THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ARACH-AMOKO, JSC; Single Justice)

MISCELLANEOUS APPLICATION NO. 23 OF 2017

BETWEEN

MOHAMMED MOHAMED HAMID ::::::::::::::::: APPLICANT

AND

ROKO CONSTRUCTION LTD ::::::::::::::::::: RESPONDENT

(An application for an interim stay arising from Miscellaneous Application No. 22of 2017 arising from Miscellaneous Cause No. 18 of 2017, arising from Civil Appeal No. 14 of 2015)

RULING

The applicant, Mr. Mohammed Mohammed Hamid instituted this application by Notice of Motion seeking for orders that:

i) An interim stay of execution be granted pending the hearing and disposal of the main application for stay of execution filed in this court.

ii) Costs abide the out come of Misc. Cause No. 18 of 2017 filed in this Court.

The application is brought under the provisions of section 98, Rules 2(2), 6(2)(b), 42 and 43 of the Rules of this Court based on the ground that;

(i) The applicant is dissatisfied with the errors apparent on the face of the record in the judgment of the supreme Court of Uganda in Civil Appeal No.14 of 2015 and he is seeking a review of the said judgment vide Misc. Cause No.18 of 2017. If the imminent execution of the orders of this court is not stayed, Misc. Application No. 22 of 2017 will be rendered nugatory.

The application is supported by the affidavit of the applicant sworn on 24th July, 2017 in which he substantially repeats the ground set out in the Notice of Motion.

The respondent on the other hand opposed the application for the reasons set out in an affidavit sworn on its behalf on the 15th August, 2017 by Ms. Diana Kasabiti, its Company Secretary. She averred that the respondent had not applied for execution of the judgment in Supreme Court Civil Appeal No. 14 of 2015 and that there was no pending execution of the said judgment against the applicant. She further averred that the main application Misc. Application No.18 of 2017 has no probability of success. She also

averred that the appellant lacked the capacity to identify errors apparent on the record of the judgment of the Supreme Court complained of on the ground that he is not an Advocate.

Background

Briefly the facts that led to this application may be summarized as follows:

On 15th July 2005, both parties entered into a construction agreement. The respondent was to construct a residential house at plot 43B Windsor close Kololo, Kampala for the applicant for a total sum of **1,100,000,000/=**. The applicant defaulted in payment for a sum of Ushs 584,430,571 upon which the respondent terminated the contract. The respondent referred the matter for arbitration and was a successful party. The applicant was ordered to pay Ushs 584,430,571 to the respondent for the work carried out together with interest at 18% p.a from the date of filing the arbitration till payment in full, general damages of 100,000,000/= with interest at 18% p.a from the date of the award till payment in full. The bill of costs was taxed by the arbitrator to Ush 92,507,410.

Dissatisfied, the applicant instituted an application in the High Court to set aside the arbitral award and was successful. The respondent then appealed to the Court of Appeal which overturned the decision of the High Court. The applicant then appealed to the Supreme Court which court found that the coram

in the Court of Appeal was not properly constituted and thereby set aside the orders of the Court of Appeal and returned the matter to the Court of Appeal to constitute a proper coram and decide the matter in accordance with established procedure.

Upon rehearing the matter, the Court of Appeal still reversed the decision of the High Court and reinstated the Arbitral Award in favour of the respondent. Aggrieved, the applicant then appealed again to the Supreme Court vides Civil Appeal No. 14 of 2015. This Court upheld the decision of the Court of Appeal and dismissed the appeal with costs to the respondent.

The applicant then filed an application for review of the judgment of this court vides Misc. Cause No.18 of 2017. He has also filed a substantive application for stay of execution under Misc. Application No.22 of 2017 together with this application for interim stay of execution.

The applicant was represented by Mr. Peter Allan Musoke while Mr. Enos Tumusiime appeared for the respondent. They relied on the affidavits on court record.

CONSIDERATION OF THE APPLICATION BY COURT

Mr Tumusiime raised some preliminary points of law at the commencement of his submissions which I should deal with before the main arguments. The first one was that the respondent had not been served with a copy of the substantive application.

Learned Counsel for the respondent complained that the said application was not served on him. Counsel for the applicant explained, and I find his explanation plausible that the Registrar had not yet informed them of the hearing date for the said application by the time the instant application came for hearing. That is why he did not serve the application in question on counsel for the respondent. The other complaint was that counsel for the applicant did not attach a copy of the substantive application for stay to the instant application as directed by this court in **Joel Kato and Another v Nuulu Nalwoga, Civil Application No. 12 of 2011 (Kitumba, JSC)**. I have carefully considered this complaint and read the rules and the authority cited by counsel for the respondent.

My view is that this practice is desirable but non compliance with it is not fatal to the application, since the information can be easily verified from the court record as I have said before in other applications such as **Drake Lubega v The Attorney General and 2 Others Misc. Application No. 13 of 2015.**

The second complaint was that the deponent of the affidavit in support of the application is not an advocate or a lawyer of any standing; therefore the averments in paragraphs 2, 3, 4, 5 and 6 are not from his knowledge. Therefore, this application lacks a supporting affidavit and should be struck out with costs on that ground alone. Counsel Musoke disagreed, and I agree with him, that the averments in the paragraphs mentioned did not require an advocate. The law is clear, under Rule 23 (1) of this court, a

party may appear by himself or herself or through an advocate. This rule stems from Article 28(3) (d) of the Constitution. The judgment was written in plain English. That applicant compared two judgments of this court and formed the view that there were errors of law on the face of the impugned judgment. The question whether he is right or wrong is yet to be determined by this court in the application for judicial review which is pending before this court.

The third point concerned the requirement by Rule 27(1) and (3) of the rules of this court. Rule 27 (1) provides that an advocate shall lodge with the registrar a list containing authorities he intends to rely on. Rule 27(3) provides that a supplementary list shall be lodged at least forty eight hours before the application or appeal is due to be heard. Counsel Tumusiime's contention is that the instant application was filed on the 25th July, 2017, without any list of authorities. That he was served with a supplementary list less than 12 hours before the hearing. This application ought to be struck out for this reason. Counsel Musoke denied that he had served the respondent's counsel with a supplementary list. He contended that what he had served on the respondent's counsel was a list of authorities which he filed on the 28th of July, 2017. He conceded that he did not file the list of authorities on the same date with the application but contended that it is not fatal since the law does not impose any time lines for filing the list.

I have considered this objection as well. It is true that what counsel for the applicant filed was the actual list and not a supplementary list of authorities and that he filed it on the 28th of July, 2017.

Rule 27(1) reads:

> ***"(1) The advocate who intends at the hearing of any application or appeal to rely on the judgments in any reported cases or to quote from any books shall lodge with the registrar a list containing the titles of those cases with their citations and the names , authors and editions of those books and shall serve a copy of the list on the other party or on each other party appearing in person or separately represented, as the case may be."***

Although the law does not give time lines within which to file such a list, in my view, I think that it is good practice to file the list of authorities at the time of lodging the application or at the earliest opportunity so that both the opposing party and the court have ample time to read them and prepare for the hearing of the application. In the instant case, counsel should have filed the list of authorities with the application or soon thereafter. Late filing of the list of authorities is, however, not fatal to an application.

I accordingly overrule all three objections.

Turning to the merits of the application, it is important to begin by emphasizing that the power of this court under Rule 2(2) in dealing with such applications is well settled. The Court has a wide discretion to make such orders as may be necessary to achieve the ends of justice. This principle was set out in a number of decisions of this court, notably in **Hon. Theodore Sekikubo & Ors V Attorney General, SCCA No.6 of 2013 and followed in Mathew Rukikaire V Incafex SCCA No. 11 of 2015.**

The principles governing the grant of stay of execution are based on Rule 6(2)(b) of the Judicature (Supreme Court Rules) Directions which provides as follows:

> ***"Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or stay execution, but the court may-***
> ***(a)……***
> ***(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of these Rules, order a stay of execution, an injunction or stay of proceedings as the court may consider just."***

This court has laid down the criteria which must be satisfied by an applicant for the grant of an interim application in a number of decisions of this court notably, in **Francis Drake Lubega V Attorney Civil Application No.13 of 15** following the principles in **Hwan Sung Industries Ltd V Tajdin Hussein & 2 Ors Civil Application No. 19 of 2008,** where this Court held that;

"- - - 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 pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."

In summary, these criteria therefore include:

a) The filing of a notice of appeal in accordance with Rule 72 of the Rules of this court;
b) The filing of a substantive application for stay of execution;
c) The evidence of an imminent threat of execution;
d) That the Application should have been brought without delay.

The granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determined by the full court as per the Rules. They are granted by a single Judge of the Court exercising the Court's inherent powers under Rule 2(2) of the Rules of this Court. This principle has been by this Court stated in **Giuliano Gariggio V Claudio Casadio, Civil Application No. 03 of 2013, followed in Hon. Theodore Sekikubo & Ors V Attorney General, SCCA No.6/13, Mathew Rukikaire V Incafex, SCCA No. 11/15 and Francis Drake Lubega V Attorney General & 2 Ors, SCCA No.13/15,** among others.

The issue therefore is whether the applicant has adduced sufficient reasons to justify the grant of the interim order for stay of execution.

Regarding the first condition, it is clear there is no notice of appeal since the applicant cannot appeal against the judgment of this court. What we have on record is instead **Miscellaneous Cause No. 18 of 2017**, filed by the applicant seeking for a review of the judgment of this court in **Civil Appeal No. 14 of 2015**. Nonetheless this court can treat such an application as being analogous to a notice of appeal using its inherent powers under rule 2(2) of the rules of this court. However, before the court can exercise this power, the applicant must demonstrate to the court's satisfaction that the application for review is not frivolous. The rationale was given by Tumwesigye JSC, in **Civil Application No. 16 of 2017, Kiganda John and Another vs. Yakobo M.N Senkungu and 5 others (SC),** where he stated as follows:

> ***" In my view, the question is whether the applicant's application for review of this court's decision in SCCA No 17 of 2014 should be treated as frivolous and not worthy of serious consideration, or is such as should warrant this court's attention. <u>Deciding this question at an early stage is important because the decisions and orders of this court as the final court of this country's judicial system should not be open to constant and needless application for their alteration. There must be an end and finality to litigation. But</u>***

there may be special circumstances that may warrant alteration of the court's decision or orders where, if not done, blatant injustice may be occasioned. That is why it was found necessary to include rule 2(2) in the rules.

Therefore, in my view, the question as to whether the application for review should be treated as analogous to a notice of appeal must, as a necessary condition, be linked to deciding whether the application for review stands a reasonable likelihood of success." (the underling is mine, for emphasis).

In **Belex Tours & Travel Ltd V Crane Bank Ltd Misc. Application No.21/15(SC)** Tumwesigye, JSC who heard a similar application dismissed it on the ground that the applicant:

"… did not advance any special reasons why his application for review should be regarded as a notice of appeal."

On the other hand, in **Civil Application No. 16 of 2017, Kiganda John and Another vs. Yakobo M.N Senkungu and 5 others (SC),** Tumwesigye JSC found that the application was:

"different in that there is a fundamental principle of justice in issue that required the application of rule 2(2) of the rules of this court."

In that case, the presiding Justice held that the application for review should be treated as analogous to a notice of appeal and proceeded to grant the interim stay.

In the instant case, first of all, there was no prayer by the applicant's counsel either in the notice of motion or his submissions to this court to treat the application for review as being analogous to a notice of appeal. Secondly, there was no averment in the affidavit that the application for review had a reasonable likelihood of success. The applicant has not in the premises shown that any special circumstance exists to enable his application for review to be regarded as analogous to a notice of appeal. From the record, the application for review actually seems to set out grounds for an appeal against the judgment of this court complained of, rather than correcting errors apparent on the face of the record as alleged.

The applicant has accordingly failed to meet the first criteria, and this application should fail for this reason alone.

Regarding the second condition, the Court record indicates that a substantive application No.22 of 2017 from which this application arises, exists on court record. It was filed on the same day with the instant application. It is yet to be served on the respondent after getting a hearing date from court.

Regarding the third condition, it is clear from the authorities cited above, that the law is that the applicant must adduce cogent

evidence of a serious imminent threat of execution. The applicant deponed in paragraphs 4 and 5 that the respondent has taken steps towards execution of this court's judgment No.14 of 2015. That the steps include but are not limited to filing for taxation of bills of costs in this court arising from the impugned judgment and that this application is made to stay the imminent probability of execution so that **Miscellaneous Application No.22/17** and **Miscellaneous Cause No.18/17** are not rendered nugatory.

Other than this averment, the applicant has not adduced any evidence of execution of the judgment. I also note that the applicant mainly pointed out the issue of taxation of bills of costs as a threat to execution. Taxation of bills of costs is provided under **Rule 105 and the third schedule of these Rules**. It is the duty of the Registrar to tax the bill of costs of a successful party in accordance with the Rules. If a party is dissatisfied with the decision of the registrar in his capacity as the taxing officer, he or she may make a reference to a single judge and finally to a full bench as provided under **Rule 106**.

In the instant application, there is no conclusive evidence adduced or attached by both parties to prove that the bill has been taxed by the taxing officer and therefore in my opinion there is nothing to stay. Further, there is no evidence adduced to show that there is an application for execution of the taxed bill. In my judgment, therefore, I find no evidence of any imminent threat of execution upon which this court can base the exercise of its

discretion to grant this application.

In the result, and for the reasons I have given, I dismiss this application with costs to the respondent.

Dated at Kampala this …… day of August, 2017

M.S.Arach Amoko

JUSTICE OF THE SUPREME COURT