THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO 105 OF 2019

(Arising from Civil Appeal No 97 of 2009)

PHENNY MWESIGWA}.....APPLICANT

VERSUS

PETRO (UGANDA) LIMITED}.....RESPONDENT

RULING OF CHRISTOPHER MADRAMA IZAMA

The applicant in this application seeks an order of stay of execution to stop any enforcement and implementation of the judgment and orders granted in Civil Appeal No 97/2019 until final determination of the appeal. Secondly, the application seeks for costs of the application to abide the outcome of the appeal. The grounds of the application are:

1. That the applicant is dissatisfied with the judgment and orders of this court and has appealed the same.
2. That execution of the said judgment would inevitably render the appeal nugatory.
3. That the applicant will suffer substantial losses if execution of the judgment is not stayed.
4. That the application has been made without unreasonable delay.
5. That the applicant is willing to provide security for the due performance of the judgment as may ultimately be binding on him.
6. That it is just and equitable that this application be granted.

The application is further supported by the affidavit of the applicant, Mr Phenny Mwesigwa (hereinafter referred to as the applicant), who deposed that on 4th April, 2019, the Court of Appeal delivered judgment in Civil Appeal No. 96 of 2012 in favour of the respondent. Being dissatisfied with the judgment of the court delivered on 4th April, 2019, the applicant appealed the judgment and orders of court by filing a

notice of appeal and also wrote to this court requesting for a certified record of proceedings. The applicant applied to stay execution of the judgment, as the subject matter of the judgment is the subject of the appeal. The applicant is challenging the award of Uganda shillings 538,000,239/= as damages, interests and costs awarded in **HCCS No. 633 of 2009** which if not stayed will cause substantial loss and hardship to the applicant. If execution of the judgment is not stayed, the applicant's business will be crippled and the applicant will suffer substantial loss. The main appeal has a high likelihood of success and if the application is not granted, execution shall render the intended appeal nugatory. Further, the applicant is willing to provide security for due performance of the judgment as may ultimately be binding on him. The application was made without an unreasonable delay and it is in the interest of justice that execution of the judgment is stayed.

In reply, the respondent filed an affidavit through Isaac Mariera of care of K & K advocates. He deposed therein that he is the Country Manager of the respondent company and made the affidavit in reply in that capacity. With the help of his lawyers Messieurs K & K advocates, he read and understood the Notice of Motion together with the affidavit in support of the application and responded as follows: The respondent instituted **Civil Suit No 633 of 2004** in the High Court of Uganda Commercial Division were judgment was delivered on 22nd January, 2009 in favour of the respondent for orders that the applicant pays special damages of Uganda shillings 536,000,139/= with interest at 21% from 25th August 2005 until payment in full and Uganda shillings 2,000,000/= as nominal damages with interest thereon at 8% per annum until payment in full. The appellant filed Civil Appeal No. 97 of 2009 in the Court of Appeal which appeal was dismissed with costs to the respondent on 4th April 2019. Mr. Isaac Mariera deposed that as the successful party in both **HCCS No 633 of 2009** and **Civil Appeal No 97 of 2009**, the respondent is entitled to the fruits of its judgment. **Civil Suit No 633** and **Civil Appeal No 97 of 2009** were both determined in favour of the respondent on the points of law and facts and therefore the applicant's intended appeal has no chance of success. The subject of the

suit is a commercial transaction and the respondent has been unfairly deprived of its money since 2004 which indebtedness according to the judgment of the High Court, currently stands at Uganda shillings 2,075,907,952/=. The respondent is a limited liability company which is a going concern and has the capacity to refund the decretal sum in case the applicant succeeds and on appeal after execution has been completed since the judgment is for payment of money. The applicant's intention is to delay the respondent's enjoyment of the fruits of the judgment of court.

In rejoinder Mr. Patrick Kabagambe, an Advocate practicing with Messrs Birungi, Barata & Associates deposed that they were the applicant's counsel in **Civil Appeal No 97 of 2009** and deposed to the affidavit in that capacity. On 4th April, 2019, the Court of Appeal delivered judgment in **Civil Appeal No 97 of 2009** in favour of the respondent according to a copy of the judgment attached. Secondly the applicant being dissatisfied with the judgment filed a notice of appeal against the decision and requested for a certified record of proceedings according to the documents attached. Thirdly, the respondent is in the process of executing the judgment in **Civil Appeal No 97 of 2009** because it has already sent the decree for approval of the applicant's counsel. The applicant is challenging the award of Uganda shillings 528,000,239/= as damages, interests and costs to the respondent which if not stayed will cause substantial irreparable loss and hardship to the applicant. The deponent substantially reproduces the grounds of the application in the affidavit in support.

At the hearing of the appeal, learned counsel Mr. Martin Mbanza represented the applicant and learned Counsel Mr. Esau Isingoma represented the respondent.

Initially the parties through representations of counsel were in agreement that adequate security could be deposited for a stay of execution order but disagreed on what that adequate security should be in the circumstances. Mr. Mbanza submitted that the applicant is willing to

provide further security in the event the two land titles deposited at the High Court Commercial Division as security pending appeal to the Court of Appeal are found not to be adequate. Mr. Mbanza however, did not have details or description of the land titles deposited as security.

In reply Mr. Esau Isingoma prayed that the application is dismissed because the application does not have attached evidence. The application is general and has generalised issues. He relied on the case of **Stanbic Bank Uganda Ltd v Atabya Agencies Ltd Supreme Court Civil Application No 31 of 2004** where Mulenga JSC at page 3 and relying on his earlier decision in **Wilson Mukiibi v James Semusambwa Civil Application No 9 of 2003** stated that:

> "a party seeking a stay of execution must satisfy the court that there is a sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if the execution proceeds, there may be some irreparable loss occasioned."

Mr Isingoma submitted that the respondent has also been denied the fruits of its judgment. He relied on the ruling in **Flora Ramarungu v DCFU Leasing Co. Civil application number 11 of 2009** where Tsekooko at page 7 stated that:

> "With respect I am not persuaded by the arguments of the applicant. There is no evidence to justify any interference with the opinions of the trial judge which was obtained by the Court of Appeal to the effect that the applicant has not proved that she will suffer irreparable loss if the status quo is not maintained. There are no compelling circumstances to justify the issuing of an interim order of stay of execution even if it is possible to execute. The mere statement from the bar by counsel for the applicant that she is in occupation of the house is not sufficient in as much as the same house was sold to a third party long before she filed a suit and the purchaser of the house is not a party to the suit."

In the alternative, Mr Isingoma submitted that the security proposed to be deposited in the Court of Appeal which is not before the court cannot be taken into account. That security had been deposited in the High Court when the liability of the applicant was about 500 million Uganda shillings but to date that amount has escalated to about Uganda shillings 2,071,724,975/-. In the premises, he proposed that the applicant should deposit a bank guarantee or bank draft equivalent to the outstanding liability of the applicant to date. He pointed out that the by the time the judgment was issued by the High Court in 2009, the debt was only Uganda shillings 536,000,239/- which decretal sum carried interest at 21% per annum from 5th August, 2005 until payment in full. He pointed out that it is now about 13 years, nine months and 22 days since the High Court decided the suit against the applicant. Mr Isingoma further prayed that the applicant should deposit the required security within 1 week from date of the ruling of this court.

In rejoinder Mr Mbanza submitted that the decision in **Flora v DFCU** (supra) is distinguishable. In that case it was stated that there was no status quo to maintain but in the applicant's current application, there is a status quo to be maintained. He further submitted that what is required at this level is security for costs according to the decision in **Kampala Bottlers v Uganda Bottlers Ltd** (not supplied) that what is required is security for costs. The applicant went to great lengths to propose that he is ready to provide security for due performance of the decree and not just security for costs. That commitment should be seen as intention to satisfy the judgment if the respondent is successful. Mr. Mbanza further relied on **Outreach to Africa Ltd v Stephen Manigamukama SC Civil Application Number 04 of 2015** for the proposition that a party, who has extracted a decree, should be perceived as someone proceeding for execution of the decree. Mr. Mbanza further relied on **Gashumba Maniraguha v Sam Nkundiye SC Civil Application Number 24 of 2015** and contended that the appeal of the applicant has merit because it is on points of law.

Resolution of the application

I have carefully considered the applicant's application which was brought for exercise of the power of a single judge under the provisions of **Rule 53** of the rules of this court. Rule 53 of the rules of this court prescribes the kinds of application that a single judge may hear. Secondly, I asked counsel to address me on the apparent contradiction between the provisions of **Rule 53** of the rules of this court and **Section 12 of the Judicature Act Cap 13** laws of Uganda on whether I had jurisdiction as a single judge to hear the applicant's application.

I have carefully considered the question of jurisdiction and it is clear that the provisions of **section 12 of the Judicature Act** have been quoted out of context for the proposition that a single judge may hear and exercise any powers of the Court of Appeal in any interlocutory application that may be heard by the full bench of the Court of Appeal. It should be borne in mind that the Court of Appeal is only duly composed at any sitting of the court of a minimum of three judges. **Article 135 (1) of the Constitution** provides that:

> "The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the court."

My attention has further been drawn to other applications for stay of execution which had been granted by single justices of this court. I have carefully considered the law on the issue of jurisdiction of a single judge of the Court of Appeal to hear an application for stay of execution pending appeal to the Court of Appeal and not the Supreme Court.

I have duly considered the several authorities referred to by the lawyers of the parties. The case of **Florah Ramarungu v DFCU Leasing Co. Ltd; Civil Application No 11/2009** before the Supreme Court arose from an interlocutory matter and not a final decision decreeing payment of money and is distinguishable. Secondly, the case of **Stanbic Bank Uganda Ltd v Atabya Agencies Ltd; Supreme Court Civil**

Application No 31 of 2004 was an ex parte application for an interim order of stay of execution. It had to satisfy conditions for the grant of an interim order ex parte and is distinguishable from the matter before this court.

In the case of **Outreach to Africa Limited v Stephen Manigamukama; Court of Appeal Civil Application No 304 of 2015**, the application was heard by a bench of three justices of the Court of Appeal and the question of jurisdiction was never raised or considered. The court ordered the applicant to deposit Uganda shillings 44,000,000/=, the balance of the purchase price, with the registrar of the court by way of a bank draft within one month from date of order. The decree for execution was for Uganda shillings 44,000,000/=. The case of **Gashumba Maniraguha v Sam Nkundiye; Supreme Court Civil Application No 24 of 2015** was heard by the full bench of the Supreme Court. It was a suit for trespass and general damages in respect of land. The Supreme Court cited with approval its earlier decision in the application of **Hon. Theodore Ssekikubo & others v the Attorney General and another Constitutional Application No. 06 of 2013** for the principles applicable to an application for stay of execution which are that; the applicant must demonstrate that the appeal has a likelihood of success; or a prima facie case of his right to appeal. Secondly, the applicant must also establish that he or she will suffer irreparable damage or that the appeal will be rendered nugatory if a stay order is not granted. Thirdly, if grounds one and two have not been established, the court must consider where the balance of convenience lies. Lastly, the applicant must also establish that the application was instituted without delay. There was no decree for payment of money and the decision is distinguishable.

In the case of **Hajj Ali Cheboi v Kiboko Mesulamu; Miscellaneous Application No 105 of 2014**, there was an application for an interim order arising from **Civil Miscellaneous Application No 104 of 2014 and Civil Appeal No 27 of 2014** pending appeal in the Court of Appeal. The application is distinguishable and not applicable to an application

when there is no pending matter before the Court of Appeal and only notice of appeal of the final decision of the Court of Appeal to the Supreme Court. Hon. Mr. Justice Kakuru, JA said at page 2 of the ruling that:

> *"An application of this nature, which seeks an order of stay of execution pending an appeal before this court, is an interlocutory matter.* A single justice of this court has power to hear and determine it. It does not require a full bench of this court. Section 12 of the Judicature Act provides as follows:-
>
> ...
>
> I don't think that Rule 53 of the Rules of this court which appears to bar a single justice of this court from hearing an application for stay of execution, injunction or stay of proceedings is relevant to the proceedings such as these before me. The Judicature Act takes precedence over the rules of this court." (Emphasis added)

In the above decision, the single justice of the Court of Appeal was clear that such an application could be granted by a single judge in an interlocutory application pending an appeal before the Court of Appeal.

Section 12 of the Judicature Act provides that:

> **"12. Powers of a single justice of the Court of Appeal.**
>
> (1) 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.
>
> (2) Any person dissatisfied with the decision of a single justice of the Court of Appeal in the exercise of any power under subsection (1) shall be entitled to have the matter determined by a bench of three justices of the Court of Appeal which may confirm, vary or reverse the decision.

On the other hand, the **Judicature (Court of Appeal Rules) Directions Statutory Instrument 13 - 10** under **Rule 53** thereof provides that:

> "53. Hearing of the applications
>
> (1) Every application, other than an application included in sub rule (2) of this rule, shall be heard by a single judge of the court; except that any such application may be adjourned by the judge for determination by the court.
>
> (2) This rule shall not apply to –
>
> (a) an application for leave to appeal, or for a certificate that a question or questions of great public or general importance arise;
>
> (b) an application for a stay of execution, injunction or stay of proceedings;"

There seemed to be an apparent contradiction between **Rule 53 (2) (b)** of the rules of this court and **section 12 of the Judicature Act**. Under **Rule 53** of the rules of this court, an application for a stay of execution, injunction or stay of proceedings cannot be heard by a single judge but has to be heard by the full bench which as we noted is composed of a minimum of three justices of Appeal. On the other hand, every application other than those stated in **sub rule 2** of **Rule 53** can be heard by a single judge. On the other hand, **Section 12 of the Judicature Act** is abundantly clear that a single judge may exercise in any interlocutory cause or matter any of the powers vested in the Court of Appeal.

For a single judge to be able to exercise those powers, it must be demonstrated that it is an interlocutory matter which is pending before the Court of Appeal. I need to re-emphasise **Section 12 (1) of the Judicature Act** which provides that:

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 has to be a pending matter before the Court of Appeal for a single judge to exercise any of the powers of the Court of Appeal in any interlocutory matter or cause. **Rule 53** of the rules of this court and **Section 12 of the Judicature Act** are therefore not contradictory or in conflict. Every decision of a single judge is appealable to a fully constituted Court of Appeal in terms of Article 135 (1) of the Constitution. A decision of the Court of Appeal is appealable to the Supreme Court. **Article 132 (2) of the Constitution of the Republic of Uganda** is explicitly clear that:

> "An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law."

It follows that a single judge can only exercise the powers of the Court of Appeal in any interlocutory matter that is appealable to the full bench of the Court of Appeal. For that to happen, there has to be a pending matter before the full bench of the Court of Appeal. Where there is no pending matter, it is the exercise of power of the full bench which is appealable to the Supreme Court. My ruling should not be taken to exclude powers of a single judge to hear any interlocutory application for an interim order of stay of execution pending the main application before the full bench of the Court of Appeal. That situation does not obtain in this application and is not for consideration and determination in this application. By using the expression "*any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal*", **section 12 (1) of the Judicature Act** did not vest in a single judge of the Court of Appeal power to exercise any power or jurisdiction vested in the Court of Appeal where there is no matter pending before it. Or simply put to exercise powers of the Court of Appeal pending appeal to the Supreme Court. In the same vein, registrars of the High Court exercise powers of the High Court when they grant interlocutory interim orders pending any

matter or cause before the High Court judge. In order to read Rule 53 of the rules of this court and **section 12 of the Judicature Act** in harmony, a single judge can hear an interim application for injunction, stay of execution or proceeding pending a main application before the full bench of the Court of Appeal.

In this particular application, there is no pending application before the full bench of the Court of Appeal. It may be that a single justice may have exercised such powers without there being any pending matter before the Court of Appeal that I have not been referred to any such decision and therefore do not have the benefit of considering the basis of such an order. In any case, I am bold to say that such exercise of power is not in accordance with **section 12 (1) of the Judicature Ac**t and is without jurisdiction though I have not come across any ruling of that nature. The said section of the **Judicature Act** envisages a pending matter before the Court of Appeal, before a single judge may exercise any of the powers vested in the Court of Appeal in an interlocutory application.

Finally, the applicant's application demonstrates clearly that it arises from **Civil Appeal No 97 of 2009** which was concluded. **Civil Appeal No 97 of 2009** is not pending before this court. Furthermore, the affidavit in support of the application and in rejoinder discloses that the applicant in annexure "A" filed a notice of appeal intending to appeal the decision of the Court of Appeal to the Supreme Court of Uganda. Secondly, the applicant applied for a record of proceedings to be typed and availed for purposes of exercising a right of appeal to the Supreme Court according to annexure "B". The very order sought in the application reads as follows:

> "An order for stay of execution be issued against the respondent staying execution, enforcement and implementation of the judgement and orders granted in **Civil Appeal No. 97 of 2009** until final determination of the appeal."

There is no pending appeal before this court. What is on record is a notice of appeal to the Supreme Court. No main application for stay of

execution was filed in the Court of Appeal. In the premises, I do not have any powers vested in the Court of Appeal which may be exercised in an interlocutory application by a single justice of appeal because there is no matter pending before the Court of Appeal. The applicant's application is for that reason not an interlocutory application and is incompetent.

In case of any error of law on the question of jurisdiction, rule 6 (2) (b) of **The Judicature (Court of Appeal) Rules** provides that:

> "6. Suspension of sentence and stay of execution
>
> (2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may-
>
> (a) ...
>
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these rules, order a stay of execution, an injunction, or estate of the proceedings on such terms as the court may think just."

The notice of appeal envisaged under **Rule 76** of the rules of this court is a notice of appeal pursuant to a decision of the High Court which shall be lodged in duplicate with the registrar of the High Court under **Rule 76 (1)** of the rules of this court. Rule 76 (1) of the rules of this court provides that:

> "Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in triplicate with the registrar of the High Court."

The word "court" is defined by Rule 3 of the rules of this court to mean the Court of Appeal of Uganda. Secondly, the applicant relied on **Rule 2 (2)** of the rules of this court which provides that:

> "(2) Nothing in this rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such

orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay."

This rule is substantially duplicated in **Rule 2 (2) of the Judicature (Supreme Court) Rules**. Specifically the Supreme Court rules provide *inter alia* that its rules cannot prevent the Court of Appeal to make such orders as may be necessary for achieving the ends of justice. In other words, even if the appeal had been determined, the Court of Appeal has power to make necessary orders pending the pursuit of any right of appeal to the Supreme Court of any litigant who is aggrieved by its decision.

The right to appeal against a decision and to preserve that right before the appeal can be heard is catered for by **Rule 6 of the Judicature (Court of Appeal) Rules** as well as **Rule 2 (2)** of the rules of this court and the rationale thereof was captured in the case of **Wilson v Church (1879) Vol 12 Ch. D 454** which has been followed in Uganda that:

> "As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory."

Wilson v Church (supra) was cited with approved by the Supreme Court in the case of **Somali Democratic Republic v Anoop Sunderial Trean C.A.C.A No 11 of 1988** before Manyindo DCJ Odoki J.S.C and Oder J.S.C. as reflecting the rationale for stay of proceedings or execution. Stays of proceedings, execution or orders of injunction are provided for under Rule 6 of the **Judicature (Court of Appeal) Rules** (supra).

In light of my holding on the question of jurisdiction, I do not have any powers to grant an order of stay of execution in the circumstances of this application, the application before me being incompetent on a matter of law. There is no pending matter before the Court of Appeal in terms of **Section 12 (1) of the Judicature Act** and a single justice of the Court of Appeal has no jurisdiction to issue an order of stay of execution pending appeal to the Supreme Court. The application of the applicant is accordingly struck out with costs.

Ruling signed for delivery by the Registrar at Kampala on 23rd April, 2019

Christopher Madrama Izama

Justice of Appeal

Ruling delivered in the presence of:

Dr. Agnes Nkonge

Deputy Registrar,

Court of Appeal.

Date: 23/4/19