

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 13 OF 2023
(ARISING FROM CIVIL APPLICATION NO. 12 OF 2023)
(ARISING FROM COURT OF APPEAL CONSOLIDATED CIVIL
APPEALS NOS. 0266 AND 0297 OF 2017)

1. Nakivubo Road Old Kampala (Kisekka) Market Vendors Ltd
2. Rwakijuma Peter
3. Kiboneka Samson
4. Swaib Zizinga.....Applicants

Versus

1. Kisembo Robert Kasoro
2. Hajji Nsimbi Yusuf
3. Uganda Registration Services Bureau
4. The Registrar General of Companies
5. The Registrar of Documents.....Respondents

Ruling of Percy Night Tuhaise, JSC
(Single Justice)

This application was brought by under Rules 6 (2) (b), 41 (1) (2), 43 (1) of the Judicature (Supreme Court Rules) Directions SI 13-11. The Applicants through this application seek orders, that:-

1. Interim stay of execution in Consolidated Civil Appeals Nos. 0266 and 0297 of 2017 be issued until disposal of an application for temporary stay of execution.
2. Costs be provided for.

This application is supported by the grounds set out in the notice of motion and in the accompanying affidavits of Rwakijuma Peter, the 2nd Applicant.

At the hearing of this application, Counsel Harriet Auma appeared for the Applicants while Counsel Brian Othieno, together with Counsel Godfrey Himbaza, appeared for the 1st and 2nd Respondents. Counsel Brian Musota, State Attorney, together with Counsel Moses Ssempijja, Legal Officer with URSB, appeared for the 3rd, 4th and 5th Respondents. The parties filed written submissions.

Background to the application

The 1st Applicant was incorporated on the 24th of August 2007, as a company limited by guarantee without a share capital with membership of 2000 members. The 1st and 2nd Respondents were voted by the general assembly as some of the members of the Board of Directors of the company. Sometime later, on 7th February, 2015, following a disagreement evolving around demolition of Kisekka market, the 2nd, 3rd and 4th Applicants together with other individuals convened a meeting “as members” of the company. In that meeting they passed a vote of no confidence in the Board of Directors comprised of the 1st and 2nd Respondents, among others, and they appointed a new Board of Directors which included themselves. They notified the

Registrar of Companies of the change of directorship. On 20th March 2015, the 1st Respondent wrote a letter of complaint against them to the Registrar of Companies. The Registrar of Companies carried out investigations, heard the parties and ruled that the extra ordinary meeting convened on 7th February, 2015 was null and void because it was convened by 2 members contrary to section 139 of the Companies Act, 2012, and that the resolutions passed in the said meeting were illegal. This was followed by another meeting convened by the Applicants purportedly to implement the decisions of the Registrar of Companies where they purportedly came up with minutes and resolutions again appointing themselves as directors of the company, and they registered the resolutions with the Registrar of Documents. This was condemned by the Registrar of Companies who maintained that such actions cannot change the directorship of a company under the law.

On 22nd July 2015, the Applicants filed an application for judicial review *vide* High Court Miscellaneous Cause No. 109 of 2015 against the Respondents, seeking orders of certiorari, mandamus, prohibition, and injunction, against the decisions of the Registrar of Companies. The High court allowed the application. Dissatisfied with the decision of the High Court, the Respondents appealed against the High Court decision to the Court of Appeal, *vide* Consolidated Civil Appeals Nos. 0266 and 0297 of 2017. The Court of Appeal in its judgment dated 13th March 2023, set aside the ruling and orders of the High Court and substituted it with an order dismissing the judicial review application.

The Applicants have now filed the instant application seeking interim stay of execution of the orders of the Court of Appeal.

Consideration of the Application

I will first consider matters concerning the validity of this application, as raised in the submissions, since they are preliminary in nature, before proceeding to consider its merits.

Through their affidavits and submissions, the 1st and 2nd Respondents opposed this application on grounds that it is bad in law; that the same should be dismissed with costs since a similar application was filed in the Court of Appeal *vide* Civil Application No. 0124 of 2023 still pending in that court. The Respondents also referred this Court to paragraph 10 of the affidavit in support of the application filed by the 2nd Applicant Rwakijuma Peter, that this same application had first been filed in Court of Appeal *vide* CA No. 0124 of 2023 but the same could not be fixed and heard urgently due to lack of quorum at the Court of Appeal Bench. The 1st and 2nd Respondents Counsel submitted that, in addition to being an abuse of court process, the said paragraph contains a falsehood that the Court of Appeal lacked or lacks quorum to hear the said application.

The Applicants, through paragraph 3 of the 2nd Applicant's affidavit in rejoinder, replied that it is only good practice to first file an application for stay of execution in the Court of Appeal but it is not fatal if the same is directly filed in this Court as it is the appellate court in this matter. However,

Counsel for the 1st and 2nd Respondents submitted that there was no application for interim stay filed at the Court of Appeal.

The record shows that on 24th April 2023, the Applicants wrote to the Registrar of the Court of Appeal a letter (Annexure C3 to the affidavit in support of the application) requesting to transfer Civil Application 124 of 2023 from the Court of Appeal to the Supreme Court. The Registrar replied that matters registered at the Court of Appeal cannot be administratively transferred to the Supreme Court. The Registrar advised that the party may file an application in the Supreme Court and then seek to withdraw the application filed in the Court of Appeal.

The Applicants' allegations of lack of quorum at the Court of Appeal are not reflected in the said letter written by the Applicants to the Registrar, neither is there any other evidence adduced by the Applicants that there was such lack of quorum. That aside, Rule 41 (1) of the Rules of this Court provides that where an application may be made either to the Supreme Court or to the Court of Appeal, it shall be made to the Court of Appeal first. Rule 41 (2) (b) provides that, notwithstanding sub rule (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) to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

The record shows that what the Applicants filed in the Court of Appeal was an application for stay of execution, not an application for interim stay of execution.

In my considered opinion, rule 41 (2) read together with rules 2 (2) and 6 (2) (b), avails an exception to rule 41 (1), by availing a discretion to this Court to entertain an application under rule 6 (2) (b) to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal. It is on that basis that I will proceed to consider the merits of this application.

The principles for consideration when handling an application for interim applications were stated by Okello JSC, in the case of **Hwang Sung Industries Ltd Vs Tajdin Hussein & Others, Supreme Court Civil Application No. 19 of 2008** that,

“For an application for an interim order of stay of execution to issue, 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 preempt the consideration of matters necessary in deciding whether or not to grant the substantive application for stay of execution”.

A court in such circumstances will focus on whether there is:-

- i) A competent notice of appeal,
- ii) A pending substantive application, and
- iii) Imminent threat of execution.

See: Sgt. Oumo and Another Vs Wanyoto and Another, Supreme Court Civil Application No. 17 of 2022.

The foregoing principles will guide this Court when considering the merits of the instant application, as reflected in the issues below.

Whether there is a competent Notice of Appeal

The record shows that the Applicants have filed a Notice of Appeal, which is Annexure “A” to the 2nd Applicant’s affidavit in support of the application. They have also requested for typed and certified copies of the Record of Proceedings in the Court of Appeal, through a letter attached to the 2nd Applicant’s affidavit in support of the application as annexure “B”.

Thus, there is a competent Notice of Appeal in place.

Whether there is a pending substantive application

Learned Counsel for the Applicants submitted, and the record indeed shows, that, on 12th May 2023, the Applicants have filed Civil Application No.12 of 2023 in this Court, seeking temporary stay of execution pending the hearing and determination of the appeal.

Thus, there is in place a pending substantive application for temporary stay of execution *vide* Supreme Court Civil Application No.12 of 2023.

Whether there is imminent threat of execution

Regarding threat of execution, Counsel for the Applicants referred this Court to paragraphs 7 and 8 of the affidavit in support of the Notice of Motion sworn by the 2nd Applicant, which state:-

7. That the Judgement of the Lower Court in consolidated civil appeals Nos. 266 and 297 of 2017 has deprived the Applicants and indeed the majority low-income vendors of their constitutional rights to benefit from and own property at Plot 9A2 Nakivubo Road, Kampala, the right and interests the lower court had protected and guaranteed.

8. That the said judgment of the Court of Appeal has disenfranchised the Applicants and indeed all the majority members of the 1st Applicant company of their membership rights to freely elect leaders of their own choice as well as enforce discipline and accountability in the 1st Applicant company. By reinstating the defunct leadership of the 1st and 2nd Respondents, when court set aside the judicial review application on allegation of illegalities."

The Applicants further contend, in paragraph 7 of the affidavit in rejoinder sworn by the 2nd Applicant, that the 1st and 2nd Respondents are working in collusion with Kampala City Council Authority (KCCA) and the government to sideline the Applicants and the majority low income vendors by depriving them of their interests in the company property which is comprised in Plot 9A2 Nakivubo Road, Kampala; that this is supported by the public notice issued by KCCA to commence development of the 1st Applicant's property without consulting the Applicants who are Directors of the 1st Applicant, while the appeal is pending before this Court.

The Applicants' Counsel submitted that this is evidence of threats to the Applicants' interests in the 1st Applicant's property, in respect to which KCCA has already issued public notice to develop the same, to the prejudice

of the Applicants, and which act shall render the application for the temporary stay and the pending appeal nugatory.

In reply, Counsel for the 1st and 2nd Respondents submitted that the Applicants' affidavit evidence has not shown what the *status quo* the Applicants allude to is, and how it is likely to be upset by the Respondents; and that they have also not shown any steps being taken by the Respondents to upset the so called "*status quo*". He argued for the Respondents that since April 2023 to date, no action has been taken by the Respondents to alter the *status quo*, contrary to what is alleged by the Applicants. He further submitted that the nature of the dispute before this Court is such that it is not capable of being executed; that, indeed, the application seeks for stay of execution of the orders in Consolidated Civil Appeals Nos. 0266 and 0297 of 2017 to be issued until the disposal of the main application for stay of execution; that, however, a look at the judgement in Consolidated Civil Appeal 0266 and 0297 of 2017 reveals that there were no orders made by the Court of Appeal that are capable of being executed; and, in essence, that the Court of Appeal's dismissal of the Applicant's application for Judicial Review is not capable of being stayed.

Regarding the Applicants' allegations in paragraph 7 of the Applicant's affidavit in rejoinder that the 1st and 2nd Respondents are working in collusion with KCCA and the government to sideline the Applicants and the majority low income vendors by depriving them of their interests in the company property comprised in Plot 9A2 Nakivubo Road, Counsel for the 1st and 2nd Respondents submitted that, the appeal before this Court is in

respect of judicial review of the orders made by the Registrar of Companies to deregister the Applicants who had illegally voted themselves into office as directors of the 1st Applicant. Counsel contended for the Respondents that the appeal does not in any way relate to property comprised in Plot 9A2 Nakivubo Road; and that there is a separate suit by the 1st Applicant company against KCCA in the High Court Land Division *vide* Civil Suit No. 150 of 2020, pending hearing in that court. According to Counsel, it is therefore out of order for the Applicants to mix submissions on judicial review, which is the subject of the appeal pending before this Court, with submissions on the quoted property; and that, in addition, there is no evidence of collusion produced by the Applicants to support their allegations.

Counsel further contended for the 1st and 2nd Respondents that KCCA and the Attorney General are not party to the instant application or the appeal from which it arises; that, therefore, it is not proper for the Applicants to bring allegations against KCCA and the Attorney General when they do not have an opportunity to respond to them. Counsel accordingly prayed that the application for interim stay of execution be dismissed with costs.

In addition, also in reply to the Applicants' submissions, Counsel for the 3rd, 4th, 5th Respondents submitted that before the orders of the High Court could be executed, the 3rd, 4th, and 5th Respondents appealed the decision of the High Court to the Court of Appeal *vide* Civil Appeal No. 297 of 2017 and the appeal was allowed where that court held that the decision of the Registrar was properly arrived at as the parties were accorded a fair hearing. Counsel

for the 3rd, 4th, 5th Respondents also submitted that under section 3 of the Companies Act, 2012, the 3rd Respondent is mandated to keep a register of companies where all information relating to companies is kept; that the status of the 1st Applicant company on the company register has not changed; and that the orders issued by the High Court in Miscellaneous Cause No. 109 of 2015 were meant to change that status, but the said ruling was overturned by the Court of Appeal before it was executed. According to Counsel, there is therefore nothing to execute to warrant the grant of an interim order of stay of execution.

It was also submitted for the 3rd, 4th and 5th Respondents that the status of the 1st Applicant company is as it was before the institution of High Court Miscellaneous Cause No. 109 of 2015, and that there is no Court Order directing the 3rd to 5th Respondents to alter that status. It is their prayer that Court makes a finding that there is no arguable substantive application before Court against the 3rd, 4th and 5th Respondents, that there is no imminent threat of execution, and that the Applicants' application against the 3rd, 4th and 5th Respondents, is misconceived and should be dismissed with costs.

The Applicants' submissions on the issue of imminent threat of execution are to the effect that the Applicants and the majority low income vendors are being denied their constitutional rights to benefit from and own property at Plot 9A2 Nakivubo Road, Kampala, the right and interests the lower court had protected and guaranteed; that members' rights to freely elect leaders of their own choice as well as enforce discipline and accountability in the 1st

Applicant company has been interfered with by reinstating the defunct leadership of the 1st and 2nd Respondents; and that, based on the judgement of the Court of Appeal in consolidated Civil Appeal Nos. 266 and 297 of 2017, the Government on 28th December 2023 through KCCA has taken over possession of the 1st Applicant's property at Plot 9A1 Nakivubo Road (formerly Kisekka Market) without any consultations whatsoever with the Applicants and/or first compensating the Applicants and all those affected contrary to the laws.

There is a discrepancy regarding description of the property allegedly taken over from the 1st Applicant's by KCCA. The Applicants refer to the said property as Plot 9A1, but the 1st and 2nd Respondents, in their written submissions on page 6, refer to it as Plot 9A2 Nakivubo Road. Annexure "A" to the 2nd Applicant's affidavit in rejoinder, which is a public notice from KCCA addressed to the Business Community in Kisekka Market Yard, did not specifically mention the plot number of the property they had embarked on refurbishing. The Notice only referred to the property as "*trading space at Kisekka Market Yard.*" It states:-

"KCCA has embarked on the refurbishment works of the trading space at Kisekka Market Yard in Kampala Central Division. The goal is to provide clean, water free trading spaces, a more conducive environment for both vendors and customers and enhance the overall infrastructure.

This is therefore to notify you that during the period of these works, there will be temporary changes to access routes that may create some inconvenience to trade and movement to residents in the area.

Please support the contractor to execute the works as fast as possible so that there is minimum disruption to business.

Together we are building a Smart City.” (Underlined for emphasis).

The photographs, marked “A” and “B” attached to the 2nd Applicant’s supplementary affidavit in rejoinder, show the hoarding off of Plot 9A1 Nakivubo Road by KCCA/Government.

It is clear from the record that Consolidated Civil Appeal Nos. 0266 and 0297 of 2017 heard and determined by the Court of Appeal arose from a decision of the High Court which had heard and allowed the Applicants’ application for Judicial Review, consequently issuing orders of certiorari, mandamus, prohibition, and injunction, against the decisions of the Registrar of Companies. The Registrar of Companies had declared the meetings convened by the 2nd and 3rd Applicants to be null and void, accordingly nullifying the said Applicants’ appointment as Directors of the 1st Applicant company. The Respondents appealed against the High Court decision to the Court of Appeal, *vide* Consolidated Civil Appeals Nos. 0266 and 0297 of 2017. The Court of Appeal, in its judgment dated 13th March 2023, set aside the ruling and orders of the High Court and substituted it with an order dismissing the application for judicial review.

The subject matter in the application for Judicial Review clearly pertained to the legality of meetings that had been convened by the 2nd and 3rd Applicants, as well as the leadership or directorship of the company. Plots 9A1 or 9A2 Nakivubo Road were not a subject matter of the dispute and are

foreign to the instant application. In Consolidated Civil Appeals Nos. 0266 and 0297 of 2017, the Court of Appeal did not make any orders pertaining to the said properties. Similarly, the unproved allegations of collusion between the Respondents and the Attorney General who in any case, are not parties to the dispute, are also foreign to the instant application. It would therefore be erroneous for this Court to grant an interim stay of execution in respect of a matter, or persons, not before it.

The second threat the Applicants complain of is that members' rights to freely elect leaders of their own choice as well as to enforce discipline and accountability in the 1st Applicant company has been interfered with by reinstating the defunct leadership of the 1st and 2nd Respondents.

The Applicants have not shown any evidence that the 1st and 2nd Respondents have inhibited the member's rights to elect leaders. There is nothing in the Applicants' evidence, or on the record, to show that the status of the 1st Applicant company on the company register has changed, or is about to be changed, as to jeopardize the Applicants' membership or legitimate leadership ambitions within the 1st Applicant company. Secondly, the Applicants have not adduced any evidence of the Respondents posing any immediate threat to execute especially those orders of the Court that are executable, like proceeding to have the 4/5 of the costs awarded to them by the Court of Appeal.

Thus, while the Applicants in this application, satisfy two of the three prerequisites for interim stay applications, in that they have filed a substantive application and a Notice of Appeal, they have failed to prove

imminent threat of execution, which is paramount in applications of this nature.

This application is accordingly dismissed with costs.

Dated at Kampala this17th.....day ofJanuary..... 2024.

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Percy Night Tuhaise
Justice of the Supreme Court

Delivered by the Registrar on
17/1/24
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