

IN THE REPUBLIC OF UGANDA
AT THE SUPREME COURT OF UGANDA AT KAMPALA
(CORAM: M.S.ARACH-AMOKO, JSC (SINGLE JUSTICE))
MISC. APPLICATION NO 13 OF 2015

BETWEEN

FRANCIS DRAKE LUBEGA:..... APPLICANT

AND

1. ATTORNEY GENERAL

2. THE COMMISSIONER LAND REGISTRATION:..... RESPONDENTS

3. HORIZON COACHES

(An application for an interim order of stay of execution arising from Misc. Application No.12 OF 2015 which arose from the decision of the Constitutional Court at Kampala (Kasule, Mwondha and Buteera, JJA/JCC) dated 29th April, 2015 in consolidated Misc. Applications Nos. 31 and 32 of 2011 which in turn arose from Constitutional Petition No. 37of 2011)

RULING:

Francis Drake Lubega, the applicant, instituted this application seeking for an interim order to stay the execution of the decision and orders of the Constitutional Court in Consolidated Misc. Application Nos. 31 and 32 delivered by the Justices of the Constitutional Court on the 29th day of April 2015, until the final determination of the substantive application for stay of execution. The applicant also prayed for an order that the costs of the application abide the outcome of the substantive application.

The application was brought by Notice of Motion under Rules 2(2), 6(2) (b), 42, 43(1), 50 and 51 of the Rules of this Court.

Grounds

The grounds on which the application is based are set out in the Notice of Motion itself thus:

1. On the 29th of April 2015, Justices of the Court of Appeal/Constitutional Court Remy Kasule, Faith Mwondha and Richard Buteera delivered a Ruling and Orders against Drake Lubega in Consolidated Misc. Application Nos. 31 &32 of 2011.
2. The applicant being dissatisfied with the above said decision filed a Notice of Appeal on the 29th day of April, 2015 and requested for a record of proceedings.
3. The Constitutional Court has not yet availed the applicant the said record of proceedings to enable him to file his appeal.
4. The applicant's intended appeal to the Supreme Court challenging the decisions and Orders of the Constitutional Court raises several constitutional and legal issues that warrant serious judicial consideration by the Supreme Court and the appeal has prima facie, a high chance of success.
5. The applicant has also filed a substantive application for stay of execution of the orders of the Constitutional Court and for a temporary injunction and this application has good chances of success.
6. That unless restrained by the Supreme Court the respondents will implement the orders of the Constitutional Court and this will irreparably occasion loss to the Applicant of his fundamental right to a fair hearing and render the substantive application and the intended appeal nugatory.
7. The balance of convenience in maintaining the status quo is in favour of the applicant.
8. This application was brought without delay.

9. It is just and fair that an interim order staying the execution of the Ruling and Orders of the Justices of the Constitutional Court is issued, pending the determination of the main application.

Affidavit in support

The application is supported by the affidavit of the applicant sworn on the 4th May, 2015 giving the reasons why he filed the application.

Affidavits in reply

The respondents opposed the application and relied on the affidavit in reply sworn by State Attorney Richard Adrole, on behalf of the 1st and 2nd respondents and an affirmation by Mr. Besiime Muhammad filed on behalf of the 3rd Respondent dated 11th May, 2015.

Affidavit in rejoinder

The applicant swore an affidavit in rejoinder to the one of Mr. Besiime Muhammad on the 13th May, 2015.

Background:

Briefly, the facts which led to this application as far as I can gather from the record may be summarized as follows:

For quite some time now, the two parties have been fighting over the ownership of property comprised in LRV 3958 Folio 10, Plot 50-52, Nakivubo Road, Buganda Bus Park, in Kampala. The dispute has generated numerous suits and applications in the High Court Civil, Land and Commercial Divisions, dating as far back as 2006. At some point, the Principal Judge stayed the suits so that they could be resolved through Mediation. To his credit, mediation took place. However, it was unsuccessful and even the mediation Report was quashed by the High Court. So, the suits are still pending in the High Court.

Meanwhile, the dispute reached H.E the President of Uganda. In a bid to find a final solution to the dispute, H.E the President in a letter dated 20th July 2011, directed the Ministry of Land, Housing and Urban Development to take steps to

rectify the anomaly that had given rise to the dispute. The President also advised the cancellation of certificates of title found to have been acquired wrongly.

It was upon receipt of that letter, that the applicant filed Constitutional Petition No. 37 of 2011 in the Constitutional Court, challenging the said directives and instruction on the grounds that they were unconstitutional. He also filed Misc. Applications Nos. 31 for a temporary injunction and 32 for an interim injunctive order.

On the 31st May, 2013, the two applications were consolidated by the Court (Kavuma, Nshimye and Kasule JA/JCC) and an interim order was issued to maintain the status quo on the suit land, pending disposal of the consolidated applications.

On the 29th April 2015, the Court (Kasule, Mwendha and Buteera JA/JCC) delivered the impugned Ruling and dismissed the application with costs to the 3rd Respondent and instead ordered inter alia, that:

- 1. An injunction be issued against the applicant ordering him to restore the peaceful status quo that existed immediately before the Constitutional Petition and the Consolidated applications were filed.***
- 2. The eviction of the 3rd Respondent on the 15th day of March, 2014 in contempt of the order of that Court of the 31st day of May, 2013 is quashed for being illegal.***

The applicant was aggrieved by the above Ruling and Orders of the Constitutional Court, and lodged a Notice of Appeal in the Constitutional Court on the 29th April, 2015 indicating that he intends to appeal to the Supreme Court against it. He also filed a substantive application for a stay of execution and the instant application for an interim stay of execution restraining the execution of the Orders of the Constitutional Court pending determination of the substantive application.

Representation

At the hearing of this application, Mr. Adam Kirumira represented the applicant. Senior State Attorney Atwine Geoffrey represented the 1st and 2nd respondents and Messrs Brian Othieno, Caleb Alaka, Okello Oryem and Samuel Muyizi Mulindwa

represented the 3rd Respondent. The applicant and Mr. Charles Muhangi, the Managing Director of the 3rd respondent were also present.

Arguments of counsel For the applicant:

Presenting the applicant's case, Mr. Kirumira read out the form of application, the order sought and the grounds on which the application is based. He then submitted that the conditions for the grant of the instant application are well settled. The purpose for granting an interim order of stay of execution is to help the parties to preserve the status quo and have the main issues between them determined by the full court as per the Rules of this Court. What the applicant needs to show in an application of this type is that:

- i) A Notice of Appeal has been lodged in accordance with Rule 72 of the Rules of this Court.
- ii) A substantive application for a stay of execution is pending before this court.
- iii) There is a serious threat of execution before the hearing of the substantive application.
- iv) The application for the interim stay of execution has been filed without undue delay.

In addition, counsel pointed out that Rule 2(2) of the Rules of the Court gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of justice and the ends of justice in the instant case is to preserve the applicant's right of appeal.

Relying on the affidavit in support of the application and in rejoinder, Counsel submitted that the applicant has satisfied the abovementioned criteria for the grant of the order sought in that:

- i) The applicant has lodged a Notice of Appeal on the 4th May, 2015 and has requested for the record of proceedings.
- ii) He has filed the substantive application for stay of execution vides Misc. Application No.12 of 2015 and it is pending before this Court.

- iii) The Ruling was delivered by their Lordships on the 29th April, 2015, and this application was filed on the 4th May, 2015. So, it was filed without undue delay.
- iv) The 3rd respondent has applied for partial execution of the orders of the Constitutional Court. The 3rd respondent has also filed a Warrant to give vacant possession, instructing court bailiffs Twesigye Richard and Kirunda Moses to evict the applicant from the premises according to Annexures X and Y to the affidavit in support. Contrary to the assertions by the 3rd respondent, therefore, there is clear evidence of an imminent threat of execution.

Counsel contended that unless the respondents are restrained by this Court, they will execute the said order and it will occasion irreparable loss to the applicant and render nugatory the applicant's fundamental right to a fair hearing. That the reason why the applicant has come to this Court is to maintain the status quo such that the applicant's right of appeal is preserved.

Based on the foregoing, counsel invited court to find that the applicant has satisfied the conditions for the grant of an interim order of stay of execution and grant the same as prayed. In support of his submissions, he cited a number of authorities from this Court including the cases of **Moses Masekenyu Ikagobya vs Isaya Kalya and 2 Others (Civil Application No. 09 of 2014)** and **Bitamisi Namudu vs Rwabuganda Godfrey, (Civil Application No. 11 of 2014)**, and **SINBA (K) Ltd and Others vs Uganda Broadcasting Corporation (Civil Application No 05 of 2014)**.

Counsel for the Respondents

The respondents opposed the application on three grounds:

- i) The application is incompetent
- ii) The applicant has no locus
- iii) The application lacks merit

Mr. Alaka argued the first ground. Learned counsel conceded that the considerations for the grant of interim orders has now been settled by this Court as indicated in the cases cited by Mr. Kirumira. However, he contended that this

application does not satisfy the conditions precedent for the grant of an interim order by this Court because, this is not an ordinary application in an ordinary civil matter. This is a constitutional application before this Court. The decision of the Constitutional Court against which the applicant intends to appeal does not relate to a decision on the interpretation of the provisions of the Constitution. As such, no appeal lies as of right against such a decision. He relied on the decision of this Court in **Hon. Theodore Ssekikubo and 3 Others vs The Attorney General and 4 Others Constitutional Application No.06 of 2013** at page 20, to support this proposition

Mr. Alaka submitted that in the premises, the Notice of Appeal which formed the basis for this application is also incompetent and so is the substantive application for stay of execution since there is no pending appeal.

Mr. Okello Oryem submitted that the applicant has no locus because he obtained an interim order in the Constitutional Court to maintain the status quo but went ahead to violate it and thereby acted contemptuously. He was found in contempt of court by the Constitutional Court. Such an applicant loses the right to be heard unless and until he has purged himself of the contempt. He cited several authorities on contempt including **Hadkinson v Hadkinson [1952] ALL ER 569**.

Mr. Othieno submitted that the application lacked merit because the documents attached to the affidavits do not show any imminent threat of execution since what is before court is an application which is yet to be granted. He added that even the warrant to give vacant possession is not yet signed and sealed. Thirdly, he argued that there is no averment in the applicant's affidavit that there is a pending substantive application. This is fatal according to the decision in **Kitende Appolonaries Kalibogha and Others v Mrs. Eleonora Wismer (Civil Appeal No.06 2010)**

Mr. Atwine argued that the applicant has not satisfied other conditions for the grant of an interim order, namely:

- i) That the substantive application and appeal are not frivolous and they have a high likelihood of success.
- ii) That the applicant is prepared to grant security for the due performance of the decree.

- iii) The applicant will suffer irreparable loss if the order is executed and there is no likelihood of getting back the property should the appeal succeed. He referred me to the Ruling of Kakuru JA in **Kyambogo University vs Prof. Isaiah Omolo Ndiege Civil Application No. 341 of 2013.**

In the end, the sum total of their prayers is dismissal of the application with costs to the respondents.

Rejoinder by applicant's Counsel

Mr. Kirumira made a brief rejoinder following the same order. In reply to Mr. Alaka, Mr. Kirumira distinguished the authority of **Hon. Ssekikuubo** arguing that the Court was determining the substantive application and not an application for interim stay of execution, in that application. Secondly, the court said in that case that the key word was “decision”. That once there is a decision, then one can appeal against it. There is also statutory law in Section 6 of the Judicature Act, which clearly overrides case law that statutory orders are appealable as of right to this Court. Therefore, the applicant is properly before the Court.

In reply to Mr. Okello-Oryem, Mr. Kirumira submitted that from the proposed Memorandum of Appeal in Annexure C to the applicant's affidavit in support and paragraphs 2, 3, and 4 thereof, the applicant intends to appeal to this Court to examine whether indeed the Constitutional Court was justified in holding him in contempt of court. If the court asks the applicant to first purge himself of contempt, he would be condemned unheard and yet he does not believe that he is in contempt of court.

In reply to Mr. Othieno, Counsel submitted that there is an averment in paragraphs 26 and 29 of the affidavit in support where the applicant averred that there is a substantive application for stay of execution which is pending before this court.

In reply to Mr. Atwine, Counsel submitted that the subsequent conditions alluded to are not for this application but for the substantive application. He also pointed out that the paragraph on page 26 of the said Ruling where their Lordships indicated that the eviction of the 3rd Respondent on the 15th March, 2014 was on the advice of the Attorney General and Police, and not the applicant. So, they are

estopped from denying that they did it by claiming that it was contemptuous. Otherwise, he reiterated his earlier prayers.

Consideration of the Arguments of Counsel

Counsel for both sides agreed that powers of this Court under Rule 2(2) are well settled as was re- stated by this Court in **Hon. Theodore Ssekikubo and Others vs Attorney General, Constitutional Application No. 04 of 2014**, that:

“Rule 2(2) of the Judicature Supreme Court Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of justice. One of the ends of justice is to preserve the right of appeal. In the cases of Yakobo Senkungu and Others vs Cresensio Mukasa, Civil Application No.05 of 2013 and Guiliano Garigio vs Claudio Casadio, Civil Application No. 03 of 2013; this Court stated that ‘the granting of interim orders is meant to help the parties preserve the status quo and then have the main issues between them determined by the full Court as per the Rules.’”

(See also: **Moses Masekenyu Ikagobya vs Isaya Kalya and 2 Others**, and **Bitamisi Namudu vs Rwabuganda Godfrey**, (supra).

The conditions listed above by Mr. Atwine are, with due respect, for the grant of substantive orders, not interim orders as Okello JSC stated in **Hwang Sung Industries Ltd vs Tajdin Hussein and 2 others, SCCA No. 19 of 2008**]. In that case, the applicant had also applied for an interim stay of execution. A similar argument had arisen and counsel had cited the **Editor In Chief of the New Vision Newspaper vs Jeremiah Ntabgoba Civil Application No. 63 of 2004(CA)**, Okello JSC, (as he then was), said:

“That case was a substantive application for stay of execution and the matter to be considered for grant of a substantive application for stay are not necessarily the same in considering application for an interim order for stay pending disposal of the substantive application”.

His Lordship then went on to set out the criteria for the grant of an interim order for stay of execution in the following clear words:

“For an application for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pe-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”

(Underlining is added for emphasis)

I have carefully studied the Notice of Motion, the affidavits and the annexures thereto. I have also considered all the arguments raised by counsel in their submissions. In my judgment, the only issue for consideration in this application is whether the applicant has satisfied the criteria for the grant of an interim order of stay of execution. Consequently, I make the following findings and conclusions:

1. Notice of Appeal-

A copy of the Notice of Appeal lodged in the Court of Appeal on the 30th April 2015, is Annexure A. The stamps thereon indicate that it was served on M/S Okello Oryem and Co. Advocates and M/S Alaka and Company Advocates on the 30th of April 2015. It bears the received stamp of the Supreme Court of the same date as well.

2. Substantive pending application.

The court records indicate that there is a substantative application for stay of execution pending before this Court, namely, **Misc. Application No. 12 of 2015**, out of which the instant application arose. They were filed on the same date, that is, the 4th May, 2015. Further, the applicant in paragraphs 26 and 29 of his affidavit in support deponed as follows:

“26.That the balance of convenience is in favour of maintaining the status quo till the application for a substantive stay of execution which is pending before this court is heard and disposed of.

27...

28...

29. That I swear this affidavit in support of the application for an interim order of stay of execution pending the determination of the main application for stay of execution. (underlining is added for emphasis)

The argument by Mr. Alaka and Mr. Othieno that the applicant has made no averment in his affidavit in respect of the pending substantive application is therefore, with respect, incorrect. Besides, I have since established the existence of the said application as a matter of fact.

3. The existence of a serious threat of execution

The case for the applicant is that there is a serious threat of execution of the ruling and orders of the Constitutional Court. He has deponed in paragraphs 9 and 10 of his affidavit in rejoinder thus:

“9. That the 3rd respondent has applied for partial execution of the order of the Constitutional Court (see attached copy of the application marked “x”).

10. That the 3rd respondent has also drafted a warrant to give vacant possession instructing Twesigye Richard and Kirunda Moses Court Bailiffs to evict me from the premises (see attached copy marked “Y”).

Annexure “X” was lodged by M/S Okello Oryem & Co. Advocates in the Court of Appeal on 5th May, 2015. It is an application for partial execution of the order of the Court of Appeal in Consolidated **Constitutional Applications Nos. 31 and 32 arising from Constitutional Petition No. 37 of 2011** between the two parties. The mode indicated therein is evicting the applicant from the disputed land and by putting thereon the respondent.

Annexure “Y” is a “WARRANT TO BAILIFFS TO GIVE VACANT POSESSION OF LAND IN PARTIAL EXECUTION OF THE COURT ORDER” addressed to the abovementioned bailiffs. It could be signed by the Registrar any time.

In my view, this is ample evidence of a serious and imminent threat of execution.

4. Delay.

The order of the Constitutional Court was issued on the 29th April, 2015. This application was lodged in this Court on the 5th May, 2015. The question of delay does not arise, in the circumstances.

Counsels for the respondents objected to the application on the grounds that:

- (i) The application is incompetent because the applicant has no right of appeal;
- (ii) The applicant has no locus to present this application; and
- (iii) The application is without merit because there is no evidence of a serious threat of execution.

I have ruled on (iii) above. As for (i) and (ii), I agree with counsel for the applicant that the issues raised cannot be determined at this stage because they are to be determined in the substantive application since they touch on the likelihood of success of the appeal. In **SINBA (K) LTD and Others vs UGANDA BROADCASTING CORPORATION, SC Civil Application No. 05 of 2014**, Okello Ag. JSC stated at pages 10 to 11 thus:

“Mr. Ochaya submitted that perusal of annexures A and B to the affidavit of Margaret Muhanga Mugisa in support of the application shows that the application from which the decision being appealed emanated, grants no automatic right of appeal. I understand that submission to be challenging the likelihood of success of the applicant’s intended appeal. In my opinion, this is a matter for consideration in determining the substantive application for a stay of execution. It is thus not necessary to pre-empt its consideration at this stage.”

Similarly, in **Attorney v Fuelex Uganda Ltd, (Constitutional Application No.04 of 2014)**, Kitumba Ag. JSC stated as follows:

“This is just an application for an interim order of stay. The matters raised by the respondent about contempt of court by the applicant’s failure to remove police immediately as the Constitutional Court directed will be better determined in the substantive application and in the appeal itself.”

More recently, in **Hon. Theodore Ssekikubo and Others vs Attorney General (Constitutional Application No. 04 of 2014)**, the applicants sought an interim stay pending determination of the substantive application. A number of legal

arguments including the right of appeal to this court were raised by counsels for the respondents. The Court declined to deal with the legal issues raised and stated at page 13 of the Ruling as follows:

“As for the rest of the legal arguments raised by Counsel, we think that they should be left for the substantive application and appeal.”

Needless to say, the Court granted the interim order until the determination of the substantive application **No. 06 of 2014**, between the same parties, which Mr. Alaka relied on in his submissions.

I hold the same view in respect of the points raised by counsels for the respondents.

In the result, I find that all the criteria for the grant of an application of this type have been met. Most importantly, in my view, the ends of justice requires that the status quo be preserved so that the pending substantive application for stay of execution between the parties can be heard and determined by the full Court in accordance with the Rules.

I accordingly allow this application and make the following orders:

- 1) An interim order staying the execution of the orders of the Constitutional Court in Consolidated Misc. Application Nos. 31 and 32 delivered on the 29th day of April 2015 is hereby issued, until the final determination of the substantive application for stay of execution or until further orders of this Court.
- 2) The costs of this application shall abide the outcome of the substantive application for stay of execution.
- 3) The Registrar is hereby directed to cause list Misc. Application No. 12 of 2013 at the next convenient session.

Dated at Kampala this....22nd....day ofMay.....2015

M.S.ARACH-AMOKO
JUSTICE OF THE SUPREME COURT