THE REPUBLIC OF UGANDA

IN THIS SUPREME COURT OF UGANDA AT MENGO

(CORAM: MANYINDO, D.C.J., PLATT, SEATON, J.S.C.)

CIVIL APPLICTION N0. 8/1991

BETWEEN

MATENDEGYERE & ORS:: APPLICANTS

Y. KASIKURA & .ORS ::::::::::::::::::::::::::::::::: : : : : : :::::::::: : : : RESPONDENT

(Application for a stay of execution of Judgment and Decree pending hearing of Civil Appeal No. 109 of 1978)

UINGBY SEAT0N, J.S.C.

The respondent brought a suit in Grade II Magistrate's Court against the applicants. It concerned land. The Respondents lost the suit. They appealed to the Chief Magistrate's Court. They again lost. Then they appealed to the High Court. There they achieved success on 8th March, 1988.

The applicants (original defendants) filed a Notice of Motion in Court on 27th June, 1991. They prayed for an Order that execution of the Decree in the suit be stayed. Rule 5(2) (b) of our Rules of Court empowers this Court to order a say of execution in any civil proceedings, where a Notice of appeal had been lodged in accordance with Rule 74.

Eriasafu Rwakaize is one of the applicants. He has fled an affidavit in support of the application. He deponed that they have lodged an appeal against the whole decision of the High Court; that the respondent's threatened to evict them from the suit land.

Rwakaize further deponed that the applicants have about 1,500 head of cattle on the land as well as crops and homes; that they would have nowhere to go if evicted before the appeal is heard; and that he has been advised the appeal stands a very good chance of success as inter alia the decision is based on wrong principles of law.

Protazio Sebutazi Ayigihugu is Advocate for the Applicants. He has submitted another supporting affidavit. He deponed that on 21st March 1991 he filed a Notice of Appeal in this Court; that on 22nd March 1988 he requested from the High Court registry a copy of proceedings and judgments; that up to date the proceedings are ready.

Ayigihugu further deponed that on 22nd March, 1988 he filed an application in the High Court for stay of execution; that the application was rejected on 21st May, 1991; that the learned Jude held, inter alia, that the, proper court to stay execution was the Court where the appeal is to be heard; and that eviction of the appellants from the suit land would defeat the purpose of the appeal.

At the hearing of the application, Nkurunziza counsel for the respondents raised an objection as jurisdiction. He submitted that the appeal that is intended to be brought, being a third appeal, cannot be entertained by this Court. He pointed out that the ordinary jurisdiction of this Court is under S.74 (1) of the Civil Procedure Act, and No.1 of 1928 as amended (Cap. 65) (hereinafter referred to as "The Act"). The relevant part of the section reads thus:-

> "74(1) Save where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on, any of the following grounds, …" (underlining added)

On first reading of S. 74, it would appear that this Court has jurisdiction to near every appeal from a decree of the High Court sitting in its appellant jurisdiction. However learned Counsel for the respondent referred us to Sanga v. Baya (1973) E.A. 312. In that case the then Court of Appeal interpreted S. 72 of the Kenya Civil Procedure Act ("The Kenya Act"). That section is similar in wording to S. 74 of our Act.

Sanga's case had also originated in a Grade 11 Magistrate's Court. It went on appeal to the Chief Magistrates Court. Then it went on to the High Court. In Kenya Legislature had

amended the marginal note to S. 72. Previously it had stated: -

> "Second appeals".

After the amendment in Kenya, the marginal note to S. 72 read:-

> "Second appeal from the High Court".

It was held by the Court that there was no right of a third appeal under that section.

In delivering the judgment of the court of appeal, Spry V.P. explained as follows:- (at p. 31):

> "In the ordinary way we only look to marginal notes to explain a section where there is some ambiguity in the words of the section, and if the wording of a section is unambiguous we apply it without regard to the marginal note. The position here is, however, unusual because the Act was amended by the Statute Law (Miscellaneous amendments) ct 1969 which, inter alia, amended the marginal note to S. 7 while leaving the section unchanged. The note had previously merely read "Second Appeals". The importance of this is, as we see it, that since the legislature specifically applied itself to the marginal note, that note must be regarded as the latest expression of the Legislature's intention. On this basis it would seem that the section was intended to create a right of second appeal but not a right of third appeal."

I would agree with counsel for the respondent that the rules of interpretation as stated in Sanga's case (above-cited) are the ones which govern the construction of S.74 of the Act. Were the words of S. 74 on all forms with S. 72 of tile Kenya act, it would be highly persuasive as to the ruling we should give on the present objection.

I find however, with respect, that Sanga's case is distinguishable from the instant one. Whereas the legislature in Kenya, for whatever reasons, amended the mar4nal note to s.7, and only the note, our Legislature left S. 74 of the Act untouched. Our legislators are deemed to

omniscient in such matters. They must be taken to have been aware of the 1969 amendment to the 1969 Act as well as the 1973 decision in Sanga's case.

In my view**,** if it had been intended that this court's jurisdiction should be restricted to hearing only first and second arpea1s from the High Court, such intention would have been made clear by our Legislature in an appropriate manner. As it is, s. 74 appears to me to be unambiguous in its wording. One need not obscure its clarity by importing words or phrases inspired by the marginal note, as was done in Sanga's case.

For these reasons, I would overrule the objection with costs to the applicant.

DATED AT MENGO THIS 30TH DAY OF JUNE 1992.

Sgd: E.E. SEATON
Justice of the Supreme Court.

I certify that this is the true copy of the original record.
B.F.B.BABIGUMIRA
REGISTRAR SUPREME COURT.