

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: HON. JUSTICE R. BUTEERA, JSC (Single Justice)]

**MISC. APPLICATION NO.16 OF 2018
(Arising from Misc. Application No.15 of 2018)**

UGANDA REVENUE AUTHORITY::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. NSUBUGA GUSTER

2. ROBINHOOD BYAMUKAMA ::::::::::::::::::::::::::: RESPONDENTS
(An application arising from Court of Appeal Criminal Appeal No.014 of 2013)

RULING OF BUTEERA, JSC

The applicant instituted this Application by Notice of Motion seeking for orders that;

1. An interim order is issued to stay the retrial of Criminal case HCT-OO-ACD-SC-0084/2012, ordered by the Court of Appeal in Criminal Appeal No.14/2013, pending determination of the applicant's main application No.15/2018 currently pending fixing and hearing in this Court.
2. No orders is made as to costs.

This Application was brought under Rules 2(2), 6(2) (a) and 42 of the Judicature (Supreme Court) Rules.

The Application is supported by an affidavit of Tonny Kalungi, a prosecutor in the Litigation Department of the applicant, sworn on 12th December 2018. It is

opposed by the 1st respondent, Nsubuga Guster who swore an affidavit to support his objection to the Application on 21st January 2019.

Background

The brief background to the Application is as follows:

On 27th June 2012, the respondent was charged in the Chief Magistrates Court – Buganda Road, attached to the High Court, Anti-Corruption Division, with five counts, to wit;

- a) Unauthorised use and interception of computer services, contrary to sections 15 (1) and 20 of the Computer Misuse Act 2011;
- b) Electronic fraud, contrary to section 19;
- c) Unauthorised access to data, contrary to sections 12 (2) and 20;
- d) Producing, selling or procuring, designing and being in possession of devices, computers, computer programs, designed to overcome security measures for protection of data, contrary to sections 12(3) and 20 of the Computer Misuse Act 2011;
- e) Unauthorised access to Customs computerised system contrary to section 19(1) (a) of the East African Community Customs Management Act 2004.

The respondents and two others were committed to the High Court – Anti-Corruption Division for trial. They were tried by Hon. Justice Paul Mugamba (as he then was) who found them guilty of the offences, convicted and sentenced them accordingly.

The respondents being dissatisfied with the decision of the trial Judge, appealed to the Court of Appeal against both conviction and sentence. The Court of

Appeal ordered for a retrial on the ground that the respondents did not take plea to the amended indictment.

The applicant was dissatisfied with the findings and conclusions of the Court of Appeal and filed a Notice of Appeal on 7th November 2018. On 3rd December 2018, the applicant filed Misc. Application No. 15 of 2018 (the main Application) for stay of proceedings. The main Application is currently pending fixing and hearing in this Court, hence this Application.

Grounds

The grounds in support of the Application are contained in the Notice of Motion and the affidavit in support deponed by Tonny Kalungi. The grounds are as follows:

1. That the High Court Anti-Corruption Division has commenced the retrial of the respondents despite the objections from the prosecution.
2. The High Court granted bail to the respondents and fixed the matter for hearing on 1st March 2019.
3. The commencement of the retrial of the respondents before the High Court Anti-Corruption Division is prejudicial to the applicants Appeal to the Supreme Court of Uganda.
4. That the applicants Application for stay has merit, raises triable issues and will be rendered nugatory if an interim order of stay is not granted.
5. That the applicant has filed the main Application No.15 of 2018 for stay of proceedings, which is currently pending fixing and hearing before this Court.
6. That the Application has been made without unreasonable delay.
7. It is just, equitable and in the interest of natural and substantive justice that the Application be granted.

Representation

At the hearing of the Application, the applicant was represented by learned counsel, Mr. George Okello and Ms. Bakanansa Hilda Walaga while the respondent was represented by learned counsel, Mr. Evans Ochieng. Both respondents were present in Court.

Submissions of counsel for the applicant

Counsel for the applicant submitted that a retrial has commenced in the High Court Anti-Corruption Division, consequent to the decision of the Court of Appeal. That the respondents took fresh plea and pleaded not guilty. The respondents are currently out on bail.

Counsel contended that if the trial before the Anti-Corruption Division of the High Court proceeds on 1st March 2019 as scheduled, it will be prejudicial to the applicants intended appeal. He emphasised that the order for the retrial made by the Justices of Appeal is one of the orders that will be challenged in the intended appeal before this Court. That if this Application is not granted, the appeal will be rendered nugatory.

He further submitted that this Application is properly grounded and there will be no prejudice to the respondents if the Application for stay of proceedings is granted. He prayed for the Application to be allowed and no orders as to costs.

Submissions of counsel for the respondents

In response, counsel for the respondents opposed the Application. He submitted that there is no substantive appeal pending before this Court. That this Application is incompetent because one can only apply for stay pending an appeal. Counsel acknowledged that a Notice of Appeal was lodged. He argued that a Notice of Appeal is merely an intention to appeal but not an appeal.

Counsel submitted that the retrial has commenced, the respondents have taken plea and the assessors have been appointed. That if the applicant is successful in this Application, what has gone on in the retrial at the lower Court will be rendered nugatory.

Counsel contended that the applicant has not demonstrated any urgency why this Court should grant the interim order and what prejudice they will suffer if the Application is not granted.

He further submitted that the applicant has not lodged a Memorandum of Appeal in this Court for guidance on the grounds of the substantive appeal. That the applicant had to demonstrate that the pending appeal has some possibility of success.

He prayed that the Court declines to grant this Application and award damages as it deems fit.

Submissions of counsel for the applicant in rejoinder

Counsel for the applicant submitted that in an application of this nature, Court is guided by the following considerations;

1. That there is a Notice of Appeal properly lodged before Court.
2. That there is a substantive Application for stay which is pending disposal.
3. That there is a serious threat of execution before determination of the pending substantive application.

According to counsel, there is no need to have filed an appeal first before an interim or main stay are sought. Counsel relied on **Francis Drake Lubega vs. Attorney General and 2 others, Misc. Application No.13 of 2015, Yakobo M.N Senkungu and 5 others vs. Crescensio Mukasa, Misc. Application No. 5 of 2013.**

Counsel submitted that following Rules 6 (2) (a) and 57 of this Court's Rules, a Notice of Appeal suffices and there is no need for a Memorandum of Appeal when lodging an Application for stay. That the matters in relation to competence can only be addressed when the appeal comes up for hearing.

Counsel further submitted that this Application is urgent because the hearing of the prosecution witnesses will commence on 1st March 2019 if the Application for stay is not granted.

He submitted that if the stay is not granted, there will be serious miscarriage of justice to the applicant. He prayed that the application be allowed.

Consideration of the application

This Court has inherent power to make such orders as may be necessary for achieving the end of justice or to prevent abuse of the process of Court under rule 2 (2) of the Judicature (Supreme Court) Rules.

Rule 2(2) provides:

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.”

The conditions for a grant of an interim order were clearly stated in **Hon. Theodore Ssekikuubo and 4 others vs. The Attorney General and others, SC Constitutional Application No. 04 of 2014**, where this Court held;

“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 M. Senkungu and Ors vs Cerencio Mukasa, (Civil Application No. 5 / 2013) and Guliano Gargio vs Calaudio Casadio, (Civil Application 3 / 2013); 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 them 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 Hwan Sung Industries Ltd vs. Tajdin Hussein and 2 Others (SCCA No. 19 of 2008).”

In addition, Rule 6 (2) (a) empowers this Court to grant orders for stay of execution where a Notice of Appeal has been lodged;

Rule 6 (2) (a) provides;

6. Suspension of sentence, stay of execution, etc

- 1) No sentence of death or corporal punishment shall be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given, until the appeal has been determined.**
- 2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—**

- a) in any criminal proceedings, where notice of appeal has been given in accordance with rules 56 and 57 of these Rules, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal. (Underlining is mine for emphasis)

In the instant Application, it is established that a Notice of Appeal was lodged by the applicant on 7th November 2018 (Annexure E). There is a substantive Application pending before this Court seeking for a stay of proceedings in Misc. Application No.15 of 2018, filed on 3rd December 2018.

There is a serious threat as the retrial has commenced although the actual hearing has not started. Annexure G and H show that the re-trial has commenced. The respondents have taken plea, been granted bail and the trial Judge scheduled the hearing for the 1st of March 2019. The appeal and the substantive Application have not yet been fixed for hearing in this Court. According to counsel, the applicant intends to challenge the order for a re-trial made by the Court of Appeal Justices in the intended appeal before this Court. If the re-trial at the Anti-Corruption Division of the High Court proceeds to conclusion, the applicants appeal will be in vain.

I have read a ruling of a Judge of the Anti-Corruption Division of the High Court dated 20th November 2018 which is annexure "G". The last paragraph reads:-

"In conclusion it is my decision that this Court shall read the indictment to the accused persons and take their plea. If they plead not guilty, the Court shall entertain their bail applications and make a decision on whether to grant bail or not. The trial in this Court would only be arrested by a decision from the Supreme Court setting

aside the judgment of the COA. It is up to the prosecution to get that decision at their earliest. Submissions from the bar would not suffice.”

The above is a clear threat that the retrial will proceed unless halted by an order of this Court.

I am satisfied that the applicants have met all the conditions required for the grant of this Application.

It is my finding that if the retrial commences as scheduled, the intended appeal and the Substantive Application will be rendered nugatory.

I do find that it would be in the interest of justice to grant an interim order to stay the proceedings of Criminal case HCT-OO-ACD-SC-0084/12 pending the determination of the main Application for stay of execution.

Accordingly this Application is allowed. An interim order is hereby granted staying the proceedings in Criminal case HCT-OO-ACD-SC-0084/12 at the Anti-Corruption Division of the High Court pending the determination of the applicants main Application No.15 of 2018 currently pending hearing by this Court.

The costs of this Application shall abide the outcome of the substantive Application for stay of execution.

The Registrar of this Court is directed to fix the main Application for stay for hearing at the earliest opportunity.

Dated at this day.....18th.....of.....February.....2019.



Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT