THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-133-2009

(Arising from M.A No. 250 of 2009)

1. TIMBER AND GENERAL STORE LTD
2. MICKY WANDERA……APPELLANTS

VERSUS

ISMAIL MUGODA……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

This is an appeal from the exparte orders of the Assistant Registrar handed down on the 22nd day of December 2009 staying execution of High Court Civil Suit No. 63 of 1998 until the determination of Misc. Application No.249 of 2009. Through their lawyers M/s Dagira & Co. Advocates the appellants filed this appeal by way of Notice of Motion under O.50 r.8 CPR and O.52 r.1 & 3 CPR.

The grounds of objection are as follows:-

i) The learned assistant Registrar had no jurisdiction to issue an interim (or any other) order to stay final Decree of a judge of the High Court.
ii) The said order is illegal, null and void *ab initio*.
iii) The appellants are entitled *ex-debito* to have the said order vacated.

iv) The said interim order has occasioned a miscarriage of justice.

v) The ends of justice require that the learned Assistant Registrar order be vacated.

In his written submission, Mr. Dagira counsel for the appellant submitted on each ground separately.

Regarding ground1 he submitted that a Registrar's powers are limited to handling interlocutory applications preliminary to the hearing of a case and not when a decree has been passed by a judge. That this is provided for under O.50 r.3 CPR.

That any decision to the contrary such as the one in the case of **Busonya Jamada & Others vs. David Giruli HCCMA 135 of 2009** were reached per incurium. That O.50 r.4 CPR limits to formal orders of attachment and sale, notices to show cause and for applications for arrest and imprisonment of judgment debtors in execution to put in force the orders pronounced by the judge in a decree. That the High Court has no jurisdiction to stay its decrees and orders issued in its original jurisdiction pending appeal to the Court of Appeal. He cited a decision in ***Uganda Commercial Bank v. Ssanya & Another 1999 KALR 804 S.C***.

On whether the said order by the Registrar was illegal, null and void Mr. Dagira urged that since the registrar had no jurisdiction any orders emanating from her decision was void *ab initio*.

Regarding whether the appellants are entitled to have the said order *ex debito justitiae* vacated learned counsel submitted that since the order of the Registrar was void a person affected is entitled to have it set aside *ex debito justitiae*.

On whether the order occasioned a miscarriage of justice Mr. Dagira submitted that it is the case since it was obtained improperly. That the conditions envisaged in order O.43 r.4 (3) CPR were not met. That no security was furnished for the due performance of the decree. That security is a condition precedent to the issuance of an order for stay of execution. Further that the decree sought to be stayed decreed that the suit property belonged to the appellants herein with no order for demolition of the house on the suit land. Therefore no substantial loss would occur to the respondent in that regard. That there was a miscarriage of justice occasioned by the Assistant Registrar's decision because it is not supported by evidence on record.

Finally on whether ends of justice require that the said order be vacated, learned counsel for the appellants answered it in the affirmative.

In his written submissions in reply, Mr. Kituma Magala for the respondents submitted that when the learned Assistant Registrar acted, she did so as a civil court because she is empowered to handle uncontested cases, formal and interlocutory matters and execution under O.50 rr1, 2, 3 and CPR and O.50 r.6 CPR. That Misc. app. 250/09 was an interlocutory matter. That the authority referred to by learned counsel for the appellant was decided in 1932 but recent cases have decided otherwise such as ***Civil appeal 8/2004 Attorney General and Uganda Land Commission And James Mark Kamoga and James Kamala*** which

decided that a registrar can entertain interlocutory matters. That this matter was interlocutory because the respondent filed a notice of appeal which gave the High Court powers to entertain an application for stay of execution before a judge and a registrar to entertain an application for an interim stay pending the disposal of the main application.

Mr. Kituuma Magala further submitted that the jurisdiction of the High Court stems from S.98 CPA. The purpose of the application for an interim order of stay was to protect the main application which is pending. That where a Notice of Appeal or an application or indeed an appeal is pending before an appellate court it is right and proper that an interim order for stay of execution either in the High Court or in any other court be granted in the interest of justice and prevent the proceedings which are pending being rendered nugatory. That the registrar had jurisdiction to issue an interim order ***HORIZON COACHES LIMITED VS PAN AFRICA INSURANCE LIMITED CIVIL APPLN. 20/2002 (SC***).

That the order of the Assistant Registrar was legal and valid and it did not cause any miscarriage of justice but was intended to preserve the status quo.

I have considered this application as a whole. I have taken into account the respective submissions by learned counsel for the parties. I have related the same to the law applicable. In a recent case before this court i.e. 1. Busonya Jamada 2. Wanyenya Shamim 3. Magoola Afusa vs. David Giruli Misc. application 135/2009 the issues similar to those raised in the instant application came up for decision by this court. One of the main issues of contention like in the instant case is whether a Registrar has powers to grant an interim stay of execution of a final decree by a

judge. I held that the Registrar has powers to issue interim orders for stay of execution of a final decree by a judge.

Powers of a Registrar are enacted under O.50 CPR. According to O.42 r.89 CPR all formal steps preliminary to the trial, and all interlocutory applications may be made and taken before the Registrar. Both applications for injunctions and stay of execution are interlocutory in nature. Under O.L r.4 CPR, formal orders for attachment and sale of property and for issue of notices to show cause or applications for arrest and imprisonment in execution of a decree of the High Court may be made by a Registrar. If a registrar has power to execution, then he should have power to temporarily stay the said orders. While doing all this, a registrar sits as a civil court of the High Court.

Learned counsel for the appellant submitted that according to him the decision in ***Busonya Jamada & Others v. Giruli*** (supra) was reached *per incurium*. He is more persuaded by the 1932 decision in ***Dhanji v. Bhagwanji Sunderji & Co[1932] 5 ULR 9*** which held that interlocutory applications referred to in O.50 r.3 CPR are those preliminary to the hearing of a case and not when a decree has been passed by a judge. But this decision of the last century has been overtaken by more recent decisions including those of our Supreme Court. This is understandable because circumstances under which the people of 1932 operated have tremendously changed with time. The situation of 1932 can no longer be appropriately compared to today's situation where society appears to do and perceive things differently. It appears people today behave differently from those of 1932. Today a status quo can easily be desecrated.

As rightly submitted by learned counsel for the respondent the more recent case of ***MUGENYI & CO. ADVOCATES V. NATIONAL INSURANCE CORPORATION CA 13 OF 1984*** supports the fact that a registrar can order an interim stay to prevent rendering a pending appeal nugatory.

In the said case, lead judgment by the President of the Court WAMBUZI, P (as he was) it was held inter alia that:

> "*I think it is well established that the High Court has inherent jurisdiction to stay any of its orders*."

The court went further to hold that

> "*Every court has an inherent jurisdiction to stay its own order and the jurisdiction of the High Court to stay its own order does not depend solely (on the then) OXLI,."*

The High Court has jurisdiction to hear an application for stay of execution pending appeal. The jurisdiction stems from S.101 (now S.98 CPA) which preserves the inherent power of the court.

According to ***LAWRENCE MUSIITWA KYAZZE AND EUNICE BUSINGYE CIVIL APPLN. 18 of 1990 S.C.,*** an application for a stay should be made informally to the judge who decided the case when judgment is delivered. But as was held in ***Busonya Jamada & Ors*** supra what if a judge is not readily available to hear the application. In my view it would be just and equitable that the matter is

handled by the registrar as a civil court so that an interim order of stay is given to prevent destruction of the status quo before the hearing of the application by the judge or the appeal. An interim order is equitable remedy given for the ends of justice. The supreme court of Uganda was of the same view earlier on.

In the case of ***HORIZON COACHES LTD V. PAN AFRICA INSURANCE LTD CIVIL APPLN. 20 OF 2002 (SC)*** KANYEIHAMBA JSC (then) held inter alia that,

> "*where a Notice of Appeal, or an application or indeed an appeal is pending before the Supreme court, it is right and proper that an interim order for stay of execution either in the High Court or in any other court be granted in the interest of justice and to prevent the proceedings and any order therefrom of this court being rendered nugatory*."

In my view, this decision can apply *mutatis mutandis* to the Court of Appeal.

In my considered view therefore given the above clearly position of the law today, the learned assistant Registrar had jurisdiction to make an interim order of stay of execution. She did not make an order of stay of execution as stated by learned counsel for the appellant. It follows that the order of the learned Registrar was not illegal, null and void *ab initio*. The appellant is not entitled to have the orders of the registrar set aside *ex debito justitiae.*

Regarding whether the registrar's order occasioned a miscarriage of justice because the respondent did not deposit security for the due performance of the decree, learned counsel for the respondent did not comment on this.

According to learned counsel for the appellant, a miscarriage of justice was occasioned because the registrar did not address the failure by the respondent herein to fulfill the requirement of the law under O.43 r.4 (3) CPR. While sitting as a civil court considering a grant of an interim order of stay of execution, the registrar must judiciously consider whether the applicant satisfies the conditions laid down under O.43 r.4 (3) that

a) Substantial loss may result to the party applying for stay of execution unless the order is made
b) The applicant has been made without unreasonable delay.
c) Security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

These are conditions precedent to the grant of stay of execution or interim stay of execution. In my view however, the registrar's order not being a final order, consideration of the registrar of these conditions should be *prima facie* only. He/she needs not do a detailed probe lest he/she oversteps his/her jurisdiction. After reading the ruling of the registrar, I am convinced that she considered O.43 r.4 (3) a, and b. She did not consider c appropriately for no mention was made of security for the due performance of the decree as may ultimately be binding on the respondent.

I however note that the respondent herein in his affidavit in support did not provide security as required. Although Mr. Dagira says the respondent deponed that he was prepared to furnish security for the due performance in the interim application, I have not seen that undertaking. He only mentioned it in the main application.

Since this was an interim application, and the type or mode of security is not specified in the law, I am of the view that an undertaking to furnish security in the main application can suffice since ultimately it is the Judge to consider what would amount to sufficient security.

Consequently, I will order that this appeal be and is hereby dismissed with costs.

Musota Stephen

JUDGE

19.5.2010

19.5.2010

Parties absent.

Mutembuli on brief for Dagira for appellants.

Wanale Interpreter.

Mutembuli: I am ready to receive the judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE