THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; OKELLO; TUMWESIGYE; AND KISAAKYE; JJSC)

CIVIL APPLICATION NO. 07 OF 2010

B E T W E E N

DR. AHMED MUHAMMED KISUULE: :::::: APPLICANT

A N D

GREENLAND BANK (IN LIQUIDATION: :::::: RESPONDENT

{An application arising from the Supreme Court Civil Appeal No. 11 of 2010}.

Civil Application by-Notice of Motion-rules 6(2)(b),43,45 & 47 of the supreme court rules-stay of execution pending appeal-costs of application

RULING OF THE COURT:

This application was brought by Notice of Motion under Rules 6(2)(b); 43, 45 & 47 of the Rules of this court seeking for an order for stay of execution pending the disposal of Civil Appeal No. 11 of 2010 now pending before this court. The applicant also prays that costs of this application be in the cause.

Background Facts:

The facts that give rise to this application are briefly that on or about the 17th day of November 1995, the applicant and a one Kiriisa obtained from the respondent a loan of UGX 30 Million at an interest rate of 25% per annum to start a business. The loan was secured on the applicant's properties comprised in Plot Nos. 246 & 238, Block No. 27 situate at Makerere Kikoni as security for repayment. The applicant and Kiriisa had problems in repaying the loan and entered into another agreement with the respondent. Under the new agreement, the applicant alone, undertook to repay the loan. Consequently, a new account was opened by the respondent in the applicant's name.

Subsequently, when the applicant defaulted on the repayment, the respondent sold off the applicant's said properties on which the loan was secured and sued the applicant for the recovery of the outstanding balance which stood at UGX 78,196,985= plus such further interest that accrued.

The High Court heard the case and on 03-10-2005, gave judgment in favour of the respondent. Though aggrieved by that decision, the applicant opted for a review of the judgment. He applied to the High Court vide Misc. Civil Application no. 616 of kl2007, for review of the said judgment. M. S. Arach-Amoko, J, as she then was, who had given the judgment, heard the application, found no merit it and on 24th October 2008, dismissed it with costs.

Dissatisfied with that ruling, the applicant lodged a Notice of Appeal on 30-10-2008 to appeal to the Court of Appeal against the whole of that decision. He eventually filed in the Court of Appeal Civil Appeal No. 13 of 2009. The Court of Appeal heard the appeal and dismissed it.

The applicant was not done yet. He therefore lodged Civil Appeal No. 11 of 2010 in this court against the decision of the Court of Appeal. It is the decree of the Court of Appeal in Civil Appeal No. 13 of 2009 that this application seeks to stay its execution pending the disposal of Civil Appeal No. 11 of 2010 now pending before this court.

Grounds Of The Application:

The grounds on which the application is based are set out in the supporting affidavit sworn by the applicant himself on the 18th day of May, 2010. briefly the grounds as can be discerned from the affidavits are:

(1) That the applicant has filed an appeal in this court.

(2) That the applicant's appeal has likelihood of success.

(3) That respondent is likely to apply to execute the decree as it has already fixed the taxation of bill of costs for hearing.

(4) That the applicant's appeal will be rendered nugatory if the order for stay of execution is not granted.

(5) That the application was brought without delay.

Opposition:

The respondent opposed the application and filed an affidavit in reply sworn by Benedict Sekabira, the Director, Non-Bank Financial Institutions at Bank of Uganda as an agent of Bank of Uganda in charge of liquidation of the respondent. The respondent relies on this affidavit in reply to support its opposition to the application.

Representation:

At the hearing of this application, Mr. Semakula Muganwa Charles appeared for the applicant while Ms. Basaza Wasswa, represented the respondent.

Written Arguments:

Both counsel filed written arguments in support of and in opposition to the application. We wish first of all to reiterate our observation made during the hearing of this application, about the written arguments of counsel for the applicant both in support of the application and in rejoinder. These written arguments do not comply with the Practice Direction No. 2 of 2005. This Practice Direction was issued by the Hon. The Chief Justice under article 133(1) of the Constitution to regulate presentation of both oral and written submissions and arguments in the Supreme Court.

Though the court reluctantly granted leave, in the interest of justice, for those arguments to be retained on the file and be considered, we wish to emphasise that Practice Direction was not issued in vain. It was intended to guide counsel in their written arguments for a fair and smooth conduct of court hearing. We therefore urge counsel to adhere to the Practice Direction in future.

We now turn to consider the merit of the application.

Merit Of The Application:

In his prolix arguments, counsel for the applicant contended that the application has merit. Repeating what were stated in the affidavit in support of the application, learned counsel pointed out that the applicant has filed Civil Appeal No. 11 of 2010 in this court against the decision of the Court of Appeal in Civil Appeal No. 13 of 2009. He submitted that the appeal has a high likelihood of success. He relied on ***Idah Iterura - vs - Joyce Maguta, Supreme Court Civil Application No. 2 of 2006.*** which stressed the

importance of evidence of lodging a Notice of Appeal under rule 72 of the Rules of this court in an application of this type.

He further pointed out that the respondent was likely to apply for execution of the decree in question soon as the taxation of the Bill of Costs had been set down for hearing on 19th May, 2010. He submitted that the applicant's appeal, now pending in this court, will be rendered nugatory if an order for stay of execution is not granted.

He concluded by praying that the application be allowed and a stay of execution granted pending the disposal of Civil Appeal No. 11 of 2010. He also prayed for the costs of this application to be in the cause.

In her reply, counsel for the respondent opposed the application. While relying on the affidavit in reply, she contended that the application lacks merit. She reasoned firstly, that the applicant contravened Order 44 rules 1 & 2 of the Civil Procedure Rules when he neither sought nor obtained the mandatory leave either from the High Court or from the Court of Appeal to appeal against the order of the High Court in Msc. Civil application No. 616 of 2007 dismissing his request for review of the High Court judgment in HCCS No. 469/2001. She argued that where an application for review is dismissed, as it was in the instant case, then leave to appeal must be sought as the rule is mandatory.

She pointed out that in the instant case, the applicant's appeal against the order of the High Court dismissing his application No. 616 of 2007 to review the High Court judgment was improperly before the Court of Appeal, and as well is properly before this court.

She stated that under rule 41(1) of the Rules of this Court, the application for stay of execution under rule 6(2)(b) must first be made in the Court of Appeal but that this one had not first been made in the Court of Appeal.

Secondly, that the applicant's pending appeal had no likelihood of success as both the High Court and the Court of Appeal had found the applicant's story of discovery of an important evidence, a cooked-up story. He added that by his incessant unsuccessful applications, the applicant had unjustifiably denied the respondent realising the fruits of its judgment obtained in 2005. That the applicant had shown no good cause to justify grant of a stay of execution in this case.

Finally, learned counsel submitted that the respondent had incurred substantial costs in defending the appeal before the Court of Appeal and the nine applications but that all these costs remained unpaid by the applicant. She denied that the UGX 16,500,000= referred to by the applicant was paid for security for costs as stated by counsel for the applicant but rather that it was a 10% deposit on the excretal amount ordered by the trial judge as security for due performance of the decree. She urged this court to invoke its powers under rule 101(3) of the Rules of the Court to order the applicant to furnish further security for costs in the sum of UGX 300,000,000=, for payment of past costs relating to the matters in question in the appeal.

She concluded that the application lacks merit and prayed that it be dismissed with costs.

In exercising his right of reply, learned counsel for the applicant denied that the applicant contravened Order 44 Rule 2 of the CPR. He contended that the necessary leave to appeal against the High Court decision dismissing the applicant's application for review of the judgment of the High Court had been sought by the applicant and was granted to him on the 26th day of February, 2009. He cited Annexture "D" to the written rejoinder, an alleged copy of the grant, as evidence of the grant of the leave to appeal. He further stated that the issue of leave to appeal was a mere procedural technicality which could be ignored in terms of Article 126(2)(e) of the Constitution.

On security for costs, learned counsel responded that this was a matter within the discretion of the court. He cited sections 26 & 27 of the Civil Procedure Act (Cap. 71 Laws of Uganda 2000), and Order 26 rule 1 of the Civil Procedure Rules.

He reiterated his prayer for grant of the application.

Laws Applicable:

The law governing application for stay of execution in this court is basically rule 6(2)(b) of the Rules of this court which provides:

"Subject to sub-rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay of 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 considers just."*

For an application in this court for a stay of execution to succeed, the applicant must first show, subject to order facts in a given case, that he/she has lodged a notice of appeal in accordance with rule 72 of the Rules of this court. The other facts to which lodgement of the notice of appeal is subject, vary from case to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted; that the applicant's appeal has a high likelihood of success.

The most often cited authority in application of this type is ***Lawrence Musiitwa Kyazze - vs - Eunice Busingye, Civil Application No. 18 of 1990,*** in which this court held that *"Parties asking for a stay"* should meet conditions like:

(1) ***that substantial loss may result to the applicant unless the order is made.***

(2) ***that the application has been made without unreasonable delay.***

(3) ***that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.***

In the instant case, the complaint is that the applicant's appeal that pending before this court has no likelihood of success. The reasons advanced for that view was that the decision from which that appeal arose was from an appeal that was incompetently before the Court of Appeal for want of the necessary leave to appeal as required by Order 44 rule 2 of the CPR. It was argued that that defect impacts on the likelihood of success of the applicant's appeal pending before this court.

Order 44 rule 1 CPR reads as follow:

"An appeal shall lie as of right from the following orders under section 76 of this Act."

The orders listed under Order 44 rule 1 above included an order made under rule 4 of Order VL VI of the CPR. This is an order granting an application for review. However, rule 4 of Order XLVI does not provide for grant of an application for review. It was mentioned in error. The correct rule is rule 3(2) of the same Order) which provides:

"Where the court is of the opinion that the application for review should be granted, it shall grant it; except that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his or her knowledge, or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation."

Rule 3(1) of Order XLVI which provides for dismissal of an application for a review is not included on the list under Order 44 rule 1 of orders from which appeal lie as of right.

It therefore falls under Order 44 rule 2 which lists the orders from which an appeal lie only with leave of court.

Order 44 rule 2 of the CPR reads thus:

"An appeal under these Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given."

It follows therefore, that the applicant needed leave either from the High Court which dismissed his application for review or from the Court of Appeal to which appeal against that dismissal would lie if leave was granted.

Learned counsel for the applicant submitted in his rejoinder that the applicant had sought the necessary leave from the High Court and that it was granted by the High Court on 26th February, 2009. He cited copy of the alleged grant annexture 'D' as evidence of the grant.

The annexture 'D' reads in essential part as follow:

"ORDER

Upon the Hon. Lady Justice M. S. Arach-Amoko hearing Mr. Semakula Muganwa Charles for the applicant and P. Basaza Wasswa (Mrs.) for the Respondent.

It is this 26th day of February 2009, ordered as follows:

1. *that Misc. Application No. 583 of 2008 for stay of execution is conditionally allowed.*

2. *the Applicant shall deposit 10% of the Decretal amount in court as security for the due performance of the Decree, within thirty (30) days from the date of this Order.*

3. *if the Applicant fails to deposit the security as ordered, execution shall ensue.*

Given under my hand and seal of this Honourable Court this 10th day of March, 2009.

Signd: D/Registrar."

Clearly the above document clearly does not in any way amount to a grant of leave to the applicant to appeal against the decision of the High Court dismissing the applicant's application for review of the judgment. We do not think that counsel was serious to produce such a document as evidence of a grant of leave to appeal.

Learned counsel further submitted that the applicant is on record as having orally applied for leave after the court pronounced its decision on judicial review although the respondent castigated that approach.

We have perused the record of the proceedings of the application for review and are satisfied that no such oral application for leave to appeal against the dismissal of the application was made by the applicant's counsel. In any case, Order 44 rule 4 of the CPR provides that *"application for leave to appeal shall be Motion on Notice."*

The rule therefore, does not give room for oral application. In the circumstances, we are satisfied that the requirement of Order 44 (2) of the CPR had not been met by the applicant. Leave to appeal against the decision dismissing the applicant's application for review had neither been sought nor had it been obtained. This failure could impact on the likelihood of success of the applicant's appeal pending before this court.

Learned counsel further submitted that a similar objection to the competence of the applicant's appeal had been made before the Court of Appeal but that that court ignored it. Indeed, the record of proceedings in the Court of Appeal shows at P. 397 that Ms. Basaza Wasswa had in her written submission to the Court of Appeal said:

"No appeal can be made against such order as of right. The appellant should have obtained leave of court to appeal against a decree, no appeal before you Order 44 allows an appeal on quashing decision or granting review. It is a one way traffic. An order refusing review is not covered."

However, despite that submission, Mpagi Bahigeine, JA, who wrote the lead judgment with which the other two Justices of Appeal agreed, never at all addressed that point in her judgment. This position further casts a shadow on the likelihood of success of the applicant's appeal now pending before this court.

Another argument against the applicant's application was that the applicant did not show how he will suffer irreparable loss if a stay is not granted.

We find merit in this argument. In his entire affidavit sworn on 18-05-2010, in support of the application, the applicant never deponed not only to the fact that he will suffer such irreparable loss if a stay is not granted.

Having failed to show that his pending appeal has likelihood of success and that he will suffer irreparable loss if a stay is not granted, the applicant has failed to show sufficient cause to justify grant of a stay of execution in this case. We, therefore, find no merit in the application which we accordingly dismiss with costs.

We therefore, find no merit in the application which we accordingly dismiss with costs.

Dated at Kampala this 7th day of January, 2011.

B. ODOKI

CHIEF JUSTICE

J. W. N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

G. M. OKELLO

JUSTICE OF THE SUPREME COURT

J. TUMWESIGY

JUSTICE OF THE SUPREME COURT

E. M. KISAAKYE

JUSTICE OF THE SUPREME COURT