IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., PLAT, J.S.C., & SEATON, J.S.C.)

CIVIL APPLICATION NO. 18 OF 1990

BETWEEN

LAWRENCE MUSIITWA KYAZZE :::::::::::::::::::::: APPLICANT

AND

EUNICE BUSINGHYE :::::::::::::::::::::::: RESPONDENT

(Appeal from the Judgement/Decree of the High Court of Uganda at Kampala (Mrs. Justice C.K. Byamugisha) dated 30/8/1990)

IN

CIVIL SUIT NO. 898 OF 1988

RULING OF THE COURT

Lawrence Kyazze and Eunice Businghye had fought a legal battle in the High court of Uganda (Civil Suit No. 898 of 1988). Mr. Kyazze lost and was ordered to vacate the suit premises within 30 days from the date of judgment namely 30th August 1990. Mr. Kyazze decided to appeal and he has brought the present Motion on notice seeking a stay of execution pending the determination of the appeal.

When the Motion was opened by Counsel for Mr. Kyazze, counsel for Eunice Businghye objected in limine, on the ground that this court could not entertain the application, since no proper application had been made to the High Court first. No doubt an application of sorts had been made, but he said that it had been struck out as improper. Accordingly, there having never been worthwhile application to the High Court, Rule 41 of the Court of Appeal Rules had not been complied with.

Rule 41 provides as follows:-

"Whenever application may be made either to the Court or to the Supreme Court, it shall in the first instance be made to the superior court:

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

Counsel for Eunice countered these assertions. He submitted that on the basis of CROPPER VS SMITH (1883) CH. DIV. 305, this Court had original jurisdiction to hear this application. The headnote of that case will be sufficient for the purposes of this application.

> "HELD, that Order LVIII r.16 gives concurrent jurisdiction to the Court below and to the Court of Appeal as to staying proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court of Appeal, but only requires that it shall not be exercised till an application has first been made to the Court below; and that the application to the Court of Appeal to stay proceedings when an order for that purpose has been refused by the Court below, is not properly an appeal".

Counsel for the Respondent stressed the fact that the High Court in this case has refused the application for a stay, on grounds which were erroneous. On surveying the whole situation, this Court could look at the ruling, given in the High Court in deciding whether to allow the present application to proceed, not as a matter of an appeal, but rather as a matter of information. If this Court found that in fact a sufficient application had been made, then this Court could treat it as having been refused, and entertain the application. On the other hand, the Respondent had appealed to this Court against the refusal, in case this court felt unable to entertain the Motion under rule 5(2) (b) of the Court of Appeal Rules. If the Motion is accepted then the appeal would be withdrawn..

These arguments raise far-reaching questions concerning the approach of this Court to the operation of Rule 41 of the Court of Appeal Rules. We may analyse those questions in the following way:-

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1) If there has been an application of some sort to the High Court, may this Court entertain its own jurisdiction if there has been a refusal on any ground?,

2) If there has been no application of any sort to the High Court, must this Court forego its own jurisdiction and wait for the High Court's decision first?

These questions stem from conflicting interests. It is the Appellate Court's interest to see that the status quo is preserved so that Court's decisions are not rendered nugatory. It is the trial Court which usually knows the facts and may be able to deal with the matter expeditiously.

Although the following decision was not part of the argument, it seems to us that the reasoning in ERIN-FOR PROPERTIES LTD Vs CHESHIRE COUNTY COUNCIL (1974) 2 ALL E.R. 448 where Megarry J. considered the history of a stay of execution or injuction pending an appeal, is an admirable start to any discussion of this matter. Indeed Megarry J, refers to Cropper Vs Smith with approval, because decided that the trial Court and Appellate Court had concurrent jurisdiction. Sir George Jessel M.R. in WILSON Vs CHURCH (1879) 11 CH.D 576 had decided that where the trial Judge had dismissed the suit absolutely, there could only be an application to the Court of Appeal for an injuction in the nature of a stay of execution. Megarry J. desired to grant an injunction in the case before him, and decided that he could do so, despite Jessel M.R.'s dictum.

At p 454 he observed:-

> "There may of course be many cases when it could be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of COTTON L.J. in WILSON Vs CHURCH (No 2) ((1879) 12 Ch D. 458,) when speaking of an appeal

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from the Court of Appeal to the House of Lords, he said, 'where a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal if successful is not nugatory".

Then as to the other side of the picture Megarry J. put the case for hearing in the High Court first, in these words at p 454:-

> "I accept, of course, that convenience is not everything, but I think that considerable weight should be given to the consideration that any application for a stay of execution must be made initially to the trial Judge. He, of course knows all about the case and can deal promptly with the application. The Court of Appeal will not be troubled with it unless one of the parties is dissatisfied with the decision of the Judge, in which case the Court of Appeal will at least have whatever assistance is provided by knowing how the Judge dealt with the application. Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails, the same sort of result as a stay of execution achieves for the application or action which succeeds, In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal. I would apply the convenience of the prodedure for the one to the other .....".

Those observations provide a background to Rule 41; it is then necessary to examine the scope of the Rule. First of all, one must bear in mind that it belongs to a set of rules which had an inter-territorial operation, as the preamble explains, and it may be that not every part of the Rule is reflected in the municipal legislation of Uganda.

The Court of Appeal for Uganda accepted in MUGENYI & Co. Adv. Vs NATIONAL INSURANCE CORPORATION Civil Appeal No. 14 of 1984, decided on 29th May 1986, that the jurisdiction stemmed from Section 101 of the Civil Procedure Act, which preserves the inherent power of the Court. It upheld Ouma J. on this point and overruled him on applying Order 19 Rule 26 of the Civil Procedure Rules. Some sympathy must be expressed with the predicament the High Court faced, because there is nothing in the latter Rules which lays down the procedure for appeals from the High Court to the Supreme Court.

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A review of the civil legislation is a follows. Section 68 of the Civil Procedure Act provides for appeals from original decrees and orders of the High Court to the Supreme Court.

Section 74 provides for appeals from appellate decrees of the High Court to the Supreme Court. Appeals from orders given on appeal is not permitted. (See Section 77 (2) of the Act).

Section 77 provides for appeals from orders given under original jurisdiction in a number of stated instances as of right, and then as the Civil Procedure Rules provide. That brings into play Order XL of the latter Rules. The combined effect of Sections 68 and 77 with order XL is to provide for appeals as of right from certain orders and appeals with leave in the case of other orders.

There is no provision in any of this legislation for a stay of execution, and when one looks at Order XXXIX one finds with some surprise that those rules only govern appeals to the High Court and not from the High Court. This is made the more poignant because there are the usual Rules concerning a stay of execution relating to appeals to the High Court. Thus the High Court stretched order 19 Rule 26 and was somewhat reluctant to use such great powers as a stay on the strength of the inherent jurisdiction. The result was a certain difference of approach between the Judges of the High Court. Why was provision not made for a stay of execution in appeals from the High Court? The main reason seems to have been the statutory power of granting a stay of execution given to the Supreme Court in Rule 5 (2)(b) of the Court of Appeal Rules. In that case, why make provision for the High Court to hear applications first in Rule 41?

That question requires a study of the provisions of concurrent jurisdiction. The proviso to Rule 41 suggests that matters concerning the granting of leave to appeal and extension of time were uppermost in the minds of the legislators. Using those matters as a guide, the situation is as follows:-

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In civil appeals, extension of time is a matter for the discretion of the Supreme Court under rule 4 of the Court of Appeal Rules alone. There is no concurrent power.

Leave is required in appeals against certain orders under Order XL. Here there is concurrent jurisdiction as provided in Order XL Rule 2 and the hierarchy is established that leave is to be sought first in the High Court in Order XL Rule 3. (Special leave of the Supreme Court only is required by Section 76 of the Act).

As far as the civil law is concerned the municipal legislation of Uganda avoids the need of Rule 41. That is to say, except for granting a stay under the inherent jurisdiction, and that adds weight to the question, does Rule 41 apply to the case where the inherent jurisdiction is exercised?

Looking then at the criminal law,

i) Concerning extension of time, Section 326 (6) of the Criminal Procedure Code Act, which provides for appeals to all appellate courts generally, empowers the "Appellate Court" for good cause shown to extend the time limited for lodging an appeal. That compares with rule 4 of the Court of Appeal Rules, and at least provides no occasion for concurrent jurisdiction. Hence Rule 41 is not necessary in this point.

ii) Concerning leave, the Court of Appeal Rules and the municipal legislation tally well,

Section 131 (1)(ii) of the Trial on Indictments Decree requires the leave of the Supreme Court to appeal against sentence, unless the sentence is fixed by law. There is no case of concurrent jurisdiction here.

But there is concurrent jurisdiction in Section 131(2) of the above Decree, There is provision for leave to appeal to be given the Supreme Court, or a certificate by the trial court that there

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is a fit case upon which to appeal, in case where a sentence of 12 months or less, or a fine exceeding Shs 200/- has been imposed by the High Court. Secondly where the fine is less than Shs 200/- there is provision for leave to appeal to be given by the Supreme Court or a certificate by the trial Court that the case involves a question of law of great public importance. Rules 38,39 and 40 of the Court of Appeal Rules cover those requirements exactly. No provision for the hierarchy of courts is made and Rule 41 is exempted by the proviso to that Rule.

The result is that the exemptions in Rule 41 are wider than needed to cover the municipal law of Uganda relating to criminal procedure. Otherwise the Court of Appeal Rules and the municipal law fit exactly.

It would seem that Rule 41 was intended to cover those cases where concurrent jurisdiction is provided for by the municipal law of Uganda. The greater operation concerning extension of time is probably necessary to cover the municipal law of other Partner States. But the main impression is that Rule 41 is not a catch - all; whether it should have that effect might require a study of all legislation providing for civil and criminal matters outside the Civil Procedure Act and Rules and the Criminal Procedure Code Act and Trial on Indictment Decree. It is significant that express power to grant a stay is given to the Supreme Court in Rule 5(2)(b) without any corresponding power given to the High Court in the Civil Procedure Act and its Rules.

Had the legislature wished to make provision for a stay of execution in the High Court that could have been done as UJJAGAR SINGH Vs RUNDH COFFEE ESTATES LTD (1966) E.A. 263 will illustrate, such provision having been made in Kenya. For some reason similar provision was not made in Uganda. It is also significant that power to grant a stay of execution is given to the High Court in cases of appeals to the High Court. It appears to be ambiguous therefore whether Rule 41

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was intended to cover the grant of a stay under the inherent jurisdiction. It is sufficient for us to say that we should resolve the ambiguity in favour of the express powers in the Supreme Court, without a mandatory limitation upon those powers as expresed by Rule 41.

The practice that this Court should adopt, is that in general application for a stay should be made informally to the judge who decided the case when judgment is delivered. The judge may direct that a formal motion be presented on notice (Order XLVIII rule 1.), after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be ex parte. If the application is refused, the parties may then apply to the Supreme Court under Rule 5(2)(b) of the Court of Appeal Rules where again they should be prepared to meet conditions similar to those set out in Order XXXIX Rule 4(3).

However there may be circumstances when this Court will intervene to preserve the status quo. In cases where the High Court has doubted its jurisdiction or has made some error of law or fact, apparent on the face of the record which is palpably wrong, or has been unable to deal with the application in good time to the prejudice of the parties or the suit property, the application may be made direct to this Court. It may however be that this Court will direct that the High Court should hear the application first, or that an appeal be taken against the decision of the High Court, bearing in mind the interests of the parties and the costs involved. The aim is to have the application for a stay speedily heard, and delays avoided.

Guided by those principles, we turn to the situation in this motion. Counsel for the Applicant, responding to the objection, was able to show that the decision of the High Court to strike out the

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application was palpably wrong. Following the decision in MUGENYI and Co. Advocates Vs NATIONAL ISURANCE CORP. (supra), the motion was to be based on Section 101 of Civil Procedure Act and not on any of the rules in Order 19 of the Civil Procedure Rules, especially Order 19 rule 26. The Applicant should only have applied under Section 101, but from the Judge's comments she would not have granted relief under the inherent jurisdiction. She thought that Order 19 rule 26 was obviously correct and section 101 superfluous. An appeal from a decree cannot be another "suit" within the meaning of Rule 26. Even if an appeal is still part of the decretal suit, that extension would leave but one suit.

Secondly under the inherent powers a motion on notice is the correct form. Assuming for the purposes of the argument that Order 19 rule 26 applied, and a Chamber summons was the right form, then Order XLVIII rules 8 and 9 allowed the Judge to convert the proceedings from a motion to a chamber summons, subject to costs. The learned Judge quoted two authorities of the High Court of Uganda. They are of doubtful value, since Order XLVIII rules 8 and 9 were not considered. Those two rules indicate that a want of form is generally not fatal.

Thirdly it is very difficult to understand how the learned Judge was not told that a notice of appeal had been presented in time, in the right place, the registry of the High Court. Counsel apparently did not inform her. We have the application before us. It is dated 4th September 1990, and that was a long time before the application for a stay was granted in October 1990. There has been an obvious error causing the Judge to declare that no appeal had been lodged by the time that she heard the application. We will not speculate who is responsible, but it is clear that the objector had the burden of supporting the objection, and to put the correct facts before the Court.

The result is that the objection was taken on such manifestly unsound grounds, that the objector ought not to have the benefit of

(1) a rehearing before the learned Judge and (2) an appeal. Both courses of action would be a great waste of time and money to the parties. This Court should now intervene, and deal with the application before it under its own jurisdiction provided by Rule 5 (2)(b) of the Court of Appeal Rules. This Court should treat the application to the High Court as having been substantially made and refused, It was not a frivolous application.

The answers to the issues set out above are therefore:-

(1) there must be substance to the application both in form and content; This Court would prefer the High Court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is great delay, this Court may intervene and accept jurisdiction in the interest of justice.

(2) This Court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interests of justice to the parties. But before the court can so act it must be satisfied of all the facts.

we therefore dismiss the objection with costs and call on the parties to continue the hearing of the application.

Delivered at Mengo this ..12th.. day of February ..... 1990.

SIGNED:

S.T. MANYINDO
DEPUTY CHIEF JUSTICE.

H.G. PLATT
JUSTICE OF THE SUPREME COURT.

E.E. SEATON
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

.....
B. F. B. BABIGUMIRA,
REGISTRAR SUPREME COURT.