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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS APPLICATION NO. 0010 OF 2024
ARISING OUT OF MISCELLANEOUS APPEAL NO. 0040 OF 2023

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- 1. COIL LIMITED**
- 2. NASR GENERAL CONTRACTING COMPANY LIMITED ::::::::::: APPLICANTS**

VERSUS

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- 1. ATTORNEY GENERAL**
- 2. I & M BANK (U) LIMITED ::::::::::: RESPONDENTS**

BEFORE HON. LADY JUSTICE HARRIET GRACE MAGALA

RULING

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Background and Introduction

This is an application that was brought by notice of motion under section 98 of the Civil Procedure Act, sections 33, 38 (1) & (3); and 39 of the Judicature Act; Rule 42(1) of the Judicature (Court of Appeal Rules), Order 50 rules 3A (1), (2) and (3); and Order 52 rules 1-3 of the Civil Procedure Rules as amended.

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It is an application for orders that an interim order be issued staying the orders and / or effects of the orders of the High Court of Uganda – Commercial Division in ***Miscellaneous Appeal No. 0040 of 2023: Attorney General versus Coil Limited & 2 Others*** pending the disposal of the substantive application (for a temporary injunction) ***Miscellaneous Application No. 0009 of 2024: Coil Limited & Anor. versus Attorney General & Anor.*** and costs of the Application.

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5 The grounds upon which the Application is premised are contained in the affidavit of Pooja Dokwal, the General Manager of the 1st Applicant are:

1. That pursuant to **MA 2837 of 2023: Coil Limited & Anor. – vs – Attorney General & Anor.** Which was heard and disposed of by the Assistant Registrar, the Applicants obtained an interim order of injunction against
10 the Respondents restraining the 2nd Respondent from honouring and /or cashing a performance guarantee against the Applicants in favour of the Ministry of Water and Environment;
2. That the 1st Respondent elected to appeal against the said Interim Order vide **Miscellaneous Appeal No. 0040 of 2023: Attorney General versus**
15 **Coil Limited & 2 Others;**
3. That the Appeal was disposed of by the learned trial judge on the 29th day of December 2023 and the decision in effect not only set aside the Interim Order of Injunction which had been granted by the learned Registrar in Miscellaneous Application No. 2837 of 2023 but also
20 disposed of **Civil Suit No. 1530 of 2022: Coil Limited & Anor versus Attorney General** without hearing it;
4. That the decision of the learned trial judge in Miscellaneous Appeal No. 0040 of 2023 did not afford the Applicants a hearing there by being exposed to liability;
- 25 5. That the Applicants contend that proceedings and findings of the learned trial judge in Miscellaneous Appeal No. 0040 of 2023 were irregular in as far as the court went beyond the scope of an application for an interim order of injunction;

M. D. Dokwal

- 5 6. That the Applicants have already lodged ***Civil Appeal No. 1666 of 2023: Coil Limited & Anor versus Attorney General & Anor*** against the decision of this Court in Miscellaneous Appeal No. 0040 of 2023 in the Court of Appeal. The said appeal is yet to be heard and disposed of;
- 10 7. That the decision of the learned trial judge in Miscellaneous Appeal No. 0040 of 2023 has left the Applicants exposed to the very liability that led them to file HCCS No. 1530 of 2023 and now Civil Appeal No. 1666 of 2023; and
8. That the Motion was filed without delay and in the interest of justice.

15 The Applicants filed a supplementary affidavit in support of the motion supplying the Notice of Appeal and Memorandum of Appeal.

 The Affidavit in Reply of the 1st Respondent was deposed by Engineer Malcolm Kasozi, an Assistant Commissioner, Water for Production Department, Ministry of Water and Environment. The 1st Respondent opposes the granting of the Interim Order of injunction for the following reasons:

- 20 1. That this application is an abuse of the court process. The Applicants have filed several applications arising from HCCS No. 1530 of 2023 and Civil Appeal No. 1666 of 2023;
2. That the Applicants without either completing the works or extending the guarantee or providing any further security to the 1st Respondent have
- 25 resorted to coming to court thereby depriving the 1st Respondent of its contractual remedies;

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- 5 3. That the 1st Respondent exercised its rights under the contract to demand for the liquidation of the performance guarantee before it expired on 31st December 2023;
- 10 4. That under the performance guarantee, the guarantor undertook to pay sums payable to the beneficiary upon receipt by the guarantor of the beneficiary's first demand in writing;
- 15 5. That the contractual time for completion of works expired on 22nd November 2021 before substantial completion of the works, extension of time was not granted, the Contractor has delayed completion beyond the period for which maximum amount of liquidated damages can be applied and the employer is entitled to remedies under the contract;
- 20 6. That the decision by the learned trial judge in Miscellaneous Appeal No. 0040 of 2023 was founded on well-established legal precedents;
7. That the orders made in Miscellaneous Appeal No. 0040 of 2023 are incapable of execution and the Administrative Order issued by this Court was issued in error and is nugatory;
- 25 8. That the 1st Respondent's rights to demand for the encashment of the performance guarantee arose from the guarantee agreement signed between the Parties and the decision in Miscellaneous Appeal No. 0040 of 2023 merely re-emphasized them;
9. That the Applicants have neither served the 1st Respondent with the Notice of Appeal and Memorandum of Appeal and nor are the said documents on the court electronic system (ECCMIS);
10. That the Applicants have no right of appeal and the appeal has no likelihood of success; and

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5 11. That the contractor is in default and if liquidation of the performance
guarantee is stopped, the 1st Respondent would be unjustly deprived of its
available remedy.

Representation

10 The Applicants were represented by Swabur Mauzuk and Peter Allan Musoke of
M/s Lwere, Lwanyaga & Co. Advocates while the 1st Respondent was represented
by Mathew Muhesi, a state attorney. Also present at the hearing for the 2nd
Respondent were Raymond Kyambadde, the Legal Officer and Kabayo Alex.

Hearing

Learned Counsel for the Parties made oral submissions.

1st Respondent's submissions

15 The Learned State Attorney submitted that this application was an abuse of the
court process because the Applicants had filed multiple actions against the same
Respondent seeking the same remedy and on the same subject matter. He further
submitted that the rights of the 1st Respondent were not derived from the Orders
20 of the learned trial judge – the Hon. Lady Justice Patricia Kahigi Asiiimwe but
rather they arose from the guarantee contract.

It was the submission of the 1st Respondent that the latter exercised their right
under the Contract to demand for the liquidation of the guarantee before it
expired on the 31st December 2023. He stated that the 2nd Respondent was yet to
25 honour the demand letter from the 1st Respondent requesting for encashment of
the demand guarantee. That as a result of the Administrative Order granted by
this court, the 2nd Respondent has been unable to honour the demand.

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5 He concluded his submissions by stating that if this application was granted the 1st
Respondent would be unjustly deprived of its available remedy for the Applicants'
default.

Applicants' submissions

10 In reply, Mr. Musoke, learned counsel for the Applicants submitted that this
application arose out of the judgment of this court in Miscellaneous Appeal No.
0040 of 2023 which the Applicants deemed as a determination of Civil Suit No.
1530 of 2023. That pursuant to this Court's decision on Miscellaneous Appeal No.
0040 of 2023, the Applicants preferred Civil Appeal No. 1666 of 2023 to the Court
of Appeal which is still pending. He submitted that is application seeks to stay the
15 execution of the decision of this court pending the hearing and final
determination of Civil Appeal No. 1666 of 2023.

Regarding the multiple applications referred to by the learned State Attorney, Mr.
Musoke submitted that the said applications directly arose out of Civil Suit 1530
of 2023 which the Applicants contend that was determined by the decision of this
20 Court in Miscellaneous Appeal No. 0040 of 2023. He submitted that while the
multiple applications may strike a chord of similarity, in law they were distinct and
had different premise in law and effect.

On the question of import of the application for an interim order, learned counsel
for the Applicant relied on the case of **Somali Democratic Republic – versus –**
25 **Anoop Sunderial Trean, Court of Appeal Civil Appeal No. 11 of 1998** where the
Supreme Court held that:

*“Where an unsuccessful party is exercising a right of appeal, it is the duty of
the appellate court to prevent the appeal from being rendered nugatory”.*

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5 The Supreme Court in **Somali Democratic Republic (supra)** quoted Lord Justice Cotton at page 458 in the case of **Wilson –v- Church (1879) vol. 12 Ch D** where he held that:

“Court would order a stay of execution in order to preserve the applicants right of appeal so that it is not rendered nugatory”.

10 In the same case **Wilson –v- Church (supra)**, Lord Justice Bret held that the law is that court will exercise its discretion so as to stop an appeal from being rendered nugatory. Lastly, it was held that as a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the judgement
15 appealed from as will prevent appeal if successful from being rendered nugatory.

Learned counsel for the Applicants submitted that he could not reply to the submissions of the 1st Respondent because they related to the main application for a temporary injunction. But in relation to this application, he submitted that an appeal had been lodged in the Court of Appeal and there was an application
20 for stay of execution and the Applicants were asking the court to maintain the status quo pending the determination of the main application. He concluded his submission by praying that court grants the application pending the hearing and determination of the main application, Miscellaneous Application No. 0009 of 2024.

25 **1st Respondent’s submissions in rejoinder**

In rejoinder, the 1st Respondent submitted that the Applicants had no *locus standi* because the guarantee was entered as a joint venture between the 1st and 2nd Applicant.

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5 He also cited the case of **Male Mabirizi versus Attorney General, Miscellaneous Application No. 0917 of 2021** where Ssekaana, J cited the supreme court of Nigeria decision in **Chief Allanah & Others versus Mr. Knayo Kpolokwu & Others** in which it was held that filing of multiplicity of actions on the same subject matter against the same opponents on numerous occasions between the same parties even where there is existence of a right to commence an action is a feature of an abuse of the court process.

He therefore prayed that court be pleased to dismiss the application with costs.

Determination

The issue before court is whether an interim order of injunction should be granted to the Applicant. The Court derives its powers to entertain such matters from section 98 of the Civil Procedure Act and section 33 of the Judicature Act. The case of **Hwang Sung Industries Limited versus Tajdin Hussein & Others, Supremen Court Civil Application No. 19 of 2008** is binding on this Court and very instructive on what considerations should be taken into account before court grants an application for an interim order of injunction. In the said case, Okello, JSC (as he then was) stated that:

“For an application for an interim 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 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”.

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5 The above position has since been adopted in cases such as **Zubeda Mohamed & Another versus Laila Wallia & Another, Civil Reference No. 7 of 2016** and **Patrick Kaumba Wiltshire versus Ismail Dabule, Civil Application No. 3 of 2018**.

In the case before court the Applicants filed **Miscellaneous Application No. 0009 of 2024: Coil Limited & Anor. – versus – Attorney General & Anor.** This is an
10 application for a temporary injunction and it is scheduled to be heard on the 15th January 2024 at 2:30pm. Court is therefore satisfied that there is a substantive pending application.

A reading of the background to this application shows that Court laboured to replicate the contents in the affidavits in support of and in reply to the application.
15 The 1st Respondent's affidavit in reply and its submissions show that they are arguing the main application for a temporary injunction. At this stage, such arguments should neither be made nor entertained.

The second consideration is whether there is an imminent threat of execution. The only thing standing between the Respondents and the Applicants from
20 encashing the performance guarantee is the Administrative Order that was issued by this honourable court which has been extended pending the hearing and final determination of this application. This is an order the 1st Respondent in its affidavit in reply stated that it was issued in error and is nugatory. Further, the learned State Attorney in his submissions stated that as a result of the
25 Administrative Order granted by this court, the 2nd Respondent has been unable to honour the demand. This in my mind implies that if the Administrative Order was not in place the 1st Respondent would have proceeded to encash the guarantee following the decision that was handed down by this honourable court

5 in Miscellaneous Appeal No. 00040 of 2023. I am therefore satisfied that in the circumstances, there is an imminent threat of execution.

Lastly, while the 1st Respondent was making submissions in rejoinder, the learned State Attorney stated that the Applicants had no locus to file this application. That the applicant as a party to this suit should have been Coil and Nasur General Contracting Co. Joint Venture. This is a case of misnomer where the name was written incorrectly. The name of the party is not entirely wrong. The doctrine of misnomer applies where: (1) the author intended to name the subject to whom the name is now being attributed and (2) a reasonable person would attribute the name to the person to whom it is now intended to be attributed. Misnomer arises when the author merely misnames the correct person as opposed to not being able to identify the correct person. The applicants filing this application as Coil Limited and Nasur General Contracting Company Limited as opposed to Coil and Nasur General Contracting Co. Joint Venture is an inconsequential deficiency or technicality which can be rectified. This therefore being a case of misnomer rather than mis-identification, I am inclined to follow the decision in **J.B Kohli & Others versus Bachulal Popatlal [1964] EA at 219** to find and order that the Applicant name be and is hereby corrected by amendment from “Coil Limited and Nasur General Contracting Company Limited” to “Coil and Nasur General Contracting Co. Joint Venture”.

25 This application is allowed and the costs shall be in the cause.

Dated and signed at Kampala this 14th day of February 2024.



Harriet Grace MAGALA, JUDGE

Delivered online (ECCMIS) this 15th day of February 2024.