

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION No.42 OF 2015

(Arising from Civil Application No.41 of 2015)

(Arising from Misc. Application No.006 of 2014)

(Arising from High Court Civil Suit No.075 of 2011)

OKAO TAMALI:.....:APPLICANT

VERSUS

THE MICRO FINANCE SUPPORT CENTRE:.....:RESPONDENT

CORAM:

Hon. Lady Justice Faith E. K. MWONDHA JA

RULING OF COURT

This application was brought under Rules 6(2)(b), 42 (1), 43(1 & 2), and 44(1) of the Judicature (Court of Appeal Rules) Directions S1 13-10

The applicant was seeking for orders that:




- (a) An interim order be issued to stay execution of the Ruling/decision in Misc. Application No.006 of 2014 and Civil Suit No.075 of 2011 until determination of Civil Application No.41 of 2015 pending before this Court.
- (b) Costs of the application be provided for.

The application was supported by the grounds contained in the affidavit of the Applicant but briefly the grounds were as follows:

- (1) That the applicant had filed Civil Application No.41 of 2015 at the Court of Appeal of Uganda at Kampala for stay of execution of the Ruling and decision in Misc. Application No.006 of 2014 and Civil Suit No.075 of 2011 pending appeal.
- (2) The applicant has filed notice of appeal at the High Court of Uganda at Lira awaiting record of proceedings to file her Memorandum of Appeal pending against the Ruling of Hon. Lady Justice Dr. Winfred Nabisinde delivered on the 14th October 2014.
- (3) The respondent intends to continue execution against the Applicant in Civil Suit No.075 of 2011

- (4) The appeal has chances of success to warrant stay of execution against the applicant.
- (5) The interim order of stay of execution is intended not to render the main application for stay of execution and Appeal Nugatory.
- (6) The respondent shall not be prejudiced on issuance of interim order of stay of execution.
- (7) It is fair and just and in the interest of justice that this application is allowed.

The respondent filed a reply deponed by Mariam Ndibuuza in her capacity as Manager Legal Services for the Government owned Micro Finance Support Centre Ltd. 

She stated as follows among others:

- 1) That the learned Resident Judge of High Court of Lira properly evaluated the evidence and dismissed the matter accordingly.
- 2) The applicant filing the same suit in different Courts is an abuse of Court process. The applicant filed an application for stay of execution and later filed an application for an interim order to stay execution and the interim application was dismissed & the main

application for stay is pending before the High Court of Lira Vide Misc. Application No.83 of 2014. That the applicant has filed the same application in this Court (a copy of the application was annexed marked "A")

- 3) That there is no appeal pending in this Court since the Ruling was delivered on 14/10/2014 and the Notice of Appeal was filed on 31/10/2014 after the lapse of 14 days.
- 4) That the appeal if there is one, there is no likelihood of success since the appellant has paid most of the money. Has paid 15,000,000/= as per receipts annexures B.
- 5) That the main application for setting aside ^{exparte} judgment and stay of execution in Misc. Application No.006 of 2014 was dismissed and when the applicant applied for interim order to stay execution pending appeal the same was dismissed also before the Deputy Registrar.
- 6) That the applicant never protested to the summary suit, she was properly served with the summons and later default judgment was entered against her and other defendants. That when notice to show cause

was issued against her and the others she replied by part payment of 15,000,000/= in three installments. That there is no damage that will arise from her fulfilling her obligation of paying the money that she owes the respondent. A copy of affidavit of service was attached and marked "C". (Court observed there are two annexures "C" but both of them filed on different dates & the 2nd one it was filed before they were served on the applicant i.e. on 16/10/2012 when they were served on 19th October (which one can be believed)

Representation

Counsel Felix Ampeirwe was for the applicant

Counsel Omara Innocent David was for the respondent 

Both counsel made oral submissions

Counsel Ampeirwe submitted among others basing on the affidavit as sworn by the Applicant dated 19th February 2015. He submitted that this application was for an interim order to stay execution of the decision in Civil Suit No.075 of 2011 and the order in Misc. Application No.006 of 2014 which were before Hon.

Lady Justice Dr. Winfred Nabisinde, Resident Judge Lira.

He argued that they have filed a Notice of Appeal in this Court and have requested for the record of proceedings to file a memorandum of appeal. The appeal has high chances of success and yet there is eminent threat of execution of the decree and orders of the High Court. He referred to annexure "D" annexed to the affidavit of the applicant which is an order signed by the Deputy Registrar High Court Lira.

Misc. Application No.83 of 2014 was dismissed with costs and ordered that execution in Civil Suit No.075 of 2011 and Misc. Application No.006 of 2014 continues. He submitted that in pursuance of that order the respondents on 15th February 2015 extracted taxation notices to have the costs taxed. That the above was done without informing the applicant or her counsel. They learnt about it when they went to Lira Court to pick the Record of Proceedings which they had requested for on 17th March 2015.

He said that the applicant right from the start was never served with court process and the matter was

raised before Court but it was not considered and the issue of no cause of action against the applicant also was raised. That the respondents are continuing with the process of execution and any minute they will execute. That if the order is not granted to stay execution the substantive application for stay and the appeal will be rendered nugatory. Counsel relied on the cases of *Idah Iterura V. Joyce Muguta* SC Civil Application No.2 of 2006 and *Lawrence Musitwa V. Eunice Busingye* SC Application No.18 of 1990.

He prayed that the order be granted.

Counsel Omara for the respondent submitted that the applicant abandoned Misc. Application No.81 of 2014 in Lira High Court. That it was only Misc. Application No.83 of 2014 which was dismissed and Misc. Application 83 of 2014 was arising from Misc. Application 81 of 2014. That it had been fixed for hearing on 25th February 2015 and that therefore the applicant stating in her affidavit that Misc. Application was dismissed was a lie.

He stated that rule 42 of the Court of Appeal Rules requires this application to be filed before the High

Court and be disposed of what was disposed of was the interim application not the substantive one. He submitted that this application ought to be struck out for embedding lies in it. That even the notice of Appeal was filed out of time since the decision was made on 31/10/2014 and yet the notice was filed on 14th October 2014. The letter requesting for proceedings was served on them on 17th November 2014. Besides Rule 76 of this Court Rules requires that Notice of Appeal has to be served within 14 days from the date of the decision order & service of the other party has to be within 7 days, this was not done. The letter requesting for proceedings was served on the respondent's counsel only on 17/2/2015 much as it was dated 27th October 2014. 130

That therefore the memorandum of appeal can't be filed without leave of Court. As such the appeal is wanting. Rule 6 (2) (b) of the Court Rules required the applicant to comply with Rule 76 to properly file the appeal. That since rule 76 was not complied with there is no appeal in Court and such an appeal is devoid of likelihood of success. He argued that there will be no

irreparable injury inflicted and execution can't make the appeal nugatory for various reasons as follows:

The subject matter of the appeal was money, which the applicant had already paid before the application came up in 2013. The orders of the High Court have been partially executed and it's only the payment of money which is remaining. That the applicant's conduct shows that this was an afterthought and has not explained how she was going to suffer irreparable injury if execution process is completed. That the application was brought very late when it ought to have been brought at the earliest opportunity among other things.

§§

That the applicant has not intimated her willingness to deposit security. But in case the Court is inclined to grant the order of temporary relief she must deposit security. That the debt is over shs.100,000,000 of which only shs.15,000,000 has been paid. He prayed that the application is dismissed with costs.

Counsel Ampeirwe for the applicant in his short reply submitted that it was true Misc. Application 81 of 2014 was lying in Lira Court. That it was meant to be heard

on 25th February 2015 but was not heard as Judges were in Judges' Conference and that no new date was given. That on 17th March 2015 they were in Lira Court but still no date was given. That they were aware of rule 76 which required this application to be filed in the High Court and this application was triggered off by the execution in light of delays envisaged.

He relied on the case of ***Lawrence Musitwa Kyazze V. Busingye Civil Appeal No.18 of 1990.***

That the payment of shs.15,000,000 was made in respect of default judgment against the applicant premised on affidavit of service of Court process upon the applicant which affidavits were not only conflicting but were falsified by the process server and that this was done with the knowledge of the respondent. That she had been compelled to pay because of eminent threats of being detained in civil prison/custody.

That she had filed Misc. Application No.006 of 2014 in Lira as a person who was sued and was not served and was being harassed for payment of claim which she wanted to contest. So it was not an afterthought. That applicant remains a person who is being condemned

unheard. That as for security for costs; they are ready to comply with what court will direct. He retaliated his earlier prayers.

Consideration of the Application

This application was made under rule 6(b) of the Court of Appeal Rules and Rule 42 among others

Rule 6(b) provides: "In any Civil proceedings where a notice of appeal has been lodged in accordance with Rule 76 of these rules, order for stay of execution, an injunction, or stay of proceedings on such terms as the Court may think just.

Rule 42 provides: "Whenever an application maybe made either in the Court or in the High Court, it shall be made first in the High Court" SB


For purposes of properly disposing of this application Rule 76 has to be stated. It provides:

(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 Sub rule (1) of this rule shall subject to rules 83 and 95 of these rules be lodged within 14 days after the date of the decision against which it is desired to appeal.

(3) 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.

The issues identified as crucial for the determination of this application were two:


1) Whether the application was competent before me in that was filed in time as per Rule 76 of this Court Rules. 

2) Whether the order sought can be granted

As can be discerned from the affidavit of the Applicant, in paragraph (1) the High Court of Uganda at Lira dismissed Misc. Application No.006 of 2014 which sought an exparte judgment and decree entered against the applicant be set aside in Civil Suit No.075 of 2011. It also sought for execution to be stayed so

that the Applicant is allowed to file a ~~decree~~^{defence}. This was on the 14th October 2014.

The first page of the trial Judges ~~Rules~~^{Ruling} which is annexed "A" on the affidavit of the Applicant is clear. For avoidance of doubt she wrote: "This Ruling follows an application by notice of motion under order 9 rule 12 & 27, order 22 rule 26 and order 52 rules 1, 2, & 3 of the Civil Procedure Rules... for the following orders:

- (a) The exparte judgment and decree entered with costs against the applicant in Civil Suit No.075 of 2011 in favour of the respondent/plaintiff be set aside.
- (b) That the execution of the decree be stayed.
- (c) That the applicant/defendant be allowed to file her defence.
- (d) Costs be paid by the respondent. 

The notice of Appeal though was signed by Counsel on 27th October 2014 it was filed in Lira Court on 31st October 2014 according to the Lira High Court Received Stamp. Calculating the 14 days running exclusive of weekends the 14 days were to lapse on 3rd November 2014.

That is when the earliest opportunity to file the Notice of Appeal ^{would lapse} ~~arose~~. This means that the serving to the respondent the Notice of Appeal was due on 12th November 2014 again excluding weekends & public holidays. According to the record counsel Innocent David ^{Omara} received the Notice on 17th February 2015, though it was dated 27th October 2014.

The question which arises is whether the none service in time to the opposite party of the notice renders the Application for an interim stay pending hearing of the substantive Application for stay incompetent, or renders the appeal incompetent.

My well considered view ^{answer to be} is in negative ¹¹ for the following reasons:

- 1) The Notice of Appeal was filed in time from the already above stated computation.
- 2) The record of proceedings has not been obtained by the applicant as deponed in her affidavit despite the letter requesting for the same having been filed on 31st October 2014. Rule 83(2) of the Rules of this Court provides: "where an application for a copy of proceedings in the High Court has been made within

thirty days after the date of the decision against which it is desired to appeal, there shall in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparations and delivery to the appellant of that copy.

3) An appellant shall not be entitled to rely on sub rule (2) of this rule unless his or her application for the copy was in writing and a copy of it was served on the respondent and the appellant has retained proof of that service. 83 (1) subject to rule 113 of these rules, an appeal shall be instituted in the Court by lodging in the Registry within 60 days after the date when the notice of appeal was lodged. Rule 76 is subject to Rule 83 among others, and therefore the applicant is protected by it.

According to the affidavit of the Applicant, this application arises out of Misc. Application No.041 of 2015 filed in the Court of Appeal for stay of execution of the Ruling/decision in Misc. Application No.006 of 2014 which

application arose from Civil Suit No.075 of 2011 pending appeal in this Court.

The High Court in Lira entered ex parte judgment in Civil Suit No.075 of 2011 against the applicant without having been served with Court process right from the beginning of the suit. Indeed the learned trial judge at page 13 of her ruling on 14th October 2014 dismissing the application she said ***"it is my finding that there is evidence that the summons were served onto a maid and not the applicant herself, that while I find the spirited arguments of counsel for the applicant very persuasive. It is my finding that the summons were served in accordance to Civil Procedure Rules order 5 Rule 13 and according to the affidavit of the process server Opio Mobby dated 16th October 2012 was received by the maid who declined to sign. That the law does not exclude a maid provided she is an adult member of the household. She said among others that, that affidavit didn't disclose an irregularity..."***

The above raises an issue as to whether the service of a maid was effective service which was geared at satisfying

the interest of justice. In my view the answer is in the negative.

Misc. Application No.006 of 2014 was brought before the High Court by Notice of Motion under order 9 Rules 12 & 27, order 22 Rule 26 and order 52 rules 1, 2, & 3 of the Civil Procedure Rules and S.98 of the Civil Procedure Act as already stated above.

Under order 44(1)(q) of the Civil Procedure Rules provides: "***an Appeal lies as of right under S.76 of the Civil Procedure Act, Cap 71, an order under rule 27 of order ix rejecting an application for an order to set aside a decree passed exparte***".


- The application shows that an appropriate step was taken by the applicant and unfortunately it was dismissed i.e. vide Misc. Application 006/2014.
- The mistake the applicant made was to file another application for stay of execution before the same court and yet the same had been dismissed together with the application to set aside the exparte decree/judgment.

- The Notice to file an Appeal was in time as already stated above. And for filing memorandum of Appeal the applicant is protected by the provisions of Rule 83 (2) so it is not even necessary to seek leave to file it as the record of proceedings were not available as counsel for the respondent submitted.
- There was no need to obtain leave from the High Court or this Court since Misc. Application No.006 of 2014 was two edged requesting for setting aside *ex parte* judgment and stay of execution. This is permissible considering the provisions of the Judicature Act Cap.13. *See para 33*
- The moment that application was dismissed the applicant had the right to appeal to this Court and therefore properly exercised her right. She had filed the notice of appeal as early as 31st October 2014 when the decision to be appealed against had been made on 14th October 2014 and she served the respondent's counsel though late on the 17th February 2015. Serving the respondent late did not prejudice them at all in my view as the record of proceedings had not been obtained.

Consequently issue number one as to whether this application was competent before me is resolved in the affirmative. Considering the second issue whether the interim order to stay execution should be granted.

For this Court to grant or not to grant the interim order it has to satisfy itself if the application was fit and proper to be allowed. There are conditions laid down in various decided cases among them is Hwan Sung Industries Ltd V. Tajdin Sussein and two others SCCA No.19 of 2008.

The conditions are set out as below:

- a) That the applicant has lodged a Notice of Appeal in accordance with Rule 76 of the Judicature (Court of Appeal Rules) Directions SI 13-10 
- b) A substantive application for stay of execution has been filed in this Court and is pending hearing
- c) That the said substantive application and the appeal are not frivolous and they have likelihood of success
- d) There is a serious and eminent threat of execution of the decree or order and if the application is not granted the main application and the appeal will be rendered nugatory.

e) The application was made without unreasonable delay.

f) That the refusal to grant the stay would inflict greater hardship than it would avoid.

In the case of ***Idah Iterura V. Joyce Muguta SC Application No.2 of 2006***, it was held that "***Under Rule 5(2)(b) which is equivalent to 6(2)(b) of the Court of Appeal Rules, once a Notice of appeal has been filed and served subject to any other facts of a particular case this Court may stay execution...***"

The granting or not granting is discretionary upon the trial judge.

In ***Lawrence Musitwa Kyazze V. Eunice Busingye Civil Suit No.18 of 1990 (SC)*** it was held that "***this Court may in special and probably rare cases entertain an application for stay before the High Court has refused to stay in the interest of justice to the parties. But before the court can so act it must be appraised of all the facts***"

According to the application and the affidavit in support of the same and the annexures attached thereon, it is

clear that the application to set aside and stay of execution was before trial Judge and was rejected and or dismissed with costs.

This meant that the applicant's right to fair hearing had been put in balance. Most importantly it was derogated from hence infringing on Article 44 (C) of the constitution. It provides among others:

“Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedoms.




(a)

(b)

(c) The right to fair hearing.

(d)"

- 1) The notice of appeal was lodged in accordance with Rule 76 of the Court Rules. The pending appeal is filed as of right as per order 44 (1)(q) no leave required.

- 2) There is a substantive application for stay of execution.
- 3) From the facts of this application the appeal is not frivolous.
- 4) There is evidence adduced by the applicant that there is eminent threat of execution considering the facts that summons to show cause why execution should not issue have already been sent out.
- 5) There is a bill of costs already for taxation which means that after taxation, application for execution will be filed and execution will ensue.
- 6) The Registrar High Court Lira had already okayed execution to continue of Civil Suit No.75 of 2011 when she dismissed the interim application for stay of execution in Misc. Cause No.83 of 2014. 
- 7) Application Nos.81 & 83 were filed irregularly in the High Court since the Court had already pronounced itself on it. So the same was incompetent before the Deputy Registrar as the issue was res-judicata before the High Court and both applications ought to have been struck out.

Because of the above foregoing, I find no substance in counsel for the respondent submissions. I am satisfied that this is a fit & proper application to grant the interim order sought for so that the main application & the appeal if successful they are not rendered nugatory.

The Applicant's right to fair hearing was infringed as per Article 44 quoted above when the Misc. Application No.006 of 2014 to set aside exparte judgment order and stay execution was dismissed. As for an order for security for costs, I am of the view that it will defeat the ends of justice if such order is made at this stage.

Accordingly the application for interim stay is granted and costs will abide by the main application.

Dated at Kampala this ^{13th}.....day of April.....2015

Signed:


Hon. Lady Justice Faith E. K. Mwendha JA