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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

{*Coram: Tumwesigye, Arach-Amoko and Nshimye, JJ.S.C* }

CIVIL REFERENCE NO.07 OF 2016

(ARISING FROM CIVIL APPLICATION NO. 04 OF 2016)

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BETWEEN

1. ZUBEDA MOHAMED

2. SADRU MOHAMED:..... APPLICANTS

AND

1. LAILA KAKA WALLIA

15 **2. THE ADMINISTRATORS OF THE ESTATE**

OF THE LATE SUNDER KAKA WALLIA:..... RESPONDENTS

(A Reference from the Ruling and order of Mwangusya, JSC (sitting as a single Justice) dated 5th May, 2016, in Civil Application No.04 of 2016.)

20 **RULING OF THE COURT**

This is a reference by the Applicants, Zubeda Mohamed and Sadru Mohamed against the ruling of Mwangusya JSC (sitting as a single Justice) dated the 5th May, 2016 in **Supreme Court CivilApplication No.04 Of 2016**,grantingan interim order of stay of execution to the respondents Laila Kaka Wallia and the Administrators of the Estate of the late Sunder Kaka
25 Wallia.

The applicants filed the reference to a panel of three Justices of the Supreme Court under the provisions of Section 8(2) of the Judicature Act and Rule 52(1) (b) of the Rules of this Court seeking for an order discharging and or setting aside the interim order.

5 **The background to the Reference**

From the record, the relevant facts giving rise to the reference are brief. The applicants instituted **Civil Suit No. 62 of 2013** against the respondents jointly and severally in Mbarara High Court for a declaration order that they were indebted to the applicants in the sum of USD 245,721 (United States dollars two hundred and forty five thousand, seven hundred and twenty one only) as money had and received from the applicants but put to the personal use of the 1st respondent and late Sunder Kaka Wallia and the money be paid to them. Judgment was entered against the respondents on the 18th August, 2015.

Being dissatisfied with the said judgment, the respondents filed a Notice of Appeal intending to appeal to the Court of Appeal. At the same time, they filed **Court of Appeal Civil Application No 365 of 2015** for a stay of execution pending the determination of the appeal as well as an application for an interim order of stay of execution.

The interim order was granted ex-parte by a single Justice of the Court of Appeal on the 16th December 2015. However, the panel of three Justices of the Court of Appeal who heard the substantive application dismissed it with costs on the 23rd March 2016, for failure to meet the key conditions for the grant of an order for stay of execution.

On the 20th April, 2016, the respondents lodged another Notice of Appeal, intending to appeal to this Court against the said order of the Court of Appeal.

On the same date, the respondents filed **Supreme Court Civil Application No.04 of 2016** in this Court, seeking for orders that an:

25 *“1. Interim stay of execution in Civil Suit No. 62 of 2013 of High Court at Mbarara be granted pending the hearing and determination of the appeal against the Ruling/decision of the Court of Appeal in Civil Application No. 0365 of 2015.*

2. *Costs of this application to abide the results of the appeal.*”

As stated earlier, Mwangusya, JSC heard the said application as a single Justice and issued the interim order complained of in this reference.

5 **The grounds for the Reference**

Eight grounds were set out in the reference as follows:

1. *That the learned Justice erred in law when he granted the interim stay of execution without a substantive application of stay of execution.*
- 10 2. *That the learned Justice erred in law and fact when he held that the lodgment of a Notice of Appeal had satisfied the first ground for the grant of an interim stay of execution.*
- 15 3. *That the learned Justice acted without jurisdiction in issuing an interim stay of execution with the effect of stopping the judgment of the Court of Appeal until the determination of the Appeal.*
- 20 4. *That the learned Justice erred in law and fact when he did not rule on the competency of the Appeal filed in this Honourable Court without first obtaining leave.*
- 25 5. *That the learned Justice did not exercise his discretion judiciously when he ordered the Applicants to deposit a certificate of title for property valued at not less than **UG Shs. 500,000,000.***
6. *That the learned Justice erred in law and fact when he held that a demand notice amounted to an imminent threat of execution that would warrant an interim stay of execution.*

7. *That the learned Justice erred in law and fact in issuing costs that would abide the outcome of the substantive application, which is in fact inexistent.*

5 8. *That the learned Justice erred in law and fact by failing to properly appraise the evidence before Court and thereby arrived at a wrong decision.*

The reply by the respondents to the Reference

In their reply to the reference filed on behalf of the respondents in this Court by their counsel Ambassador Francis Butagira on the 11th July 2015, the respondents contended that the grounds
10 for the reference are without merit in that:

1. *The learned Justice was justified to order an interim stay of execution.*

2. *The learned Justice was justified when he held that a Notice of Appeal had satisfied the ground for stay of execution.*

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3. *The learned Justice had jurisdiction to order an interim stay of execution.*

4. *The learned Justice acted judiciously when he ordered for the deposit of a certificate of title valued at not less than Uganda Shillings 500,000,000 to act as security.*

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5. *The learned Justice was justified to hold that a demand notice amounted to an imminent threat of execution that would warrant an interim stay of execution.*

6. *The learned Justice was justified to hold that a substantive application does exist.*

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7. *The learned Justice properly evaluated the whole evidence before court and came to a proper decision.*

Consequently, the respondents prayed that the reference should be dismissed and the decision of the single Justice be upheld.

Submissions by Counsel

In his lengthy written submissions, learned counsel for the applicant, Mr. Allan Kyakuwa argued grounds 1, 2,3,5,7 and 8 jointly and grounds 4 and 6 separately. During his oral highlights before Court, however, he oppositely summarized the grounds to basically complain about the interim order having been issued by the learned Justice without satisfying the settled principles for the grant of interim orders by this Court, in that:

1. The order was made without a substantive pending application for a stay of execution.
2. The underlying appeal was incompetent. It was lodged without leave from the Court of Appeal. In essence there is no appeal in law. Section 6(1) of the Judicature Act excludes appeals from interlocutory orders passed by the Court of Appeal to this Court. See: **Lukwago Erias vs Attorney General and KCCA, SC Civil Application No. 06 of 2014**, and **Kasirivu Atwoki & Others v Grace Bamurangye Boroza & Others, SC Civil Application No. 2 of 2010**.

The order is inconsistent with the settled principle for the grant of interim orders by this court. There is need for consistency and guidance on the jurisprudence on interim orders from this Court. This is precisely because, in the instant case, while the learned Justice approved the principles in the decision in **Hwang Sung** which have stood the test of time, and even observed that there was no substantive application, nevertheless, the learned Justice went on to issue the interim order complained of, thereby contradicting the said decision.

Interestingly, ten days later, this Court in **Ganafa Peter Kisawuzi v DFCU Bank, SC Miscellaneous Application No. 05 of 2016**, dismissed an application for an interim order on similar facts, that is, where there was no substantive application pending before the Court.

3. There was no proof of imminent threat of execution.

In conclusion, Counsel Kyakuwa prayed that the reference be allowed and the decision of the learned Justice be discharged or set aside on the grounds above, with costs to the applicants.

In his response, Counsel Butagira strongly opposed the reference arguing that the relevant Rule governing interim orders is 6(2)(b) of the Supreme Court Rules. It says: “*Where a Notice of Appeal... is lodged...*”

Therefore, once you lodge a Notice of Appeal, you can apply for an interim order. In support of this submission, he relied on case of **Stanbic Bank Uganda Ltd v Atabya Agencies, SC Civil Application No. 31 of 2004** where Mulenga JSC as he then was, sitting as a single Justice in a similar application cited with approval the statement by Kanyeihamba JSC, as he then was in
5 **Horizon Coaches Ltd vs. Pan African Insurance Ltd, SC Civil Application No. 20 of 2002** that,

*“where a Notice of appeal or an application or indeed an appeal is pending before the Supreme Court, it is right and proper that an interim order for stay of execution either in the High Court or any court, be granted in the interest of justice and to prevent the proceeding and any order
10 therefrom of this court being rendered nugatory.”*

According to Counsel Butagira, the learned Justice of the Supreme Court had relied on Rule 6(2) (b) of the Supreme Court Rules above in arriving at his decision. He was therefore justified in issuing the interim order. We shall comment on that case later in this Ruling.

His other contention is that the respondents are appealing against the order of the Court of
15 Appeal refusing to grant a substantive stay of execution. Therefore, what is pending before Court is that application. There was thus no need for leave to appeal since the Court of Appeal was not sitting as an appellate court but it was exercising its original jurisdiction when it dismissed the respondent’s application for stay of execution.

Lastly, learned Counsel maintained that there was an imminent threat of execution hanging over
20 his clients after their application for stay of execution was dismissed by the Justices of the Court of Appeal and the applicants had given an ultimatum that they would execute any time. The learned Justice therefore addressed himself rightly to this issue and gave the right order.

For the forgoing reasons, Counsel Butagira contended that the reference lacked merit and prayed
25 that the Ruling of the learned Justice be upheld.

Consideration of the Reference by Court

We have perused the record and considered the submissions by both learned counsel. We have also read a number of authorities from this Court on interim orders particularly the ones cited by

both learned counsel. What runs through all the authorities is the fact that the law and the principles in this area are well settled.

The law governing applications for injunctions or stay of execution is set out in Rule 6(2) (b) of the Rules of this Court which reads as follows:

5 “6(2) 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, or injunction or stay of proceedings as the Court
10 may consider just.”

Applications for stay of execution are handled by a full bench.

In cases of urgency, however, this Court is empowered by Rule 2(2) of the Rules of the Court to issue interim orders in order “to achieve the ends of Justice”. Applications for interim orders are heard by a single Justice of the Court. Applications for interim orders are granted pending
15 determination of the substantive application, not the appeal. An interim order is a stop gap measure to ensure that the substantive application is not rendered nugatory.

The principles followed by our courts were clearly stated in the celebrated case of **Hwang Sung Industries Limited v Tajdin Hussein & Others, SC Civil Application No. 19 of 2008** where Okello JSC, as he then was said:

20 “For an application for an interim 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 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.”

We also found an instructive summary by this Court in **Hon. Theodore Ssekikuubo and others v The Attorney General and others, SC Constitutional Application No. 04 of 2014** where
25 this Court said:

“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 Cerencio Mukasa, SC Civil Application No. 5 of 2013** and **Guliano Gargio vs Calaudio Casadio** this Court stated that ‘the granting of interim orders is meant to help parties to preserve the status quo and then have the main issues between the parties determined by the full court as per the Rules”

Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before hearing of the substantive application. Needless to say, there must be a Notice of Appeal. See **Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others (SCCA NO. 19 of 2008)**. (the underling was added for emphasis).

In summary, there are three conditions that an applicant must satisfy to justify the grant of an interim order:

1. A Competent Notice of Appeal;
2. A substantive application; and
3. A serious threat of execution.

In **Hon. Theodore Ssekikuubo and others v The Attorney General and others**, this Court found that the applicants had not only filed a Notice of Appeal and requested for the record proceedings of the Constitutional Court, but they had filed an application for a substantive stay of execution which was pending before Court. Court also established from the affidavit evidence that there was an imminent threat of expulsion of the applicants from Parliament. The court granted the application on that basis.

In the instant case, we first and foremost find that the application itself was incompetent in so far as the applicants had prayed for an interim order to:

“be granted pending the hearing and determination of the appeal against the Ruling/decision of the Court of Appeal in Civil Application No. 365 of 2015.”

This was clearly a glaring error since an interim order can only be granted pending disposal of the main application, not the appeal itself.

Secondly we find that although the learned Justice was fully alive to the law and principles above and actually referred to the decision in **HwangSung(supra)** in his ruling, however, he
5 only considered two of the laid down conditions for the grant of interim orders, namely, the lodging of a Notice of Appeal and the existence of an imminent threat of execution. We therefore agree with the applicants' counsel that this was an error. We emphasise that in an application for an interim order, the judge must consider all the three conditions above, before reaching a decision to grant or dismiss an application for an interim order.

10 Thirdly, regarding the existence of a pending substantive application, the learned Justice was silent and understandably so, because there was no substantive application filed in this Court at all. Yet he ordered, *“The costs will abide the outcome of the main application.”* This was in our view, yet another error.

It is further our finding that the applicants (now respondents) did not in the instant case prove
15 by affidavit evidence, and indeed, nowhere in the affidavit in support of the application sworn on behalf of the applicants by Jonny Wallia, on 30th March, 2016, did he aver that he had filed a substantive application for a stay of execution which was pending before this Court. The emphasis in paragraphs 5 to 10 of the said affidavit was that *“the intended appeal will be rendered nugatory and the applicant shall suffer substantial loss if the stay of execution is not
20 granted...”*

As rightly pointed out by Mr. Kyakuwa, this omission in itself was fatal on the basis of the authority of the decision of Okello, JSC in **Kitende Appolonaries Kalibogha and 2 Others v Mrs Eleonora Wismer, SC Civil Application No. 06 of 2010** where his Lordship stated as follows:

25 *“In the instant case, I accept the submission of counsel for the respondent that there is no averment in the affidavit in support of the application that there is pending a substantive application for stay of execution. This is not an irregularity but a fatal omission which cannot be cured by counsel's statement from the bar.”*

Counsel Butagira did not deny this anomaly but argued that the Notice of Appeal was to be treated as the substantive application. With due respect to senior counsel, this argument is erroneous. A substantive application is a separate set of documents where the applicant prays for a stay of execution. It is a Notice of Motion which must be accompanied by an affidavit
5 stating the reasons for the application and it is given a distinct file number. It can never be the Notice of Appeal because they are two different files. The third set of documents is usually a separate application for an interim stay of execution, pending determination of the main or substantive application for stay of execution. It is therefore impossible to transform a Notice of Appeal into an application for stay of execution.

10 In the case of **Stanbic Bank Uganda Ltd v Atabya Agencies (supra)** relied on by counsel Butagira, this is what Mulenga JSC (as he then was), stated at page 3 of that Ruling while citing with approval the holding by his learned brother, Justice Kanyeihamba in **Horizon Coaches Ltd vs. Pan African Insurance Ltd, (supra)** which we have reproduced earlier on in this Ruling:

15 *“I respectfully agree with that holding. I made a similar decision in **Horizon Coaches Ltd vs. Francis Mutabazi & Others, SC Civil Application No. 21 of 2001.** Those decisions however, should not be construed as authority for the view that an interim order for stay will always be granted whenever a Notice of Appeal is pending in this Court. Such an interim order is granted under r 1(3) (now rule 2(2)), of the rules of this court on the grounds set out in that rule, namely
20 if it is necessary for achieving the ends of justice or to prevent abuse of the process.”*

Clearly, that case does not assist Counsel Butagira's arguments because Justice Mulenga held that the application had not satisfied the conditions for being heard and granted an interim order ex parte and actually went on to dismiss it. We share the same view.

In the premises and for the reasons we have given, we find merit in the complaint by the
25 applicants' counsel that the learned Justice erred when he granted the interim stay of execution without a substantive application for stay of execution.

This ground of the reference therefore succeeds.

Fourthly, regarding the issue of Notice of Appeal, this Court has repeatedly stated that in order to base an application for an interim stay, it is needless to say that the underlying Notice of Appeal must be a valid one; otherwise the substantive application on which the interim order is based would have no leg to stand on. The Court has further stated that the right of appeal from the Court of Appeal to this Court is provided for under Section 6(1) of the Judicature Act as follows:

“An appeal shall lie to the Supreme Court where the Court of Appeal confirms, varies, or reverses a judgment or order including an interlocutory order, given by the High Court in exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal”.

The intended appeal to this Court is against the order of the Court of Appeal dismissing **Court of Appeal, Civil Application No. 365 of 2015** which was an application for stay of execution. Clearly the intended appeal is from an interlocutory order of the Court of Appeal. There is thus no right of appeal to this Court. In **Lukwago Erias v KCCA, Civil Application No.06 of 2014** this Court stated as follows:

“The right of appeal is a creature of statute. There is nothing known in law as an inherent right of appeal. The legal foundation for application for stay of execution pending appeal is the right of appeal to the proper court and the fact that a Notice of Appeal has been filed in that court. Where a Notice of Appeal has been filed but the right of appeal does not exist, the Notice of Appeal is incompetent and cannot form the basis for an application for stay of execution pending appeal, as there is no pending appeal.”(Underlining was added for emphasis).

The **Lukwago** application was found to be incompetent and was struck out for that reason.

In yet another similar application of **Dr. Kasirivu Atwooki and Othres vs. Grace Bamurangye Bororoza and others, SC Civil Application No. o2 of 2010** this Court re-stated its opinion in **Uganda National Examinations Board v Mpora General Contractors(Civil Application No.19 of 2004 and Beatrice Kobusingye vs. Fiona Nyakana & Another ,SC Civil Appeal No. 5 of 2004** as follows:

“As we recently stated in the UNEB case... there is no right of appeal to this Court originating from interlocutory orders of the Court of Appeal which orders are incidental to the appeal but not resulting from the final determination of the appeal itself.

We are not persuaded to change that opinion.”

5 The Court went on to state the following:

“Neither section 78 nor Article 132 of the Constitution confer any right of appeal to the respondents nor does either confer any jurisdiction on this Court to entertain an appeal arising from the decision of the Court of Appeal in interlocutory matters such as the ruling in the Court of Appeal in Civil Application No. 85 of 2009 between the parties. Interlocutory applications are generally an exercise intended to help that Court to do house clearing. If appeals were allowed to come to this Court from interlocutory rulings of the Court of Appeal, this Court would be swamped with wholly unnecessary multiplicity of appeals. Indeed the Court of Appeal itself would be clogged with many pending appeals which could not be heard and decided because they would await decision on such interlocutory appeals to this Court. We can foresee the possibility of encouraging multiplicity of unnecessary appeals to this Court. Delays would affect expeditious disposal of appeals in the Court of Appeal.” (Underlining was added for emphasis).

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That appeal was struck out for these reasons.

Regarding the Notice of Appeal itself, the learned Justice stated:

20 *“In this particular instance, there is no substantive appeal pending in this Court, but rather the appeal is pending in the Court of Appeal. The appeal has not yet been determined by that court. However, there is a notice of appeal against the decision of the Court of Appeal to refuse stay of execution, which in my view satisfies the first condition.”*

25 With due respect to the learned Justice, the Notice of Appeal filed against the decision of the Court of Appeal in Civil Application No. 365 of 2015 was incompetent. It could not therefore form the basis for an application for a substantive stay of execution let alone an interim order.

The learned Justice for these reasons erred when he overlooked the submissions by the applicants' counsel on the competence of the underlying appeal and issued the interim order.

Fifthly, regarding the condition of the existence of an imminent threat, it is our finding that the learned Justice based his findings on the Notice of Motion and the affidavit in support of the application where it was stated that the respondents had issued a final demand notice dated 29th March 2016 and his Lordship concluded that:

“...the fact that the application for stay of execution was refused means that the respondents can go ahead and execute. In other words, there is a serious and imminent threat of execution. Thus the second condition is fulfilled.”

10 He then proceeded to grant the interim stay of execution and ordered the Respondents (the instant applicants) to deposit a certificate of title worth UGX 500,000,000 (five hundred million shillings)“*which would ensure that the respondents' entitlement to enjoy the fruits of their judgment is secured in case they finally win the appeal.*”

15 In our considered opinion and upon careful perusal of the record before us, we find that the evidence of eminent danger of execution was not strong enough to justify the grant of an interim order in the absence of a warrant of execution or a Notice to Show cause why execution should not issue from the executing court. There was only a demand letter from the applicants' lawyers.

This ground therefore succeeds as well.

20 In conclusion,we strongly reiterate the position of the law that an interim order should only be granted subject to the well settled conditions, for a short time until a named day or further order of the court, pending determination of the main application. (**See: Hon. Anifa Kawooya v Attorney General CAMA NO.479 of 2011**).

25 In the instant case, the interim order dated 17th May, 2016 is not only open ended but makes reference to a non-existent application as well. It was not based on a substantive application for stay of execution and therefore had no leg to stand on. Definitely, the interim application did not meet the well laid down and settled principles for the grant of such orders. With due respect to the learned Justice of this Court, the interim order was thus granted in error.

In the result and for the reasons given, we find merit in the reference and grant it accordingly, with the orders that:

- 1. The interim order dated 17th May 2016 is hereby set aside.
- 2. The certificate of title deposited in this court by the applicants be returned to them forthwith.
- 3. The costs of this reference shall be borne by the respondents.

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Dated at Kampala this 14th day of February 2017.

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J. TUMWESIGYE
JUSTICE OF THE SUPREME COURT

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M.S ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

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A. NSHIMYE
JUSTICE OF THE SUPREME COURT

