THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KOLOLO

(CORAM: OKELLO, JSC.)

CIVIL APPLICATION NO. 04 OF 2010

BETWEEN

ALCON INTERNATIONAL LTD:::::::::::::::::::::::::::::::::: APPLICANT

AND

1) THE NEW VISION PRINTING
& PUBLISHING CO. LTD.

2) THE EDITOR IN CHIEF
NEW VISION & SUNDAY VISION:::::::::::::::::: RESPONDENTS

(An application for an interim order of injunction arising from Civil Application No. 03 of 2010).

RULING OF G. M. OKELLO, JSC:

This application seeks an interim order restraining the respondents from publishing or printing any matter, in the print media, relating to or connected with Civil Appeal No. 15 of 2009, ***National Social Security Funds (NSSF) and Another - vs - Alcon International Limited,*** now pending before this court, until the substantive Civil Application No. 03 of 2010, seeking a permanent injunction, is heard and determined. The application also seeks for costs of the application.

The application is brought under rules 31 and 42 of the Rules of this court, section 48 1(a) of the Judicature Act (cap. 13) and Order 41 r 2(1) of the Civil Procedure Rules (SI 71 - 1).

The background to the application is briefly that the applicant is the respondent in *Civil Appeal No. 15 of 2009,* (supra). The *National Social Security Fund (NSSF) and Another* are the appellants in that appeal.

Sometimes in 1994, the applicant had entered into a contract with NSSF. Under the contract, the applicant was to complete the construction of a partially constructed structure on Plot No. 1 - Pilkington Road, Kampala. W. H. Ssentoogo T/a Ssentoogo and Partners, was contracted as the architect of the project. Disputes arose between the parties to the contract culminating in NSSF terminating the contract in May 1998, whereupon the applicant sued for breach of the contract.

When the case came up for hearing, the trial judge stayed the proceedings and referred the disputes to arbitration. An arbitral award was made. NSSF and Another unsuccessfully sought to have the award set aside. Their appeal to the Court of Appeal against the High Court's refusal to set aside the arbitral award was also unsuccessful, hence Civil Appeal No. 15 of 2009.

While this appeal is pending, the current respondents published in the New Vision News Paper series of articles commenting on the judgments of the High Court and Court of Appeal, the subject of the pending appeal. The applicant complained that the publications were prejudicial not only to the applicant but also to the proceedings in the pending appeal.

In consequence, the applicant filed in this court Civil Application No. 03 of 2010 seeking to restrain the respondents from further publishing prejudicial matters relating to the pending appeal until it is heard and determined. The applicant further complained that the respondents have threatened to continue serialization of their articles in their next Sunday Vision, hence this application.

The application is based on the following grounds:

(a) ***That the applicant is a party to*** *Civil Appeal No. 15 of 2009; NSSF and Another - vs - Alcon International Ltd.* ***Which is pending before this court.***

(b) ***The respondents in their issue of Sunday 11th April 2010, commenced a series of publications contemptuous to the High Court and Court of Appeal judgments and are calculated to portray the applicant as fraudulent, corrupt and criminal in the execution of the contract that is the subject matter of the appeal proceedings before the court;***

(c) ***That the respondents have continued publishing similar articles on 18th April 2010 to the prejudice of the applicant.***

(d) ***That these publications are prejudicial to the proceedings in the appeal before the court which is yet to be heard.***

(e) ***That the applicant has filed an application for an injunction vide*** *Civil Application No. 03 of 2010* ***when it is yet to be heard and determined.***

(f) ***That the applicant will suffer irreparable loss if the interim order is not granted.***

The above grounds are a summary of the contents of the affidavit of Mr. Enos K. Tumusiime sworn on 21-04-2010, in support of the application.

Presenting the applicant's case, Mr. M. Kabega, learned counsel for the applicant referred to the Notice of Motion, repeated the contents of the affidavit in support of the application and prayed that the application be allowed.

The respondents opposed the application essentially on two grounds, firstly on procedure and secondly on substance. They relied on the affidavit in reply sworn by Edmund Wakida of Lex Uganda Advocates & Solicitors, as counsel duly instructed to defend the respondents.

On procedure, Mr. Wakida contended that if the applicant's complaint is that the publications are defamatory and prejudicial to the applicant's interest in the pending Civil Appeal No. 15 of 2009, then the Supreme Court is not the right court to originate a cause of action. Only Presidential Election Petition originates in the Supreme Court.

He pointed out that while the inherent power of this court under rule 2(2) of the Rules of this court is wide enough to enable the court to grant an injunction, the circumstances in which such a power can be exercised are stated in rules 2(2) and specific rule 6 (2)(b) of the Rules of this court which have not been cited by the applicant. Pendency of an appeal before the court is a necessary condition before the court can exercise its inherent power. He relied on ***National Housing & Construction Corporation - vs - Kampala District Land Board, Civil Application No. 06 of 2002.***

He submitted that the required circumstances do not obtain in the instant application, particularly as the respondents are not party to the pending appeal nor were they party to the case before the High Court or Court of Appeal. He concluded that in these circumstances, this court cannot exercise its inherent power. For this proposition learned counsel relied on ***Civil Appeal No. 9 of 1999, David Muhenda & 3 Others - vs - Margaret Kamuje*** (SC) and prayed that the application be dismissed.

In response, Mr. Kabega contended that even if the applicant did not cite rule 2 (2) of the Supreme Court Rules, this court can still grant the relief sought under rule 31 of the same Rules. He denied that the application is based on the fact that the respondents have published defamatory matters about the applicant but rather that it is based on the respondents' publication of and threat to continue publication of matters prejudicial to the

applicant and to the proceedings in the pending appeal. He prayed that the application be allowed.

The issue raised by the above arguments of counsel is basically whether this application is properly before this court.

I must confess that I have not come across any specific rule which empowers this court, or any other court, to grant an interim injunction restraining a non - party News Paper from publishing prejudicial opinion on a case pending before the court. However, every court has inherent powers to make any order as may be necessary for achieving the ends of justice or to prevent abuse of its process. For the Supreme Court, this power is provided for in rule 2 (2) of the Rules of this court.

In this connection, while I accept that rule 31 of the Rules of this court gives this court wide general power when dealing with appeals, I am of the opinion that the proper rule to invoke in a case of this type is the inherent power under rule 2 (2) of the Rules of this court and not rule 31.

Citing a wrong provision of the law or failure to cite a provision of the law under which a party seeks a redress before court is a technicality which should not obstruct the cause of justice. It can safely be ignored in terms of article 126 (2)(e) of the Constitution.

I have read ***National Housing & Construction Corporation case*** (supra) to which learned counsel for the respondent referred me. In that case, this court while considering rule 5 (2)(b) of the Rules of this court (Now rule 6 (2)(b), considered the principles governing amongst others grant of an injunction to restrain a party from doing something.

There, this court stated that where notice of appeal has been lodged in accordance with rule 72 of the Rules of this court, rule 5 (2)(b) empowers the court *"to use its discretion to grant an injunction to restrain a party from doing something."*

Mr. Wakida argued that since the respondents are neither parties to the pending Civil Appeal No. 15 of 2009 nor were they parties to the proceedings in the High Court or Court of Appeal, this court cannot issue an injunction to restrain them from continuing to do the act complained of. He relied on ***David Mohenda and 3 Others - vs - Margaret Kamuje*** (supra).

With respect, I am not persuaded by that arguement. *David Muhenda and 3 Others* (supra), does not in any way advance the respondents' cause. It is distinguishable from the instant case on their facts.

David Muhenda and 3 Others started as a land dispute case between *Margaret Kamuje - vs - Israel Karasuma*, before a Magistrate Grade II in Fort Portal. Judgment was given by the Magistrate for Margaret Kamuje. When she sought to execute the decree and gain vacant possession of the disputed land, six people who apparently settled on the land after the judgment was given in her favour, objected to the execution. Their objector's application was heard by a Magistrate Grade I who upheld the objections of four but refused the objections of two objectors.

The Memorandum of Appeal to the High Court against the decision of the Magistrate Grade I showed that only one of the objectors had appealed. However, there were credible indicators that the appeal was on behalf of all the six objectors. The appellate High Court Judge gave judgment affecting all the six objectors including those who did not give notice of appeal. He acted under rule 27 of order 39 of the Civil Procedure Rules (Now rule 27 orders 43 CPR). This rule empowers the High Court to pass any decree or make any order affecting all or any of the respondents though such respondents may not have filed any appeal or cross appeal.

It was argued that the appellate judge should have not decided the appeal without hearing all the persons who were parties to the objection proceedings but not parties to the appeal because their interests were prejudiced by the decision in the appeal.

This court rejected that arguement and upheld the High Court decision reasoning that the appellate judge acted within his power under rule 27 of order 39 of the CPR.

The instant case, is a case of a News paper which is not a party to the appeal pending before this court but engages in writing comments or opinions that are allegedly prejudicial to a party relating to the pending proceedings. The imposing question is whether the court before which the appeal is pending does not have power to restrain such an act?

As I have stated earlier in this ruling, every court has inherent power to make any order as may be necessary for achieving the ends of justice or to prevent abuse of its process. In my considered opinion, the application of inherent power is not limited to only parties. It is wide enough to cover even non-party News Paper that engages in publishing prejudicial opinion on a party to or in respect of proceedings that are subjudice. In such a situation the court exercises that power to achieve the ends of justice.

On substance, Mr. Wakida contended that the application is bad because firstly, it purports to restrain the respondents' right to disseminate information obtained from court proceedings. Secondly, it seeks to prevent the right of the public to access information, a right guaranteed by article 41 of the Constitution, when it is not shown that the information is prejudicial to either national security, State Sovereignty or to private right. Learned counsel concluded that the application lacks merit and prayed that it be dismissed.

In response, Mr. Kabega contended that the application neither seeks to gag the respondents from disseminating non prejudicial matters about the applicant on proceedings that are subjudice nor to interfere with the public right to access information

as guaranteed by article 41 of the Constitution. The application seeks only to prohibit the respondents from publishing prejudicial comments or opinions about the applicant on a matter which is subjudice.

The issue raised from the above arguments of counsel, in my view, is whether the application has merits to justify grant of the relief sought.

In ***Hwan Sung Industries Ltd. - vs - Tojdin Hussein and 2 Others, Civil Application No. 19 of 2008,*** this court considered the issue of merit of an application seeking an interim order. After establishing that the notice of appeal had been lodged in accordance with rule 72 of the Rules of this court, the court stated on merit as follows:

> ***"- - - 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."***

I still stand by that statement. Upon being satisfied that the notice of appeal has been lodged in accordance with rule 72 of the Rules of this court, it is only necessary for the court to satisfy itself, on evidence, that a substantive application is pending and that there is a serious threat to do the act complained of before the substantive application is heard and determined. Lodgment of the notice of appeal in accordance with rule 72 ensures the competence of the pending substantive application. There is therefore, no need to pre-empt consideration of matters of substance, necessary for the success or otherwise, of the substantive application.

In the instant application, I am satisfied that the notice of appeal No. 15 of 2009, was lodged in accordance with rule 72 of the Rules of this court. There is no dispute about

the pendency of that appeal before this court. I am also satisfied on the evidence from the supporting affidavit of Mr. Enos K. Tumusiime that there is pending before this court a substantive application No. 03 of 2010 seeking a permanent injunctive order restraining the respondents from carrying out their threat to further publish the matters complained of.

It is not necessary for me at this stage to consider whether the publication complained of plainly and deliberately passed the limit of frank, candid and honest comments expected of a journalist on a matter pending before court. That is a matter to be reserved for consideration at the hearing of the substantive application. It is important at this stage to avoid rendering the pending substantive application nugatory when heard.

In the result, I allow this application and order the respondents to stop publishing in the print media any matter prejudicial to the applicant in respect of Civil Appeal No. 15 of 2009, which is subjudice until the pending substantive application No. 03 of 2010 is heard and determined.

Costs of this application shall abide the outcome of the substantive application.

Dated at Kololo this 30th day of June , 2010.

G. M. OKELLO
JUSTICE OF THE SUPREME COURT