THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA, JJ.SC

CIVIL APPLICATION NO. 6 OF 2002

BETWEEN

NATIONAL HOUSING & CONSTRUCTION CORPORATION APPLICANT

AND

1. KAMPALA DISTRICT LAND BOARD)
2. CHEMICAL DISTRIBUTORS LTD.) ---------- RESPONDENTS

[Application for stay of Execution, An Injunction and or stay of Proceedings arising from Ruling of Court of Appeal at Kampala (Kato, Twinomujuni and Kitumba JJ..A) dated 9th January 2002 - Civil Application No.87 of 2001]

RULING OF THE COURT: National Housing and Construction Corporation (NHCC), the applicant, instituted an application by notice of motion under ***Rules 1(3), 5(2)(b), 40 and 41*** of the Rules of this Court against Kampala District Land Board, the first respondent, and Chemical Distributors Ltd., the second respondent. By the application, the applicant seeks orders for stay of execution, an injunction and a stay of proceedings to issue against the two respondents, in effect, to restrain them, from disposing of or developing a piece of land described as Plot 4 Luthuli Second Close, Bugolobi, registered in Land Registry under LRV 2860 Folio 20 (hereinafter referred to as "the suit land"). The application also seeks for an order to prevent taxation or recovery of costs awarded to the Respondents first by the High Court in HCCS NO.428 of 2001 and later by the Court of Appeal in Court of Appeal Civil Application No.87 of 2001.

The notice of motion contains thirteen grounds. They summarise the contents of two affidavits sworn on 11/2/2002 in support of the motion. The first affidavit was sworn by Aloysius Gounga Lubowa, the then Technical Manager of the Applicant. The second was sworn by Mr. Peter K. Musoke, the Corporation Secretary. Mr. Silver Byaruhanga, a director of the second respondent and A. Kabuye, Secretary to the first respondent swore an affidavit each, respectively on 12/4/2002 and 15/4/2002 in reply.

It is useful to give the background from which the application arose. The applicant is a construction parastatal Corporation. It has a lease over an estate of land in Bugolobi, a suburb of Kampala, known as Bugolobi flats. Apparently in the middle of the estate is the suit land formerly known as Plot M.597 to which residents of the flats have or had access for recreation purposes. In 1999, however, the first respondent leased to the 2nd Respondent the said suit land which was thereupon registered in the Land Registry under LRV.2860 Folio 20, as Plot 4 Luthuli Second Close, Bugolobi. Because the applicant claimed that the said lease was fraudulent, it instituted a suit in the High Court against the two respondents seeking an order to have the lease cancelled. The suit was dismissed with costs. The applicant filed a notice of appeal intending to appeal to the Court of Appeal against the decision of the High Court. Meantime the applicant unsuccessfully applied for stay of execution first in the High Court and later in the Court of Appeal. Being dissatisfied with the decision of the Court of Appeal dismissing the application for stay of execution, the applicant gave notice of appeal intending to appeal to this Court against that dismissal. It was thereafter that the applicant filed the application in this Court applying for orders to stay execution, an injunction and stay of proceedings. In April last year when this application came up in this Court for hearing, the two respondents

unsuccessfully objected to the competence of the application on grounds, inter alia, that the intended appeal is not one authorised by law and that the applicant had no right of appeal.

The thirteen grounds set out in the notice of motion to support the application, can be summarised as under:

(1) The suit land has been occupied by the applicant since 1969 when it acquired 99 year lease to its Bugolobi estates.

(2) The suit land provides amenities, such as estate workers' toilet and recreation grounds, for tenants of the applicant.

(3) The respondent acquired the suit land through fraud and as a consequence the applicant instituted a court action to recover the suit land.

(4) After the applicant lost the suit in the High Court, it lodged notice of appeal to the Court of Appeal and unsuccessfully sought stay of execution in both Courts.

(5) The applicant has lodged a notice of appeal to this court against the order of the court below refusing stay of execution, injunction and stay of proceedings.

(6) The applicant fears that the 2nd respondent will dispose of the suit land unless stay of execution is granted and such disposal will lead to substantial loss and irreparable damage to the applicant, incapable of monetary compensation

(7) There is a probability of success of the appeal to the Court of Appeal and to this court.

The respondents have filed their affidavits in reply. To summarise, the respondents jointly oppose the application on these grounds: -

1. That the suit land does not belong to applicant as the applicant has not shown under what tenure it owns the suit land.

2. The applicant has no probability of succeeding in any of the appeals to the Court of Appeal or to this Court.

3. The 2nd respondent is the lawfully registered proprietor having been granted by the 1st respondent a five year lease from 1/6/1999.

4. The applicant's fears about execution and disposal of the suit land are baseless as there is no application for execution nor is there pending disposal.

5. Even if execution is effected, the applicant will not suffer irreparable damage nor substantial loss incapable of monetary compensation as stated, or at all, especially since the applicant has subdivided its own estate pending its disposal according to the Condominium Properties Act 2001. Further the subdivision does not include the suit land. If the planned sale by the applicant is effected, the applicant will not have and /or retain any interest in its present estate and so will lose nothing.

6. The principle of the balance of convenience favours the second respondent rather than the applicant.

7. There is no need to delay taxation of costs. Further even if the respondents recovered the costs, they, especially the first respondent, has the means to repay those costs.

8. Therefore there is no basis for the grant of stay of execution or injunction or stay of proceedings.

Counsel for both sides filed written arguments. The applicant's arguments were filed by Messrs Ssawa, Mutaawe & Co., Advocates, while those for the respondents were filed jointly by three firms, namely, Sendege, Senyondo & Co, Advocates; Ojambo, Wejuli -Wabwire & Co, Advocates; and Muhimbura & Co, Advocates.

Because the issue of ownership is the foundation of the appeal now pending in the Court of Appeal, we cannot decide on the ownership of the suit land. Besides the materials before us which are contained in the opposing respective affidavits are insufficient to enable us to come to definite conclusions.

This application is a paradox of sorts. As we said earlier, the intended appeal is against the decision of the Court of Appeal refusing to grant precisely the same orders as those now sought in this application. On the face of it, a decision made in this application, one way or the other, would in effect dispose of the intended appeal. Because the court below refused to grant stay of execution, injunction or stay of proceedings, the nature of pleadings in this application are such that the discussion of the complaints in this application is in effect a review of the decision of that court; in reality it is a form of appeal against the refusal to grant that application. This is clear from grounds 5, 6 and 7 set out in the application and the complaints set out in paragraphs 9,10,11 and 14 of Mr. Musoke's affidavit. Grounds 5, 6 and 7 in the application state as follows: -

"5. The applicant filed Civil Application No. 87 of 2001, an application for stay of execution or an injunction to restrain the respondents from, among others, transferring the land pending the finalisation of the applicant's intended appeal to the Court of Appeal against the High Court decision.

6. On the 9th day of January, 2002, the Court of Appeal dismissed the said application with costs to the two respondents on the grounds that there was no danger of property being disposed of as there was a caveat, the 2nd respondent had a five year lease requiring it to develop the property, and that the applicant had not shown that it would incur substantial and irreparable loss if the property was alienated or disposed of before the appeal.

7. The applicant has filed a Notice of Appeal in the Supreme Court against the said dismissal of its application and the order for costs."

Although ground 6 summarises the gist of the decision of the Court of Appeal, the three grounds (5, 6 and 7) are based on the contents of paragraphs 10,11, 12 and 14 of the supporting affidavit sworn by Peter Musoke.

Ground 14, may be given as an example; it reads as follows: -

> " ***14 That I verily believe that the learned Justices of Appeal when dismissing Civil Application No.87 of 2001 erred: -***

(i) In holding that the dismissal of the suit did not have an automatic effect of removing the caveat and yet there was evidence in the supplementary affidavit of Mr. Robert Saawa sworn in support of that application, and Mr. Mutaawe for the applicant clearly informed court, that the Registrar of Titles had already threatened to remove caveat and was only prevented from doing so when the applicant obtained an Interim Order on the basis of the said suit.

(ii) In basing their decision partly on the ground that the 2nd respondent could not transfer the suit land because it has to fulfil a development covenant before being able to transfer the said land;

(iii) In holding that the applicant would not suffer any irreparable damage if the suit land was sold, alienated or otherwise disposed of, and that the applicant had not made any attempt to show that any such irreparable loss would occur and yet in paragraphs 7 and 8 of my affidavit dated the 4th day of December, 2001, which was sworn in support of that application, and which was re-iterated on page 2 of the applicants written submissions filed in court on 7thh day of December, 2001, I

clearly pointed out that if the respondents were not restrained, the 2nd respondent would dispose of the suit land before the appeal was finalised and that in case the applicant's intended appeal is successful, there would be no chance of getting the land back".

The record before us contains only a copy of the ruling of the Court of Appeal and the Interim order of the High Court dated 8/6/2001. We do not have the full record of the proceedings in the Court of Appeal in respect of Civil Application No.87 of 2001 with which to compare what is stated in paragraph 14. There are however two affidavits sworn in opposition to the application.

The first sworn by Kabuye on behalf of the first respondent does not challenge what is stated in **Musoke's** affidavit, especially paragraph 14 quoted above.

The second affidavit, also sworn in reply by **Byaruhanqa** on behalf of the second respondent, does not directly refute the averments by **Musoke** in the said paragraph 14 of his affidavit. In it Mr. Musoke is claiming that the Justices of Appeal glossed over some material evidence, when the learned Justices decided Civil Application 87 of 2001. That as a result of the glossing over the learned Justices of Appeal made a wrong ruling confirming that the caveat cannot be removed; that the suit land cannot be alienated and that the applicant will not suffer substantial loss or irreparable damage. Since Musoke's evidence, in the form of an affidavit, has not been contradicted, his assertions can be accepted that;

(a) There was a threat by the Registrar of Titles to remove the caveat until the High Court issued Interim Injunction on 8/6/2001. This order is on the file.

(b) The suit land is capable of alienation.

The principles governing granting of stay of execution are not in dispute. In terms of para (b) of subrule (2) of Rule 5 of the Rules of the Court: -

"***(2)----------the court may -***

> ***(b) in civil proceedings, where a notice of appeal has been lodged in accordance with rule 71, order a stay of execution, an injunction, or a stay of proceedings as the court may consider just***"

From these provisions it is clear that this court is empowered to use its discretion to grant: -

(i) Stay of execution of a decree or order. Normally stay of execution is a relief granted to suspend the operation of a judgment or order of a court.

(ii) An injunction to restrain a party from doing something. Generally an injunction is a relief in the form of an order or decree by which a party to an action is required to do, or refrain from doing, a particular thing.

(iii) Stay of proceedings is usually a relief in the form of suspension of proceedings in an action, which may be temporary until something requisite or ordered is done; or permanently, where to proceed would be improper.

The subrule envisages that each relief can be granted in given circumstances.

In the matter before us, arguments have been made for or against each relief and it is to these arguments that we now turn. We start with prayer for reliefs of stay of execution and injunction.

Learned counsel for the applicant referred to the principles which govern stay of execution to be:

(a) To protect the right of appeal because, if the subject matter of appeal is disposed of, there is no likelihood of the appellant getting it back.

(b) Where a party is exercising its unrestricted right of appeal, the court ought to see that the appeal, if successful, is not rendered nugatory.

(c) Applicant will suffer substantial loss unless stay is granted.

In support, counsel cited some authorities including **Wilson Vs Church** (No.2) (1879) 12 Ch.D.454 and L.M. **Kyazze Vs E. Busingye.** Civil Application No.18 of 1990 (S.C.).

Counsel further argued that" ***stay of execution pending appeal can only be granted if there are special circumstances and good cause to justify such a course*****"** and relied on **F. Sembuya Vs AH Port Freight Service** (U) Ltd, Civil Application No.15 o 1998 (S.C). Counsel referred to the contents of the affidavit of Musoke which show that disposal of the suit land was previously prevented because of the caveat it lodged in the land registry, pointing out that after the High Court dismissed the suit, the caveat lapsed. Counsel argued that the Court of Appeal erred when it held in its ruling, the subject of the intended appeal that the dismissal of the suit did not lead to automatic lapse of the caveat. In their joint written arguments, counsel for the respondents opposed the application. They in turn relied on **Wilson Vs Church** (supra) and on **Somali Democratic Republic Vs Anoop S. Sunderlal Trean** Civil Application No.11 of 1988 (S.C) in which the tests for granting an injunction were stated as: -

> **"----------Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the Court in ordinary cases to make such orders for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be bonafide, or there are other sufficient exceptional circumstances."**

Learned counsel contended that the test set out in this passage is not present in the application before us. They also submitted that the applicant has not diligently exercised the alleged right of appeal by filing the intended appeal or explaining why it has not done so nor applied for extension of time. Counsel contended that if the application is granted it will effectively dispose of the intended appeal and that the application is an abuse of court process intended to delay justice.

It is well established that no two cases have the same facts and therefore each case must be decided on its own facts. Take the case of **Wilson Vs Church** (Supra) which is relied on by both sides. Numerous persons, including Wilson, contributed funds towards the construction of railway works. The funds were held by Trustees who included Col. Church, the respondent. The contributors were issued with bonds. The company was or became insolvent and so it was doubtful if bondholders would benefit even if the construction was carried on. Wilson instituted an action on behalf of himself and all other bondholders against Col. Church and others who were trustees for the bondholders, claiming for a declaration that a fund of a large amount in the hands of the trustees should be

returned to the bondholders and not applied in the construction of the works or the railway.

Court gave judgment for Wilson and ordered for the trust fund to be distributed among the bondholders and that the defendants, other than the trustees, should pay the costs of the suit, the plaintiff to have his costs in the first instance, paid out of the trust fund. The defendants proposed to appeal to the House of Lords against the judgment and meantime applied for stay of execution of the judgment except as to taxation and payment of costs. They also sought to stay execution for recovery of costs unless the solicitors entitled to receive those costs personally undertook to refund those costs in case the House of Lords reversed the judgment.

Counsel for the applicant (defendants) argued that as the applicant had a right of appeal, the practice of the court in such cases should be followed, which is to order stay of execution of judgment. That when the appeal is a matter of right, the court will always so deal with the subject matter of the appeal as not to render the appeal, if successful, nugatory. In this case the funds were in the power of the court and could not be distributed without court's permission. Most of the bondholders were abroad so if the funds were distributed, they would never be recovered. On the other hand the respondent (plaintiff) and other bondholders could not be injured by stay of execution, as the fund was secured and earning interest.

The respondent opposed the application for stay because the applicants were practically insolvent and the appeal was speculative because if it succeeded the applicants would get no real benefit from the money. At the end of the arguments the court granted the stay. In his lead judgment, **Cotton, L.J.,**

expressed the opinion quoted above which has now acquired fame by setting tests which should be applied in considering application for stay of execution. In the **Somali Democratic Republic** case (supra), at page 5, this Court adopted the same reasoning.

In our opinion there is an obvious distinction between **Wilson Vs Church** and the matter before us. The principal distinction is that in the former case, the right of appeal was obvious as it sprung from a decision on the merits of the case. In the case before us, the intended appeal is against an interlocutory decision by the Court of Appeal, and not from the appeal itself. The other distinction is that neither counsel produced the relevant English rules of practice under which **Wilson Vs Church** was decided. As pointed out earlier, the tests which this Court must consider in order to determine an application of this kind are spelt out in **Rule 5 (2) (b) of the Rules** of the Court. Of course it can be argued that the principle enunciated in **Wilson Vs Church** has been followed for so long that there must be sound reasons in order to depart from the principle.

As mentioned earlier, the essential arguments for and against the present application are in substance the same which were raised in the Court of Appeal. That court referred to it's rule 5 (2) (b) which reads: -

> ***....the Court may,***
>
> ***In any Civil Proceedings, where a notice of appeal has been lodged in accordance with rule 75 order stay of execution, an injunction or a stay of proceedings on such terms as the court may think just*****"**

The Court of Appeal then quoted a passage from its ruling in **National Enterprises Corporation Vs Mukisa Foods Ltd** - Miscellaneous

Application No. 7 of 1998 (unreported) where the Court set out the import of its Rule 5 (2) (b). The court then said: -

> "***The only Issue to be resolved is whether the applicant has established that it is likely to suffer substantial loss or irreparable damage***"

before it dismissed the application in respect of the first respondent on the ground that since it had leased the suit land to the second respondent, it no longer had power to dispose of the suit land. That court stated: "*Court can not grant an injunction to restrain one from doing something that he has no power to do any way*".

This opinion by the Court has not been raised by the 1st respondent in this Court. As regards the 2nd respondent, the Court of Appeal held that:

(a) The applicant failed to show that the suit property was likely to be disposed of in the "*near future by 2nd respondent or any one else*". That the likelihood of disposal is very remote.

(b) That the applicant had failed to show that if the property was disposed of, such "*disposal would result into substantial loss or irreparable damage*". Because of this holding the court refused to consider the applicant's generous offer to deposit adequate security.

The applicant has shown in its affidavits that the trial judge did not consider material evidence in support of its suit before the suit was dismissed. Rule 5 (2) (b) of the Rules of the Court of Appeal stipulates that:

> "***Where a notice of appeal has been lodged in accordance with rule 75***"

The Court of Appeal may stay execution, grant injunction or stay proceedings.

The important point is filing of the notice of appeal. The Court of Appeal did not consider this aspect of rule 5 (2) (b). This was a misdirection. In view of the fact that the claim by the applicant that material evidence was not considered by the trial court, in our view, the probability of success in the Court of Appeal was not ruled out. Further we think that it is an error to say that dismissal of the suit did not lapse the caveat lodged by the applicant. And since the applicant was prepared to deposit adequate security, it is just that the application should be granted on the following conditions.

(a) The applicant will pay the taxed costs of the respondents in this Court in respect of this application and in the Court of Appeal in respect of Civil Application no. 87 of 2001.

(b) The applicant must expeditiously institute the intended appeal in this Court, in any case within 45 days from the date hereof.

(c) The appeal in the Court of Appeal ought to be disposed of as soon as it is practical.

(d) Nothing should be done about the suit land until the pending appeals are disposed off or until further orders from this court.

Delivered at Mengo 6th day of November 2003.

B.J. ODOKI

CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N TSEKOOKO
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT