THE REPUBLIC OF UGANDA

IN THE HIGH COURT UGANDA AT KABALE

Miscellaneous Application NO.0068 OF 2020

(Arising from Miscellaneous Application No. 107 of 2019)

(Arising from Miscellaneous Application No. 0075 of 2019)

(Arising from Civil Suit No. 0024 of 2018)

KABALE MUNICIPAL COUNCIL==========APPLICANT

VERSUS

KABALE CENTRAR MARKET TRADERS ASSOCIATION LTD==========RESPONDENT

BEFORE HON. JUSTICE SAMUEL EMOKOR

RULING

The Applicant brings the instant application by Notice of Motion **under section 59 and Section 34** of the Civil Procedure Act, **Order 22 Rule 23 (1) of Civil Procedure** Rules seeking orders that the Execution of Orders of this Court in **HCMA No. 0107 of 2019** be stayed until the appeal against the Orders of this Court vide **Miscellaneous Cause No. 0170 of 2019** is determined by the Court of Appeal and that provision be made for costs.

The grounds upon which this application is premised is that the Applicant is aggrieved with the decision of this honourable Court in **Miscellaneous Cause No. 0170 of 2019** and that the Applicant has commenced an appeal process to the Court of Appeal but that the Respondent has moved Court to execute the orders of this Court in **Miscellaneous Cause No. 0170 of 2019** and that if this application

is not granted the Applicant would suffer irreparably and the intended appeal would be rendered nugatory and in vain. That it is fair and just that this application is granted.

A one Ndimo Deo the Town Clerk of the Applicant Local Government Council deponed an affidavit in support of this Application and in brief avers that the Applicant is aggrieved with the decision of this honourable Court in **Miscellaneous Cause No. 0170 of 2019** and has commenced an appeal process to the Court of Appeal. That the Applicant has previously requested for a certified copy of the record of proceedings from this Court but todate this has not been done and now the Respondent has commenced execution proceedings.

That if this application is not granted the Applicant would suffer irreparably and the intended appeal would be rendered nugatory.

The Respondents chairperson one Simon Mashemererwa deponed an affidavit in reply to the application and in brief avers that the Respondent has never taken the requisite steps under the law to lodge an appeal that the Applicant claims have been commenced. That the instant application is brought in bad faith and is a wastage of Court's time since the Applicant's officials have always acted in contempt of Court.

Further that this application is a frantic attempt by the Appellant to deny the Respondent's members their legal right to compensation for the loss of their property inform of lock up shops at Kabale Central Market and subsequently to render the ruling and orders of this honourable Court in **Miscellaneous Application No. 0107 of 2019 nugatory**.

That it is the interest of Justice that this Court disregards the Applicants machinations which are tantamount to further contempt of Court's orders.

Representation:

When this application came up for hearing Mr Mwebaze Ndibarema Principal State Attorney represented the Applicant while Mr. Timothy Twikirize appeared for the Respondent.

Both Counsel opted to proceed by filing Written Submissions.

I do not find it necessary to reproduce verbatim the submissions of Counsel since the same is on Court record. I will in my decision make reference to the same as and when appropriate.

The Respondent's Counsel proposed 3 issues for determination in this application that I find to properly capture the issues arising and I will adopt the same. They are:

i. **Whether the Applicant can be heard when she is guilty of contempt of Court.**
ii. **Whether there are sufficient grounds to warrant the grant of this application.**
iii. **What remedies are available to the parties?**

Issue 1: Whether the Applicant can be heard when she is guilty of contempt of Court.

A brief of Counsels submissions:

It is the submission of the Respondent's Counsel that the Applicant acted with impunity in disobeying the orders of this Court in HCMA No. 107 of 2019 when she proceeded to demolish Kabale Central Market Premises to the detriment of the Respondents members and that resultantly this honourable Court condemned the Applicant to pay a fine of UgX 100,000,000/= and costs of the application to the Respondent. To date Counsel submits the above contempt has not been purged by the Applicant.

Counsel relies on the decision in **Wildlife Lodges Versus Country Council of Marok and another [2005] EA 344** where the Court held that:

"*A Court of law never acts in vain and as such issues touching on contempt of Court take precedence over any other case of invocation of the Jurisdiction of the Court"*

Counsel also cited the decision in **Comform Uganda Ltd versus Megha Industries (U) Ltd HCMA No. 1084 of 2014** where in the Court held thus:

"*This Court therefore finds that, the Applicants cannot have Courts discretion exercised in their favour before they have purged themselves of contempt…..to hold otherwise would be encouraging impunity by litigants who find Court orders un pleasant and decide to disobey them"*

It is therefore the submission of the Respondents Counsel that the Applicant cannot seek audience of this honourable Court without purging itself of the contempt.

The Applicants Counsel in rejoinder submits that is not necessary for one to purge himself/herself of the contempt and cites the decision **in Male H. Mabirizi Kiwanuka Versus Attoney General C.A.Civil App No. 549 of 2022** in which the Court held interalia that:

"…while the general rule is that a Court will not hear an Applicant for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set a side, on whatever ground or grounds, the *very order disobedience of which had put the person concerned in contempt"*

It is the contention of the Applicants Counsel that the present application was filed after the Applicant had filed a notice of appeal and as such denial of audience to the Applicant would be contrary to the provisions of **Article 28 of the Constitution.**

My decision:

I have carefully studied the authorities made reference to by the Counsel in this matter. It must be observed from these authorities that a Court has discretion on making a decision on whether the contemnor should purge themselves for contempt. It is therefore not a hard and fast rule that all contemnors must purge themselves of contempt before they are given audience by the Courts**.**

I am fortified in this position by the observation of the Court in Mabirizi Kiwanuka (Supra) quoting with approval the decision of denning **L.J in Hadkinson Versus Hadkinson [1952]285 and I quote:**

"...I am of the opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard but if his disobedience is such that so long as it continues, it impedes the course of Justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed"

I am persuaded that the ends of Justice will only be met in this matter when the Applicant is given audience to prosecute this application. The Applicant after all has commenced an appeal process against the order of this Court on contempt. I will return to this issue of the appeal process later in my ruling.

The verdict of this Court therefore on the first issue is resolved in the affirmative.

Issue 2: Whether there are sufficient grounds to warrant the grant of this application.

It is the submission of the Applicants Counsel that the Applicant is aggrieved with the decision of this honourable Court in **HCMA No.170 of 2019** and that the Applicant has commenced an appeal process in the Court of Appeal but that the Respondent has moved to execute the orders of this honourable Court in **HCMA No. 170 of 2019** and that if the instant application is not granted the Applicant will suffer irreparable damages and the intended appeal would be rendered nugatory.

To buttress his case the Applicants Counsels relied on the decisions in **Administrator General Thru the lawful Attorney Kyomuhendo Versus NSSF SCCA No. 0002 of 2009** in which the Court held that it has discretion to order a

stay of execution where a notice of appeal has been lodged in accordance with its rules.

Counsel also relied on the decision **in Kyambogo University Versus Professor Isaiah .H Omolo Ndiege CA CIV.App No. 341 of 2013** in which the Court citing the decision of the supreme Court in **Dr. Ahmed Muhammed Kisuule versus Greenland Bank SC Misc. App. No. 70 of 2010** had this to say:

"*For an application in this Court for stay of execution to succeed the Applicant must first show subject to other facts in a given case that he/she had lodged a notice of appeal in accordance with Rule 72 of Rules of this Court. The other facts which lodgment of the notice is subject vary from case to case but include the fact that the Appellant will suffer irreparable loss if a stay is not granted, that the Appellants appeal has a high likelihood of success"*

The Applicant therefore invites this Court to find that it has demonstrated that it has sufficient grounds for grant of this application.

The Respondents Counsel in his written submissions in reply contends that the instant application is only intended to frustrate the Respondent from accessing the fruits of their Judgment as the Applicant has never taken the requisite steps under the law to lodge an appeal. It is the argument of Counsel that the notice of appeal which the Applicant lodged is defective in that it does not comply with the prescribed format of **Rule 76 of the Judicature (Court of Appeal Rules) Directions** which provides:

"Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision; and where it is intended to appeal against a

part only of the decision it shall specify the part complained of, state the address for the service of the Appellant and state the names and addresses of all persons intended to be served with copies of the notice"

It is the contention of Counsel that the Notice of Appeal which the Applicant filed does not indicate the parts of the decision against which her intended appeal is premised.

To buttress his point Counsel relys on the decision in **Patrick Kaumba Witshire Versus Ismail Dabule CA Civil App. No. 0003 of 2010** in which the court held that:

"...in summary there are three conditions that an application must satisfy to justify the grant of an interim order of stay of execution:

1. *"A competent Notice of Appeal.*
2. *A substantive application, and*
3. *A serious threat of execution*"

It is the submission of the Respondents Counsel that the Applicant has not met the above considerations.

My decision:

I have carefully perused the Notice of Appeal attached to this application and relied upon by the Applicant.

I have no difficulty in agreeing with the Respondents Counsel that the Applicants Notice of Appeal does not in full comply with the requirements of **Rule 76 of the Judicature (Court of Appeal Rules) Direction.**

The Notice of Appeal falls short of specifying which part of the decision the appeal is against. It is silent in this regard. This fact not withstanding it is not the duty of this Court to inquire into the competency of this Notice.

The Respondent is at liberty under **Rule 82 of the Judicature (Court of Appeal Rules)** to apply for the Notice of Appeal to be struck out.

As it stands therefore the Applicant has filed a Notice of Appeal against part of the decision of this Court in **Miscellaneous Cause No. 170 of 2019** and I find as such.

The Court in **Theodore Ssekikubo Versus Attoney General and 4 others Constitutional Application No. 0004 of 2014** held that the existence of a valid Notice of Appeal was adjudged to be an essential prerequisite to the grant of an interim order of stay of execution in addition to considerations as to whether there is a substantive application pending and whether there are serious threats of execution before hearing of the substantive application.

The Applicant in demonstrating that there is a threat of execution has attached to this application Misc.App. No. 107 of 2019 an application for execution of the decision in HC. Misc.Cause No. 170 of 2019 by the Respondent.

The mode of execution prayed for is attachment of the Applicants assets until payment in full.

I am sufficiently satisfied that the Applicant has demonstrated that there is a serious threat of execution by the Respondent.

The 2nd issue is therefore resolved in the affirmative.

Issue No. 3 Remedies:

The main purpose for granting an application for stay of execution is to ensure that the stausquo is preserved until Court finally determines the main cause and to ensure that if the intended appeal is successful, the same would not be rendered nugatory.

See also Lawrence Musiita Kyazze Versus Eunice Busingye SC Civ.App. No. 0018 of 1990.

In light of my findings above, the instant application is allowed with the following orders issuing:

i) An order of stay of execution is issued against the orders in Civil MA. No. 0170 of 2019 until the appeal against the orders of this Court vide Misc. Cause No. 107 of 2019 is heard and determined by the Court of Appeal.

ii) The costs of this Application shall abide the outcome of the Appeal.

It is so ordered.

Before me,

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Samuel Emokor

Judge

28/02/2023