

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1027 OF 2015

5 **ARISING OUT OF CIVIL SUIT NO. 0359 OF 2015**

AMDHAN KHAN:.....APPLICANT

VERSUS

STANBIC BANK (U) LIMITED:.....RESPONDENT

BEFORE: HON.MR JUSTICE BASHAIJA K. ANDREW

10 **RULING**

Dr. Byamugisha Joseph, Counsel for the Respondent, raised three preliminary points before the hearing of the application, which this court is required to rule upon. The first one is based on *Section 6 of the Civil Procedure Act (Cap 71) (CPA)* which provides that;

15 ***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit***

*or proceeding is pending in the same or any other court having jurisdiction in
Uganda to grant the relief claimed.”*

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Dr. Byamugisha submitted there is an application for a stay of execution which, according to the affidavit in reply, was filed on the 26th October, 2015. That the instant application was filed on the 30th October, 2015, also seeking for the enforcement of the same decree, and that by the operation of **Section 6(supra)** this application should be stayed.

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The second point is based on **Section 34(1) CPA** where it provides that;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

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Dr. Byamugisha submitted according to this section, the instant application leads to matters between the parties relating to the discharge, and satisfaction of the decree, and that they can only be determined by the Execution Division which has jurisdiction in execution matters and not by the Land Division.

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The third point is that this matter being on appeal, such questions can only be determined by the Court of Appeal under **Section 11 of the Judicature Act (cap13)**. Counsel argued that this court is *functus officio* as far as hearing and determining this application is concerned since it no longer has the suit which is now with to the Court of Appeal for determination, and also does not have the execution file which is with the Execution Division.

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To back his submissions, Counsel relied on ***Goodman Agencies Ltd vs. Attorney General & Hassa Agencies K. Ltd, Constitutional Petition No. 3 of 2008*** where Tabaro J, changed the contents of a consent judgment, and on appeal it was observed that the learned Judge having endorsed the consent judgment, even if no formal decree had been
45 extracted, would not alter that judgment. Counsel further relied on ***Black’s Law Dictionary*** for the definition of the term *functus officio* which means; “*without further authority of legal competence because the duties of the original commission have been fully accomplished.*”

Dr Byamugisha argued that this court completed the suit and a decree was extracted out
50 of it and indeed an appeal was filed in respect of it. Counsel cited a Botswana case of ***Magdeline Makinta vs. Fostina Nkwe, Court of Appeal No.26 of 1001*** which quoted from ***Adneste Monanyana vs. The State, Criminal appeal No.8 of 2001***, and held that the general principle now well established in South Africa as well in Botswana is that once a court has duly pronounced a final judgment or order it has itself no authority to
55 correct or alter or supplement it. The reason is that it becomes thereupon *functus officio*, its jurisdiction in the case having been fully and finally exercised its authority over the subject matter has ceased. The Court of appeal of Uganda which cited both cases in ***Goodman Agencies Ltd vs. Attorney General & Hassa Agencies K. Ltd (supra)*** further held that although this is a criminal case judgment from a foreign jurisdiction, it highly
60 persuasive and embodies the correct statement of the law on the subject. Dr. Byamugisha submitted that this court should therefore not proceed with hearing this application.

In reply Mr. Oyine Ronald, Counsel for the Applicant, submitted that the application is substantially seeking orders to cite the Respondent bank and sanction it for acting in

65 contempt of court. That it is not an application to vary, set aside, alter or otherwise; the
decree that was earlier passed. That it is that reason that distinguishes the authorities
Counsel for the Respondent cited on the *functus officio* rule.

70 Mr. Oyine further submitted that the question for the determination in this application is
whether or not the Respondent is in contempt of the orders that this court made, and that
there is no any other better court that is best suited to determine this application other
than this very court. That this court has inherent jurisdiction to determine this application
and that there is nothing to the contrary.

75 Regarding provisions of **Section 6 CPA**, Mr. Oyine submitted that it is true that the
application for stay of execution was filed on the 26th October, 2015, and this application
on the 30th October, 2015. That, however, the application for contempt of court takes
precedence of any other, and that in this case any other being in reference to the
application for stay of execution. For this proposition Mr. Oyine relied on ***Housing
Finance Bank Ltd & Another vs. Edward Musisi, CAMA No.158 of 2010*** to the effect
that a court of law never acts in vain and as such issues touching on contempt of court
take precedence over any other case of evocation of the jurisdiction of the court, and that
80 this is irrespective of **Section 6(supra)** and the fact that an application has been made for
stay of execution. Counsel insisted that the application should be heard and disposed of
first.

85 Regarding the issue on the jurisdiction of the Land Division and the Execution Division,
Mr. Oyine argued that it is just a matter of semantics. That **Section 34(1)(supra)** properly
read shows that the court executing the decree would be this very court. Counsel argued

that the creation of the Execution Division was for administrative purposes, but not for of ousting the jurisdiction of this court. Further, that **Section 34(1)(supra)** does not oust the jurisdiction of this court from entertaining any other matter arising from this suit.

90 On the point that an appeal has been filed against the decision of this court, Mr. Oyine submitted that it is tried law that it is not an automatic stay. Counsel argued that the mere fact that there is a pending appeal does not stop any other matters that would arise in the original suit unless there has been an automatic stay to that effect. For this position Mr. Oyine once again relied on **Housing Finance Bank Ltd & Another vs. Edward Musisi (supra)** where there was a pending appeal in the Supreme Court because the Court of
95 Appeal had passed a decree but it went on to hear the matter and to find that the applicant was in contempt of court.

Mr. Oyine argued that **Section 11 of the Judicature Act (supra)** is not applicable anywhere in this application because it just provides that the Court of Appeal has powers of the court of original jurisdiction for purposes of re-evaluation of evidence on the
100 substantive appeal; but not that it can oust the jurisdiction of the High Court to determine whether the Respondent is in contempt of court. Mr. Oyine submitted that the preliminary objections be rejected and the application proceeds.

Mr. Oyine then made an application that for purposes of not wasting time and because of the nature of this application, the Managing Director of the Respondent bank be
105 summoned to be personally present in court on the next hearing date together with Mr. Jonathan Were, the Legal Advisor to the Respondent bank who swore an affidavit in reply to this application.

Counsel stated that the latter is needed for cross-examination basically on areas surrounding the fact that shortly after the decree was passed in the main suit, the Respondent bank received and receipted payment of Shs.100 million the Applicant paid towards the purchase of the suit property as it appears as *Annexure "J and K"* to the application, and to confirm the fact that they have continued to take benefit of the judgment, but again continue to act in contempt the very court orders that they are deriving benefit.

In rejoinder Dr. Byamugisha submitted that there was no reason for summoning the Managing Director who is not conversant with this case. Counsel also sought to distinguish the *Housing Finance Bank Ltd & Another vs. Edward Musisi case (supra)* arguing that the case was for stay of execution and that the rules provide that for a stay of execution in respect of an appeal to the Supreme Court, the stay must be first be made in the Court of Appeal. Further, that the decision in that case is not that contempt of court proceedings take precedence over other proceedings. Rather, that it is that when a party is in contempt of court, it should not seek in it assistance of that court. That in that case the Registrar had ordered the party to deposit a certificate of court in court and a party had refused to do so, and that there was no application which took precedence.

Dr. Byamugisha reiterated that that whether or not the Respondent is in contempt of court is a question which will be argued in the main application if the preliminary objections are not upheld.

On the issue of jurisdiction, Dr. Byamugisha noted that this court has inherent jurisdiction, but in respect of specific matters that are in respect of a case before it. That if

130 there had been no appeal to the Court of Appeal, then this court would have inherent
jurisdiction in the matter, but that now it does not.

The following are the issues for determination:

- 135 **1. Whether the operation of Section 6 CPA bars this court from hearing the instant
application for contempt of court where there is already an application filed for a
stay of execution in the original suit.**
- 2. Whether the Land Division has jurisdiction in a case in which it passed a decree
that is before the Execution Division for an application for a stay of execution.**
- 3. Whether this court is functus officio in the application for contempt of court before
it.**
- 140 **4. What are the remedies available to the parties?**

Resolution of the Issues:

***Issue No. 1: Whether the operation of Section 6 CPA bars this court from hearing the
instant application for contempt of court where there is already an application filed for
a stay of execution in the original suit.***

145 The issue, in my view, poses primarily questions of law which are well settled in the case
of ***Housing Finance Bank Ltd & Another vs. Edward Musisi case (supra)*** which was
cited by Mr. Oyine. Although Dr. Byamugisha sought to distinguish the case for the
reasons he assigned, the case is nevertheless precise on the point at hand. At page 12 of
the judgment, the Court of Appeal held, inter alia, that;

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“A Court of Law never acts in vain, and as such, issues touching on contempt of court take precedence over any other case on invocation of the jurisdiction of the Court.”

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To my mind the Court of Appeal set a rule of general application in that cases touching contempt of court take precedence over any other. The phrase “any other” must be read and construed to mean and to include all such applications, such as one for a stay of execution in the Execution Division in this case.

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The reasons are not hard to find. It would be futile for a court to issue orders that are not effective owing to the parties’ disobedience of such orders; and yet the court continues to issue such other orders on top of those already issued but disobeyed. It is thus highly necessary that matters touching contempt of court be dealt with as matter of urgency and priority. This rationale is aptly encapsulated in Court of Appeal holding in the ***Housing Finance Bank Ltd & Another vs. Edward Musisi case (supra)*** at page 11, that;

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“The principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders issued by Court through its set judicial process, in the normal functioning of the Courts; are not complied with in full by those targeted and /or called upon to give due compliance.”

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I must add that matters touching contempt of court take precedence over any other irrespective of the provisions of ***Section 6 CPA (supra)*** and the fact that an application has been made for stay of execution, or that an appeal has been preferred against the decision out of which the application for contempt of court arises. That is the import of the Court of Appeal even excluding the invocation of the jurisdiction of the court in the

Housing Finance Bank Ltd & Another vs. Edward Musisi case (supra). The application for contempt of court should be heard and disposed of first.

175 ***Issue No.2: Whether the Land Division has jurisdiction in a case in which it passed a decree that is before the Execution Division for an application for a stay of execution.***

Again this is purely a question of law. It is trite law that a court that passes a decree or order has the power to execute the decree or order. **Section 34(1) CPA** to which Dr. Byamugisha made reference actually supports the view that it is this court (Land Division) that primarily empowered to execute its orders. **Section 30 (supra)** provides 180 that a decree may be executed either by the court which passed it or by the court to which it is sent for execution.

The same view is fortified by provisions of **Order 22 r.1 (1)(c) CPR** to the effect that the court which passed the decree has the power to execute it. Under **Order 22 r.4 CPR** it is only when the court that passed the decree desires that its own decree shall be executed by 185 another court that the court that passed the decree may transfer the decree to that other court. Under **Order 22 r.7 CPR**, a party seeking to execute the decree must first apply to the court that passed the decree or to the court to which the decree has been transferred. This rule simply replicates the provisions of **Section 31 CPA (supra)** to the same effect.

Furthermore, **Section 29 CPA** defines the expression, “court which passed a decree”, or 190 words to that effect, in relation to the execution of decrees, to include—

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and

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(b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit in which the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.”

I do not read in any of these provisions any ouster of jurisdiction of this court as the Land Division that passed the decree in the first instance.

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Apart from the above, High Court Divisions were created simply for the convenience and ease of administration and management of court business. It was never meant nor does it purport to confer jurisdiction on those division. *Administrative Circular No.4 of 2011* under which the Execution Division was created does not oust or purport to oust the jurisdiction of the High Court, in any matter, which is conferred under *Article 139 of the Constitution* and duly operationalised by *Section 14 of the Judicature Act (Cap 13)*. It is thus incorrect to argue that the Land Division which was created under *Administration Instruction No.1 of 2006* ceases to have jurisdiction over the application for contempt of court arising from a decree it passed that is before the Execution Division of the High Court.

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Issue No.3: Whether this court is functus officio in the application for contempt of court before it.

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The *functus officio* rule encapsulates the general principle that the court passing judgment or decree cannot revisit the judgment or purport to exercise a judicial power over the same matter. That is the principle in the case of *Goodman Agencies Ltd vs. Attorney General & Hassa Agencies K. Ltd,(supra)* that was cited by Dr. Byamugisha

215 I however do not find the principle relevant in this application which seeks to cite and
sanction the Respondent bank for contempt of court. This court would be *functus officio*
only to the extent that it cannot revisit its decision in the case it has already determined
and concluded. It cannot be *functus officio* in an application arising out of that case;
particularly where there are allegations of contempt of court orders.

220 Similarly, I am unable to find that an appeal against the decree of this court operates as a
bar to this court hearing any other matters arising out of the same case unless there is an
automatic stay of execution. This is the settled position of the law. Merely because there
is a pending appeal does not stop any other matters that would arise in the original suit
unless there has been an automatic stay to that effect. This is the also import of the
225 decision in ***Housing Finance Bank Ltd & Another vs. Edward Musisi (supra)***. To that
end, I do not find ***Section 11 of the Judicature Act (supra)*** applicable to facts of this
application. In all I find that the objections are unsustainable and I overrule them with
costs.

Regarding Mr. Oyine’s application to summon the MD of the Respondent along with the
230 Legal Advisor, whereas there is merit for summoning the Legal Advisor, who may be
needed for cross – examination on his affidavit, I do not find justification for summoning
the MD who does not feature anywhere in the application and who is ably represented by
the Respondent’s Counsel. Only Mr. Jonathan Were the Legal Advisor of the Respondent
is therefore summoned to attend court for the said purpose.

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BASHAIJA K. ANDREW

JUDGE

01/12/2015