

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT
KAMPALA

CIVIL APPLICATION NO. 0009 OF 2023
(Arising From Civil Application No. of 2023)
(Arising From Civil Appeal No. 13 of 2020)

- 1. FORMULA FEEDS LIMITED**
2. GICHOHI NGARI
3. ANNE WANGUI GICHOHI ::::::::::::::::::::::::::: APPLICANTS
4. SAMSON GICHOHI NGARI

VERSUS

KCB BANK UGANDA LIMITED ::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA, JSC
(Sitting as a single Justice)

RULING OF COURT

This application was brought under Rule 2(2), 6(2) (b), 41(2), 42(1) and 43 of the Judicature Supreme Court Rules) Directions S1 13-10) seeking for orders that;

- a) An interim order doth issue staying the execution of the decree of the High Court (Commercial Division) in Civil Suit No. 289 of 2014 until the determination of Supreme Court Civil Appeal No. 13 of 2020;
- b) Costs for this application be provided for

The application is supported by the affidavits of the 2nd and 3rd applicants which state the grounds upon which this application is premised. Briefly, the grounds are that;

1. On 10th February 2016, the High Court (Commercial Division) delivered judgment in Civil Suit No. 289 of 2014 in favour of the respondent.
2. The applicants were dissatisfied with the said decision in the High Court and accordingly filed Civil Appeal No. 76 of 2016 in the Court of Appeal.
3. On 8th July 2020, Court of Appeal Civil Appeal No. 76 of 2016 was dismissed with costs to the respondent.
4. The applicants were dissatisfied with the entire judgment and decree of the Court of Appeal in Civil Appeal No. 76 of 2016 and accordingly filed an appeal in the Supreme Court vide Supreme Court Civil Appeal No. 13 of 2020 and the same is pending determination.
5. On 30th September 2022, the respondent filed two applications for execution of the decree in High Court (Commercial Division) Civil Suit No. 289 of 2014 in the High Court vide EMA No. 0279 of 2022.
6. On 9th November 2022, the Applicants filed High Court (Commercial Division) Miscellaneous Application No. 1647 of 2022 seeking for an order staying the execution of the decree in High Court (Commercial Division) Civil Suit No. 289 of 2014 but the same was dismissed on 13th February 2023.

7. The Applicants' appeal vide Supreme Court Civil Appeal No. 13 of 2020 is meritorious, raises serious questions and has a high likelihood of success.

8. There is a serious and imminent threat of execution of the decree of the Court in Civil Suit No. 289 of 2014 before the determination of Supreme Court Civil Appeal No. 13 of 2020.

9. The applicants filed a substantive application for stay of execution of the decree of the High Court (Commercial Division) Civil Suit No. 0289 of 2014 and before this Honourable Court and the same is pending hearing and determination.

10. The applicants shall suffer irreparable damage and/ or substantial loss if this application is not granted.

11. The application has been made without unreasonable delay.

12. The applicant's right to be heard in the main application for stay of execution will be rendered nugatory if this application is not granted.

13. The applicants have already paid Ug Shs. 30.000.000 (Uganda Shillings Thirty Million) to the respondent as part of the taxed costs of 71,726,801/= and have already expressed willingness and ability to furnish security for costs in the main application.

The respondent filed an affidavit in reply sworn by Leila Linda Najjemba and filed on 21st March 2022. She states briefly that;

1. The application is incompetently before this court; it ought to have been filed in the Court of Appeal first and that the applicant has filed the substantive application for stay of execution of the decree in HCCS No. 289 of 2014 in the Court of Appeal.
2. The respondent's notice to show cause why execution should not issue- EMA No. 279 of 2022- was dismissed by the Registrar of the High Court on the 7th of December 2022.
3. On 24th March 2022, the applicants were ordered by the Supreme Court to deposit security for costs in the sum of 141,726,801/=.
4. In contempt of court, the applicants have to date refused to comply with the Order of the Supreme Court.
5. Supreme Court Civil Appeal No. 13 of 2020 is incompetent for non-compliance with an order to deposit security for costs.

Representation

At the hearing of this application, Counsel Derrick Bazekuketta appeared for the applicants while Counsel Terence Kavuma appeared for the respondents.

Applicant's submissions

Counsel for the applicant relied on the decision in **Horizon Coaches Ltd v Pan African Insurance Company Supreme Court Civil Application No. 20 of 2002** on the purpose of interim orders, and argued that the purpose is to preserve the *status quo* and to prevent the proceedings or any order therefrom of this court being rendered

nugatory. In addition, counsel relied on the cases of **Yakobo Senkungu and others vs Cerencio Mukasa, Supreme Court Civil Application No. 5 of 2013** and **Guliano Gargio vs Calaudio Casadio Supreme Court Civil Application No. 2 of 2013** in which
5 the Supreme 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*".

Counsel Bazekuketta submitted that the principles followed by
10 courts in applications of this nature were clearly stated in the case of **Hwang Sung Industries Limited v Tajdin Hussein & Others, SC Civil Application No. 19 of 2008** where Okello JSC, as he then was held; *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*
15 *execution before the hearing of the substantive 3 application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.*"

Counsel submitted that according to the Supreme Court decision in **Zubeda Mohamed & Anor v Laila Kaka Walia & Anor Supreme**
20 **Court Civil Ref. No. 7 of 2016** at page 8, there are three conditions that an applicant must satisfy to justify the grant of an interim order, namely; a Competent Notice of Appeal has been filed; a substantive application is filed and a serious threat of execution.

Counsel argued that the Applicants in this case filed an appeal in
25 this Court vide Supreme Court Civil Appeal No. 13 of 2020 against

the judgment of the Court of Appeal in Civil Appeal No. 76 of 2016 and the same is pending determination before this court. The Notice of Appeal and Memorandum of Appeal are attached to the affidavit of Gichohi Ngari and marked "B" and "C" respectively. The Applicants
5 filed a substantive application vide Supreme Court Civil Application No. 0007 of 2023 in this Honourable Court for an order of stay of execution of the decree of the High Court (Commercial Division) in HCCS No. 0289 of 2014.

Regarding the existence of a serious threat of execution, counsel
10 submitted that the Respondent, through 2 different law firms, filed 2 separate applications for execution of the same decree in the High Court (Commercial Division Civil Suit No. 289 of 2014. Although the Respondent's application for execution vide High Court (Commercial Division) EMA No. 179 of 2022 was dismissed, the Respondent has
15 since filed an appeal against this ruling vide High Court (Commercial Division) Miscellaneous Appeal No. 323 of 2023 against the 2nd, 3rd and 4th respondents seeking for execution of the decree by way of committal in civil prison and the same has been fixed for hearing on Friday, 17th March 2023 at 9:00am. A copy of the Notice of Motion in
20 High Court Miscellaneous Appeal No. 323 of 2023 and the hearing notice for the said appeal are attached to the affidavit of Gichohi Ngari and are marked as annexures "F" and respectively. Counsel prayed that this courts grants an interim order of stay of execution to preserve the status quo until the disposal of the substantive
25 application.

Respondent's submissions

Counsel Kavuma, for the respondent submitted orally in court and raised a preliminary objection under Rule 41(1) of the Judicature Supreme Court Rules Directions S1 13-10, that this application should have been first filed in the Court of Appeal. Counsel relied on this court's decision in **Global Capital Save 2004 Ltd and another Vs Alice Okiror and another Civil Application No. 57 of 2021**, in which it was held that Rule 41(1) requires that parties must first file applications for stay in Court of Appeal. That the applicant, having a substantive application for stay of execution in the Court of Appeal and filing a similar application seeking similar orders in this court amounts to abuse of court process.

Counsel relied on the decision in **Attorney General Vs Eddie Kwizera Constitutional Application No. 1 of 2020** on the notion that applications of this nature have to first be made to the Court of Appeal.

Counsel submitted further that the applicants were ordered to pay security for costs, which they have not deposited to date and this renders the appeal incompetently before this court. Counsel prayed that the applicant be held in contempt of court for having failed to deposit security for costs within the 45 days ordered by court. Counsel relied on the decision in **Housing Finance Bank Ltd and another Vs Edward Musisi M. A No. 158 of 2010** in which it was held that a party in contempt of court by disobeying an existing court

order cannot be heard in a different, but related cause or motion, unless and until such a person has purged himself/herself of the contempt. Counsel Kavuma prayed that the application be dismissed with costs to the respondent.

Applicant's rejoinder

Counsel Bazekuketta submitted that the substantive application relied on by the respondent's counsel filed at the Court of Appeal was rejected on ECCMIS, which is a judicial record, with the Registrar Court of Appeal stating that the application was wrongly filed because the Court of Appeal is not the executing court. That under Rule 41(1) of the Rules of this Court, such application can be made to the Court of Appeal where it is the executing court. That the decree to be executed is that of the High Court in H.C.C.S No. 289 of 2014 and not of the Court of Appeal. No proceedings are before the Court of Appeal and as such, the applicant had to seek redress in this court.

Counsel submitted further that the applicants cannot be held in contempt of court where there is no application for dismissal of the appeal for failure to pay security for costs.

Consideration of the application

I have read the pleadings and considered the law and submissions of both counsel.

Before I delve into the merits of this application, it is pertinent that I address the preliminary objection raised by the respondent's counsel

on whether this application is properly before this court. **Rule 41** of the Rules of this court states that;

41. Order of applications to the court and to Court of Appeal

(1) Where an application may be made either to the court or to the Court of Appeal, it shall be made to the Court of Appeal first.

(2) Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the court may, in its discretion, on application or of its own motion, give leave to appeal and make any consequential order to extend the time for the doing of any act, as the justice of the case requires, or entertain an application under rule 6(2)(b) of these Rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

This issue was well discussed by the Supreme Court in **Lawrence Musiitwa Kyazze vs Eunice Busingye, Supreme Court Civil Application No. 018 of 1990**, in which the Supreme Court observed and held as follows:-

"The practice that this court should adopt is that general applications for a stay should be made informally to the Judge who decided the case when judgment is delivered. The Judge may direct that a formal motion be presented on notice (Order XL VIII rule 1.), after a notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set

out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application maybe ex parte if the application is refused, the parties may then apply to the Supreme court under Rule 5(2)(b) of the Court of Appeal Rules where again they should be prepared to meet similar condition similar to those set out in XXXIX Rule 4(3). However there may be circumstances when this court will intervene to preserve the status quo. In cases where the High Court has doubted its jurisdiction or has made some error of law or fact apparent on the face of the record which is probably wrong, or has been unable to deal with the application in good time to the prejudice of the parties in the suit property, the application maybe made direct to this court. It may however be that this court will direct that the High Court would hear the application first, or that an appeal be taken against the decision of the High Court, bearing in mind that the interest of the parties and the costs involved. The aim is to have the application for stay speedily heard, and delays avoided." Emphasis added

It is now settled law that this court and the Court of Appeal have concurrent jurisdiction in applications of this nature. The applications should first be filed in the Court of Appeal but where exceptional circumstances exist, they can be filed straight in this Court. The applicant in this case has an appeal pending before this court, but execution proceedings are underway at the Commercial Division of the High Court. The applicant's counsel contended in his rejoinder, that the application filed at the Court of Appeal through ECCMIS was rejected by the Registrar for re-direction to the Supreme

Court before which the appeal is pending. It is my considered view that such an exceptional circumstance exists in this case and accordingly overrule the respondent's preliminary objection.

Rule 6 (2) (b) the Rules of this court which provides for stay of execution states:

(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).....;

(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."

The principles followed by our courts for the grant of interim orders are set out in the case of **Hwang Sung Industries Limited v Tajdin Hussein & Others, SC Civil Application No. 19 of 2008**, cited by learned counsel for the applicant, where Okello JSC, as he then was, said:

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

This court held in the case of **China Henan International Cooperation Group Co. Ltd Vs Justus Kyabahwa Civil Application No. 30 of 2021** that;

5 *"In cases of urgency, this Court is empowered to issue interim orders as a stop gap measure to ensure that the substantive application is not rendered nugatory. This power is granted to Court by Rule 2(2) of the Rules of the Court in "order to achieve the ends of justice". In Hon. Ssekikuubo & Ors vs AG & Ors, SC Constitutional Application No. 04 of 2014, this Court said:*

10 *"Rule 2(2) of the Judicature 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 **Zubeda Mohammad & Anor vs Laila Kaka Wajja & Anor, SC Civil Reference No.07 of 2016**, relied on by learned counsel Bazakuketta for the applicant, this Court said:

15 *"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;*
- 20 2. *A substantive application;*
3. *A serious threat to execution."*

Regarding the first condition, I find that the applicants have filed a Notice of Appeal and appeal in this court vide Supreme Court Civil

Appeal No. 13 of 2020 and both the Notice of Appeal and the Memorandum of Appeal are attached onto the affidavit of the 2nd applicant.

A substantive application has also been filed in this Court vide Supreme Court Civil Application No. 007 of 2023 seeking a substantive order of stay of execution of the decree of the High Court in H.C.C.S No. 0289 of 2014 and it is pending hearing.

Regarding existence of a serious threat of execution, counsel Bazekuketta submitted that the ruling in Miscellaneous Appeal No. 323 of 2023 was delivered on 20th March 2023 and the learned Judge directed that the Registrar of the High Court Commercial Division to fix the application for execution for hearing. I must note that the appeal from this application and the substantive applications arise has been fixed for hearing on the 28th of March 2023.

In conclusion and for the foregoing reasons, I find that the applicant has met the conditions for the grant of an interim stay of execution. I am fully aware that Rule 2 (2) of the Rules of this Court confers on the Court discretionary powers in the pursuit and fulfilment of the exercise of the substantive justice. It would be improper for this court to allow execution proceedings go on against the applicants whose appeal has already been fixed for hearing. I therefore allow this application and make the following orders;

1. An interim order is hereby granted staying the execution of the decree of the High Court (Commercial Division) in Civil Suit No.

289 of 2014 until the determination of Supreme Court Civil Application No. 0007 of 2023.

2. The Registrar of this court is directed to fix Supreme Court Civil Application No. 0007 of 2023 on the 28th of March 2023, together with S.C.C.A No. 13 of 2020, which has already been cause-listed.

3. Costs shall abide the main cause.

I so order

Dated this 23rd day of March 2023



Stephen Musota

JUSTICE OF THE SUPREME COURT

The ruling delivered to day
the 23rd of March 2023
as directed

