The Hon. Mr. Justice J. W. Tsekooko

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION 438/95

ALCON INTERNATIONAL LTD. .... APPLICANT

- VERSUS -

KASIRYE, BYARUHANGA AND CO. ADVOCATES ..... RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE V.F. MUSOKE-KIBUUKA

RULING

The Applicant seeks an order of this court for the stay of the Execution of a taxation order made by the Deputy Registrar, on 11th December, 1995. The application is brought under section 101 of the Civil Procedure Act, Cap. 65 and Order 48 rule 1 of the Civil Procedure Rules.

The applicant, Alcon International Ltd., is a reputable Construction Company operating in Uganda. The respondent is a firm of advocates of this court. During the month of October, 1993, the applicant gave instructions to the respondent to render various legal services required towards enabling the applicant to secure a tender award for the erection and completion of the Social Security House at plot No. 1, Pilkington Road, Kampala. The total contractual sum for the erection of the Social Security House, which belongs to the Social Security Fund, was US $ 16,160,000/= (united states dollars sixteen million one hundred

and sixty thousand only).

On 5th October, 1995, Messrs Kasirye Byaruhanga and Co. Advocates lodged in this court a bill of costs totalling to Uganda shillings 537,883,500/= (shillings five hundred thirty seven million, eight hundred eighty three thousand and five hundred only) for taxation. In a Ruling delivered by the Deputy Registrar, His Worship D. Wangututsi, on 11th December, 1995, from the bill of costs of shs. 537,883,500/= a total of Uganda shillings 295,895,667/= was taxed off leaving a total of Uganda shillings 254,104,333/= as taxed and allowed. The taxation order was extracted and a Certificate of taxation was issued on 12th December,1995.

On 18th December, 1995, the applicant lodged a notice of intention to appeal against the taxation order. By this application, Alcon International seeks an order for the stay of the execution of the taxation order until the intended appeal is finally determined. He also prays for the costs of this application.

The application is supported by an Affidavit sworn by Mr. Kultar Hanspal, who states that he is the Managing Director of Alcon International Ltd. Mr. Hanspal complains about both learned counsel who appeared at the taxation proceedings for both parties. He avers that Mr. Byaruhanga who appeared for the respondents mispresented to the learned Deputy Registrar that the respondent firm lobbied for the award of the building contract

to Alcon International and prepared both building and co-financing contracts. He states that Mr. MacDosman K. Kabega, who appeared for Alcon International at the taxation hearing, acted contrary to instructions and the interests of Alcon International when he conceded to and admitted the alleged mispresentations by Mr. Byaruhanga. Mr. Hanspal avers that the taxation procedure was riddled with gross irregularity due to the fact that the learned Deputy Registrar acted upon the evidence of Mr. Byaruhanga which was not made on oath thereby occasioning gross injustice to Alcon International. Mr. Hanspal also avers that Alcon International has instructed M/S Kibedi and Co. Advocates to file an appeal against the taxation ruling and order and that Alcon's appeal has a high chances of success. Lastly, Mr. Hanspal avers that unless the execution of the taxation order is stayed Alcon stands to suffer substantial loss and the Company's reputation will be stifled and impaired.

In a supplementary affidavit in reply, Mr. MacDosman K. Kabega, on his part, flatly denies that he ever acted contrary to the instructions given to him by Alcon International while he represented the applicant during the taxation proceedings. Mr. Kabega also avers that the applicant had informed him that the respondents had participated in the negotiations leading to the award of the contract except that their fees were on the high side. He states that he acted in earnest and contested the taxation to the best of his ability and in accordance with the instructions given to him by the applicant.

The respondent firm also filed an affidavit in reply. It was sworn by Mr. William Byaruhanga who avers that he personally conducted the taxation proceedings before the learned Deputy Registrar of the High Court on 11th December, 1995, at which the applicant was represented by Mr. MacDosman Kabega. He further avers that the taxation of the Bill of costs was conducted by the learned Deputy Registrar in accordance with the law and established Principle and was guided by the Advocates (Remuneration And Taxation of Costs) Rules 1982. Mr. Byaruhanga also states that the Applicant is estopped from contesting challenging the actions of his own counsel who had fully instructions and duly guided the learned Deputy Registrar as to the amount of the instruction fees due to the respondent.

Mr. Byaruhanga submits that the intended appeal has no merit whatever and that there are no grounds to support the allegation of gross injustice made by Mr. Kultar Hanspal on behalf of the applicant. Mr. Byaruhanga submits further that the intended appeal is frivolous and vexatious with no likelihood of success and that the application is incompetent since the applicant has applied the wrong procedure and since no appeal has been filed in accordance with the law governing the taxation of costs.

I will deal with the issue of the competence of this application first.

The issue of the competence of this application has two aspects to it. The first aspect is whether the applicant has invoked the

right law in bringing this application, and what effect the finding has on the application. The second is whether there is an appeal from the order of taxation upon which the order for the execution can be based.

With regard to the first aspect of the issue of the competence of the application, the applicant has invoked section 101 of the civil Procedure Act and Order 48 rule 1. It is very well settled law that section 101 of the Civil Procedure Act, Cap. 65 can only be competently invoked where there is no other provision providing the procedure to be followed. In Mugenyi & Co. Advocates vs. National Insurance Corporation, it was held by the Court of Appeal for Uganda, and re_ affirmed by the Supreme Court in Francis Nansio Micah vs. Nuwa Walakira Civil application No.009 of 1990, that the High Court had inherent jurisdiction "Under section 101 of the Civil Procedure Act, to grant a stay of its own decree pending an appeal" to the Supreme Court since there is no provision in the Civil Procedure Rules to cover such a situation. That appears to have misled the applicant to believe that the same procedure was applicable in this case.

Since order 39 rule 4 specifically provides for the jurisdiction of the High Court to stay orders or decree pending appeal to the High Court, including, in my view orders such as the one in the instant application, I am of the strong view that the correct procedure would have been be to invoke order 39 rule 4. This is an appeal to the High Court itself and not from the High Court to the Supreme Court. It would therefore, not be

appropriate to invoke the inherent powers of the court under section 101 with regard to the instant application.

The relevant Procedure is specifically set out in order 39 rule 4 (5). That is that an application such as the instant one has to be by motion on notice. The applicant, in this application has proceeded by notice of motion but under order 48 rule (1) instead of under order 39 rule 4(5). The procedure provided for under both orders is by way of Notice of Motion. What would be the effect of invoking the wrong law in this case?

In Salume Namukasa v. Yosefu Bukya, (1966) E.A. 433 It was held by this Court that an application brought under a wrong procedure by way of chamber summons instead of by notice of motion as the Civil Procedure Rules required was fatally defective and the defect could not be cured by the discretionary powers of the court under section 101 of the civil Procedure Act. The application was dismissed.

However, the instant application is easily distinguishable from the one in Namukasa's case (supra) in that though the wrong law is cited here, the end result is the same the right procedure is in the end employed that is proceeding by notice of motion.

In addition, during the hearing of the application, learned counsel for the applicant, Mr.Kibedi, submitted that should this court find any defect in the procedure followed in filing this

application, then the court should find that the defect is curable by the Provisions of paragraph (e) of clause (2) of Article 126 of the Constitution of the Republic of Uganda, 1995. Which directs courts in this country to administer substantive justice without undue regard to technicalities.

I have considered this submission and I have no difficulty in coming to the inclusion that neither the invocation of section 101 of the Civil Procedure Act, Cap. 65, which in my view should not have been invoked at all, nor the omission to cite order 39 rule 4 (2), and (5) in this application, do in any way, prejudice or occasion any injustice to the respondent. The procedure adopted does not constitute a serious departure from the substantive procedural requirements by the Civil Procedure Rules since the application is brought by way of Notice of motion as it would have been the case if the applicant had proceeded under order 39 rule 4 (5) which is the correct procedure. The procedural defects mention above can, in my humble opinion be cured by the invocation of Article 126 (2) (e) of the Constitution.

In case I am wrong, on the proper application of the provisions of Article 126 (2) (e) of the Constitution, since the Constitutional Court (the Court of Appeal) has neither been constituted nor had occasion to set the proper perimeters for the operation, of Article 126 (2) (e) of the constitution, then I will amply also rely on the pronouncement in Iron and Steal Ware Ltd. vs. Matyr & Co. Ltd. (1956) EACA to the effect that the

rules of procedure, being the handmaids of justice, should not, at the same time, be used to defeat its ends. There is sufficient material in the instant application upon which the court can exercise its discretion. This court can ignore the procedural defects of this application and proceed to consider it on its merits.

On the question of whether there is an appeal or not. I have no difficulty in finding that the application is competent on that account even though, at the time of its filing, no memorandum of appeal had been lodged in this court. By the time of filing the application, only a notice of appeal was existence, having been filed with this court on 21st December, 1995. I find ample assistance, in reaching this conclusion, from the decision in Ujaga Singh vs. Runda Coffe Estates Ltd. (1966) E.A. 263 in which the court of appeal for East Africa, while interpreting the word 'appeal' in its own rules, for purposes similar to the instant application, stated that the word appeal in rule 53, of the East African Court of Appeal rules, was used "to describe a procedure started by filing a notice of appeal". By analogy the word "appeal" appearing in subsection (1) of section 61 of the Advocate's Act, 1970, could, for the purposes of this application, be interpreted in similar terms. It would appear, that once a notice of intention to appeal is filed, then the procedure of appeal is put in place.

In Cannie Kabanda vs. Kananula Melvin Consultanting Engineering. Civil suit No. 884 of 1990 (Unreported), a similar application

was dismissed by this court, because there was neither appeal nor notice of appeal to justify the granting of the order for stay of execution. In the instant application, notice of Appeal was lodged in the High Court on 21st December, 1995, well within the 30 days allowed by section 61 of the Advocates Act for the lodging of an appeal of the kind.

To that extent, therefore, I agree with learned counsel for the applicant, Mr.Kibedi, that the application is competent and that it can be regarded as being properly before this court.

The second matter I shall consider is whether sufficient cause has been shown by the applicant to justify his prayer for an order of stay of execution.

At the hearing of the application. Mr.Kasirye submitted that the order sought in this application should not be granted because in order for an order for stay of execution to be granted the applicant must show both sufficient cause and also that special circumstances warranting the granting of the order exist. He cited the case of Baker vs. Avelier 14 Q.B. 769 to support his submission. In reply, Mr. Kibedi submitted that the fact of an impending appeal would, itself, constitute sufficient cause for the purposes of granting
the order for stay of execution.

The principle of sufficient cause is embedded in order 39 rule 4. For ease of reference, I shall set out below in full, the

relevant parts of Order 39 rule 4:

O.39 "4 (1) An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from * the decree; but the High Court may for sufficient * cause order stay of execution of such decree.

(2) where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing there from, the court which * passed the decree may, on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied.

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant

*Emphasis added

for the due performance of such decree or order as may ultimately be binding upon him".....

From the provision of sub-rule (1) of rule 4 of order 39, it appears to be fairly clear that the fact of the existence of an appeal would not in itself constitute sufficient cause for an order to stay execution of an order or decree being appealed from. I find it difficult, therefore, to accept learned counsel's submission that the fact of preferring an appeal in itself, constitutes sufficient cause in this application. In my views, sufficient cause would have been shown if there was evidence to show that the taxing officer had improperly addressed himself to the law relating to the taxation of costs of advocates. There was no such evidence. (see KCC Vs.National Pharmacy Ltd. (1979) HCB. 215 and In Samali Democratic republic Vs. A.S. Treon Civil Application No. 11 of 1988, this court emphasised the principle that a stay of execution can on only be granted if it is satisfied that there is good cause to do so and there are special circumstances to justify such course.

The applicant mentioned that during the taxation proceeding, the taxing officer had relied on evidence by Mr. Kasirye not given on oath. I find this most unconvincing. Mr. Kasirye attended the taxation proceedings as counsel and not as a witness. I do not think that the question of his taking an oath at those proceedings could have ever arisen. Mr. Kultar Hanspal, in his affidavit avers that the sum awarded is colossal and would stifle the operation of the company. This averment has not been sufficiently substantiated to show that the fees taxed did not

merely constitute a large sum but were also undue or illegal.

Mr. Hanspal's averments that there existed a mispresentation by learned counsel for the respondent and also that learned counsel who represented the applicant at the taxation proceedings acted outside the instructions of the applicant also do not, in my view, prove that either sufficient cause or special circumstances exist to warrant the granting of the order being sought. Both averments have been adequately answered in my view. In any case, if his own counsel acted improperly, other appropriate legal evenness exists through which the applicant can obtain appropriate redress.

I am not satisfied that if this application is not granted substantial loss may result to the applicant in terms of paragraph (a) of sub-rule (3) of rule 4 of order 39. In my opinion the fact of the costs constituting a large sum of money does not, in itself, constitute loss to the applicant. The costs have got to be examined in respect of the services rendered and the rules governing the taxation of the Advocates fees. In any case. If the order is executed and the applicant becomes successful on appeal, there is nothing which would prevent the applicant from recovering any part of the fees which may have been improperly paid by him to the respondent. In those circumstances, I do not think that any possible substantial loss has been proved.

I therefore, find that neither sufficient cause has been shown

nor do special circumstances exist, to warrant the granting of the order of stay of execution sought in this application.

The application is, therefore, dismissed. The cost for this application, are awarded to the respondent.

V.F. MUSOKE-KIBUUKA

AG. JUDGE.

1/3/96

RULING: Read out in the presence of both Counsel.