necessity of serving it. He stated that the correct time frame of the case was 2021, and the argument that the proceedings had spanned two decades should be dismissed. He referenced the Supreme Court's decision in **Ham Enterprises Ltd Vs. Diamond Trust Bank (U) Ltd and Another (supra)**, highlighting the importance of preserving the right to be heard. The automatic right to appeal, even in interlocutory appeals, under Order 6 Rule 30(2) CPR was emphasized.

He addressed concerns about the right to a fair hearing, asserting that dismissing the application would undermine the right to appeal post-decision. He rejected the Respondent's assertions of forum shopping and asked the Respondent's counsel to prove the existence of the Court of Appeal application.

COURT'S DETERMINATION

After carefully considering the pleadings, submissions by counsel, relevant authorities, and pertinent laws, I shall render a determination on the pivotal issue of whether a stay of proceedings should be granted. I aim to ascertain from the arguments presented by the respective counsel whether there exist grounds which, in accordance with the law, justify the issuance of such an order.

WHETHER THERE IS A COMPETENT NOTICE OF APPEAL

The Applicant submitted that a Notice of Appeal was lodged on the Electronic Court Case Management Information System (ECCMIS) and invited the court to verify the lodgment. The Applicant argued that an application for a stay only necessitates one ground, namely the Notice of Appeal.

On the other hand, the Respondent contended that there is no Notice of Appeal attached to the Affidavit in Reply, and no Notice of Appeal had been served on them at the time of filing and hearing this Application.

Rule 3 of the Judicature (Court of Appeal Rules) Directions provides a definition of "Notice of Appeal" in relation to a civil appeal, stating that it refers to a notice lodged in accordance with Rule 76 of the said Rules.

Rule 6 (2) (b) provides that:

> *"Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—*
>
> *(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76 of these Rules, order a stay of proceedings on such terms as the Court may think just.".*

Rule 76 outlines the contents and form of a Notice of Appeal, which should be endorsed by the Registrar of the High Court,-see sub rule (5). Form D in the First Schedule to the Rules. In this context, it is essential that a Notice of Appeal is not only filed but also endorsed by the Registrar.

The Respondent points out that the Applicant's alleged Notice of Appeal on ECCMIS lacks the necessary endorsement by the Registrar. The Applicant,

while acknowledging this absence, sought to attribute the delay in endorsement to the Court.

In **Watira Wilson vs. Wakikona David & Another CACA No. 08 of 2021**, a similar situation emerged. The Appellant filed a Memorandum of Appeal beyond the prescribed time, leading to objections from the Respondents. The Respondents argued that the Appellant's Memorandum and Record of Appeal were filed and served belatedly without leave of Court. The Appellant contended that the delay was due to the Registrar's failure to promptly provide the Record of Proceedings, thus justifying the non-adherence to the prescribed timelines. The Appellant then filed an application to validate the Memorandum and Record of Appeal.

As a preliminary objection, the Respondents argued that the Appellant had failed to take an essential step within the time prescribed by law, to wit: filing and serving the Memorandum and Record of Appeal with the seven (7) days. The Respondents prayed that the Appeal be struck out with Costs.

Whereas Watira (supra) was a Parliamentary Election Petition Appeal, it is instructive on the issue raised by the Applicant in the instant application regarding the Applicant’s justification for failure to serve the Notice of Appeal on the Respondent.

In Watira (supra), while striking out the Appeal, Madrama JA, elaborately discussed the distinction between “lodging in the Registry” and “lodging with the Registrar”.

He stated that:

"Under the Judicature (Court of Appeal Rules) Directions, the word "Registrar" is defined under Rule 3 to mean the Registrar of the Court and includes a Deputy and an Assistant Registrar of the Court. The word "Registry" is separately defined under the same Rule 3 to mean the Registry of the Court.

It follows that the filing of a document with the "Registrar" does not mean an endorsement generally by the Registry staff but specifically means an endorsement by the "Registrar". (Emphasis mine)

A scrutiny of Rule 76 (1) of the Judicature (Court of Appeal Rules) Directions then becomes imperative. It provides that:

"Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the High Court."

From the above, the question then becomes, "Has the Applicant in the instant case lodged a Notice of Appeal with the Registrar?" Evidently, the answer is in the negative.

Other than the filing of the Notice of Appeal on ECCMIS, no evidence has been adduced to prove that the Applicant lodged the Notice of Appeal with the Registrar of this Court as mandated by law.

Reviewing Rule 76(1) of the Judicature (Court of Appeal Rules) Directions, which requires a Notice of Appeal to be lodged with the Registrar, it is evident that the Applicant's Notice of Appeal lacks the necessary endorsement. The Applicant's assertion that the Registrar's delay caused the absence of endorsement is unsubstantiated.

Furthermore, the Application itself was filed on 14th June 2023, and the Applicant, in paragraphs 6 and 10 of the Supporting Affidavit, incorrectly claimed to have a pending appeal in the Court of Appeal as of that date. Contrary to this claim, a review of the ECCMIS records shows that no competent Notice of Appeal was lodged with the Court of Appeal at that time.

The Applicant's failure to ensure that their Notice of Appeal was properly endorsed by the Registrar underscores their inability to meet the procedural requirements outlined in Rule 76.

The import of failure to take an essential step was explained in **Andrew Maviri -vs- Jomayi Property Consultants CACA No. 274 of 2014,** wherein the Court of Appeal held that:

> *"…..taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by the Court, if the action is not performed as by law prescribed, then whatever legal process has been done before, becomes a nullity, as against the party who has the duty to perform that act."*

Considering the above, the absence of a properly endorsed Notice of Appeal, as required by Rule 76, indicates that the Applicant has not satisfied the prerequisites for obtaining a stay of proceedings.

It is evident that the Applicant prioritized the endorsement of their Application on ECCMIS over the proper endorsement of the Notice of Appeal. This uneven approach raises questions about their diligence and commitment to adhering to the legal processes.

In light of the foregoing, the Applicant has not successfully demonstrated the existence of a valid Notice of Appeal that would justify the granting of a stay of proceedings.

WHETHER THE APPLICANT HAS AN AUTOMATIC RIGHT OF APPEAL.

The Applicant contends that its proposed appeal falls under the category of an automatic right of appeal as per Order 6, Rule 30(2) of the Civil Procedure Rules (CPR). However, the Respondent disputes this assertion.

Order 6, Rule 30(1) of the CPR grants the Court the authority to strike out a pleading if it lacks a reasonable cause of action or answer, or if the suit or defense appears frivolous or vexatious. Subsequently, under Order 6, Rule 30(2), any orders issued in line with this rule are appealable as of right.

In the present case, while the Judgment was entered pursuant to Order 6, Rule 30(1) CPR, the orders to strike out the Written Statement of Defence were predicated on Order 6, Rules 8 and 10 of the CPR, as well as Section 7 of the Civil Procedure Act (CPA). Notably, the court's language indicated that the Defence was "evasive and general" under Order 6, Rules 8 and 10 CPR, differing from the phrase "frivolous and vexatious" utilized in Order 6, Rule 30(1) CPR.

It is pertinent to clarify that the notion that the Applicant's intended appeal falls under the automatic right of appeal as outlined in Order 6, Rule 30(2) CPR is misconceived and legally unsustainable. The provision in Order 6, Rule 30(2) CPR pertains to appeals against findings, orders, or judgments stemming from proceedings conducted under Order 6, Rule 30(1) CPR. Consequently, Order 6, Rule 30(2) does not bestow an unrestricted right of

appeal upon the Applicant regarding orders issued outside the scope of Order 6, Rule 30(1) CPR.

GROUNDS OF APPEAL

I will now examine the grounds presented in the Applicant's intended appeal and evaluate their competence and potential for establishing a legal foundation to justify the requested stay of proceedings.

The Applicant asserts that it has a pending appeal that raises substantial triable issues with a high likelihood of success, thereby warranting judicial consideration.

In **Silverstein vs. Chesoni [2002] 1 EA 296**, a persuasive judgment from the Court of Appeal of Kenya, it was held that:

> *"An applicant seeking a stay under rule 5(2)(b) of the Court's Rules had to satisfy the Court that his intended appeal was arguable, that is, that the intended appeal was not frivolous, and that unless the order of stay were granted, the intended appeal, if successful, would be rendered nugatory. Both requirements had to be proved before an injunction or order of stay could be obtained."*

According to Black's Law Dictionary 8th Edition, a "frivolous suit" is defined as a lawsuit lacking a legal basis.

In determining whether to order a stay of proceedings, the Court weighs the prima facie merits of the intended appeal. The Applicant's Affidavit in Support of the Application outlines four grounds of appeal, that:

1. The Learned Trial Judge erred in law when he held that the Applicant's Written Statement of Defence offended O.6 Rules.8 and 10 of the Civil Procedure Rules.
2. The Learned Trial Judge erred in law when he failed to evaluate and assess the Written Statement of Defence in its entirety and the annexures attached thereto, thus arriving at a wrong conclusion that the Applicant's Written Statement of Defence was general and with evasive denials, thereby causing an injustice.
3. The Learned Judge erred in law when he held that paragraphs 6 to 25 of the Written Statement of Defence offend the doctrine of Res Judicata.
4. The Learned Trial Judge erred in law when he entered Judgment in accordance with O.6 r.30 of the Civil Procedure Rules, thus condemning the Appellant unheard.

Upon thorough examination, the aforementioned grounds of appeal emanate from the Ruling of this Court, wherein the Written Statement of Defence was struck out due to stated violations of O.6 Rules 8 and 10 of the Civil Procedure Rules, as well as the doctrine of Res Judicata under Section 7 of the Civil Procedure Act.

The brief background of the Ruling is that, the Respondent raised two objections against the Applicant's Written Statement of Defence, that is;

1. That the WSD is an evasive denial and does not disclose a reasonable defence/answer to the Plaintiff's claims thereby offending O.6 Rules.8 and 10 CPR, and that,

2. The WSD is substantially barred by Res-Judicata and is therefore, legally untenable under Section 7 of the Civil Procedure Act.

At page 13 of the Ruling, this Court found that the WSD offended O.6 Rules.8 and 10 CPR. Furthermore, at page 19, Court found that paragraphs 6 to 25 of the WSD offend the doctrine of Res Judicata encapsulated in Section 7 CPA.

Premised on the foregoing, the WSD was struck out.

At page 20 of the Ruling, Court held that:

> *"Resultantly, the Written Statement of Defence filed by the Defendant in the instant case is struck out for making general and evasive denials in offence of O.6 Rules.8 and 10 CPR ……."*

Court struck out the WSD for offending Section 7 CPA as well as O.6 Rules. 8 and 10 CPR and thereafter, entered Judgment under O.6 r.30 (1) CPR. Consequent to the striking out, Judgment was entered against the Applicant.

The striking out of the WSD and the entering of Judgment are clearly distinct actions, each capable of forming a ground or grounds of appeal. However, it ought to be noted that the latter is only consequential to the former and in fact, an appeal lodged only in respect of the judgment would be of no consequence to the striking out.

Section 76(1) CPA and O.44 r.1 CPR enlist the orders that are appealable as of right.

Whereas Ground 4 of the intended appeal is appealable as of right under O.6 r.30 (2) CPR, Grounds 1 to 3, the substantive grounds of the Applicant's appeal require leave of Court.

The Applicant has neither sought nor obtained leave of either this Court or of the Appellate Court as envisaged under Section 76 CPA and O.44 CPR, in respect of grounds 1 to 3 of the Appeal.

Section 77(1) CPA provides that:

> *"Except as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction……..."*

Similarly, O.44 r.2 CPR also provides that:

> *"An appeal under these Rules shall not lie from any other order except with leave of the Court making the order or of the Court to which an appeal would lie if leave were given."*

Upon careful perusal of the said provisions, it is evident that the Court's findings and subsequent orders striking out the Appellant's Written Statement of Defence were interlocutory orders made under Section 7 CPA as well as O.6 Rules. 8 & 10 CPR and are not appealable as of right. They are only appealable with leave of Court.

In **Dr. Sheikh Ahmed Mohamed Kisuule -vs- Greenland Bank (in liquidation) SCCA No. 11 of 2010**, the Supreme Court held that:

> *"Where leave is required to file an appeal and such leave is not obtained, the appeal filed is incompetent and cannot even be withdrawn as an appeal. It is not merely a procedural matter but an*

essential step envisaged by Rule 78 of the Judicature (Court of Appeal Rules) Directions."

It is now settled law that an Appellate Court lacks jurisdiction to entertain a matter in which leave to appeal is required but has not been sought or granted.

The import of failure to take an essential step was explained in **Andrew Maviri -vs- Jomayi Property Consultants (supra)**, where the Court of Appeal held that:

"….. taking an essential step is the performance of an act by a party whose duty it is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by the Court, if the action is not performed as by law prescribed, then whatever legal process has been done before, becomes a nullity, as against the party who has the duty to perform that act."

In **Attorney General vs. Shah [1970] EA 523** Court held that;

"Where a right of appeal is given subject to leave being obtained, either of the court appealed from or the appellate court, and leave is not obtained, there is no appeal before the court and the purported appeal must be struck out as incompetent."

Similarly, in **Uganda Revenue Authority vs. Mabosi & Another, SCCA No.1 of 2006**, the Supreme Court held that;

"An appeal filed without leave first being obtained is incompetent and cannot be entertained by the Court"

In the event, the Applicant's failure to obtain the mandatory leave to appeal as regards Grounds 1 to 3 renders the intended appeal in respect of those grounds, a nullity and with no prospect of success.

EXCEPTIONAL CIRCUMSTANCES

The Applicant argued that the fact of filing a Notice of Appeal amounted to an exceptional circumstance envisaged under the law. That since it had filed a Notice of Appeal, that was an exceptional circumstance that warranted the grant of a Stay of proceedings.

On the other hand, the Respondent contended that no such circumstances had been proved by the Applicant.

The crux of the applicant's position lies in the contention that the mere act of filing a Notice of Appeal constitutes an exceptional circumstance in accordance with the prevailing legal framework. It is their assertion that, having lodged a Notice of Appeal, the situation automatically warrants the issuance of a Stay of proceedings. In contrast, the respondent disputes the establishment of such circumstances by the applicant.

According to **Halsbury's Laws of England 4th Edition at page 437**:

> *"A stay of proceedings arises under an order of the Court which puts the stop or "stay" on the further conduct of the proceedings in that Court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the Court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process.*

The order is made generally in the exercise of the Court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances." (Emphasis mine)

The import of this is that the granting of a stay of proceedings is a discretionary power vested in the court. This power emerges as an order that suspends or "stays" the progression of proceedings at their current stage. Its primary objective is to prevent undue harm to either party or to forestall the abuse of legal processes. It is a mechanism that operates within the court's discretionary jurisdiction, often involving a summary process that avoids delving into the substantive merits of the case. This power, particularly in cases of stay, is sparingly exercised and is reserved for exceptional circumstances.

My further discernment of the import of the passage from Halsbury's Laws (supra) is that the exceptional circumstances are those as would occasion undue prejudice or abuse of process.

The applicant's contention that the mere filing of a Notice of Appeal qualifies as an exceptional circumstance necessitating a Stay of proceedings is in my opinion misconceived. This contention, though founded on the concept of initiating an appeal, is misconceived in its interpretation of the law. The act of filing a Notice of Appeal is a procedural requirement inherent in the legal process, but it does not in itself inherently constitute an exceptional circumstance.

Lodgment of a notice of appeal by itself does not amount to an exceptional circumstance. It provides the locus for the Applicant/intended appellant to present what he thinks are exceptional circumstances for court to consider in determining whether or not to grant a stay of proceedings. Otherwise the Applicant's argument postulates the notion that mere lodgment of a notice of appeal should leave court with no option but to grant a stay of proceedings. This can never have been the intention of the law, that the law bestows discretionary mandate upon court to determine whether or not stay of proceedings is warranted and in the same breath take away this discretion by warranting automatic right to stay by a mere act of expressing the intention to appeal upon filing a notice of appeal.

Rather, Lodgment of a notice of appeal provides the applicant, or the intended appellant, with the opportunity to present their perceived exceptional circumstances that would necessitate a stay of proceedings.

Imposing an automatic right to a stay solely based on the lodgment of a Notice of Appeal negates the discretionary nature of the court's authority. This would effectively undermine the court's ability to independently assess the legitimacy of the circumstances surrounding the appeal. It is crucial to remember that the law's intention is not to divest the court of its discretion but to provide a platform for the presentation and evaluation of exceptional circumstances.

IRREPARABLE LOSS AND MONETARY AWARDS

The applicant's argument hinges significantly on the notion of irreparable loss, citing the substantial sum of UGX 50,000,000,000 that would be

derived from the consolidated fund. In paragraph 14 of the Affidavit in support of the application, the Applicant avers that he will suffer irreparable loss, incapable of being atoned for in damages, arising from the colossal sum of UGX.50, 000,000,000 which would be derived from the consolidated fund.

However, the respondent has counteracted this argument in paragraph 8 of his Affidavit in Reply by contending that a decretal award issued by the court, following a judicious examination of the dispute, cannot inherently lead to the sort of irreparable loss that would warrant a Stay of proceedings.

In an apparent turnaround, in his submissions in rejoinder, Counsel for the Applicant discounted the averments in paragraph 14 of the Affidavit in support of the Application, he submitted that this is not pivotal to the grant of the application.

Upon a holistic examination of the affidavit in support of the application, it becomes evident that the core of this application revolves around the potential damages the applicant may incur as a result of the award. This substantial amount, originating from the consolidated fund, is presented as a supplementary factor to bolster the applicant's position.

However, the legal relevance of the source of the monetary awards sought by the respondent in HCCS No. 274 of 2021 is, in essence, immaterial in the determination of this application. Counsel for the applicant rightly diminished the significance of this factor in the application's context.

A substantial facet of consideration is the duration of the proceedings and the precedent set by corresponding cases. This specific case has a long-

standing history, stretching back to 2007, when it first surfaced before the Tax Appeals Tribunal. Over the years, it navigated through various court levels, culminating in its current state as the instant Application.

In a pertinent precedent, **Sekandi Lusangwa -vs- Administrator General CACA No. 457 of 2022**, a comparable case was dismissed. The Court of Appeal held that an application for Stay of proceedings pending appeal should not be entertained when the case's history was marred by an extended timeline due to unending applications. The court deemed such behavior an endeavor to manipulate the legal process for ulterior motives, resulting in an unjust prolongation of the proceedings. The same rationale applies to the present case.

Thus, fortified by the earlier determinations of this Court, it is patently unjust to permit the current matter and the involved parties to linger further within the court system. Consequently, to stay the proceedings in HCCS No. 274 of 2021 would not align with principles of justice, as underscored by existing judicial findings.

The arguments presented by the applicant, while grounded in certain legal interpretations, do not substantiate the exceptional circumstances required to warrant a Stay of proceedings. The act of filing a Notice of Appeal alone does not equate to an exceptional circumstance. The application's focus on potential damages, the source of monetary awards, and the case's duration collectively indicate that staying the proceedings would not be just or appropriate.

In their submissions, counsel for the Applicant extensively cited and sought to rely on the Supreme Court decision in the case of **Ham Enterprises Ltd**

& 2 Others -vs- Diamond Trust Bank (U) Ltd & Another SCCA No. 13 of 2021 to support its submissions on the right to a fair hearing.

The Applicant's Counsel also argued that the decision was applicable since the Trial Judge had, just as had been done in the instant case, struck out the Defendants' Written Statement of Defence and entered Judgment under O.6 r.30 CPR.

I will now address myself to the relevance of this decision.

I have carefully read the Ruling in **Ham Enterprises Ltd -vs- DTB (U) Ltd, HCMA No. 654 of 2020,** the Judgment of the Court of Appeal in **DTB (U) Ltd -vs- Ham Enterprises Ltd CACA No. 242 of 2020**, and finally, the Supreme Court decision in, **Ham Enterprises Ltd -vs- DTB (U) Ltd SCCA No. 13 of 2021**, all of which stem from the same underlying facts and are between the same parties.

The facts giving rise in those suits and the Court decisions therein, are clearly distinguishable from the instant case.

In Ham Enterprises Ltd (supra), the Plaintiff's suit was founded on illegality as well as breach of contractual, fiduciary and statutory duties. The Plaintiff sought the following remedies:

a) Declaratory Orders.

b) Breach of contractual, fiduciary and statutory duties.

c) An order of recovery of UGX. 34,295,951,553/= and USD. 23,467,670.61 being monies that were unlawfully appropriated by the Defendants, from the Plaintiffs' loan accounts.

d) An order for the unconditional release/discharge of mortgages and all corporate and personal guarantees issued by the Plaintiffs.

e) Permanent Injunction

f) General and Punitive Damages

g) Interest and Costs.

The Plaintiff filed a formal application under Order 9 Rules 6, 8 and 10 CPR seeking to strike out the Defendants' Written Statement of Defence for being a perpetration of illegalities. In the alternative, the Plaintiff prayed that the Defence be struck out for being frivolous, vexatious, and evasive and for failure to disclose a reasonable answer to the Plaintiffs' claim.

The Plaintiff prayed that Judgment be entered against the Defendants upon the Plaintiffs' claim in HCCS No. 43 of 2020. The Application was allowed as prayed by the Plaintiff and Judgment entered.

It is pertinent to note that no Order or finding was made by my learned Trial brother Judge, pursuant to the alternative prayer on evasive denial.

On 1st appeal, the Court of Appeal allowed the appeal on only grounds 9 and 11 which dealt with the propriety of the Trial Judge's order striking out the Written Statement of Defence and the Judgment he had subsequently entered for the Plaintiff.

The Supreme Court upheld the findings of the Justices of Appeal in setting aside the Judgment entered by the Trial Judge under O. 6 r.30 CPR and all the Orders issued therein.

The case of "Ham Enterprises Ltd (supra)" can be effectively distinguished from the current situation on several crucial grounds:

1. In Ham Enterprises Ltd (supra), the Judgment entered under O.6 r.30 (1) CPR was, with respect to the trial judge, erroneous since it encompassed matters of fact that required formal proof. The Trial Judge's Declaratory Orders on illegality of the mortgages, recovery of UGX. 34,295,951,553/= and USD. 23,467,670.61 being monies that were unlawfully appropriated by the Defendants, from the Plaintiffs' loan accounts, breach of contract and unconditional discharge of the mortgages were all untenable since they required formal proof.

2. Secondly, the Judgment entered was not an Interlocutory Judgment envisaged under O.6 r.30 (1) CPR since it determined the dispute between the parties with finality. Having wholly resolved the dispute, the Order of the Learned Trial Judge in essence, became a decree appealable as of right. At page 35 of its Judgment, the Supreme Court faulted the Learned Trial Judge for having made an omni-bus finding of illegality of all the transactions.

The Court further held that:

> "The Learned Trial Judge erred in entering Judgment in the main suit under O.6 r.30 CPR when the matter before him was not for determination of the head suit; but rather an application whose resolution, in the circumstances, could not dispose of the head suit."

On the other hand, in the instant case, the assessment of Damages, being the only live issue left for determination by the Court, was set down for formal proof in accordance with Order 9 Rule 8 CPR.

3. Thirdly, the Defence in Ham Enterprises Ltd (supra), was struck out for perpetrating illegalities in contravention of several provisions of the Financial Institutions Act 2004 (as amended). Consequently, both the Order striking out the Defence and the Judgment entered, were appealable as of right, having been premised on provisions outside the CPA and CPR and for which leave to appeal was not expressly mandated by law.

In the instant case however, the Judgment was struck out for offending O.6 r.8 & 10 CPR as well as Section 7 CPA, both of which require leave prior to lodgment of an appeal.

4. Fourthly, the flawed nature of the Judgment in "Ham Enterprises Ltd (supra)" is highlighted by its unintended assistance to the plaintiff's benefit from an illegality. The court permitted the plaintiff to retain funds obtained through illegal contracts and further recover substantial sums from the defendants. This contradicts established legal principles including the maxim "*ex turpi causa non oritur actio*" and the doctrine of "*pari delicto potior est conditio possidentis*."

In contrast, the current case is focused on the recovery of damages and compensation, making it distinct from the non-pecuniary claims in "Ham Enterprises Ltd (supra).".

5. Regarding the right to a fair hearing, both the Court of Appeal and the Supreme Court held that the Learned Trial Judge was wrong in law when he, having earlier made an Order appointing an auditor to help Court determine the extent of the Plaintiffs' indebtedness to the

Defendants, then vacated the same Order in his Judgment under O.6 r.30 (1) CPR.

6. Another stark distinction between Ham Enterprises Ltd (supra), and this case is also found in the nature of the claims as put forward in the Plaints. The Plaintiff's claim in the instant case is pursuant to the Constitutional Court's finding that the Defendant (URA) is in Contempt of Court Orders. Unlike Ham Enterprises Ltd (supra)'s case that included non-pecuniary claims, the Plaint in the instant suit is entirely restricted to recovery of Damages and Compensation which by their very nature, are pecuniary claims that can be handled under O.9 r.8 CPR.

The case of "Ham Enterprises Ltd (supra)" is markedly different from the present case on multiple fronts. These distinctions encompass the nature of judgments, the issues of illegality, the context of the claims, and the overall legal implications. As a result, the application's reliance on "Ham Enterprises Ltd (supra)" is misplaced.

Consequently, the intended Appeal is incompetent, a nullity and cannot serve as a lawful basis for the grant of a Stay of proceedings.

The Application is dismissed, and costs are awarded to the respondent.

Delivered at Kampala this 25th day of August 2020.

Richard Wejuli Wabwire

JUDGE

Present in Court:

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