

- 5 3. That their intended appeal to this Court has higher chances of success as the High Court which was the first appellate Court failed in its cardinal duty of subjecting the evidence on record to a fresh and exhaustive scrutiny and also failed in application of Section 39 of the Land Act Cap.227 and as a result came to a wrong decision of dismissing the applicant's appeal yet their father entered into a transaction affecting the family land in 2001 without their consent yet they were residing on it.
- 10 4. That unless an interim order is issued staying execution pending the hearing and determination of the main application by this Honourable Court, execution in the two lower Courts may proceed, thereby rendering the main application nugatory.
- 15 5. That the subject matter of the intended appeal is land where the applicants were born, raised and stay. And it is from it where they and their families derive sustenance and have got no alternative place where to stay or derive sustenance.
- 20 6. That unless execution is stayed as applied for pending the hearing and determination of the main application, the applicants and their families are likely to be prevented from staying on and using the suit land and are likely to be harassed with payment of the bills of costs for the two lower Courts before the hearing and determination of their main application and eventually their intended appeal.
- 25 7. That it is in the interest of justice and fairness that this application is allowed and an interim order issued staying execution as prayed for.

The application is supported by the affidavit of the first Applicant Mr. Yoramu Kasinde who deposed that the 2nd applicant is his younger brother. The Applicant reiterated the grounds in the notice of motion and attached a copy of the notice of appeal filed in the High Court. He deposed that his intended appeal has high chances of success because the High Court failed in its duty as a first appellate Court to subject the available evidence on record to fresh and exhaustive scrutiny. Furthermore, he has filed a main application for stay of execution which is attached. The applicants state that unless an interim order is granted staying execution of the orders of the lower courts; execution may proceed thereby rendering the main application nugatory.

The affidavit in reply is sworn by the 1st Respondent Mr. Kihonde Samuel who states therein that he is a male adult of sound mind and the second respondent is his younger

5 brother. He deposed that the application is incompetent and misconceived on the following grounds:

(a) Such an application must have first been filed in the High Court where execution is supposed to take place.

10 (b) There has to be a substantive suit before the application for stay of execution is made.

(c) There must be a threat of execution.

15 (d) The Applicants have not filed a notice of appeal.

(e) The Applicants have never served the respondents with a letter requesting for a typed and certified record of the lower Court

20 The respondents assert that the application is incurably defective and should be dismissed with costs.

At the hearing of the application, the applicant was represented by learned Counsel Mr. Bashir Lukaawa while the respondent was represented by learned Counsel Rev. Bikangiso Ezra

Applicants Submissions

25 Counsel for the Applicants submitted that all three considerations for the grant of an interim order of stay of execution have been satisfied. This is because there is a substantive application, secondly, there is a Notice of Appeal attached to the application and lastly, there is a threat of execution before the main application is heard.

The Respondent's submissions

30 Counsel for the Respondents submitted that the applicant's application is incompetent because it should have first been made to the High Court as stipulated by **Rule 42(1)** of the Rules of this Court and as held in **National Pharmacy Ltd v KCC [1979] HCB 132** that an application for stay of execution should first be made to the High Court.

35 Secondly, the respondent's counsel submitted that the alleged substantive application does not bear an application number or bear the stamp of Court and it is not signed by

Decision of Hon. Mr. Justice Christopher Madrama Izama *Truly yours* *7350 court* *2019 style ATTORNEY GENERAL*



5 raised of a preliminary nature arises from the submission that the application was erroneously first filed in the Court of Appeal contrary to **Rule 42 (1)** Rules of this Court and as interpreted in **National Pharmacy Ltd v KCC [1979] HCB 132**.

Rule 42 of the Rules of this Court provides for the order of hearing applications as follows:

10 "42. Order of hearing applications.

(1) Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court.

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

20 The above rule was interpreted by this Court when it was known as the Supreme Court in **Francis Nansio Micah v Nuwa Walakira; Civil Application No 9 of 1990**. By that time the Supreme Court which heard appeals from the High Court was the highest appellate court in Uganda. The respondent had objected to the application on the ground that the Supreme Court had no jurisdiction to entertain the application until an application for a stay had been made and disposed of by the High Court first. This is the exact issue raised by the respondent's counsel in this application. I have found no basis to reconsider the law which was considered by the Supreme Court in that decision. This is what they said after considering the rule 41 which is equivalent to rule 42 of the rules of this court:

30 "That is the situation in this application. The application could be made to the High Court and it could be made to the Supreme Court under rule 5 (2) (b) of the Rules. The provision is instructive:

"... the court may in its discretion, on application or of its own motion give leave to appeal or extend time for the doing of an act, notwithstanding the fact that no application has been made to the superior court."



5 Although in criminal matters the Supreme Court can intervene, without there
having been an application first in the superior court, the absence of express
provision for granting a stay by the High Court seems to imply that the rule is
directory and not mandatory. At any rate that is commonly the rule in cases of
10 concurrent jurisdiction, lower costs being awarded as a penalty. Since admittedly
both courts, the superior court and the appellate court have jurisdiction,
therefore the appellate court cannot be suddenly without jurisdiction if
application is made directly to it. But the court may prefer that the application be
made to the High Court in the first instance, and in general it is desirable that
15 should be so, because, as we have said, in cases of this nature the High Court is
fully appraised of the suit. As we indicated, however, there may be exceptional
cases where a direct application to the court would be justifiable, and in that case
the court must be supplied fully with the necessary information."

The question for consideration is whether there are exceptional circumstances where a
direct application to the court would be justifiable and whether the applicant has
20 supplied the court fully with the necessary information.

I have carefully read through the application and starting with the grounds in the notice
of motion, there is no mention of any grounds as to why the matter was filed direct in
this court and not in the lower court. The affidavit in support of the application similarly
does not mention any basis for having filed the application in the Court of Appeal direct
25 and why it was not firstly filed in the High Court. That being the case, there are no facts
for the exercise of any discretionary power to consider whether there are justifiable
circumstances that warranted the filing of the application direct in the Court of Appeal
in the first instance and not in the High Court.

The above notwithstanding, this is an application for an interim order pending the
30 hearing of the main application in the Court of Appeal. Presumably, the issue of whether
the application should be filed direct to the Court of Appeal could be dealt with by the
full bench of the Court of Appeal in the main application. In which case, the question for
consideration would be whether failure to grant the interim stay order in this application
would render the main application nugatory? I do not think so. The fact of not having
35 filed the application in the High Court in the first instance can be considered by a single
Judge of the Court of Appeal in an interlocutory application in a matter pending before
the Court of Appeal. **Section 12 (1) of the Judicature Act** provides that:



5 "A single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal."

There is a pending matter before the Court of Appeal and I may exercise any of the powers of the Court of Appeal in any interlocutory matter or cause. In this application, there is a prayer for an interim order of stay of execution and therefore rule 42 of the rules of this Court is applicable. Under Rule 42, I have to consider why the application
10 was not filed in the High Court in the first place but I am unable to do so for want of grounds to address my mind on the issue and therefore on that ground, there is no basis for the exercise of the power of this court to determine whether the matter was properly filed direct in this court despite the directive in rule 42 (1) of the rules of this
15 Court to first file it in the High Court.

The second matter of concern is the fact that the respondent challenges the notice of appeal that is on court record. I have already established from the Court of Appeal record that the applicants indeed filed the main application before this court in Civil Application No 258 of 2018. Even though the attachment to the notice of motion shows
20 that the main application had not been filed in court or issued, the question of whether it was indeed filed as a question of fact was established from the court record and the objection on the basis that there is no main application in this court is overruled. I would straight away go to the second matter of concern relating to the notice of appeal and the time within which to file a competent notice of appeal or serve the same on the
25 respondents. In all cases, where the applicant invokes the jurisdiction of the Court under Rule 6 (2) (b) of the Rules of this court, the applicant must demonstrate that a notice of appeal has been lodged in accordance with Rule 76 of the Rules. Rule 76 of the Rules of Court provide that:

"76. Notice of appeal in civil appeals.

30 (1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court.

(2) Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal.

35 (3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision; and where it is intended to appeal against a



5 part only of the decision, it shall specify the part complained of, state the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice.

10 (4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain the leave or certificate before lodging the notice of appeal.

(5) A notice of appeal shall be substantially in Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant."

15 Rule 76 (2) provides that every notice provided for under sub rule 1 shall be lodged within 14 days after the date of the decision against which it is desired to appeal. In considering the issue as to whether a notice of appeal has been lodged in accordance with rule 76, it is also necessary to preliminarily consider whether the notice of appeal was lodged within 14 days after the date of the decision against which it is desired to appeal. This is also the subject of another objection of the respondent's counsel to the application on the ground that no notice of appeal has been filed in the Court of Appeal or served on the respondents or their advocate. I do not have to first consider the question of service but will first consider the notice of appeal on the face of it. The notice of appeal attached to the application itself is not in the prescribed form. 76 (5) provides that the notice of appeal shall substantially be in form D in the First Schedule to the Rules. Form D *inter alia* provides as follows:

25 "Take notice that – being dissatisfied with the decision of the Honourable Justice – given at ___ on the ___ day of ___ 20 ___ intends to appeal to the Court of Appeal against the whole of the decision/such part of the decision as decided that:..."

The notice of appeal in this appeal merely states as follows:

30 "TAKE NOTICE that YORAMU KASINDE and NUWAGABA KENNETH being aggrieved and dissatisfied with the decision and orders of Hon. Justice David Matovu made on the 10th day of July, 2017 but judgment having been delivered on the 26th day of September, 2017, intend to appeal to the Court of Appeal of Uganda against the whole decision...."



5 The notice of appeal is defective by stating that the decision and orders of the learned
first appeal court trial Judge was made on 10th July, 2017 but judgment was delivered on
26th September, 2017. The notice of appeal was filed in the High Court on 27th
September, 2017. It does not clearly specify when the decision of the Judge was made
or delivered as required by Form D. Was it on 10th July, 2017 or 26th September, 2017?
10 The judgment of the High Court attached to the application as annexure "J" is dated 10th
of July 2017. On the face of it, the decision was delivered on 10th July, 2017 and the
notice of appeal was filed out of time. Assuming that it was delivered on 26th
September, 2017, and the notice of appeal was filed in time, the applicant seeks
extension of time within which to serve the notice of appeal on the respondent in the
15 main application. In the same omnibus main application, the applicants to this
application seek extension of time within which to file an appeal in ground (b) of the
notice of motion. Lastly, they pray for stay of execution, in the main application. On the
other hand, the application for an interim order, which is the application before me, is
merely for two orders namely:

20 "(a) An interim order does issues staying execution of the judgment and orders of
the High Court of Uganda at Mbarara in Civil Appeal Number 041 of 2016 and
also the court from which the said appeal arose, pending the hearing and
determination of the applicant's main application.

25 (b) Costs of and incidental to this application abide the result of the intended
appeal."

There is no application for extension of time in this application. Secondly, it is conceded
that the applicant's notice of appeal is defective having been served out of time in the
main application. That means that there is no competent notice of appeal or appeal
pending before the Court can deal with any interlocutory application unless and until
30 the notice is validated as sought in the main application. In the premises, there is no
valid application before this court and the application for an interim order of stay of
execution is incompetent and accordingly struck out with costs.

Dated at Kampala the 6th day of June 2019


Christopher Madrama Izama

35 **Justice of Appeal**